Neutral citation [2023] CAT [60]

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)
1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 October 2023

Before:

SIR MARCUS SMITH
(President)
MR JUSTICE ROTH
MR BEN TIDSWELL

Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

Claimants

\- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

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.

Defendants

(the "Merricks Collective Proceedings")

Heard at Salisbury Square House on 23, 24 and 25 May 2023

RULING (EVIDENCE ON PASS-ON)

APPEARANCES

Adrian Beltrami KC, Mehdi Baiou, David Wingfield and Alexandra Littlewood (instructed by Humphries Kerstetter LLP and Scott and Scott (UK) LLP) appeared on behalf of a number of Umbrella Proceedings Claimants

Philip Moser KC, Philip Woolfe and Oscar Schonfeld (instructed by Stephenson Harwood LLP) appeared on behalf of a number of other Umbrella Proceedings Claimants

James Segan KC and George Molyneaux (instructed by Hausfeld & Co. LLP) appeared on behalf of Primark

Derek Spitz and Greg Adey (instructed by Mischon de Reya LLP) appeared on behalf of Ocado Holdings Ltd

Sonia Tolaney KC, Matthew Cook KC and Ben Lewy (instructed by Jones Day (in respect of Case 1517/11/7/22 (UM) and Freshfields Bruckhaus Deringer LLP (in respect of Case 1266/7/7/16) appeared on behalf of the Mastercard Scheme Defendants

Laurence Rabinowitz KC, Daniel Piccinin KC, Jason Pobjoy and Isabel Buchanan (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Visa Scheme Defendants

Marie Demetriou KC and Anneliese Blackwood (instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of the Merricks Class Representative

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A. INTRODUCTION

(1) The First and Second Rulings

1. This is the third, and latest, Ruling concerning the case management of various "Merchant Interchange Fee Proceedings". The earlier rulings were:

   (i) The "First Ruling", under citation number [2022] CAT 14, dated 16 March 2022.

   (ii) The "Second Ruling", under citation number [2022] CAT 31, dated 6 July 2022.

2. The First Ruling in substance considered, and dealt with, issues arising out of the management of multiple claims before the Tribunal. The Second Ruling in substance considered, and dealt with, issues concerning the management of evidence in relation to these multiple claims, in particular as regards the question of "pass-on". Neither the First Ruling, nor the Second Ruling, reached any final position on either joinder or evidence. Each Ruling did, however, endeavour to give a clear steer to the parties as to how these multiple, and very complex, claims were to be managed. In this Ruling, we take the First and Second Rulings as read, and adopt the terms defined therein.

(2) Trials 1, 2 and 3

3. By its order made on 23 December 2022 and dated 13 January 2023 (the "December 2022 Order"), the Tribunal directed that the issues arising out of the various Merchant Interchange Fee Proceedings be determined at three trials, "Trial 1", "Trial 2" and "Trial 3". In broad terms:

(i) Trial 1 will take place in the first quarter of 2024 to deal with certain Article 101(1) TFEU[1] liability issues.[2] This Ruling is not concerned with Trial 1.

(ii) Trial 2 will take place over seven weeks, commencing in October or November 2024. It will address all issues relating to acquirer and retailer pass-on.[3] This Ruling is primarily concerned with the manner in which issues concerning retailer pass-on are to be dealt with. Acquirer pass-on is also considered but (for reasons we will come to) represents an altogether easier issue to manage. In anticipation of the evidential difficulties that pass-on was likely to occasion, the December 2022 Order made provision for a "Pass-on Evidential Hearing" to take place in May 2023. This Ruling is the outcome of that hearing.[4]

(iii) Trial 3 is a "sweep-up" trial, intended to deal with all other issues. No date has been listed for the hearing of Trial 3.[5] We say nothing more of substance about Trial 3 in this Ruling.

(3) The composition of this Tribunal

4. In Rulings 1 and 2, the Tribunal comprised a "three-chair" panel – the President, Mr Tidswell and Lord Young (as he became). Lord Young KC has judicial responsibilities in Scotland which precluded his continuing as a member of the Tribunal, and his place was taken (convenient because of his involvement in the Merricks Collective Proceedings[6]) by Mr Justice Roth. For the purposes of Trial 1 and Trial 2, an economist member will be essential, and for these trials Mr Justice Roth will give way to Professor Michael Waterson (who is also a member of the Tribunal in the Merricks Collective Proceedings). Given his future role in Trial 2, his expertise as an economist, and the fact that this Ruling

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[1] Treaty on the Functioning of the European Union.
[2] See paragraphs 6 to 8 of the December 2022 Order, as varied by Order of the President (Varying Future Conduct Trial 1 Directions) made and dated 10 May 2023.
[3] See paragraphs 9 and 10 of the December 2022 Order.
[4] See paragraphs 3 to 5 of the December 2022 Order.
[5] Paragraph 11 of the December 2022 Order.
[6] Described in Ruling 2 at [8] to [10].

is concerned with future case management, Professor Waterson's comments were invited on an earlier draft of this Ruling, and they have been taken into account.

(4) Parties

5. There were a number of parties before the Tribunal. They fall into the following groups:

   (1) Individual claimants (not class members subject to the Tribunal's collective proceedings regime) bringing claims against one or both of Mastercard and/or Visa entities in relation to the operation of their respective card payment schemes. Such claimants ("Individual Claimants") themselves fall into three classes:

      (i) *Active claimants*. These are claimants – in reality, groups of claimants acting through common legal representatives – taking an active part in these proceedings. Because of their common legal representation, these claimants were referred to by reference to the solicitors that they have instructed: hence, the "HK Claimants" (claimants instructing Humphries Kerstetter); the "S+S Claimants" (claimants instructing Scott + Scott); the "SH Claimants" (claimants instructing Stephenson Harwood). We shall refer collectively to these three groups as the "Active Claimants". Before us, the HK Claimants and the S+S Claimants were represented by a team led by Mr Beltrami KC. The SH Claimants were represented by a team led by Mr Moser KC.

      (ii) *Stayed claimants*. These are claimants who have applied to have their claims stayed. The Tribunal is prepared to grant such stays: but on the terms that the Individual Claimant whose claim is stayed (i) agrees to be bound by any determination of common issues (including any appeals) as if an Active Claimant and (ii) agrees to provide such disclosure as the Tribunal may order. Such stays, we should make clear, are not necessarily permanent.

The party subject to the stay may, of course, apply at any time to have the stay lifted, and the Tribunal will consider any such application on its merits. We shall refer to these claimants as the "Stayed Claimants". The Stayed Claimants were not represented before us.

(iii) *Claimants neither stayed nor active.* A sample of this class of claimant was represented before us at the hearing. Mr Segan KC (instructed by Hausfeld) led a team for "Primark".[7] Mr Spitz (instructed by Mishcon de Reya) led a team for Ocado Holdings Ltd ('Ocado'). It is important to note that the claims advanced by both Primark and Ocado are substantial, running to many millions of pounds. We are particularly grateful to Primark and Ocado for being represented before us. Neither Primark nor Ocado have elected (to date) to be an Active Claimant, but neither have they sought a stay. Both Primark and Ocado made the point that their claims were sufficiently large and complex to warrant trials on their own; both recognised that (for the reasons given in the First and Second Rulings) this was not the way the Tribunal was proposing to manage these proceedings, having invoked its "Umbrella Proceedings" jurisdiction;[8] but both – most helpfully – appeared before us to ensure that the position of the "Non-Stayed Non-Active Claimants" was taken into account.

(2) *Collective proceedings.* These are proceedings authorised to be continued as collective proceedings under section 47B of the Competition Act 1998. By Order dated 18 May 2022, the Tribunal certified that certain claims brought against three Mastercard entities were authorised to be continued as collective proceedings and that Mr Walter Merricks CBE was authorised to act as the Class Representative in these proceedings. We have referred to them (in the Second Ruling) as the "Merricks Collective Proceedings" and

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[7] We define the term because there were a number of claimants from the Primark group which fall within this category, though it is unnecessary to specify further.
[8] See Practice Direction 2/2022: Umbrella Proceedings.

that is a term we will continue to use. Had they been authorised, we would have wanted to have other related collective Merchant Interchange Fee Proceedings before us.[9] In the event, the only collective proceedings before us were the Merricks Collective Proceedings, represented by a team led by Ms Demetriou KC (instructed by Willkie Farr & Gallagher).

(3) *The scheme defendants.* We have recorded elsewhere that these claims all concern the open four-party payment schemes for credit and debit cards and the rules of operation for those schemes set by (respectively) the Mastercard group of companies ("Mastercard") and the Visa group of companies ("Visa"). Before us, Mastercard were represented by a team led by Ms Tolaney KC (instructed by Jones Day in respect of Case 1517/11/7/22 (UM) and Freshfields Bruckhaus Deringer LLP in respect of Case 1266/7/7/16) and Visa by a team led by Mr Rabinowitz KC (instructed by Linklaters and Milbank).

6. The Individual Claimants comprise merchants and various local authorities who accepted payment by debit and or credit cards for goods or services which they supplied, whereas the class of claimants in the Merricks Collective Proceedings are all end consumers. For convenience, we shall refer in this judgment to the Individual Claimants as "Retailers".

(5) The Pass-on Evidential Hearing

7. In the First Ruling at paragraph [20(1)], the Tribunal noted that *"there is a real lack of clarity as to how "pass-on" questions are to be resolved at a substantive hearing".* Accordingly, a hearing was listed in order to provide – or to seek to provide – clarity in this regard. This hearing, over two days, resulted in the Second Ruling. Although that hearing articulated a number of issues and resolved a few of them, it did not sufficiently resolve precisely how the question of pass-on was to be resolved. Hence the listing of a yet further hearing, the Pass-on Evidential Hearing.

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[9] See the Tribunal's Judgment in *Commercial and Interregional Card Claims 1 Ltd v. Mastercard Incorporated* [2023] CAT 38.

8. In a letter to the parties dated 5 December 2022, some time after the Second Ruling had been handed down, the Tribunal expressed a degree of unease that these case management issues were proving so difficult to resolve and sought to provide some guidance:

> The Tribunal had, frankly, anticipated that the work done on the list of issues would enable clear directions for the trial of the pass-on issue to be given at the last hearing. That proved not to be possible, mainly because, even though some parties continued to press a "sampling" approach, that approach was not articulated to a sufficient degree of detail to enable proposals sensibly to be considered.
>
> The Tribunal wishes to stress that it is by no means a foregone conclusion that the Tribunal will direct a "sampling" approach, particularly if such an approach is not determinative of all claims before the Tribunal in relation to pass-on.
>
> Further to the discussion at the CMC and the Tribunal's indications regarding the Evidential Hearing, the Tribunal has given careful consideration to the approaches that it would like the parties to consider further. Three possible approaches are set out below, and are articulated in some detail. That fact should not be taken as any indication that the Tribunal has formed any view at all as to the way forward. However, the Tribunal is satisfied that a clear course will have to be directed at the Evidential Hearing if Trial 2 is to be effective. The fact that the three possible approaches articulated are substantially inconsistent and so mutually exclusive gives (the Tribunal trusts) a sense of the difficulties that the management of these matters give rise to.

9. In the event, the hope that the parties would sufficiently align to identify a clear course of action proved to be misplaced. At the evidential hearing, the parties essentially re-deployed arguments as to process and case management which we had substantially heard before, without significantly narrowing the issues between them. What is more, none of the parties even articulated with any precision exactly how their own chosen methodology would work. There was, on all sides, an element of "kicking the can down the road" by submissions that issues would become clear and capable of resolution if only that particular party's methodology of choice were to be "given a try".

10. Even if we had not directed the Pass-on Evidential Hearing, this would be an unsatisfactory state of affairs. It is all the more so, given that: (i) the Pass-on Evidential Hearing has now come and gone; (ii) Trial 2 is to be heard at the end of 2024; (iii) Trial 1 will take up considerable time at the beginning of 2024; and (iv) there is not merely no agreement, but wide and significant disagreement as to how Trial 2 is actually to be tried.

(6) The structure of this Ruling

11. The remainder of this Ruling is structured as follows:

(1) In Section B, below, we describe, in broad-brush terms, the three approaches that we were presented with, which we will describe as the "Disclosure/Expert Approach", the "Sampling Approach" and the "Proxy/Econometric Approach". That description is deliberately broad-brush, for we are in no doubt that none of the approaches, so far articulated, is capable of leading to an effective Trial 2. To anticipate, we will not be adopting any of these approaches as framed by the parties, because we consider none of them to address the critical case management issues.

(2) All this is somewhat critical of the parties, but it is important to understand why the parties have found these issues so intractable, and why our criticisms must be tempered by a considerable aliquot of sympathy and understanding for the very real difficulties the parties all face. We expand upon these difficulties in Section C, below, for it is important to understand the nature of the parties' concerns so that we can make appropriate directions to trial. In brief summary, the difficulties are these:

(i) These are massive and complex proceedings, where – across literally thousands of claims – we are seeking to try a number of common issues in only two (admittedly large) trials. The difficulties in balancing fairness and procedural efficiency cannot be overlooked or disregarded, and it is understandable that all of the parties have placed greater emphasis on identifying the evidence they wish to call than concerning themselves with procedural manageability.

(ii) There is a very real danger in the "procedural tail" wagging the "substantive dog". What we mean by this is that the nature of the evidence that the Tribunal permits the parties to call may have (and in the parties' eyes does have) a significant bearing on the outcome of Trial 2. This is, of course, intrinsically unacceptable.

Trials exist to determine the substantive issues between the parties; and the interlocutory stages that precede trials are intended to ensure a proper and fair outcome on the evidence at trial and – in themselves – are supposed to be "outcome neutral".

(iii) The Tribunal does not – because of the very many claims, and so very many parties on the claimant side, before it – have the room for manoeuvre in evidential terms that existed in previous pass-on trials, notably the proceedings before this Tribunal in *Sainsbury's Supermarkets Ltd v. Mastercard Inc* ("*CAT Sainsbury's*)[10] and *Royal Mail Group Ltd v. DAF Trucks Ltd and others ("Trucks I")*.[11] These were both substantial (multi-week) trials, but where the claimants were limited in number, unlike in these cases, where the range of claimants – Active, Stayed and Non-Stayed Non-Active – is vast. It was possible, in *CAT Sainsbury's* and in *Trucks I*, to permit the claimants to call what evidence they wished and to try the claims in a "traditional" adversarial way, with each party (subject to the Tribunal's "light touch" case management control[12]) adducing the evidence they considered necessary properly to try the cases. That room for manoeuvre does not exist in the present case, because the range of facts that could be said to be relevant (e.g., in terms of individual businesses or even sectors or industries) is so vast as to preclude effective trial.[13] It follows that the Tribunal must

[10] [2016] CAT 11 at [27] and [28] (where the witnesses of fact are described), [432]*ff* (where pass-on is considered) and [438]*ff* (where the Tribunal describes factual evidence on pass-on that it received and plainly took careful account of).
[11] [2023] CAT 6, at Sections F and G (where the witnesses of fact are described), [167]*ff* (where principles of causation and quantum are considered), [550]*ff* (where the majority consider the evidence in relation to pass-on).
[12] We say "light touch" because although the Tribunal is rightly regarded as an interventionist Tribunal, that manages cases actively, the Tribunal will in the ordinary case give considerable latitude to a party wishing to call certain evidence.
[13] The case management decision not to try individual cases in the hope that these will act as signals for the settlement of other (later) cases has been made (see the earlier Rulings), and we are not going to re-visit it: none of the parties invited us to, and those who made that decision (the President and Mr Tidswell, Mr Justice Roth having joined the proceedings only at this stage) remain of the view that this course continues to be appropriate. Clearly, this approach must involve more than simply "rolling up" hundreds of claims and trying them in one massive trial. Trial 2 is in no way long enough for that course – and 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.

exercise rather more control over the evidence that is adduced than would ordinarily be the case. That, of course, is what informed the Tribunal's insistence on the hearings that preceded the First Ruling and the Second Ruling. The fact that these Rulings have signally failed in what they set out to achieve is an indication of the extreme procedural difficulties faced by the parties and the Tribunal in this case.

(3) Section D, below, addresses what we consider to have been the true *lacuna* in the approach of all of the parties, which is a failure to articulate what issues or factors are, and what issues or factors are not, relevant to determination of the fact or extent of pass-on. It is true that some of the experts retained by some of the parties did seek to identify some of the factors that might cause the level of pass-on to increase or decrease, but no expert attempted a complete list, and there was no attempt to agree a list of factors. Inevitably, given this *lacuna*, no party attempted to tie the evidence that would be needed at Trial 2 to the factors that are relevant to questions of pass-on. We stress that this part of our Ruling is intended to assist the economist experts in settling a conclusive list of factors[14] which will then assist the Tribunal and the parties in articulating with precision the evidence needed in order to assess the effect of each of the factors identified as relevant. However, given the history, and the inability of the parties and their experts actually to agree what matters and what does not, the Tribunal must adopt a somewhat controlling approach to this process, which is described in Section D below.

(4) The approach in Section D, although general in the way it has been framed, is principally concerned with retailer pass-on, which is far more complex than acquirer pass-on ("Acquirer Pass-on"). Acquirer Pass-on is that part of the (allegedly) unlawful multilateral interchange fee set by Mastercard or Visa and charged by acquirers (the "Acquirers") to their customers, the Retailers, that the Acquirers themselves are said to pass-on to the Retailers.

[14] Obviously, nothing in procedurally fair litigation is ever completely set in stone. We have in mind a list of factors that can be added to or subtracted from, but subject to Tribunal control.

Although, we are confident that the workings of debit and or credit card schemes are tolerably well-known, and have been discussed in a number of judgments, we should make clear that "Acquirers" are those undertakings that have a contractual relationship with a Retailer (a vendor of goods or services) that allows for the acceptance of a card at that Retailer's point of sale. Naturally, Acquirers charge Retailers for the services they provide. The issue of Acquirer Pass-on arises where – assuming an overcharge (hereinafter "Overcharge") to the Acquirer – there is a dispute as to whether the Overcharge has been passed on by the Acquirer to the Retailer. "Retailer Pass-on" arises where – an assumed Overcharge having been passed on to the Retailer by the Acquirer – the merchant passes the Overcharge on to its consumers ("Consumers"). As we say, Section D, below, considers in some detail the approach to Retailer Pass-on. Section E very briefly considers a short-cut in relation to Acquirer Pass-on which ought, in our view, to enable the issue to be resolved more quickly.

(5) Sections F and G, below, deal respectively with the involvement in Trial 2 of, first, the Merricks Collective Proceedings and, secondly, the Non-Stayed Non-Active Claimants.

B. THREE APPROACHES

(1) Introduction

12. We have identified three broad approaches that were articulated by some of the parties before us. Entirely understandably, the Non-Stayed Non-Active Claimants (even those represented before us) contributed less to the question, and we focus on the parties who advanced what purported to be a fully fleshed-out approach. Of the parties who did articulate such an approach: (i) the Active Claimants took what we term a "Disclosure/Expert Approach"; (ii) Mastercard took a "Sampling Approach"; and (iii) Visa and the Class Representative in the Merricks Collective Proceedings took a "Proxy/Econometric Approach". We will describe, in broad-brush terms, what each of these entailed: we will eschew the detail because (for reasons we have touched upon) we do not consider any

approach to be worthy of detailed consideration until the *lacunae* in the approaches of all parties have been addressed.[15]

13. Before we come to these three approaches, two can be regarded as "bottom up" (the Disclosure/Expert Approach and the Sampling Approach), whereas the third (the Proxy/Econometric Approach) can be regarded as "top down". We describe what we mean by this in the next section (Section B(2)).

(2) "Bottom up" and "top down"

(a) "Bottom up"

14. The Active Claimants and Mastercard made the valid point that, in those cases where pass-on had actually been tried (as opposed to those, far more numerous, cases where pass-on was only considered in the abstract), factual evidence on the question was adduced and heard and given due regard by the Tribunal. We were referred, in particular, to the decisions of this Tribunal in *CAT Sainsbury's* and *Trucks I*. We have already referred to those decisions,[16] and explained why those cases (which were large but limited in terms of range of factual issues) cannot be templates for this litigation.

15. However, the reference to *CAT Sainsbury's* and *Trucks I* serves as a salutary reminder to us. In this jurisdiction, it is for each party to choose how to articulate their case, and that whilst the Tribunal is ultimately the guardian of its processes and has the power to control the evidence coming before it, the Tribunal's duty to manage its cases actively cannot come at the expense of procedural fairness. The Active Claimants and Mastercard stressed that their proposals sought to square the circle between procedural efficiency and procedural fairness, but that the Tribunal needed to be careful in not unduly preferring the former over the latter. We agree. It follows that if (a question we will be returning to) granular evidence from the Retailers to show how they passed on the Overcharge to their

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[15] See paragraph 11(3) above.

[16] See paragraph 11(2)(iii) above.

Consumers is material, this Tribunal must be extremely cautious in considering its exclusion.

16. By way of example, the HK and S+S Claimants placed a great deal of emphasis on the importance of <u>how</u> Retailers priced. The thesis was that how Retailers price affects pass-on. If, by way of example and purely for the sake of argument, a Retailer priced on a "cost-plus" basis (i.e. prices based on costs plus mark-up or profit), then pass-on to the Consumer might be very high (even approaching 100%). On the other hand – on this thesis – dynamic pricing (adjusting prices based on market conditions) might produce a different outcome (pass-on to the Consumer might be low). If (and, as we shall see, it is a big "if") a party's approach to pricing is important to pass-on, then clearly evidence relating to that will matter. Dr Mark Bloomfield of Turbulence, an expert in pricing approaches and strategy retained by the HK and S+S Claimants, said this about the information he would wish to have access to in order to prepare a full report:[17]

> To prepare my full report, I would be assisted by industry experts and/or claimant material from the time period covered by the claims. Given the number of claimants and common approaches to pricing within particular sectors, the period of time covered by the claims, the likely volume of pricing material held by each claimant, and the likelihood that the requisite material may not be available for the whole claim period for all claimants, I would propose to gather information through a claimant survey or questionnaire, possibly supplemented by a data-gathering exercise in respect of a small sample of claimants, and in conjunction with industry expert reports for certain industries, to help me undertake my analysis across the different industries and to analyse the approaches within those different industries. I believe that this represents a reasonable way to report <u>on pricing</u>,[18] given the numbers of claimants involved. In my preliminary view, a pricing questionnaire to be filled out by claimants should address the following matters:
>
> 1. That claimant's revenues, pricing history, policies and strategies, namely:
>
>   I. General overview of the different types of products sold by the claimant:
>
>   1. Whether they are single products or bundles.
>
>   2. Whether the sold products were owned and operated by the claimant or sold on a 3rd party basis.

[17] Letter from Dr Bloomfield dated 13 March 2023.
[18] We emphasise these words. The implicit assumption – on which Dr Bloomfield did not express a view – is that this approach would elucidate pass-on.

II. Pricing history:

1. How frequently the prices were changed and what initiates a price review/change.

2. Whether discounts/ promotions/premiums were applied and to identify the reason(s) for this.

3. Whether discounts are managed (relative to a ratecard) or the price is managed explicitly.

4. Some form of revenue and profitability information including as to particular products.

III. Pricing Policies:

1. Price Model(s) used by the claimant.

2. Information on what costs (if any) are factored into the price paid by the customer.

3. Whether the claimant operates a differentiated / segmented pricing strategy. That is, the price of a given product may vary by customer segment, channel, etc.

4. Changes in Price Models/ Strategy over time.

IV. Pricing Process:

1. What departments are responsible for pricing (e.g. finance, sales, marketing, etc) and (if different) for price promotions/discounts?

2. What software or technology is used to set, maintain, and optimise prices (where appropriate)?

3. Pricing T&Cs in the claimant's standard (or other) terms.

V. Payment Policies:

1. What payment options were available to customers?

2. Whether prices changed depending on the payment method / solution, including whether surcharges were imposed on any types of cards.

3. Whether price matching / price guarantees were in place and evidence of when it was applied.

4. How merchant service charges and interchange fees are accounted for (e.g. in fixed or variable costs).

Unless the claimant had significantly altered their approach to pricing during the time period covered by the claim, I anticipate that the data

listed above could be provided from a more limited time period as an example of the approach taken.

17. We call this a "bottom up" approach because it involves obtaining by some means (in this case, a questionnaire) data from the pool of claimants. Dr Bloomfield anticipates a great deal of information being sought from the claimants (or a sample of claimants), which would then be used as evidence to establish more general propositions which can be applied to the wider claimant pool to inform the pass-on question. We say nothing, at this stage, about the relevance of the information Dr Bloomfield wanted to obtain. It is, however, worth noting that a similar approach was suggested by Dr Gunnar Niels, the expert economist retained by Mastercard, albeit that he appeared to envisage gathering a more limited amount of information.[19]

18. No doubt the questions asked of the claimants could be refined, and the burden reduced in this way and – perhaps – through the use of sampling. We will return to these questions. The point we are making is simply that the Active Claimants' and Mastercard's cases were intended to be built "from the bottom up", on the basis of information obtained from the Individual Claimants.

(b) "Top down"

19. By a "top down" approach to pass-on, we mean an approach to the question of pass-on that is, in the first instance, by way of economic theory, albeit supported by additional material identified by the economist putting forward that economic theory both to fill gaps and validate the theory advanced. It is helpful at this stage to refer to the dissenting judgment of Mr Ridyard in *Trucks I*. We make no apology for setting out a large part of this dissent because it represents a helpful way to understand the relationship between economic theory and the practical exercise of assessing pass-on:[20]

> 696 As has been discussed earlier in this judgment, a variety of pass-on mechanisms have been addressed in the previous cases that have dealt with this issue. These have been captured in the four options for possible responses to an overcharge that were first set out in *CAT*

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[19] We refer to his report dated 12 April 2023.

[20] We have highlighted in **bold** certain of the extracted passages ([696]-[701]) to which we specifically refer below.

Sainsbury's and reproduced (in slightly amended form) by the Supreme Court in *Sainsbury's*. [1] **To recap: option (i) was to do nothing, hence absorbing the overcharge in reduced margins and profits; options (ii) and (iii) involved the claimant reducing costs elsewhere in its business to compensate for the adverse impact of the overcharge; and option (iv) involved the claimant increasing the price of the product that used the input affected by the overcharge in its downstream market.**

697 The [Supply Pass-On ("SPO")] argument in the current case falls squarely into option (iv). DAF's argument is that Royal Mail and BT both used trucks as an input into the provision of their respective postal and telecommunications services, and that they were able to use the regulatory process (and to a lesser extent the normal forces of competition) to pass-on higher truck prices that they charged for these services to their downstream customers. I regard this as a very important feature of the current case, since [2] **the distinction as to whether a pass-on mechanism falls into option (ii) or (iii) on the one hand, or option (iv) on the other, is critical to understanding the causal link between the overcharge and the pass-on**.

698 To explain this, it is first relevant to provide some context on the economics of pass-on. Our judgment has already cited *CAT Sainsbury's* as characterising economic thinking on pass-on as follows: "whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers." [3] **I cannot purport to speak for all economists, but this statement does not correspond to my understanding of the main thrust of economic thinking on pass-on. The considerable economic literature that exists in this area does not regard pass-on as a phenomenon that is focussed on cost or profit recovery in a general sense, but rather on understanding how a change in one cost facing a firm (such as an increase in an input cost) is likely to cause the firm to adjust its profit-maximising price when selling products that depend on the affected input.** For example, suppose a firm incurs unit costs of £5 to make a product, and chooses to sell it at a profit-maximising price of £7, earning a margin of £2 per unit. If some external event occurs that increases its unit cost from £5 to £6, the primary question that is addressed by the economics of pass-on is how this change is likely to cause the firm to revise its profit-maximising price in the downstream market. [4] **That decision typically depends on a trade-off between the advantages of raising prices to restore the firm's price-cost margin (full pass-on in this illustration would involve an increase in selling price for £7 to £8), and the disadvantages associated with losing sales volumes (hence profits on lost sales) if such pass-on occurs.** The economics of pass-on explore the factors that affect this trade-off to derive predictions about the most likely rate of pass-on under different market and competitive conditions. [5] **Many outcomes are possible, but a large proportion of predicted outcomes involve some degree of downstream pass-on because in all but extreme cases the firm's optimal response to this adverse cost influence is to restore at least some of the lost profit margin.** As such, the economics is intently focussed on incentives and hence on causal influences, and it is largely concerned with the kind of responses that fall within option (iv) of the classification described above.

> 699. The main results derived from the economics of pass-on do not envisage options that would fall into options (ii) or (iii) of the above categorisation. In other words, it is not normally predicted that a profit-seeking firm will respond to an increase in the input cost of making product A by reducing the amount it seeks to pay for inputs to unrelated products B or C.[6] **There is normally no causal link between these elements because a well-run firm will already have taken steps to ensure it does not incur higher costs than are necessary to make other products.** This is not to say that an option (ii)/(iii) can never be the predicted outcome, but it does indicate that a claim of mitigation that relies on such a mechanism is likely to find itself battling against established economic theory on pass-on.
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> 700. The point is clearly illustrated by the *Stellantis* case, in which the defendant (NTN) specifically raised a pass-on defence that asserted that the claimant (FCA) would respond to an overcharge by achieving offsetting cost savings elsewhere in its business. In its judgment, the CAT at [34] rejected this argument in very clear terms:
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> "…the argument assumes that procurement staff would not negotiate as hard as they could for lower prices, but would do so only to the extent required to meet the target…NTN's implicit case that FCA's negotiators would not negotiate as hard as they could, and would stop when they had reached their target because the target operated as a cap on what they were required to do or did, is unpleaded and speculative."
>
> 701. The Court of Appeal subsequently endorsed the CAT's judgment, confirming that its assessment was sound as a matter of law. It was also sound as a matter of economics, for the reasons discussed above.

20. This is an important passage in the context of an evaluation of pass-on, made by a respected economist who was speaking as an ordinary member of the Tribunal in a carefully considered judgment where he was recording his dissent to the reasoning (although not the outcome) of the majority. Mr Ridyard's views are worthy of the highest respect. We make the following points:

    (1) Mr Ridyard's view of firms was that they operate in such a state of efficiency that a well-run firm would already have reduced the amount it pays for other products to the lowest possible level even before the increase in cost which is the subject of the pass-on investigation.[21] That may very well be the case – and certainly <u>would</u> be the case in the state of "perfect competition" to which we will come. But it is possible for a firm or an industry to operate in

[21] At footnote [2], [3] and [6] in the passage quoted above.

a state where cost cuts or effective cost cuts[22] are possible or even causally likely. At the end of the day, this is a question of fact.

(2) Mr Ridyard's view – which is clearly related to the one we have just described – is that in many industries it will be possible for a firm to pass-on a cost and so maintain (at least in part) its margins.[23] Again, this is an entirely understandable conclusion: but one of (expert) fact.

(3) Whether that conclusion can properly be drawn in any given case is likely to depend on many factors. One (to our mind likely to be critical) factor is that articulated by Mr Ridyard,[24] namely the extent to which an increase in price triggered by the increased cost will be profit-making (or, at least, profit neutral) to the firm in question. The point, when considered, is actually self-evident. A rational firm, faced with an increase in one of its input costs, will only increase its price if that increase will be worthwhile. If the effect of the increase is to lose so many sales that the additional revenue gained from those sales which continue to be made is more than offset by lower volumes of sales, increasing price will make no sense, and the increase in input cost will either have to be made good by an erosion in profits or (which Mr Ridyard found less likely) in hammering away at other costs in order to maintain margin.

(4) All that being said, we consider that Mr Ridyard usefully describes the critical issue for resolving pass-on questions, which is to explore the factors which affect the trade-off between increased price and decreased sales for a profit maximising firm, which (once identified) will allow predictions to be made in certain market and competitive conditions. The difficulty before us now is how to test for that outcome – and that requires a process whereby only evidence that will assist in this inquiry is adduced.

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[22] For example, a failure to increase wages with inflation.
[23] At footnote [6] in the passage quoted above.
[24] At footnotes [4] and [5] in the passage quoted above.

(3) The three approaches

(a) Introduction

21. It would be wrong to suggest – and we do not do so – that each of the three approaches are radically different, and lack any commonality. In fact, once the "bottom up" and "top down" approaches have been identified and described, the differences and similarities can be dealt with very quickly.

(b) The Sampling Approach

22. We begin with the Sampling Approach, although this was in fact advocated by Mastercard rather than the Active Claimants. This approach involved, first, obtaining information from the Individual Claimants by way of questionnaire. The precise content of the questionnaire was not specified by Mastercard. Ms Tolaney KC indicated that the content of the questionnaire could, rapidly, be agreed. We do not accept this: given the difference in approach evidenced by the parties before us, we are in little doubt that the questionnaire would not be agreed. This is no criticism: the fact is that the parties were so far apart on what matters were relevant to determining the question of pass-on (particularly as regards the approach to pricing of the Individual Claimants) that we are in no doubt that a further hearing would be required to determine the precise content of the questionnaire.

23. Mastercard said that the questionnaire would then enable the parties to group the claimants by commonality of factors affecting pass-on, and then identify "sample" claimants, drawn from the class of Individual Claimants, from whom disclosure would be sought, and who would (as necessary) be called to give evidence and be cross-examined. Mastercard was not opposed to variants on this theme: for instance, the use of experts (whether industry experts or pricing experts).

(c) The Disclosure/Expert Approach

24. The Disclosure/Expert Approach was, in essence, similar to the Sampling Approach, save that the emphasis on witness evidence was reduced (we would not say eliminated) and in place of this evidence an approach was adopted, where the data from the questionnaire and any disclosure would be reviewed by industry and/or pricing experts, whose efforts would (in a manner unclear) be co-ordinated by an expert economist.

25. There was some consensus between the Active Claimants (who pressed this approach) and Mastercard (which advocated for the Sampling Approach). Both agreed that information as to the method of pricing was particularly important, and it may be that an initial questionnaire could have been agreed between these parties: but not with the other parties before us.[25] Furthermore, both sides showed a degree of flexibility in the extent to which they would incorporate or lessen reliance upon witnesses of fact/experts. Again, however, as with the Sampling Approach, the Disclosure/Expert Approach was insufficiently articulated to enable us to lay down directions to trial (even if we were minded to) without yet a further hearing.

26. The HK and S+S Claimants further proposed to use a "simulation model" in order to derive an outcome. The problem with simulations (and no working model was produced) is that to be robust they require a wide range of data. The economic experts for these claimants, Mr Falcon and Dr Frankel, indeed outlined in headline terms the "minimum necessary factual evidence" that this approach would require: that evidence was extensive, and would involve reliance on industry experts as well as sampling for the purpose of disclosure, and we think such disclosure would have to be extensive to support the assumptions to be incorporated in the modelling. As we understood the proposal, such simulation modelling would then be required for each relevant sector (and their proposal indicated that there might be up to 39 sectors). We

[25] Visa and the Class Representative in the Merricks Collective Proceedings took a very different approach, as we will describe.

were not surprised that none of the other parties' experts (including the experts for the SH Claimants) appeared to endorse this approach.

(d) The Proxy/Econometric Approach

27. Visa and the Class Representative in the Merricks Collective Proceedings advocated an approach whereby existing public domain material which illustrated factors relevant to pass-on and public domain studies which could be used as a proxy for the rates of pass-on would be supplemented by targeted regression analysis using publicly available data or, where such data was not available, data from a sample of claimants. While much of the underlying methodology for the public studies was econometric, we understand Visa's approach to be "top down", because it was essentially based on presumptions from previous studies which were being adapted for the particular sectors which feature in these proceedings. Although characterised by other parties as a purely theoretical approach, Mr Rabinowitz KC was at pains to stress that his clients were not opposed to – indeed, advocated – the gathering of evidence provided that process was targeted to evidence that would actually assist an expert economist in resolving the pass-on question. Indeed, as just described, Visa's expert expressly envisaged that some sampling may be required. Accordingly, Mr Rabinowitz KC was not advocating for a purely theoretical approach, divorced from all evidence.[26]

28. Having advocated for an approach where the evidence to be adduced should be informed by expert economic direction, there was unfortunately a marked lack of specificity as to the way forward. Again, this was for understandable reasons:

    (1) The problem with the Overcharge – assuming it is established – is that it is so small as to be insusceptible to econometric analysis. There would, statistically speaking, be too much "noise" as to evidence how the Overcharge had been

[26] One might get the impression – from our reference to Mr Ridyard's approach in paragraph 19 above – that we consider a purely theoretical approach to be feasible. We do not, for reasons which we expand upon below. However, we do consider that an economist led approach does imply an early theoretical articulation by the parties' economists of how costs affect price (i.e. how pass-on "works") in order to understand what evidence needs to be adduced. This includes an explanation of the factors that are likely to be causative of pass-on, as described in general terms by Mr Ridyard in his dissenting judgment.

treated by Retailers. Thus, simply obtaining data from Retailers, and using it to "regress" to find what was passed on and what was not would produce no sensible or reliable outcome.

(2) As a result, it would be necessary to use proxies – other forms of cost, more susceptible of analysis, capable of being tracked through the web of cost and price in order to determine who, in fact, bore that particular cost. Whilst, no doubt, such an approach could be undertaken *de novo*, by referring to some proxy cost common to many of the claimants, that was not the approach principally advocated by Visa. Rather, it was suggested that a trawl of prior analyses and studies be undertaken – a number of these were identified – as at least a starting point to resolving the pass-on question.:

(3) As with the two other approaches we have described, the approach was less than fully baked. Even if fully accepted by us (which we are not inclined to do), the Proxy/Econometric Approach was insufficiently articulated to enable us to lay down directions to trial yet without a further hearing.

(4) The Class Representative in the Merricks Collective Proceedings took an approach in essence similar to that of Visa. However, there was an anterior question regarding the involvement of the Merricks Collective Proceedings in Trial 2 that we raise now, and resolve later (in Section F, below):

    (i) Although there is a duplication between the claims brought by the Active Claimants and those brought in the Merricks Collective Proceedings, that duplication concerns the issue of pass-on <u>in theory</u>. The <u>actual</u> overlap – in terms of <u>rival</u> claims to the <u>same</u> Overcharge – is far less extensive because of the limited overlap in the time periods covered in the claims. Although the Tribunal has expressed the view that even if there is no actual inconsistency between direct and indirect claims (in the sense that rival claimants are laying claim to different Overcharges), there is still merit in managing and hearing such issues together,[27] that is only one factor to be weighed when considering whether an Umbrella

[27] See the Second Ruling at [8] to [10] and [15].

Proceedings Order is to be made, and Ubiquitous Matters identified across multiple proceedings.

(ii) No such orders have (yet) been made in regards to the Merricks Collective Proceedings.[28] Before any such order can be made, the case management implications of hearing Ubiquitous Matters together need to be considered. The case management implications are significantly affected by the manner in which the issues are to be tried.

(iii) Accordingly, we will turn to the question of the Umbrella Proceedings Practice Direction, and the orders that should be made in relation to the Merricks Collective Proceedings and Trial 2 after we have determined how the pass-on issue is to be resolved.

(5) The Class Representative in the Merricks Collective Proceedings contended – as we have noted – for an approach similar to that of Visa. Indeed, this was a course that was probably forced on the Merricks Collective Proceedings:

(i) Viewed as an isolated set of proceedings, the Merricks Collective Proceedings are advanced against Mastercard alone, where it is alleged that any Overcharge was passed on by Retailers to Consumers. As matters stand, the Merricks Collective Proceedings will not receive disclosure from any Retailer absent an order from this Tribunal.

(ii) Hence, the keenness of the Class Representative to participate in Trial 2. Although, of course, dependent on the nature of such participation, the likelihood is that if the Merricks Collective Proceedings participated in Trial 2, the Class Representative would be able to deploy (in support of his case) such material as was disclosed or produced by the other parties to Trial 2.

(iii) The Class Representative's approach to pass-on was significantly informed by this. Essentially, what was proposed was that data and

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[28] At [10] of the Second Ruling.

material disclosed by the Retailers in the course of Trial 2 would be used by the Class Representative to "extrapolate backwards" and inform not merely the limited period of temporal overlap between the claims advanced in the Merricks Collective Proceedings and the claims advanced by the Active Claimants, but also the significant period of time pre-dating that overlap.

C. ANALYSIS AND APPROACH

(1) The test for pass-on

29. It is quite clear from the written and oral submissions that we have heard, and from the materials that we have read and/or been referred to, that the parties will not be able to agree an approach – notwithstanding the attempts to provide clarity of direction in the First Ruling and in the Second Ruling. That is because the parties appear to consider that the method of establishing pass-on will, in and of itself, have an effect on the substantive outcome of the proceedings. Thus, the Active Claimants appear to consider that a "bottom up" approach will result in an outcome to their advantage; whereas the Class Representative in the Merricks Collective Proceedings appears to consider that a "top down" approach is to the advantage of the class. Equally, the positions of Mastercard and Visa – albeit more nuanced – appear to be similarly influenced.

30. It goes without saying that court procedures are intended to produce a fair and impartial trial, and not result in the outcome of that trial being in any way skewed by the procedural methodology adopted by a tribunal in seeking to bring a matter to trial.

31. If (as clearly articulated in the passages above from Mr Ridyard's dissent in *Trucks 1*, with which we agree), the crucial element of the exercise is to identify the factors that have a causative connection to pass-on rates, then the question of whether to apply a "top down" or "bottom up" approach to measuring those factors can only be answered once the factors are properly identified. At that stage, and probably with reference to the sectors involved, a judgement can be made as to whether evidence can feasibly be obtained from a claimant or a

selection of them, or whether an approach of applying economic theory and testing that, with data (either from public sources or from the claimant pool), is appropriate.

32. Once it is apparent that this is the correct order of proceeding, the concerns regarding a "skewed" trial evaporate. The question becomes, how best can a pass-on question be tried and resolved by reference to the factors that might potentially affect the outcome in the relevant sectors?

33. We are very conscious that, in collective proceedings, the Tribunal bears an important responsibility in case management and in ensuring that there is a "blueprint" to trial.[29] We consider that a similar responsibility arises where – as here – there are many multiples of claims (albeit not in the form of collective proceedings) raising the same issues, which require collective case management. There are, in these circumstances, obvious attractions to a "top down" approach in a situation where there are so many Individual Claimants. Individualised evidence from each claimant is impracticable. But, once the "shape" of the issues is clear, there may well be room for some form of "bottom up" evidence to support particular factors, on a sample or high level survey basis. The most obvious example of this is where claimants engaged in an express surcharge to customers to cover the Merchant Service Charge ('MSC') approach in the present case.

34. Above all, however, we are satisfied that, in this case, it is imperative (particularly given the fact that issues of case management remain very much live issues, even following our First and Second Rulings) that the parties obtain a sufficiently clear steer from this Tribunal to enable effective steps to Trial 2 to be put in place as soon as is practicably possible. It is clear that this needs to be done with a high degree of specificity and with a clear direction to the parties as to how to differentiate between relevant and irrelevant fact. As we indicated during the course of the hearing, this appears to us to be one of the fundamental reasons why none of the parties was able to articulate precisely what it was they

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[29] See, for example, *MOL (Europe Africa) Ltd v. Mark McLaren Class Representative Ltd*, [2022] EWCA Civ 1701; *Gormsen v. Meta Platforms Inc*, [2023] CAT 10.

were inviting the Tribunal to direct. That is because none of the parties have been given sufficient clarity or direction as to how to differentiate between those factors that are relevant to the question of pass-on, and those which are not.

D. DIRECTIONS FOR THE RESOLUTION OF THE QUESTION OF PASS-ON

(1) Directions

(a) Introduction

35. We are in no doubt as to the general directions that need to be made in order to try the substance of the issues arising in Trial 2. We set these directions out in general terms in the following paragraphs. It will be necessary to embody them in an order in due course, but we will leave that to the parties to agree. The directions that we frame are both <u>positive</u> (relating to steps that we consider <u>should</u> be undertaken by the parties) and <u>negative</u> (identifying areas where we do not consider that it would be profitable to direct further effort).

(b) The need to establish an agreed list of the factors that are relevant to the question of pass-on

36. This is self-evidently necessary, and although some work had been done by some of the parties' experts, there was no agreement as to what factors were, and what factors were not, potentially relevant to the question of pass-on. It is obvious that such a list must be settled before any serious progress can be made in terms of identifying the type of evidence that will have to be adduced in order to determine whether the Overcharge has been passed-on. This is the case regardless of whether a "top down" or "bottom up" approach is to be preferred for any particular factor. There is, for example, no point in gathering specific data without some understanding of what factor the data is likely to illustrate.

37. It is obvious that those factors that are, and those factors that are not, relevant to whether pass-on has or is likely to have taken place in response to the Overcharge (or, indeed, any overcharge) is not a legal question but a question

of economic fact. It seems to us that clear direction from the expert economists retained by the parties, as unintermediated as possible by legal forensics, is extremely important. In other words, the economic experts should seek to agree a list of these factors.

38. Once that list of factors has been formulated, we require the experts to identify the options for gathering evidence to determine the causative effect of those factors on pass-on rates. The experts should do that by reference to the potential “top down” and bottom up” options and the practical considerations that apply in this case. The experts are to seek to agree an approach in relation to each identified factor.

(c) Identification of relevant sectors

39. It is nearly certain that evidence as to the pass-on of costs will need to be specifically referrable to those industries, industry sectors and/or sub-sectors that are representative of the claimants bringing these claims. We anticipate that there may be material differences in the application of the factors between sectors of the economy. We shall refer to them generally as “sectors”, but there may well be variables as to size, geographic extent etc., leading to identification of sub-sectors, on which we can express no view.

40. In the first instance, it will be necessary to agree a list of those sectors at the same time as the factors are identified, so that considerations about different causative effects between sectors can be identified and the evidence relevant to that properly targeted. Again, this will be a matter for the expert economists in the first instance, some of whom have already expressed views on the subject.

41. However, none of the experts have approached the exercise of identifying the sectors by reference to whether the factors might or might not apply differently in any sector. If a factor is likely to be general across the economy, it seems unnecessary to consider it separately sector by sector. However, where a factor might vary in effect between sectors then a more granular exercise is going to be necessary. It is therefore the likely variations between sectors that should primarily drive the identification of separate sectors. By approaching the matter

in this way, we anticipate that the list of sectors can be kept to a manageable and proportionate length.

42. The experts are going to have to articulate what evidence they are actually looking for and we expect the economists to seek to agree what investigations it might be necessary to undertake. In this regard, it may well be necessary to engage industry specific experts, to answer those questions falling outside the expertise of the economists, although it may be that questions can be answered by reference to published materials.

43. Either way, this is something that the expert economists will need to give careful thought to, and seek to agree. To the extent that industry experts need to be instructed, we doubt very much whether it would be proportionate for each party to instruct their own industry expert, and we put the parties on notice that we regard this as an area where the instruction of a joint expert to resolve a specific matter is likely to be appropriate.

44. To this extent, we endorse the Disclosure/Expert Approach. But we stress that what we have not resolved – and what we cannot resolve at this stage – is precisely which industry experts will need to be retained and what they will be instructed to do. However, we do want to be clear that we regard this approach as led by the economic experts, and that we are unwilling to allow industry experts free-range as to the questions they address.

(d) The use of Simulation Models

45. We do not consider that a simulation model will assist us at trial. Our understanding is that considerable work will be required in order to construct a simulation model, which will require the collection of a vast amount of data to be of any utility. It is likely that there will be real questions about the validity of the model to replicate real world conditions and that the "black box" nature of the model will make it difficult, or even impossible, to make an informed assessment of the strengths and weaknesses of the model. It will, for example, be difficult for the Tribunal to manipulate the simulation model of its own volition, should it wish to at the trial.

46. We note that the European Commission's guidelines in relation to estimating pass-on record some of these concerns about simulation models and conclude that *"[...] it may in many cases be difficult to meet the required standard of proof under applicable law when applying this method."* [30] For the present, we consider that no such evidence should be adduced at trial.

(e) The use of Econometrics and Proxies

47. We are also sceptical that econometric analysis specifically directed to the Overcharge in this case will be of assistance, for the simple reason (also recorded in paragraph [28] above) that the multilateral interchange fee (MIF) is so small as to be unlikely to be measurable in such an exercise.

48. In contrast, we do consider that past studies of the price effect of other costs, involving econometric techniques <u>should</u> be of assistance and, where available and suitable in relation to a particular sector or factor, should be the obvious first port of call for the evidence relating to that sector or factor. We therefore order that the experts instructed by all parties should direct their minds (i) to what past studies exist that might assist and (ii) how such materials might be deployed in resolving the pass-on question. We stress that this is a question that should be addressed by <u>all</u> experts, even if the party retaining them has in the hearings before us advocated <u>against</u> the usefulness of such evidence.

(f) A Sampling Approach

49. We consider that any Sampling Approach would have to be extremely tightly controlled. We do not exclude, at this stage, a Sampling Approach, but neither do we direct it. We consider that before this aspect of evidence gathering should be taken any further, the expert economists should carry out the exercise of agreeing the relevant factors (with regard to any sectoral differences) and should assess the availability and suitability of public data and studies and also the potential use of industry experts in relation to a particular sector. Where,

[30] Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07), at [132] and [133].

following that assessment, a sampling approach is considered to be the most appropriate way to obtain evidence of the causative effect of a factor or in a particular sector, the experts are to seek to agree (i) the persons or classes of person they would want to sample in order to obtain evidence to assist in resolving the pass-on question and (ii) the questions that would be asked.

(g) Questionnaires

50. We see benefit in the sending of a questionnaire to all claimants seeking to determine matters such as: (i) which sector(s) they were in; (ii) whether and if so for what period their prices included an express surcharge for payment by debit and or credit card; (iii) the proportion of payments for their sales which was by debit and or credit card on an annualised basis over the claim period; (iv) to identify their acquiring bank(s) through the period of their claim; and (v) whether their agreement with that bank for the MSC was for a blended fee or was on a Cost + or Cost ++ basis[31] (see section E below for further detail on these last two items).

51. We do not however consider that the questionnaire should include questions about how the merchant sets its prices or treats the MSC within their budget setting or whether the merchant has target profit margins as we consider that such answers will be much more subjective, unsuitable for generic analysis and could not be relied on without disclosure and potential cross-examination, which is, at least at this stage, not something we are prepared to agree to. Beyond that, the final content of the questionnaire should be postponed until after the resolution of the other activities we have ordered should take place.

(h) Liberty to revisit

52. We should say that these directions are not finally conclusive: we consider that the evidence-gathering exercise needs to be iterative, and we are certainly not closing out options permanently. However, we would expect a clearly reasoned

[31] We understand that some of these have been covered already in a questionnaire sent to Retailers in relation to Trial 1 issues.

justification from an expert before we would agree to the pursuit of evidence which we have indicated we do not currently favour.

(2) A fundamental problem: securing agreement amongst the experts

(a) The problem stated

53. For the President and Mr Tidswell – who participated in the hearings preceding the First Ruling and the Second Ruling, and have given their names to those Rulings – the foregoing has the flavour of "*déjà vu* again". The purpose of these hearings and those Rulings – which were not in themselves insubstantial – was to achieve a degree of confidence in the approach to the gathering of the evidence to be adduced at Trial 2. As we have described, the process so far has not met with significant success, and this is the third time of trying. This is a criticism of no one: but it is a reflection of the very difficult process all are engaged in.

54. Trial 2 is listed for the last quarter of 2024, and time is not our friend. We do not consider that we can simply leave the matters we have directed to unsupervised agreement between the experts. As we have noted throughout this Ruling, it is most unlikely that such agreement will be forthcoming without significant effort from the expert economists and the Tribunal.

55. The next sections:

(1) Set out how we expect agreement to be reached so that the evidence gathering process can continue and an orderly Trial 2 take place.

(2) Set out – purely by way of example – two controversies that we expect will arise amongst the experts and which we consider will have to be resolved at an interlocutory stage in advance of Trial 2.

(3) Provide an illustration (no more than that) as to how the Tribunal might try to resolve controversies such as these, in order to obtain the agreement between

experts that must be achieved on evidence gathering so that Trial 2 is not permanently derailed.

(b) Tribunal control of the process

56. Clearly, the experts will need to work closely with one another in order to ascertain the extent to which the matters outlined in paragraphs [36] to [51] can be agreed and (more relevantly) those areas of disagreement. We consider that the economic experts should produce a joint expert report[32] by 4:00pm on 30 November 2023 setting out with precision those matters that are agreed and by 4:00pm on 7 December 2023 a joint expert report identifying those matters that are not agreed, and why.

57. On a date after 7 December 2023, a two-day evidential hearing will take place before the Tribunal constituted for Trial 2 (the President, Mr Tidswell and Professor Waterson). The hearing will be in the form of an interlocutory "hot tub", where the Tribunal will – with all experts sworn and in the witness box – explore the evidential questions addressed in the two reports we have described. Whilst there may be scope for questions from counsel, we stress that we envisage that this process will be Tribunal led. In the following sections, we will endeavour to articulate the sorts of controversies that the Tribunal will want to explore; and how it may do so.

58. We appreciate that these are difficult, complex and novel matters. In addition to the evidential hearing we have described, the Tribunal proposes that – on a regular basis (say fortnightly) – either Mr Tidswell or the President make themselves available for a remote discussion (not a hearing; and for no longer than an hour) at which the Tribunal's guidance can be sought on points of dispute arising. We have no desire to allow controversies that can be resolved quickly to be permitted to fester.

[32] That is, a report where the primary duty owed by the experts is to the Tribunal, not to the parties instructing them.

(c) Two controversies

59. We stress that these are no more than illustrations of the sort of dispute that (i) is likely to arise as between the economic experts, (ii) which the economic experts should endeavour to resolve but which (iii) the Tribunal is likely to have to determine, if agreement cannot be reached, well before the commencement of Trial 2, in order to articulate an answer not to the substantive question but to the evidence-gathering process.

(i) First illustration: pricing and pricing strategy

60. The critical importance in working out what matters and what does not matter can be illustrated by the different views that were articulated before us at the hearing as regards the approach to pricing that was taken by the Active Claimants and Mastercard on the one hand, and Visa and the Class Representative on the other. As to this:

(1) It was the position of the Active Claimants and Mastercard that the claimants' approach to pricing mattered a great deal as regards the question of pass-on, whereas Visa and the Class Representative submitted that the point was of minor – if any – importance.

(2) Before we come to our understanding of the argument (and we stress that we are doing no more than illustrating the importance of separating the relevant from the irrelevant: we are in no way seeking to resolve this question), we set out a number of different (but typical) pricing strategies:[33]

(i) *Cost plus.* This involves applying a profit margin on top of the average or marginal costs of a business.

(ii) *Competition-based.* This is where a company's pricing is determined – at least in part – by taking into account the price

[33] These are set out in paragraph 10 of a letter dated 16 May 2023 from Vassilis Economides of LEK Consulting LLP, an expert economist retained by the SH Claimants. We doubt very much whether these descriptions are controversial but – given that we are deciding nothing – it does not matter if they are.

levels of competitors, as well as expectations as to how competitor price levels will evolve over time.

(iii) *Customer value-based.* Value-based pricing methods aim to set prices based on the value that is delivered by the business' products or services to the business' customers. This is closely linked to how the benefits of a product or service are perceived and assessed by the customers relative to the price that they pay.

(iv) *Dynamic pricing.* This is a strategy that aims to adapt prices rapidly and flexibly in response to changes in customer demand. This is typically required in situations where there is a fixed inventory of goods or services that are perishable or will otherwise lose their value if not sold by a certain point in time.

(3) We have little doubt that there are other strategies that might be adopted, and that more than one strategy might be adopted at any one time. Indeed, it may very well be the case that a particular firm might not <u>know</u> its pricing strategy. This is unimportant for present purposes. What matters is whether pricing strategy affects pass-on.

(4) Clearly, if a firm were to adopt a cost-plus pricing strategy and enforce it rigorously, pass-on of an overcharge (including the Overcharge) would be 100%. The Overcharge would constitute an "input cost" (i.e. a cost that the firm would bear), but it would also form a part of the price charged by the firm to its customers, who would bear 100% of the Overcharge.

(5) It is <u>less</u> clear whether this is the case if other pricing strategies were to be adopted. Suppose a firm adopted a dynamic pricing strategy. Would the pass-on rate of the Overcharge fall below 100% and – if so – by how much? It is at this point in the analysis that the "to whom" question (the identity of who pays the Overcharge) comes to matter:

(i) In *CAT Sainsbury*'s, the Tribunal noted that *"an economist is concerned with how an enterprise recovers its costs"*[34] and (more significantly) that:[35]

> Given that an efficient firm must – in order to turn a profit – pass its costs (one way or another) on to its consumers or else go out of business, pass-on might be said to be a fact of economic life (at least over time), occurring in relation to each and every cost, including an illegitimate or illegal overcharge like the UK MIF.

(ii) If this is right (and this was Visa's contention), pricing strategy is an irrelevance. One way or the other – perhaps over a period of time – a firm will recover its costs. This "latency" – recovering an increased cost later in time through a temporally later increase in price – is in a sense obvious and we would expect to be included in the list of factors the experts identify as being relevant to pass-on. Firms do not change their prices every instant. To do so would likely alienate customers and involve the incurring of wasteful costs. A degree of latency is likely to be present in most cases. The question is whether pricing strategy affects simply latency (when an overcharge is passed-on) or whether it affects the rate of pass-on (whether all of an overcharge is passed on, or only a proportion, or none). There is potentially a further question, namely whether, if an overcharge is passed-on after a significant delay and only as part of a general price increase, that satisfies the legal test for mitigation, i.e. a "proximate connection" between the overcharge and the price increase: see the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others*[36] at paragraph [215].

61. We express no opinion on this question, which will have to be resolved at trial. But it is a matter on which consensus is going to have to be reached as to whether, and the extent to which, evidence is adduced. For present purposes, what is significant, and troubling, is that none of the economic experts instructed by the Active Claimants or Mastercard even addressed this question. There was

[34] At [484(4)].
[35] At [433].
[36] [2020] UKSC 24.

much discussion of pricing strategy and how the pricing strategies of the claimants might be ascertained; but no discussion of the relevance of the point.

(ii) A second illustration: supplier pass-on

(2) The Tribunal in *CAT Sainsbury's* stated:[37]

> When faced with an unavoidable increase in cost, a firm can do one or more of four things:
>
> (1) It can make less profit (or incur a loss or, if loss making, a greater loss).
>
> (2) It can cut back on what it spends money on – reducing, for example, its marketing budget; or cutting back on advertising; or deciding not to make a capital investment (like a new factory or machine); or shedding staff.
>
> (3) It can reduce its costs by negotiating with its own suppliers and/or employees to persuade them to accept less in payment for the same services.
>
> (4) It can increase its own prices, and so pass the increased cost on to its purchasers.

(3) When the Supreme Court considered this point in *Sainsburys SC,* it reframed the description of the options, including option (3) so as to remove the reference to employees. The Supreme Court also stated that options (1) and (2) would not reduce the merchant's loss and therefore the merchant would be entitled to recover the overcharge, but that options (3) (as revised) and (4) would (subject to any volume effect as a consequence of option (4)).[38]

(4) Mr Ridyard did not consider option (3) to represent pass-on or to be particularly relevant to the analysis. That, however, appears to have been because such saving would not arise in a well-run firm.[39]

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[37] At [434].

[38] See Sainsbury's Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24; [2020] 4 All ER 807 at [205] and [206].

[39] At footnote [6] in the passage, quoted at paragraph 19 above: *"There is normally no causal link between these elements because a well-run firm will already have taken steps to ensure that it does not incur higher costs than are necessary to make other products."*

In these proceedings, Mastercard has pleaded option (3) as a defence – see for example the following[40]:

> "Even if (which is denied) additional costs have been incurred by the Claimants as a result of any breach of competition law by Mastercard, each of the Claimants cannot recover damages for such increased costs insofar as it: (i) passed-on that increased cost to its customers either in its retail prices or through surcharging; (ii) offset those increased costs by reducing other costs by negotiation with one or more of its suppliers."

Mastercard makes reference to paragraphs [205] and [215] of *Sainsbury's SC*.

(5) This is an area where evidence is going to be necessary, if the point is to be pursued (as at the moment it is). However, no party (including Mastercard) has engaged with the question of what evidence is required and how that is to be obtained. This needs to be addressed, in the first instance by Mastercard's expert, and then by the Claimants' experts.

(iii) Probing: possible approaches

62. The Tribunal is likely to wish to probe and parse the views of the expert economists in some detail, both to ensure the Tribunal's own understanding and resolve outstanding issues as to evidence gathering. No expert should be under the illusion that merely asserting the relevance of certain evidence will make that evidence relevant.

63. The following analytical framework may assist the parties in understanding the granular level with which the Tribunal intends to grapple with these difficult evidential questions. We stress that this is merely an indication of how the Tribunal will attempt to resolve questions of what evidence is to be adduced at Trial 2, and it is very likely that the specific approach will change in light of the reports that we have described. The economist experts should also feel entirely free to critique what is said below, and disagree with it. We consider that, this too, will assist the Tribunal.

[40] Case 1406/5/7/21 (T) *Hermes* at [131].

64. Visa's position is essentially that, as a matter of economic theory, in conditions of perfect competition 100% of costs are likely to be passed on. But since perfect competition does not exist in reality, the rate of pass-on is likely to be less than 100% but will nonetheless be significant.[41]

65. Given Visa's assertion, and the shifting burden of proof in relation to pass-on, it may be a useful exercise for the parties, and the Tribunal, to analyse pass-on by reference to a possible analytical framework based on perfect competition conditions. Using that analytical framework, it may be possible to explain to the Tribunal how the factors the experts contend to be relevant to pass-on are indeed relevant. Pricing or pricing strategy is an excellent example of such a factor: Visa says pricing or pricing strategy is relevant only to latency, and cannot affect the rate of pass-on. The Retailers and Mastercard contend the precise opposite. At the moment, we have no tool for determining – even on the basis of arguability – who is right and who is wrong. The Tribunal needs to be able to identify well before trial what evidence will assist in determining the rate of pass-on; in order to do that, the Tribunal needs to know which are the (arguably) relevant factors, and what evidence will and will not assist.

66. The objective would be to state a scenario where, given the assumptions built in, pass-on will (as a matter of inevitability) be 100%. The relevance of a factor going to the rate of pass-on turns on whether that factor can plausibly explain by reference to the analytical framework a rate of pass-on of <u>less</u> than 100%.[42]

67. If it assists the parties in considering this approach, what follows is a possible framework based on the world of "perfect competition", which involves the following assumptions:

(1) The market here under consideration operates in circumstances where there is no latency. Unlike in the "real world", where changes occur dynamically over time, changes occur immediately, and have immediate effects.

[41] See Mr Rabinowitz KC on day 2, page 101, line 2: *"Merchants pass-on costs. To the extent they are able to, they pass-on cost. The great likelihood is that some part of the costs involved in the MIF have been passed on".*

[42] The framework resembles the "null hypothesis" used by statisticians.

(2) Sellers (actual and potential) sell a single homogeneous Product to a universe of (actual and potential) Buyers. Price is the sole determinant of (i) whether Sellers are willing to sell and (ii) whether Buyers are willing to buy.

(3) Aggregate demand (from Buyers) is limited, varying only by reference to price. Aggregate supply (from Sellers) is (or can be presumed to be) potentially infinite, such that no Seller has market power. Entry into and exit from the market is cost-free.

(4) Price informs the buying and selling decisions of Buyers and Sellers differently. An individual Buyer will buy the Product if the value that the Buyer attaches to the Product exceeds the Price. Value is subjective to the individual Buyer. Aggregating demand at any given price gives the shape of the demand curve.

(5) An individual Seller will sell the Product if marginal revenue equals or exceeds marginal cost. Fixed costs of entry and exit do not act as constraints.

(6) Buyers have good market knowledge, such that their demand will move, immediately, to the Seller selling the Product at the lowest price. Although the market demand curve will be shaped normally, each Seller will be faced with a demand curve that is perfectly elastic and hence a perfectly elastic marginal revenue curve.

(7) Marginal cost includes (or we assume it to include) a proper return to the Seller. With that assumption, and in these circumstances, the Seller will have to price <u>at (marginal and, in this model, average) cost</u>. More specifically:

    (i) If the Seller is inefficient, then even if that Seller prices at cost (meaning the cost to that Seller), the Seller will have to leave the market because they will not be able to match the price of the most efficient Seller in the market.

(ii) Sellers that are operating at maximum efficiency will be the only Sellers in the market. Because no Seller has market power, and because of the elasticity of demand arising in these circumstances, every Seller in the market will have to price at cost. Failure to do so will result in a total loss of demand to that Seller.

(8) It follows that where some Sellers are faced with an increase in cost, and some Sellers are not (a "non-Universal Increase in Cost"), Sellers whose costs have increased will leave the market, leaving those Sellers not exposed to the increase in the market. A non-Universal Increase in Cost cannot be passed on in these circumstances. Pass-on will be nil.

(9) However, where there is a "Universal Increase in Cost", one affecting the costs of all Sellers in the market equally, this will be passed on to 100% to Buyers, and demand will vary accordingly.

68. We are sure that other means of exploring what relevant factors exist: the foregoing is presented, as we have said, as no more than an illustration of an approach that might assist.

E. ACQUIRER PASS-ON

69. The contracts between Acquirers and Retailers are, in many cases, quite specific and clear as to the relationship between cost and price. Many contracts are "Cost+" or "Cost++" contracts, where the MIF is specifically identified as a charge paid for by the Retailer. In short, these are cost plus contracts, and it is difficult to see how a contention of 100% pass-on of the Overcharge from the Acquirer to the Retailer could seriously be resisted. Neither Mastercard nor Visa sought to do so.

70. More difficult is the so-called "blended" contract, where the MIF is not specifically identified as an element in the price. We consider that the parties should approach some of the largest Acquirers, and seek to obtain from them data concerning (i) blended rates charged to a representative sample of Retailers

and (ii) the MIF charged to that Acquirer over time. If there is correlation between the two, then the question of pass-on ought to be susceptible of expert consideration on the basis of this data alone.

71. Since we are concerned to ensure that Trial 2 proceeds as efficiently as possible, we are grateful to the parties (Visa in particular) in agreeing to take this forward.

72. There has also been correspondence and a discussion at a CMC in relation to Trial 1 about the possibility of the parties obtaining data and other information from the Payment Systems Regulator. We need not address this ongoing issue in this judgment.

73. We have also indicated above that a questionnaire which asks limited questions of claimants in relation to the nature of their acquirer contracts would be a sensible step and we understand this has to some extent already taken place.

F. THE MERRICKS COLLECTIVE PROCEEDINGS AND THE UMBRELLA PROCEEDINGS PRACTICE DIRECTION

74. As we have noted,[43] the Class Representative in the Merricks Collective Proceedings seeks to resolve the pass-on question in the collective proceedings by "extrapolating backwards" from the data emergent from the exercise conducted in resolving the pass-on issues between the Active Claimants, Visa and Mastercard. As matters stand, we consider that this process is far better undertaken as part of Trial 2, rather than as a separate self-standing trial taking place at some point in 2025.

75. Accordingly, we direct that the Class Representative in the Merricks Collective Proceedings participate in the process that we have described in paragraphs [36] to [51] above, with a view to participating in Trial 2. We do not make a final direction in relation to Trial 2 participation (although we expect that to happen) simply because we do not know precisely what evidence the expert economists will seek. If – as Ms Demetriou submitted – disposing of the pass-on issues in

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[43] See paragraph 28(5) above.

the Merricks Collective Proceedings will involve no more than "extrapolating backwards" from data that would in any event have to be produced by the Active Claimants, then this is obviously the most efficient course. If, on the other hand, resolution of the pass-on issues in the Merricks Collective Proceedings involves substantial additional and separate work, then a separate trial is indicated.

G. THE NON-STAYED NON-ACTIVE CLAIMANTS

76. As we have noted,[44] the Individual Claimants (i.e. leaving the Merricks Collective Proceedings out of account) fall into three classes: (i) Active Claimants, (ii) Stayed Claimants and (iii) Non-Stayed Non-Active Claimants. The position as regards the first two classes (i.e. (i) and (ii)) is clear. The Active Claimants are participating in Trials 1 and 2, and will be bound, as a matter of course, by the result. Stayed Claimants are stayed on terms that, whilst the claims are stayed, these Stayed Claimants will be bound by any general outcome in the litigation and may be obliged to provide disclosure. These are no ordinary stays *simpliciter*. Of course, any Stayed Claimant may apply to have the stay lifted, and any such application will be dealt with by the Tribunal on the merits.

77. Non-Stayed Non-Active Claimants are a group of claimants who are adopting (understandably) a "wait-and-see approach", whose position now needs to be clarified. Primark and Ocado appeared before us to assist us in clarifying their position, and we are grateful to them.

78. The principal concern of both Primark and Ocado arose in relation to what "exception regime" might apply to persons not actually before the Tribunal at Trial 2. The notion of such a regime was floated by the Tribunal in its letter of 5 December 2022, but to be clear, no such exceptions regime has been articulated, still less ordered. Its existence and shape very much depends on the process adopted to Trial 2, which we have now outlined.

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[44] See paragraph 5 above.

79. Accordingly, it is now possible to be more definitive about the exceptions regime. When describing what it called an "expert-led" approach in its letter of 5 December 2022, the Tribunal said this:

> **An "expert-led" approach**
>
> 6. Informing this approach would again be the need to create an outcome that would be binding, or at least highly influential, across the vast claimant community as well as in relation to the defendants. By "highly influential", we mean an outcome that would *prima facie* be binding, unless the party that would otherwise be bound to produce cogent evidence that a given case was so atypical as to bring it outside the "norm".
>
> 7. This approach would involve expert evidence on a reasonably wide and deep sector-by-sector basis. The experts would no doubt wish to have access to underlying factual material (presumably on a sampling basis), and that process would be controlled by the Tribunal. It might be that a "two-phase" process could be adopted, with the experts first seeking to articulate the relevant facts, with opinion evidence analysing those facts following.
>
> 8. The aim would be to end up with a benchmark, by industry, for pass-on, which would be seen as the default answer (either for settlement or even as a binding outcome if not challenged by specific factual evidence to the contrary), always leaving open an "exceptions" process where any party (claimant or defendant) could seek to persuade the Tribunal that the position of a particular claimant was different from the benchmark established for their particular industry.

80. Although our approach is very much expert-led, it is not the approach described in the foregoing paragraphs. Given the way in which we anticipate the economic evidence on pass-on to develop, we consider that to frame an exceptions process now would be an error, and that an exceptions process would be inimical to the process we envisage occurring. Of course, we recognise that the need for an exceptions process cannot absolutely be closed out, and we would certainly be minded to review matters at the end of Trial 2.

81. We therefore consider that all interested claimants should proceed on the basis that Trial 2 will aim to articulate a common answer to <u>all</u> of the cases, and that there will not necessarily be an exceptions process. That means that Non-Stayed Non-Active Claimants will <u>either</u> have to participate in the process; or else apply to be stayed on the usual terms.

H. DISPOSITION

82. We will proceed to Trial 2 in the manner articulated above. By way of summary:

(1) The experts are to seek to agree a list of potentially relevant factors which might affect the fact or rate of pass-on and which therefore need to be tested for (whether on a top down or bottom up basis – to be determined in due course).

(2) At the same time, the experts are to seek to agree a list (of a proportionate and workable length) of sectors, by reference to the potential for factors to have different causative effects on pass-on rates in those sectors.

(3) Simulation models are not to be used in the case.

(4) Econometric/Proxy studies may be used if:

(i) An exercise which is meaningful can be carried out on a set of available data.

(ii) An expert considers previous studies are relevant as a proxy for the pass-on rate of the Overcharge.

(5) In either case in (4)(i) and (ii), the experts need to set out what is contemplated and why before this evidence will be permitted.

(6) The experts are to consider, seek to agree or determine differences on:

(i) The relevance and utility of pricing strategies.

(ii) Supplier pass-on. Mastercard's expert is to provide a list of factors which are relevant to the pleaded issue of supplier pass-on, and the experts for the Claimants are to respond to that and seek to agree those factors.

(iii) The use of a perfect competition framework to identify and test for factors affecting pass-on rates.

(iv) Any other controversy which the experts think is material.

(7) The parties are to approach some of the largest Acquirers and seek to obtain from them 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 claims.

(8) The Class Representative in the Merricks Collective Proceedings should participate in the process that we have described in paragraph [82], with a view to participating in Trial 2.

(9) The parties should agree a form of questionnaire dealing with the matters described in paragraph [50] above and should submit that to the Tribunal for further approval.

(10) The economic experts should produce a joint expert report by 4:00pm on 30 November 2023 setting out with precision all those matters covered by this order that are agreed and, by 4:00pm on 7 December 2023, produce a joint expert report identifying those matters that are not agreed, and why.

(11) On a date after 7 December 2023, a two-day evidential hearing will take place before the Tribunal constituted for Trial 2 (the President, Mr Tidswell and Professor Waterson). All economic experts should be available to be sworn and to give evidence on the matters covered by the reports referred to above.

83. It would be helpful if the parties could agree a form of order.

84. This Judgment is unanimous.

Sir Marcus Smith President	The Hon Mr Justice Roth	Ben Tidswell

Charles Dhanowa OBE, KC (Hon) Registrar	Date: 5 October 2023