Neutral citation [2024] CAT 39

Case Nos: 1441-1444/7/7/22

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 June 2024

Before:

BEN TIDSWELL
(Chair)
TIM FRAZER
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

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

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

(1) MASTERCARD INCORPORATED

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

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

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

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

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

Respondents / Proposed Defendants

Heard at Salisbury Square House on 17-18 April 2024

JUDGMENT (REVISED CPO APPLICATIONS)

APPEARANCES

Lord Wolfson KC, Michael Bowsher KC, David Caplan, Ligia Osepciu, Flora Robertson and James White (instructed by Harcus Parker Limited) appeared on behalf of the Proposed Class Representatives in Case Nos. 1441-1444/7/7/22.

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

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

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A. INTRODUCTION

1. This is the second attempt by two corporate entities (the "PCRs") to obtain Collective Proceedings Orders ("CPOs") in relation to two opt-out claims and two opt-in claims, against the Proposed Defendants, being various Mastercard and Visa entities.

2. The outcome of the first attempt (the "Original Applications") is recorded in the Tribunal's judgment of 8 June 2023 ([2023] CAT 38, which we will refer to as the "2023 Judgment"). We adopt sections B (Background to the litigation) and D (Legal Framework) from the 2023 Judgment and will not repeat them here.

3. It suffices, by way of setting the scene, to say that the Original Applications concerned a claim to recover, on behalf of a class comprising mainly UK and some European merchants, an alleged overcharge comprising all or part of particular types of multilateral interchange fee (the "MIF"), which issuing banks received from acquirers in accordance with the scheme rules of the Proposed Defendants. The MIFs concerned related to transactions between regions (Interregional MIFs) and transactions using business or corporate cards (Commercial Card MIFs).

4. It was said that merchants had ended up paying those MIFs and, in line with a number of regulatory and court decisions concerning other types of MIF, classes comprising those merchants were entitled to recover damages from the Proposed Defendants as a consequence of their breaches of statutory duty in infringing Chapter I of the Competition Act 1998 ("CA 1998") and/or Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

5. The Original Applications were unsuccessful for a number of reasons, affecting both the proposed opt-out and opt-in proceedings. These defects are summarised in [252] of the 2023 Judgment. In very summary terms, they involved:

   (1) Problems with the identification of the class, where merchants on so-called "blended" contracts would not know if they had paid particular Interregional MIFs or Commercial Card MIFs, and in relation to non-

UK members of the proposed opt-in classes (which also gave rise to a question about the commonality of issues).

(2) A failure by the PCRs to set out a satisfactory (or indeed any) methodology to show how key issues could be progressed to trial and tried satisfactorily, thereby also assisting with the determination of the extent of common issues for the proposed class.

6. The 2023 Judgment allowed the PCRs a further period of time to address these defects. That anticipated the possibility that further factual investigation might establish greater clarity in respect of the class definition. The PCRs responded with a revised set of proposed proceedings, which were filed on 18 December 2023 (the "Revised Applications"). The Proposed Defendants provided their Responses on 28 February 2024 and the PCRs filed a Reply on 20 March 2024. The Revised Applications were heard on 17 and 18 April 2024. Following the April CPO hearing, the Tribunal asked for further submissions on a particular point, and these were provided by the parties on 3 May 2024.

7. Three other events are worth noting at this stage:

(1) There was a hearing before the Tribunal on 10 November 2023 to consider revisions to the PCRs' funding arrangements, which was the subject of a judgment dated 17 January 2024 ([2024] CAT 3).

(2) The Proposed Defendants sought permission to appeal certain aspects of the 2023 Judgment relating to the Tribunal's assessment of the relative suitability of the proposed proceedings compared with the Umbrella Proceedings currently underway in the Tribunal (the Umbrella Proceedings are described in some detail on the 2023 Judgment at [18] and following). Permission to appeal was refused by the Tribunal ([2023] CAT 58) and by the Court of Appeal in a judgment ("the CA PTA Refusal") dated 7 March 2024 ([2024] EWCA Civ 218). We will return to this decision further below.

(3) Trial 1 in the Umbrella Proceedings took place in February and March 2024 and judgment was reserved. Trial 2 (which deals with pass-on) is scheduled to take place in November and December 2024.

B. THE REVISED APPLICATIONS

(1) Overview of changes

8. There are a number of significant differences between the Original Applications and the Revised Applications:

(1) The PCRs have dropped their claims in respect of MIFs for Interregional Card Transactions, so the proposed proceedings now concern Commercial Card MIFs only.

(2) The PCRs have provided further evidence in the Revised Applications which they say resolves the concerns about class identification identified in the 2023 Judgment. The PCRs have also put forward an alternative class definition, which seeks to avoid the class identification problem identified in the 2023 Judgment by including in the proposed classes all merchants who had agreements with acquirers which enabled the merchant to accept Commercial Cards. We deal with the PCRs' case on class definition in more detail below.

(3) The proposed class in the opt-in claims has been narrowed so that it no longer includes transactions taking place outside the UK.

(4) The PCRs' expert economist, Mr von Hinten Reed, has set out his proposed methodology in relation to areas where the 2023 Judgment had identified a lack of or an inadequate methodology.

(5) The Revised Applications also contain further information about how the proposed collective proceedings would interact with the Umbrella Proceedings and the PCRs have provided a revised Litigation Plan and revised Litigation Budgets.

(2) The PCRs' approach to class definition

9. As noted above, the PCRs put forward an alternative class definition (the "Revised Class Definition") in the Revised Applications. This reads as follows:

> "All Merchants who, at any point during the Claim Period, had in place a Merchant Agreement with an Acquirer which enabled the Merchant to accept Commercial Cards as a means of payment for transactions in the UK. The Proposed Class does not include Excluded Merchants."

10. The Revised Class Definition was the only class definition pleaded in the draft amended claim form put forward in the Revised Applications. It was the only class definition referred to in the Publicity Notices published by the PCRs in advance of the hearing of the Revised Applications. However, at the CPO hearing the PCRs sought to rely on both the Revised Class Definition and the class definition advanced in the Original Applications (the "Original Class Definition"), which reads as follows:

> "Merchants who paid a Merchant Service Charge in respect of one or more Inter-regional Card Transactions and/or Commercial Card Transactions during the Claim Period."

11. However, given the withdrawal of the claim in relation to Interregional Card Transactions, the Original Class Definition was not fully reflective of the alternative position on which the PCRs sought to rely. The correct class definition (which was not formally articulated in any document filed or published by the PCRs) should have omitted the reference to "*Interregional Card Transactions"* and should have referred only to *"Commercial Card Transactions"*, so as to read as follows:

> "Merchants who paid a Merchant Service Charge in respect of one or more Commercial Card Transactions during the Claim Period."

12. We will for convenience refer to this adjusted version of the Original Class Definition from the Original Applications as the "Adjusted Original Class Definition".

13. The PCRs argued that the new evidence submitted with the Revised Applications was sufficient to remove the concerns of the Tribunal, as expressed in the 2023 Judgment, about class identifiability.

14. In the course of the hearing of the Revised Applications, Lord Wolfson KC (for the PCRs) indicated that the PCRs' preferred class definition was the Adjusted Original Class Definition, with the Revised Class Definition being the fallback option.

15. The approach of the PCRs to class definition, and in particular the attempt to run alternative and unpleaded class definitions, was the subject of criticism by the Proposed Defendants, which we will return to shortly.

C. THE OBJECTIONS TO THE REVISED APPLICATIONS AND THE ARGUMENTS OF THE PARTIES

16. The Proposed Defendants advance a number of objections to the Revised Applications and submit that the Tribunal should decline to grant a CPO for any of the proposed collective proceedings. Their objections can be summarised as follows:

(a) Identification of class – Revised Class Definition

(1) The Revised Class Definition is impermissibly wide, as it includes a very material proportion of merchants who would not have accepted Commercial Card Transactions. It does not comply with the requirements of the CA 1998, and, even if it did, the Tribunal should not grant a CPO in respect of it.

(b) Identification of class – Adjusted Original Class Definition

(2) The PCRs have not properly pleaded the Adjusted Original Class Definition, and it has not been properly publicised in accordance with the Tribunal's Rules. In any event, the fresh evidence is insufficient to overcome the concerns about the Original Class Definition as expressed in the 2023 Judgment.

(c) Methodology

(3) The methodology put forward by the PCRs to calculate aggregate damages for the purposes of the opt-out proceedings is defective, because it fails to deal with a number of important items, such as the split between the damage suffered by opt-in and opt-out class members, the exclusion of existing and settled claims and the treatment of non-UK domiciled merchants.

(4) There are various other methodology defects in relation to issues such as exemption and the taking into account of countervailing benefits, merchant pass-on and acquirer pass-on.

(d) Suitability

(5) The Proposed Defendants seek to revisit some of the arguments about the relative suitability of the proposed proceedings and the Umbrella Proceedings, in particular as a result of the narrowing of the proposed proceedings (to remove Interregional Card Transactions), the degree of ambiguity about the PCRs' intentions in relation to participating in the Umbrella Proceedings and the cost/benefit assessment to be made given the new circumstances of the Revised Applications.

(e) Authorisation

(6) The Proposed Defendants criticise the PCRs for their approach to the Revised Applications, and in particular the continuing defects, and submit that these demonstrated continuing poor management of the proceedings.

17. Some of these objections are common to the opt-out and opt-in proceedings, although there are also points particular to one or the other. We will therefore distinguish between the types of proceedings when setting out the parties' arguments in more detail.

(1) The proposed opt-out proceedings

(a) Identification of class – the Revised Class Definition

18. It is common ground that there will be a significant number of merchants who will be eligible for inclusion in the class set out in the Revised Class Definition, but who will not have accepted a Commercial Card Transaction at any time in the Claim Period.[1] Data presented by Mastercard suggested this proportion could be around 25% for larger merchants and in excess of 70% for smaller merchants. While these figures are not agreed by the PCRs, we understood Lord Wolfson KC to accept that the number of merchants in the proposed class who had not accepted Commercial Card Transactions would be substantial.

19. It follows that these merchants (those who have not accepted Commercial Card Transactions) do not in fact have a claim. They have not been charged a Commercial Card MIF, have not paid an unlawful overcharge and have therefore suffered no injury as a result of any infringement of Article 101/Chapter I by the Proposed Defendants. Again, we understood this to be accepted by the PCRs.

20. Section 47B(1) of CA 1998 is the statutory provision which permits the bringing of collective proceedings. It reads:

> 47B Collective proceedings before the Tribunal
>
> (1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").

21. The claims to which section 47A applies are set out in 47A(2):

> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> [the section then lists the relevant prohibitions]

[1] This is defined in the Amended Claim Forms as the period commencing 6 June 2016 through to the date the (unamended) Claim Form was filed, being 1 June 2022.

22. The Proposed Defendants argue that it is a necessary condition of inclusion in the collective proceedings regime under section 47B that a claim exists as defined in section 47A(2), namely one in which a person has suffered loss and damage. They further argue that this interpretation is consistent with the authorities which consider both the need for a claim and the inclusion in previous certified classes of persons who may not have suffered loss, and draw a distinction between the two concepts.

23. The Proposed Defendants also rely on the Tribunal's judgment in *Neill v Sony Interactive Entertainment* [2023] CAT 73, which they say reached exactly the conclusion they argue for, albeit in a different context.

24. The PCRs say that the terms of section 47A(2) are descriptive rather than prescriptive and that this is demonstrated by certification granted in a number of cases in which some members of a class may not have suffered a loss. That is consistent with the provisions of section 47C, which allows for the aggregate assessment of damages, and the discussion of that section by the minority in *Mastercard v Merricks* [2020] UKSC 51 ("*Merricks SC*"), as endorsed and applied in the Tribunal's decision in *Gutmann v First MTR South Western Trains Limited* [2021] CAT 31. That removes any requirement of loss as an essential element of the claim – both for the purposes of quantum and liability. To approach the matter any other way would undermine the whole intent of access to justice which underpins the collective proceedings regime.

(b) Identification of the proposed class – the Adjusted Original Class Definition

25. The PCRs rely on three items of fresh evidence in making their submission that the Tribunal should now grant CPOs in respect of the Adjusted Original Class Definition:

    (1) The application of the Interchange Fee Regulation 2015,[2] in its original form and as adopted post-Brexit in the UK by the Interchange Fee

[2] Regulation (EU) 2015/751 on interchange fees for card-based payment transactions.

(Amendment) (EU Exit) Regulations 2019 (together, the "IFR"), which makes provision for merchants to be provided with information about their transactions, from which those merchants would be able to determine whether they have conducted Commercial Card Transactions. The IFR makes it plain that the information required to be provided or made available includes the interchange fee paid by the acquirer to the issuer, regardless of how that charge is passed on to the merchant. It is therefore irrelevant that some merchants (said to be a small number) may be on blended contracts which are based on one or more aggregated rates for transactions undertaken by the merchant.

(2) Sample statements provided to merchants by acquirers, which show the form of compliance by acquirers with the IFR, and in particular demonstrate that merchants are being provided with information about Commercial Card Transactions.

(3) Further information about the transaction data which Visa and Mastercard have, which might allow them to match merchants with Commercial Card Transactions.

26. The PCRs rely on the following provisions of the IFR:

"Article 9

Unblending

1. Each acquirer shall offer and charge its payee merchant service charges individually specified for different categories and different brands of payment cards with different interchange fee levels unless payees request the acquirer, in writing, to charge blended merchant service charges.

2. Acquirers shall include in their agreements with payees individually specified information on the amount of the merchant service charges, interchange fees and scheme fees applicable with respect to each category and brand of payment cards, unless the payee subsequently makes a different request in writing.

[…]

Article 12

Information to the payee on individual card-based payment transactions

> 1. After the execution of an individual card-based payment transaction, the payee's payment service provider shall provide the payee with the following information:
>
> > (a) the reference enabling the payee to identify the card-based payment transaction;
> >
> > (b) the amount of the payment transaction in the currency in which the payee's payment account is credited;
> >
> > (c) the amount of any charges for the card-based payment transaction, indicating separately the merchant service charge and the amount of the interchange fee.
> >
> > With the payee's prior and explicit consent, the information referred to in the first subparagraph may be aggregated by brand, application, payment instrument categories and rates of interchange fees applicable to the transaction.
>
> 2. Contracts between acquirers and payees may include a provision that the information referred to in the first subparagraph of paragraph 1 shall be provided or made available periodically, at least once a month, and in an agreed manner which allows payees to store and reproduce information unchanged.

27. The PCRs say that the mere fact that acquirers are obliged to provide, or make available, transaction information (which would include information identifying Commercial Card Transactions) is sufficient to deal with the question of identifiability. Every merchant will either have statements which set out that information or will be able to request that information from their acquirer, who is under a legal obligation to provide it.

28. These provisions, say the PCRs, are consistent with sixteen sample statements of account from acquirers to merchants, which were exhibited to the sixth witness statement of Thomas Nathan Ross, a partner at Harcus Parker Limited, solicitors for the PCRs. The statements span the period from 7 February 2019 to 5 July 2023, with all but two falling later than (i.e. outside the period of) the current Claim Period for the proposed proceedings. Each of them shows a line-by-line breakdown of transaction charges at a level from which it is possible to identify Commercial Card Transactions and the interchange fees associated with those.

29. Mr Ross also dealt in his statement with the transaction data which Mastercard and Visa hold. This was a subject of some discussion at the hearing of the Original Applications and is referred to at [186] to [188] of the 2023 Judgment.

However, Mr Ross explained that, after receipt of the 2023 Judgment, the PCRs sought further information from the Proposed Defendants and also sought to instruct a payments system expert to investigate this question more fully.

30. While neither initiative was successful (the Proposed Defendants did not provide the information before the Revised Applications were made and it was not possible to find a suitable expert willing to assist), Mr Ross says he has learned that the Proposed Defendants can identify merchant transaction data (including whether the merchant has conducted Commercial Card Transactions) by using something called a Merchant Identification Number, or "MID".

31. The PCRs' position at the CPO hearing was that the Tribunal could be satisfied about identifiability because there was a legal obligation for acquirers to supply that information, which meant that merchants should either have the necessary information already or should be able to obtain it. In the event that was not possible, the MID provided an alternative route for verification, but this was a secondary option and probably unnecessary.

32. We should add that, in their Reply, the PCRs appeared to suggest that the Tribunal had applied the wrong legal test in its approach to the question of identifiability in the 2023 Judgment. At the hearing, Lord Wolfson KC appeared disinclined to pursue these arguments. We will in any event deal with them briefly in our analysis below.

33. The Proposed Defendants are highly critical of the approach taken by the PCRs in relation to the Adjusted Original Class Definition. They submit that this definition:

    (1) Is not the definition pleaded in the Revised Applications (which is the Revised Class Definition).

    (2) Is not in fact pleaded anywhere, as relied on, because the Original Class Definition included Interregional Card Transactions, which have now been dropped from the proposed proceedings, and the Adjusted Class Definition has never been pleaded.

(3) Has not been properly publicised by way of the requirements in the Tribunal's Rules relating to Publicity Notices, because only the Original Class Definition (i.e. including Interregional Card Transactions) and the Revised Class Definition have been included in those notices.

34. The Proposed Defendants dispute the significance of the IFR in a variety of ways:

(1) It cannot be inferred that acquirers have complied with the provisions of the IFR. Barclays was fined by the Payment Systems Regulator ("PSR") in a decision (the "Barclays Decision") dated 14 December 2018 because it did not comply with Article 12. [3]

(2) In any event, Article 12 does not require as much as the PCRs assert:

(i) It only requires information to be made available, not actually to be provided.

(ii) Nothing in Article 12(1) requires the acquirer to specify if the transaction involves a Commercial Card. The Proposed Defendants rely on the Barclays Decision to support that proposition, as well as other material published by the PSR.[4]

(iii) Information about interchange fees might not specify whether the fee was for Interregional or Commercial Cards, and so would therefore be inconclusive.

(iv) The information might also not distinguish Mastercard transactions from Visa transactions.

[3] Payment Systems Regulator, Decision Note, December 2022.
[4] Payment Systems Regulator, "Market review into the supply of card-acquiring services; Final Report", Annex 1, "Industry Background", November 2021 (MR18/1.8 Annex 1) and Payment Systems Regulator and "Guidance on the PSR'S approach to monitoring and enforcing compliance with the Interchange Fee Regulation", September 2021.

(v) Where merchants were on a blended contract, there might not be a level of granularity about interchange fees that allowed the merchant to identify Commercial Card Transactions.

35. In relation to the sixteen acquirer statements, the Proposed Defendants say that they are insufficient to provide assistance with identification:

(1) They mostly (fourteen out of sixteen) post-date the Claim Period.

(2) Those within the claim period are from small acquirers and cannot be taken as being representative.

(3) There may have been different practices during the claim period (as the Barclays Decision suggests).

(4) All sixteen merchants are on a type of contract where interchange fees needed to be dealt with separately (that is, they are not on fully blended contracts where only one, or a small number of, MIF rate(s) is applied to all transactions). They are therefore not representative of the wider merchant population, which is predominantly on fully blended rates.

36. In relation to the MID argument, the Proposed Defendants provided witness statements from Nicholas Cotter, a partner at Jones Day, who acts for Mastercard, and from Timothy Steel, formerly an Executive Director of Payment Economics at Visa but now a consultant to Visa. The thrust of their evidence is that:

(1) Visa does not use MIDs, but instead uses something similar called a Card Acceptor ID, or "CAID".

(2) It is not straightforward to identify MIDs or CAIDs for individual merchants, as there may be several MIDs/CAIDs for a merchant group, or indeed several merchant groups could be aggregated under a single MID/CAID. Merchants do not always know what their MID/CAID is.

(3) It would be an extremely laborious task for the Proposed Defendants to undertake any exercise at scale of matching merchants with MIDs/CAIDs. However, if a merchant provides a MID/CAID, it is possible to obtain transaction data relating to that MID/CAID, which would identify any Commercial Card Transactions.

37. The Proposed Defendants therefore argue that it is impractical to suggest that any material number of merchants could use MIDs/CAIDs to identify whether or not they had accepted Commercial Card Transactions and had therefore paid a Merchant Service Charge which included a Commercial Card MIF.

(c) Methodology issues

38. The Proposed Defendants make a number of criticisms of the adequacy of the methodology advanced by the PCRs, in accordance with the requirement of the *Microsoft v Pro-Sys* test, as explained in [65] and following of the 2023 Judgment. These mainly centred on the proposed approach to the calculation of aggregate damages, as follows:

(1) The PCRs do not have a proper methodology for excluding the value of existing and settled claims in other proceedings from the calculation of aggregate damages and there is an absence of data that would permit that.

(2) The methodology put forward by the PCRs to allocate the overcharge between the opt-out and opt-in claims is flawed, and the adjustments made by the PCRs' expert, in recognition of those flaws, reduce the claim to a very low level.

(3) There is no methodology to exclude from aggregate damages class members who opt-out and non-UK domiciled merchants, both of which will result in an inflated aggregate damages claim.

39. The PCRs' answer to these criticisms is essentially that their expert has demonstrated there are ways in which these deductions and allocations can be

estimated, and the Tribunal can be confident that, as the claim progresses, it will become clearer which approaches are likely to be most accurate.

40. The Proposed Defendants also resume their criticism from the Original Applications about the methodology for the issues of exemption under Article 101(3), the assessment of countervailing benefits and the assessment of merchant and acquirer pass-on.

41. The PCRs say that these are largely matters on which the Proposed Defendants bear the burden of proof and, until they are able to develop their case further, the PCRs have done all that can reasonably be required.

(d) Relative Suitability

42. This is again an area where the Proposed Defendants have reprised arguments made in respect of the Original Applications (and, in that regard, rejected in the 2023 Judgment). The Proposed Defendants say that features of the Revised Applications (under either class definition) give rise to a need to revisit the question of whether the opt-out collective proceedings are more suitable for the disposition of claims than the Umbrella Proceedings. This issue is bound up with the PCRs approach to the Umbrella Proceedings, on which the Proposed Defendants say the PCRs have been less than forthcoming and straightforward.

43. The PCRs say nothing has changed in relation to relative suitability since the 2023 Judgment, which has been endorsed by the CA PTA Refusal. They also say that they have made it plain that they intend to take advantage of the Umbrella Proceedings, both in terms of efficiency for the benefit of class members and the best use of the Tribunal's resources. It would however be inappropriate for them to make further commitments unless and until the CPOs are granted, as only then can the correct assessment be made of how the two sets of litigation should interact.

(2) The proposed opt-in proceedings

(a) Methodology

44. The Proposed Defendants repeat their criticisms about methodology in relation to exemption/countervailing benefit, merchant pass-on and acquirer pass-on. They also repeat the points about non-UK domiciled merchants, with the additional criticism that there is no methodology to deal with these claims, taking into account in particular the likelihood that the acquirer may not be located in the UK for such merchants.

45. The PCRs say there is no uncertainty about the position with acquirer location and no need for a developed methodology, given the immaterial size of this part of the claim.

(b) Relative suitability

46. The Proposed Defendants repeat in this context the points described above about relative suitability, with the addition of the following:

(1) The change of scope of the proposed proceedings (to remove Inter-regional MIFs) is likely to have a significant impact on the level of interest of merchants in opting in to the proceedings.

(2) In particular, there is an enhanced risk of fragmentation of claims, because merchants now only have the option of bringing and resolving Commercial Card MIF claims in the proposed collective proceedings, while having to bring separate claims for all other MIFs.

(3) The PCRs have made no effort to investigate the current level of merchant interest following this development.

(4) The cost/benefit analysis now weighs against certification, given the likely reduced size of the claim compared with the proposed litigation budgets.

47. The PCRs say that there is no reason to think that the level of interest in the opt-in proceedings will have changed and the reasoning in the 2023 Judgment and the CA PTA Refusal still holds good.

(3) Authorisation

48. The Proposed Defendants say that the continuing defects they have identified in the Revised Applications demonstrate poor management of all of the proposed proceedings, which would justify the Tribunal refusing to grant the Revised Applications.

49. The PCRs say they have complied with the 2023 Judgment and have in that way demonstrated their ability to deal with the issues in the case.

D. ANALYSIS

(1) The proposed opt-out proceedings

(a) Identification of class – the Revised Class Definition

50. In our judgment, the Proposed Defendants are correct in their argument that the Revised Class Definition fails to meet the requirements of section 47B CA 1998.

51. We do not accept the suggestion by the PCRs that section 47A(2) permits the deliberate inclusion of class members who have never been exposed to a wrongful act and have, as a consequence, no possibility of having suffered a loss.

52. This argument conflates two different issues:

(1) The possibility that a member of a class might turn out not to have suffered a loss (for example, because a merchant surcharges customers, therefore passing on the loss to a third party).

(2) The fact that a proposed class member might have no claim, because they have never been exposed to the wrongful act complained of.

53. This distinction is apparent from a discussion of the eligibility requirement in the Tribunal's CPO decision in *Gutmann*. The Tribunal there was asked to grant a CPO in respect of a proposed class of persons who purchased certain types of train fare. It was argued by the respondents that there were no, or limited, common issues and that the claims were not suitable for collective proceedings because of the need to make an individual factual assessment of loss, the diversity of the class members' situations and the likelihood that some class members would have suffered no loss.

54. The Tribunal conducted a review of UK, Canadian and US authorities on the extent to which variations in loss might affect the existence or otherwise of common issues. The Tribunal referred to, and adopted, the reasoning in the minority judgment in *Merricks SC* about the effect of section 47(C)(2) in establishing liability where no loss had been proved. The Tribunal also referred to the judgment of the Court of Appeal in *Merricks*, which reversed the Tribunal's finding that the likely variation in pass-on of loss to the consumers in that case meant it was not a common issue.

55. The Tribunal then turned to a number of examples put forward by the respondents to demonstrate the possibility that some passengers might not have suffered any loss. In relation to one such example, the Tribunal said (emphasis added):[5]

> 129. As for example (v), if a passenger did not hold a valid Travelcard at the time of their journey, that journey is not in-scope of the claim. The residual possibility that the passenger might not know when purchasing a ticket in advance whether they would have a Travelcard by the time of travel is, in our judgment, minimal. Moreover, subject only to (iii), we consider that the various examples do not preclude the issues we have identified from being common issues as the term is explained above. Almost any class action will include some claimants who suffered no loss: e.g. see para 112 above regarding Merricks. We think it would create an unfortunate obstacle to an effective regime for collective proceedings if potential defendants could sustain objections to the eligibility condition based on speculative examples. Where appropriate, the interests of the defendant can be protected by making some reduction in the aggregate damages award, based on reasonable estimation or assumption.

[5] At [129].

56. Lord Wolfson KC relied on this passage, and in particular the reference to *"[a]lmost any class action will include some claimants who suffered no loss*" as support for his argument that it was permissible to include in the class large numbers of merchants who do not have a claim. We disagree. What [129] in *Gutmann* in fact demonstrates is the distinction between class members who have not suffered a loss and class members who have no claim. Hence, passengers without a Travelcard at the time of travel have no claim and are said to be *"not in scope*". The other examples discussed concern passengers who have a claim but may not have suffered loss (for example, passengers who may not have bought a cheaper ticket anyway or were otherwise being reimbursed). The passage therefore supports the Proposed Defendants' argument, not the PCRs'.

57. In reviewing the Canadian authorities, the Tribunal also noted the decision of the Ontario Court of Appeal in *Mouhteros v DeVry Canada Inc. et al*, 41 O.R. (3d) 63, [1998] OJ No. 2786. As the Tribunal explained at [85] of its judgment, this case involved an application to certify a proposed class of students at private educational colleges on the basis that the defendant had misrepresented the quality of its offering and the marketability of its graduates. The proposed class included <u>all</u> students enrolled at the colleges over six years. The court refused certification because, among other things, the class definition was over-inclusive, so that many of the included students might have no claim. That included students who were unable to show any reliance (which was an essential ingredient of the cause of action).

58. We recognise that the Canadian regime is in certain respects different from the collective proceedings regime in the UK and we do not seek to place any weight on the decision in *Mouhteros*, other than to note that it is another case (like this one) where there can be a clear distinction drawn between the lack of a claim and questions as to whether there has been a loss suffered.

59. As noted by the Tribunal in *Gutmann*, the minority (Lords Leggatt and Sales JSCs) in *Merricks SC* considered the ability of the aggregate damages regime in collective proceedings to permit liability to be established on a class-wide basis, without the need for individual members of the class to prove that they have

suffered loss, even if that would otherwise be an essential element of their claim.[6] We agree with Ms Tolaney KC that this discussion relates to section 47(C)(2), which removes the requirement to prove individual loss. It says nothing about individual members of a class who have not been exposed to a wrongful act and therefore do not have a claim.

60. We also agree that the reasoning of the minority in *Merricks SC* is entirely consistent with Ms Tolaney KC's argument on section 47B. It would seem absurd if it were possible to include class members with no claims in collective proceedings and then to rely on the aggregate damages provisions to establish a liability to those class members. We do not consider that such an approach could have been intended by the draftsperson of sections 47B and 47C.

61. There is also, in our judgment, a clear distinction between a class definition which might, inadvertently, produce the result that a class member turns out not to have a claim, and the deliberate inclusion in the class of a large number (potentially the majority) of class members in respect of which it is known that they have no claim. The former is a necessary function of the type of proceedings, involving classes with large membership, and reflects the discouragement by the Tribunal in [129] of *Gutmann* of "speculative examples". The latter seems to us to disregard altogether the plain requirements of section 47B.

62. In *Neill v Sony Interactive Entertainment* [2023] CAT 73, the proposed class representative sought to include in the proposed class consumers who purchased games after the proceedings had been issued. The Tribunal held that section 47B (read with 47A(2)) prevented such an approach, accepting Sony's argument that the purpose of the collective proceedings regime was to combine claims which must be extant at the time of the claim form. Although not directly addressing the question before us now, we agree that the logic of the Tribunal's decision in *Neill v Sony* supports the Proposed Defendants' arguments here.

[6] At [95].

63. We therefore agree with the Proposed Defendants that section 47B(1) does not permit the collective actions regime to include class members who have no basis to make a claim and could not advance such a claim in any other forum. That is clear from the plain wording of the statute and is also consistent with the authorities which were cited to us. The PCRs derive no assistance in their reliance on observations in *Merricks SC* and *Gutmann* about situations where there may be no loss, or no need to prove loss because of the aggregate damages regime. That is a different question altogether and not relevant to the one before us.

64. As a secondary position, we were invited by Ms Tolaney KC to conclude that the proceedings would not be eligible for collective proceedings, even if technically permitted by section 47B. It is not necessary to consider that submission in any detail, but for completeness we agree that it would be extremely unattractive to grant a CPO where there were large numbers of class members who had no claim, not least because of the conspicuous absence of common issues between those class members and those who did have a claim. That conclusion rather reinforces our view about the correct application of section 47B.

65. We therefore decline to grant the applications for CPOs on the basis of the Revised Class definition.

(b) Identification of class – the Adjusted Original Class Definition

66. We start this section of our judgment with a reminder of the purpose of the exercise we are tasked with undertaking in relation to this issue. In the 2023 Judgment,[7] the Tribunal noted that both rules 79(1)(a) and 79(2)(e) refer to identification of class members, as follows (emphasis added):

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

[7] See [56] and following.

(a) are brought on behalf of an identifiable class of persons;

(b) raise common issues; and

(c) are suitable to be brought in collective proceedings.

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

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(b) the costs and the benefits of continuing the collective proceedings;

(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

67. After considering the relatively few authorities on the point, the Tribunal concluded:

62. We make the following observations about the interplay of rules 79(1)(a) and 79(2)(e):

(1) In our view, these rules, while overlapping, perform distinct functions. As is clear from Merricks SC (by analogy with the test for common issues), Trucks CPO and FX, rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is a factor to consider among other factors when considering suitability.

(2) Rule 79(1)(a) asks whether an objective and clear class definition has been proposed (see Trucks CPO at [188]). It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. This underpins important features of the collective proceedings regime, such as the assessment of common issues and the ability to identify those who are bound by the result of those proceedings.

(3) While rule 79(1)(a) is identified as a hurdle, we note the importance, as summarised in Le Patourel CA at [29], of collective actions facilitating access to justice. It should not easily be assumed that the existence of a hurdle, in the form of rule 79(1) generally, requires an overly prescriptive approach. There may well be some ambiguity or uncertainty permitted in a class definition and

> reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to "have regard to all the circumstances".
>
> (4) Rule 79(2)(e) is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and seems important in relation to issues such as registration of class members and the distribution of any award of damages.
>
> (5) Rule 79(2)(e) is one of a number of factors relating to suitability under rule 79(2) (in order to meet the requirement in rule 79(1)(c)). Each factor is to be weighed along with the others and an overall judgment reached about suitability (see Merricks SC at [61] and [62]).
>
> (6) Despite having distinct functions, rules 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person's membership of the class."

68. We did not understand the Proposed Defendants to disagree with any of this reasoning. On the other hand, the PCRs, in their Reply, made it plain they did disagree with aspects of the Tribunal's analysis. In oral argument, Lord Wolfson KC did not press the criticisms recorded in the Reply, and it is unnecessary (given the conclusions we have reached on this issue) to consider them further. We do however observe that, not having sought to appeal any aspect of the 2023 Judgment, we consider the PCRs to be bound by the findings in the 2023 Judgment, including the observations in [67] quoted above, if that should be material to the outcome of these applications.

69. We therefore see no reason to depart from the view expressed in the 2023 Judgment that the primary exercise under rule 79(1)(a) is to decide whether or not the class definition is, on its face, using reasonable assumptions based on common sense, capable of sensibly identifying a class. The Tribunal was unable to reach that conclusion in the 2023 Judgment, because there was, on the face of the evidence before the Tribunal, no reason to believe that a large number of merchants could determine, with any relative ease, whether they were included in the class or not.

70. That is not, however, to suggest that the PCRs are faced with a hurdle that requires them to establish that every merchant who might be in the class can easily and quickly verify that position. At least as far as rule 79(1) is concerned, the exercise is a more general one, involving an objective assessment of the

class definition on the basis of reasonable assumptions, and allowing for a degree of uncertainty or ambiguity. The core question (both in the 2023 Judgment and in relation to this issue in the Revised Applications) concerns the reasonable assumptions that apply in making that objective assessment.

71. In the 2023 Judgment, the Tribunal concluded that there was no reasonable basis to assume that a merchant on a blended contract could say with any certainty whether they were within the class. Put another way, the PCRs failed to address this point of identifiability with any sufficient contextual material that might reasonably support such an assumption.

72. When one comes to consider rule 79(2), the question becomes much more about practicality, and the Tribunal will exercise its judgment in broad terms at the CPO stage, provided it is satisfied that there is going to be a workable methodology (or, possibly, methodologies) which will allow the mechanics of registration, distribution and the like to be given effect. That requires, in practice, at least a credible suggestion about how merchants might be able to identify themselves.

73. The PCRs have now provided further evidence to the effect that any merchant has a variety of ways of making such a determination. The centrepiece of that is the IFR, by which it is said that acquirers are bound to provide or make available to merchants information which would disclose the existence or otherwise of Commercial Card Transactions.

74. The IFR was not in fact raised as a solution by the PCRs until their Reply in relation to the Revised Applications. It is unfortunate, to say the least, if the answer to the problem of identification is substantially provided by the IFR. If that is the case, then we do not understand why it was not a solution put forward by the PCRs at the hearing of the Original Application, or even highlighted in the Revised Applications. A great deal of money and time has been spent since the issue of identification was raised in respect of the Original Applications, much of which has arguably been wasted if the PCRs are now correct in their argument about the IFR.

75. The PCRs also rely on the sample statements of account as an answer to the problem of identifiability. There are some unsatisfactory aspects to this position as well. Despite the number of months elapsing since the 2023 Judgment, and the provision of further evidential material, we are still only presented with a partial picture of what actually happens in practice between merchants and acquirers, especially on forms of blended contracts where there is only one or more headline rate.

76. While we have been provided with sample statements which do show the provision of information to merchants at the level of types of transaction (thereby identifying Commercial Card MIFs), these largely post-date the Claim Period. It is also unclear exactly what type of contract the merchants involved are on – whether fully blended (just a single transaction rate for interchange fee purposes) for example, or something more disaggregated.

77. We might have expected to receive evidence from a merchant, or a payment service provider, or some other person with expertise in the area. Instead, we have only been presented with a short section in Mr Ross's sixth witness statement which describes the sample statements, but which leaves many questions unanswered.

78. It has been suggested by the PCRs that there is a general unwillingness in the industry to give evidence against the Proposed Defendants. We are not in a position to determine whether that is or is not the case, though if correct it may provide a partial explanation for the lack of information. It is also notable that the Proposed Defendants did not seek to put forward a positive evidential case on what the position is in practice following the IFR – although in fairness to them, the significance of the IFR only became apparent in the PCRs' Reply.

79. As far as we can ascertain, the sample statements themselves do not provide details of the actual MIFs which have been paid by acquirers to issuers. Instead, they appear to provide details of the Merchant Service Charge (that is,

aggregating the components of the interchange fees, scheme fees and the acquirer's own charges into one figure) as a "per transaction" price.[8]

80. Against that background, the proper application of the IFR is a crucial element of the PCRs' case. It is not altogether clear, but it seems to us that the IFR does require acquirers to provide or make available to merchants information which ought to identify individual transactions or groups of transactions, and which therefore might plausibly identify the existence of Commercial Card Transactions. That is for the following reasons:

(1) The IFR capped interchange fees for consumer credit and debit cards but excluded commercial cards from those caps.[9]

(2) The recitals to the IFR make plain the significant emphasis on transparency which underpins the legislation, in order to allow merchants and consumers to make better informed choices about card acceptance and card usage. For example:

> "(34) Scheme rules applied by payment card schemes and practices applied by payment service providers tend to keep merchants and consumers ignorant about fee differences and reduce market transparency, for instance by 'blending' fees or prohibiting merchants from choosing a cheaper card brand on co-badged cards or steering consumers to the use of such cheaper cards. Even if merchants are aware of the different costs, the scheme rules often prevent them from acting to reduce the fees.
>
> […]
>
> (38) A clear distinction between consumer and commercial cards should be ensured by the payment service providers both on a technical and on a commercial basis. It is therefore important to define a commercial card as a payment instrument used only for business expenses charged directly to the account of the undertaking or public sector entity or the self-employed natural person.
>
> (39) Payees and payers should have the means to identify the different categories of cards. Therefore, the various brands and categories should be identifiable electronically and for newly issued card-based payment instruments visibly on the device. In addition, the payer should be informed about the acceptance of the payer's payment instrument(s) at a given point of sale. It is necessary that any limitation on the use of a given brand be announced

[8] This is apparent from the rates charged for transactions in the statements which are higher than the caps for those types of transactions under the IFR, suggesting that the transaction rates in the statements include scheme fees and acquirer charges.
[9] Article 3 and 4.

by the payee to the payer at the same time and under the same conditions as the information that a given brand is accepted.

(40) In order to ensure that competition between brands is effective, it is important that the choice of payment application be made by users, not imposed by the upstream market, comprising payment card schemes, payment service providers or processors. Such an arrangement should not prevent payers and payees from setting a default choice of application, where technically feasible, provided that that choice can be changed for each transaction."

(3) That is consistent with the prohibition of the "Honour all Products" rules applied by the schemes to prevent merchants from selectively declining categories of cards issues by an issuer on the basis of their relative cost.[10]

(4) We agree with the PCRs that Article 9 is concerned with the nature of the contract which exists between acquirers and merchants, while Article 12 concerns the information to be provided by acquirers to merchants. It is Article 12 that matters here.

(5) Article 12(1) requires the provision of information by transaction, but also allows aggregation by: *"brand, application, payment instrument categories and rates of interchange fees applicable to the transaction"*.

(6) It seems both logical and necessary that the information about *"payment instrument categories"* provided to merchants by acquirers under Article 12 should allow merchants to assess the relative costs of accepting commercial cards, as compared with consumer cards. Otherwise, the merchant is in no position to carry out the steering activity that recital 34 contemplates. That also suggests that the information supplied at a disaggregated level should also allow the same identification of the category of card used.

81. That view is supported by the sample statements, which do indeed specify Commercial Card Transactions separately from other types of transaction. We do not reach any concluded view on whether the statements by themselves definitively establish the position, because of the limited information we have

[10] See Article 10 of the IFR.

about them and the period in which they largely were issued. However, at the very least they support our interpretation of Article 12.

82. Our view of the effect of Article 12 is also consistent with the approach taken by the PSR:

(1) In its Guidance in relation to the IFR, the PSR described its expectations as to communication by acquirers to merchants as follows:

> *"Communication to the merchant*
>
> *4.61 The specified information may be either provided to merchants (sent or given directly to the merchant – for example, on paper or, where the contract provides, by email) or made available to them (so the merchant can obtain it when they choose – for example, by accessing a secure website).*
>
> *4.62 The information must be in a clear and comprehensible form and in a medium that the merchant can store and reproduce whenever required.*
>
> *4.63 Where the information is made available, it must be easily accessible and the acquirer should clearly explain to the merchant that the information is being made available and how to obtain it. Acquirers could, for example, write to merchants explaining the type of information that is available and how merchants can access it. Acquirers might also include information about accessing the information in their regular communications with merchants. We would consider any requirements for merchants to call a certain number or email acquirers each time they wish to obtain the information as meaning that the information is not readily available to merchants."* [11]

(2) It is significant that the PSR suggests that material may be made available by, for example, access to a secure website, but that a requirement for merchants to call or email to seek information would not amount to the information being made available.

(3) The Barclays Decision concerned the failure by Barclays, as an acquirer, to update its systems in time to meet the requirements under Article 12. In the meantime, some information was offered to some merchant customers, but this was not sufficient compliance. The following paragraphs of the Barclays Decision are of relevance:

[11] Guidance on the PSR's approach to monitoring and enforcing compliance with the Interchange Fee Regulation, September 2021 (updating October 2016 Guidance).

4.3 As well as capping interchange fees, the IFR introduced business rules regarding the provision of charging information to merchants by acquirers and the labelling of different types of payment cards, amongst other things. These measures intended to address historical practices that have kept merchants and consumers ignorant about fee differences between different acquirers, reducing market transparency and the ability of merchant customers to make informed choices as to which acquirer they contract with. This range of business rules, of which Article 12 is one, may lead to increased transparency and provide conditions that are capable of leading to increased competition, from which merchants and consumers might ultimately benefit through increased choice and/or lower prices.

[…]

4.8 First, it enables acquirers to make Article 12 Information available to their merchant customers rather than providing it to them. For Article 12 Information to be provided to a merchant, it must be actively communicated by the acquirer without further prompting by the merchant. For Article 12 Information to be made available to a merchant, the acquirer must ensure that access to the information is possible so that the information is in fact available. Article 12(2) information is not made available if there is anything which hinders merchants' access to it (or deters merchants from obtaining it), or if merchants are not made aware of it and how it can be requested.

4.9 The PSR has issued guidance about the steps an acquirer should take when making Article 12 Information available to merchants. It states that the information must be easily accessible, and the acquirer should clearly explain to the merchant that the information is being made available and how to obtain it.

4.10 Second, Article 12(2) enables an acquirer to either provide or make available Article 12 Information periodically, rather than after the execution of each relevant individual card transaction. The frequency of the provision/making available of the information must be at least once a month.

(4) Barclays intended to make the Article 12 information available to its merchant customers through a new IT platform, which was not ready in time. It did not intend to provide aggregated information and it managed only partial compliance with Article 12 through the existing statements it provided to customers while the platform was being built. Barclays was fined £8,400,000 by the PSR. Its new platform was operating and available to customers by December 2018. We understand this to mean that merchants could access their disaggregated transaction data through a website portal. We assume this means historic data prior to December 2018, as well as data for transactions after that date, because the PSR treated the infringement as coming to an end.

(5) We do not accept the Proposed Defendants' contention that the Barclays Decision demonstrates that the PCRs cannot rely on Article 12 for the purposes of rule 79(1)(a). It may well be the case that Barclays did not comply with the IFR throughout the period from December 2015 to December 2018. That is however beside the point. The question is whether Barclays (or any other acquirer) has a legal obligation to provide information or access to information. The PSR's decision in relation to Barclays and the PSR's IFR Guidance makes it plain that an acquirer has to ensure there is a mechanism for easy access by merchants to their transaction history. There is no reason to think that Barclays, or indeed any other acquirer, is not providing that access now, regardless of whether they failed to do so during an earlier period. Indeed, we know that to be the case in relation to Barclays and we think it reasonable to assume, for present purposes, that other acquirers have taken note of the Barclays Decision and the significant fine imposed.

83. For completeness, we should add that we do not accept the suggestion by the PCRs that the IFR requires the acquirer to disclose to the merchant the MIF the acquirer has paid the issuer, where that is not the same as the interchange fee elements of the MSC charged by the acquirer to the merchant. We do not read Article 12(2) as requiring that information, and it does not appear to be provided in practice.

84. The Proposed Defendants are also plainly wrong to suggest that there is no obligation to distinguish transactions by brand (i.e., whether Visa or Mastercard). The aggregation provisions in Article 12(1) refer specifically to identifying the brand.

85. We conclude, therefore, that the IFR does require acquirers to provide or make available to merchants information which would allow a merchant to identify whether or not it accepted Commercial Card Transactions.

86. The new material is, in our judgment, sufficient to satisfy the requirements of rule 79(1)(a). As we have already noted, the test is not intended to be a prescriptive one or one in which the hurdle for the PCRs should be set

unreasonably high. It is enough to establish that, objectively and on the basis of reasonable assumptions, there is a sensible way of determining the class. The IFR, together with the statements, provide a reasonable basis to assume that class members can identify themselves.

87. It also establishes that, in the suitability analysis under rule 79(2)(e), there is likely to be a methodology which allows for identification of merchants at the registration or distribution stage.

88. It is therefore unnecessary to decide whether the MIDs/CAIDs suggest the same conclusion because the schemes themselves can identify Commercial Card Transactions, given the provision of that information by a merchant. We do make the following observations for completeness:

    (1) Much of the argument about MIDs/CAIDs seemed to miss the point, in that it seemed to be accepted by the Proposed Defendants that if they were given a MID/CAID for a particular merchant then they were likely, with relative ease, to be able to provide transaction details.

    (2) It may be the case that in some cases the merchant will struggle to produce a usable MID/CAID – for a variety of reasons, such as being able to identify the information from their records or because of the vagaries of the ways that acquirers sometimes allocate MIDs/CAIDs.

    (3) It is also somewhat impractical to expect the Proposed Defendants to be able to process large numbers of requests from merchants, if MIDs/CAIDs are to be the primary mechanism for the provision of transaction data.

    (4) For these reasons, we consider that Lord Wolfson KC was right to treat this potential mechanism as a secondary or back-up one, for situations where there might be difficulty with a merchant obtaining information from an acquirer.

89. For these reasons, we consider that the PCRs have now overcome the problems identified in the 2023 Judgment about identifiability and have, as invited in the 2023 Judgment, put forward further material which has satisfied us that the requirements of both rule 79(1)(a) and rule 79(2)(e) are met.

90. That leaves the Proposed Defendants' objections as to the approach taken by the PCRs. These are twofold in substance:

(1) As to the failure to plead the Adjusted Original Class Definition, we agree that the PCRs' approach has been unsatisfactory in pleading terms, but we do not consider that the Proposed Defendants have suffered any prejudice, as the PCRs' position was made plain in their letter of 18 December 2023, which accompanied the Revised Applications, in which they said this:

> *"12 The PCRs have thus adopted a "two-pronged" approach. They have proposed a revised class definition, but without prejudice to their position that the original class definition is workable i.e. that the opt-out class is identifiable given the new evidence that will be adduced."*

(2) We also agree that the Publicity Notices have not been issued in the correct format. This is however an issue which can be remedied by the publication of fresh Publicity Notices prior to any formal grant of a CPO, which we deal with in the Disposition section below.

(c) Methodology

91. We deal first with the points about the calculation of aggregate damages. These arise as a consequence of the exercise contemplated by section 47C, by which the PCRs will seek to establish an aggregate figure for the amount by which the class has been overcharged as a consequence of the alleged infringement under Article 101/Chapter I. In summary terms, that involves:

(1) Calculating the difference between the lawful level of all Commercial Card MIFs (which the PCRs say is zero) and the Commercial Card MIFs actually charged. This will provide a "gross" overcharge figure for the whole UK economy.

(2) Calculating the value of that gross overcharge figure which should be allocated to the opt-out class members.

92. In order to arrive at the figure in (2), it is common ground that adjustment has to be made to the economy-wide aggregate figure to remove:

(1) Merchants who have existing claims (for example in the Umbrella Proceedings).

(2) Merchants who have settled their Commercial Card MIF claims already (likely to be as a result of a settlement of their MIF claims generally).

(3) The claims of merchants who would be eligible for inclusion in the opt-in class, being merchants with an annual turnover in excess of £100 million.

93. There are some complexities in relation to each of these adjustments. Considering first the allocation of the gross overcharge between the opt-in and opt-out classes, the PCRs expert, Mr von Hinten-Reed, initially proposed to use Office of National Statistics data on turnover to ascertain the proportion of transactions attributable to the opt-out class. The Proposed Defendants noted in their Response that the proportion of turnover of businesses larger or smaller than £100 million is unlikely to be the same as the proportion of Commercial Card Transactions undertaken by those businesses. In other words, turnover is unlikely to be a proxy for Commercial Card Transaction levels.

94. Mr von Hinten-Reed accepted that this point was likely to result in an overallocation of the gross overcharge to the opt-out class (on the basis that larger businesses were likely to have a disproportionate share of Commercial Card Transactions). Mr von Hinten-Reed therefore proposed an alternative methodology, which involved taking data which the Proposed Defendants have in relation to a limited number of larger merchants and using that in conjunction with public data to come up with an alternative allocation of the gross overcharge between the opt-in and opt-out classes.

95. Dr Niels, the expert for Mastercard, produced a short supplemental note in which he took a random sample of 200 merchants from the population of merchants for which Mastercard does have transaction data linked to merchants.[12] The Proposed Defendants say that exercise suggested that only 6% total Commercial Card MIFs would be apportioned to the proposed opt-out class. It also suggested that 43% of merchants would be apportioned to the opt-in case, which is obviously not correct and which demonstrates the flawed nature of the approach.

96. The PCRs do not accept the representative nature of Dr Niels's sample. They also argue that Mr von Hinten-Reed has now produced two means of estimating the outer boundaries of the amount required to be apportioned, and that the answer could and would, in due course, and on the basis of better data, be determined to be somewhere in between.

97. In relation to existing and settled claims, Mr von Hinten-Reed initially proposed to rely on the Proposed Defendants' own data on settled and existing claims to estimate the amount of Commercial Card MIFs that needed to be deducted in order to arrive at a suitable aggregate damages award. Having been told that the Proposed Defendants do not have sufficient information to link existing and settled claimants with Commercial Card MIF values, Mr von Hinten-Reed proposed an alternative approach of extrapolation from the same sample referred to above, where Mastercard has carried out work to link merchants with transactions.

98. Mr von Hinten-Reed says that this approach would result in an underestimate, but he does not actually carry out the calculation. Mastercard say that their calculation suggests that 65-75% of Mastercard Commercial Card MIFs would be accounted for by existing claims.

99. As a consequence of these various calculations, the Proposed Defendants say that it is apparent that the opt-out claim may actually be relatively small –

[12] This is an exercise that Mastercard has carried out for a relatively small number of merchants which it wishes to analyse further in the ordinary course of business. As we understand it, they tend to be the larger merchants Mastercard deals with.

possibly only tens of millions rather than hundreds of millions of pounds. This, they say, suggests that the cost-benefit analysis for the proposed claims is not met. We will return to this point later.

100. It is difficult to form any firm view at present on the likely outcome of the exercises which are being suggested to remove existing and settled claims from the aggregate damages figure and to apportion Commercial Card MIFs between the opt-in and opt-out proposed claims. It is fair to say that all the exercises we have been presented with are high-level, without there being clarity about a common data set and with limited clarity about exactly what data is or might be available in due course, including through the disclosure process.

101. It is however clear that some form of apportionment exercise is possible, as Mr von Hinten-Reed's various attempts demonstrate. Those attempts may currently be subject to flaws, may produce bias one way or the other and may lead to results which are inconsistent with other data points. However, our expectation is that, by the time of a trial of these proceedings, it will be possible for the parties' experts to provide greater precision and clarity in their approaches. It is also a paradigm example of a situation where the Tribunal is able and entitled to synthesise several different approaches to produce an estimated outcome, with due assessment of the strengths and weaknesses of the various methodologies and the data underlying them.

102. We are therefore satisfied that the PCRs have put forward a sufficiently developed methodology for the calculation of aggregate damages, recognising that further work is required in due course.

103. We do not consider that the issue of removing from aggregate damages those merchants who choose to opt-out is a sufficiently significant one to require a developed methodology at this stage. As discussed above in relation to the Adjusted Original Class Definition, there are likely to be mechanisms for individual merchants to identify their Commercial Card Transactions and there is no reason to think that there will be an unmanageable number of merchants for whom that exercise has to be carried out.

104. There was a degree of confusion about the position of (1) non-UK domiciled merchants transacting in the UK and (2) merchants carrying out UK transactions using acquirers based outside the UK. Our understanding of the position in relation to these categories is as follow:

(1) Non-UK domiciled merchants cannot be included in the opt-out class unless they opt-in. If they do not opt-in (to the proposed opt-out proceedings), their Commercial Card Transactions need to be deducted from the gross Commercial Card MIF figure in order to exclude them from aggregate damages. The PCRs say, however, that this is likely to be a small number, involving only card present transactions for non-UK merchants.[13] That seems likely to be correct and suggests that the issue is not a material one.

(2) The PCRs set out in their Reply, for the first time, that the proposed proceedings would be limited to transactions in the UK that used a UK-based acquirer. The Proposed Defendants pointed out that such a distinction would require a methodology to remove from the gross Commercial Card MIF figure the value of transactions acquired by a non-UK acquirer, which was said to be a significant proportion of some merchants' transactions. In oral submissions, Mr Bowsher KC confirmed that in fact the PCRs' case includes such transactions.[14] As far as we understand the position, that disposes of the methodology point made by the Proposed Defendants.

105. There are then a variety of points advanced by the Proposed Defendants in respect of methodology, which concern subjects such as acquirer pass-on, merchant pass-on, exemption and something which the Proposed Defendants referred to as "countervailing benefits".

106. We are satisfied that the PCRs have, through Mr von Hinten-Reed, advanced sufficiently plausible methodologies to deal with these points. That is not to say

[13] Card not present transactions are likely to be conducted by a non-UK acquirer and therefore will not be included in the gross Commercial Card MIFs figure for the UK.
[14] Day 1, page 124, lines 3 to 5.

that we are entirely satisfied with Mr Von Hinten-Reed's approach. At times, it seemed that he was creating more complexity than resolving it. For example, in his 5th report, he advanced a number of detailed steps to identify merchant pass-on, some of which seemed much more suitable for assessment of pass-on by an individual merchant than the assessments of an economy-wide figure for pass-on in relation to the calculation of aggregate damages (which we think is the obvious way to approach the issue).

107. We do however accept the PCRs' submissions that many of these issues are ones which are likely to be raised by the Proposed Defendants in their defences and there is a limit on the amount that can usefully be said about them in the meantime, even given the very extensive history of such points being raised before. We also note the observations of the Court of Appeal in *UK Trucks Claim Limited v Stellantis NV and ors* [2023] EWCA Civ 875 at [102]:

> 102. At the certification stage, the CAT has in each case to determine what level of detail it requires from the parties and their experts and, as Green LJ said in argument, that implies that the CAT has a broad margin of discretion in relation to certification with which this Court should not interfere unless a clear error of law is identified. In my judgment, it is not for the PCR to produce an expert methodology which addresses every conceivable issue or defence which the defendants say they will or may run. To go down that route would be to encourage a plethora of expert evidence addressing every conceivable argument that might be raised, and a long drawn out and expensive certification process as in the United States. It is important that the CAT and this Court discourage that approach. As Lord Briggs JSC made clear in Merricks SC at [41], the Microsoft test is not intended to be onerous. It sets a fairly low threshold and simply does not require the PCR's methodology to anticipate and address at the certification stage every point that might be raised in defence.

108. Those words are, in our judgment, an apt caution in this case, where the Proposed Defendants have attacked a wide range of methodology in relation to the PCRs' case. It is plain, in relation to a subject as well traversed as MIFs, that there will be a workable methodology to address most of those issues, because they have been considered in detail before by regulators or in trials in the courts. To take exemption under Article 101(3) as an example, there is a great deal of material in the Commission's *Mastercard* decision about the exemptibility of consumer card MIFs, [15] and it would have been perfectly acceptable for Mr Von Hinten-Reed to point to that material as demonstrating the sort of factual

[15] At [227] to [250].

material and data the Tribunal would need to determine the same issue in relation to these Commercial Card MIFs, noting any likely areas where a different approach was required.

109. Turning to the specific criticisms put forward by the Proposed Defendants:

(1) Merchant pass-on: this is the intended subject of Trial 2 in the Umbrella Proceedings and the Tribunal in those proceedings has issued several judgments and rulings setting out the proposed approach to trying the issue.[16] That has involved proposals by some of the parties to determine a UK wide economy pass-on figure. There is ample material in these judgments and rulings to establish that there is a workable methodology for trying this issue. It was rather unhelpful that Mr von Hinten-Reed did not seem to approach the exercise as one of setting an economy wide figure. It also remains unclear exactly how the PCRs propose to manage these proposed proceedings alongside the Umbrella Proceedings (about which we say more below). However, we are satisfied that there is no methodology problem at this stage which would prevent certification.

(2) Acquirer pass-on: the same position applies to this issue as applies to merchant pass-on. We are satisfied that there is no methodology problem at this stage which would prevent certification.

(3) Exemption/countervailing benefits: There was some confusion about where the expression "countervailing benefits" first originated in the proceedings and it was necessary for Mr Kennelly KC to clarify that Visa (at least) meant the credit that might have to be given in the assessment of loss for benefits received as a consequence of the wrongful act. In other words, it is a question relating to the calculation of damages. However, there is some overlap between this concept and the assessment of benefit to merchants which might arise under Article 101(3). In either case, as we have indicated above, there is ample material from prior regulatory and court consideration to make it plain

[16] [2022] CAT 14, [2022] CAT 31 and [2023] CAT 60.

what is likely to be required to try this part of the case. Mr von Hinten-Reed could perhaps have been crisper in his explanation of this reality, but we see no reason to be concerned about this as a methodology point at this stage of the proceedings.

(d) Suitability

110. The suitability points raised by the Proposed Defendants concerned three main areas:

(1) The significance in the Revised Class Definition of class members who have suffered no loss. This point falls away given our rejection of the application based on the Revised Class Definition.

(2) The costs/benefits analysis, given the significant budgets which the PCRs continue to put forward and the likely reduction in the aggregate value of the damages in the opt-out proceedings (as a result of the matters raised in relation to methodology, as set above).

(3) The relationship between the proposed opt-out proceedings and the Umbrella Proceedings, in respect of which the PCRs have refused to commit themselves.

111. We can deal with points (2) and (3) together. The PCRs have been ambiguous about their intentions in relation to joining the Umbrella Proceedings. To some extent, that is justified, as there are several elements of uncertainty about timing, the shape of the Umbrella Proceedings and so on which justify an unwillingness to give a categorical commitment to joining the proceedings.

112. As a matter of reality, it seems most unlikely that the Tribunal will be content to allow the PCRs to advance their claims entirely independently, so as to try their proposed proceedings as standalone cases. That would, at least at first sight, lead to a waste of time, costs and judicial resources when the same issues are being determined in the Umbrella Proceedings. For example:

(1) Trial 1 in the Umbrella Proceedings finished at the end of March, and the parties await a judgment that will determine the issue of infringement in relation to Commercial Card MIFs.

(2) Trial 2 will commence in November 2024 and will determine merchant and acquirer pass-on, including the determination of an economy-wide figure for merchant pass-on.

113. Of course, the PCRs have not been able to participate in Trial 1 and will very likely have limited ability to participate in Trial 2 (for which the first round of expert evidence, in the form of "positive cases" is due in July 2024). That may be a matter of some concern to the PCRs and their advisers, but it is to some extent a consequence of the way in which these applications have been managed.

114. There was some suggestion that the PCRs could, for example, apply for summary judgment in the proposed opt-out proceedings to apply the outcome of Trial 1 in relation to Commercial Card MIF infringements, should that turn out to be favourable. We were not given any adequate explanation of what might happen if the outcome were to be unfavourable. In any event, it seems to us that the obvious course would be for the PCRs to get the immediate benefit of any findings in Trial 1 (and indeed Trial 2) by simply being joined to the Umbrella Proceedings.

115. In order for that to happen, there would of course need to be an application by the PCRs or some order as a result of the Tribunal's own initiative. Various parties would need to be invited to make representations. We therefore say no more about what might happen in that regard, other than to say our provisional view, from the perspective of the Tribunal certifying these proceedings, is that there are likely to be considerable benefits and not many obvious disadvantages to that course of action. We therefore proceed, in our assessment of suitability, on the basis that this is the likely position.

116. In that case, we would also expect to see a major revision of the litigation budgets prepared by the PCRs, reflecting that a great deal of work would be

done by others, and not the PCRs' team, in progressing the issues in the proposed proceedings. We therefore view the litigation budgets as being at best indicative of standalone costs, and unlikely to be the right answer in the real world after the grant of CPOs. The budgets will therefore need to be revised in due course.

117. For these reasons, we do not find the objections of the Proposed Defendants sufficiently compelling to alter our view, as summarised in the 2023 Judgment, on suitability of the opt-out proceedings.

(e) Authorisation

118. We remain of the view (expressed in the 2023 Judgment) that there are some unsatisfactory aspects of the way in which the PCRs have approached these proceedings. These will be apparent from the discussion above, and we will not repeat them here. They are not sufficient to cause us to determine that it is not just and reasonable for the PCRs to have carriage of the proposed proceedings, but they do suggest that the proceedings will require close management after the grant of CPOs and of course it remains open to the Tribunal to revoke certification under Tribunal Rule 85. This conclusion about authorisation applies to the opt-in proceedings as well.

(2) The Proposed opt-in proceedings

119. We will not repeat in this section the points made in relation to the proposed opt-out proceedings which are common to the proposed opt-in proceedings. There are two additional areas of challenge which are specific to the opt-in proceedings.

(a) Methodology

120. The Proposed Defendants say that there is no methodology put forward to deal with non-UK domiciled merchants who may choose to join the opt-in claim. This applies to the calculation of the value of their claims and the question of the location of their acquirer.

121. The PCRs say that there is no uncertainty regarding the location of acquirers and no need for a developed methodology as the point only affects "card present" transactions, which will be of immaterial value.

122. In our judgment, this is a point of detail which is not central to the claim and which does not need a fleshed out methodology at this stage of the proposed proceedings.

(b) Suitability

123. The Proposed Defendants criticise the PCRs for failing to reconnect with merchants who previously indicated interest in the Original Applications. In the absence of any direct evidence, they say the interest of such merchants is inevitably going to be reduced, as a result of the removal of Interregional Card Transactions from the claim, the consequent reduction of claim size and the effect this will have in increasing the fragmentation of merchant claims – the proposed opt-in proceedings will now only address <u>one</u> of a number of MIFs, requiring merchants to initiate further proceedings to claim for other MIFs and making settlement of any of the claims more complex.

124. We view these arguments as largely recycling points which were rejected in the 2023 Judgment and which were also the subject of the CA PTA Refusal. In the latter judgment, the Court of Appeal said this:[17]

> 38. …It is worth standing back. If, as the applicants contend, there is no material difference between individualised and collective proceedings then it is hard to see why the applicants should be objecting to collective proceedings. The real answer is likely to be that the applicants consider that individualised proceedings will be more difficult to mount and thereby fewer claims will be brought against them.

125. We respectfully agree with that observation and endorse it in the present circumstances. In our view, none of the changes in relation to the proposed opt-in proceedings identified by the Proposed Defendants alter the original assessment made by the Tribunal in the 2023 Judgment, to the effect that collective proceedings are the better way of vindicating the claims of the

[17] [2024] EWCA Civ 218 at [36].

potential class of merchants who might join the opt-in proceedings. If that assessment is wrong, it will become apparent before too long, as few merchants will in fact opt-in. If it is right, then we will see viable opt-in proceedings take shape, which in our view is a more suitable way of those merchants pursuing their claims than joining the Umbrella Proceedings at this point in time.

E. DISPOSITION AND NEXT STEPS

126. We intend to grant the Revised Applications, on the basis of the Adjusted Original Class Definition, being the Original Class Definition, as amended by the removal of Interregional Card Transactions. Before we do so, the PCRs should issue fresh Publicity Notices which include the Adjusted Original Class Definition and give a period of three weeks for any person who wishes to make representations to do so. At the end of that period, subject to any representations which cause us to reconsider our present intention, we will make the formal orders to grant the CPOs.

127. The parties should, as a matter of priority, agree a timetable for the filing and service of defences and the convening of a further CMC as soon as possible after that. At that CMC, the Tribunal will expect to discuss the precise plans for the interaction between the Umbrella Proceedings and these proceedings. The Tribunal will also expect to see revised budgets which reflect those plans.

128. This decision is unanimous.

Ben Tidswell
Chair

Tim Frazer

Dr William Bishop

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

Date: 7 June 2024