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A Behavioural Analysis of the Future of Collective Redress for Financial Consumers Following the Supreme Court Decision in Merricks v Mastercard

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Abstract
One of the biggest problems faced by consumers seeking redress for financial harm is the prohibitive expense and impracticality of bringing low-value individual legal proceedings. The Consumer Rights Act 2015 introduced a new regime for collective redress for competition law infringements whereby for the first time, claims may be brought on an opt-out basis. The new regime was examined by the Supreme Court in its recent decision in *Merricks v Mastercard.* The *Mastercard* claim raises important questions about consumer remedies, access to justice, litigation funding and practical enforcement issues. This paper examines the decision through the lens of behavioural science, seeking insights into the availability and accessibility of redress for consumers and considering the implications for the regulation of lenders in the future. The influence of behavioural science on the development of the law is reviewed, the progress of the Mastercard claim and the Supreme Court's decision is analysed, and some conclusions are proposed about possible future developments and the effectiveness of the collective redress regime from a behavioural perspective.

Keywords Consumers · Consumer remedies · Financial services · Behavioural science

Introduction

The relationship between providers of financial services and consumers has been an area of regulatory debate for decades, and continues to pose difficult challenges. It is typically characterised by an imbalance of power, a lack of transparency and a raft of ethical questions (Caplovitz 1963; Wojcik 2019). One of the most acute problems

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faced by consumers seeking redress for financial harm is the prohibitive expense and impracticality of bringing low-value individual legal proceedings. In 2015, a new regime for collective redress for competition law infringements was introduced.[1] Under this new regime, claims may be brought on a "opt-out" basis for the first time, allowing claims to be brought by a representative on behalf of all claimants who fall within a defined class, unless the consumer chooses actively to opt out. The new regime was examined for the first time by the Supreme Court in its recent decision in *Merricks v Mastercard,*[2] which was followed some months later by certification of the first application for an opt-out collective proceedings order (CPO).[3] It is important to note that the Supreme Court's decision dealt with questions pertaining to the CPO only; the substantive issues in the case have yet to be litigated. Nonetheless, as the first judicial examination of the CPO procedure, the decision merits close examination. The *Mastercard* claim raises important questions about consumer remedies, access to justice, litigation funding and practical enforcement issues.

The original application was initiated by Walter Merricks, former chief ombudsman of the Financial Ombudsman service, in 2017. He sought permission to bring a CPO against Mastercard on behalf of all UK consumers covering a 16 test period between 1992 and 2008. Mr Merricks argued that Mastercard had charged unlawful interchange fees to retailers during this period and that these costs were passed on to consumers in the form of inflated prices. The Competition Appeal Tribunal (CAT) originally declined the application, but it was successfully appealed to the Court of Appeal[4] and upheld by the Supreme Court.[5] The case was returned to the CAT who proceeded to certify the claim,[6] followed by several other applications.[7] The number of applications for CPOs awaiting determination by the CAT is now well into double figures (Bushell et al 2021: 782). All indications point to the conclusion that the *Mastercard* decision heralds a new era of opt-out consumer claims (Silver 2021: 7).

The implications for all consumers of financial services, as well as for firms and insurers, are profound. The Financial Conduct Authority (FCA) estimates there are around 30million credit card holders alone in the UK (FCA 2019), and given that many consumers do not have access to credit cards the total number of consumers is likely to be several times this number.

This paper will first examine the claim against Mastercard and its progress through the appeal process via the decisions of the CAT and Court of Appeal. The decision of the Supreme Court will be analysed. The paper will outline the influence of theories of behavioural psychology and behavioural economics on the development of the law in this area. It will then examine the Mastercard claim and the

[1] Consumer Rights Act 2015 Schedule 8.

[2] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

[3] *Merricks v Mastercard* [2021] CAT 28.

[4] *Walter High Merricks CBE v Mastercard Incorporated and others* [2019] EWCA Civ 674.

[5] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

[6] *Walter High Merricks CBE v Mastercard Incorporated and others* [2021] CAT 28.

[7] Case 1304/7/7/19 *Justin Gutmann v First MTR South Western Trains Limited and another;* Case 1305/7/7/19 *JustinGutmann v London and South Eastern Railway Limited*; Case 1404/7/7/21 *David Courtney Boyle and Edward John Vermeer v Govia Thameslink Railway.*

relevant regulation and jurisprudence through a behavioural lens, seeking to offer fresh insights into the availability and accessibility of redress for consumers and considering the implications for the regulation of lenders in the future. Finally some conclusions will be proposed about possible future developments and the effectiveness of the collective redress regime from a behavioural perspective.

The Mastercard Litigation

Legal Background

The claim against Mastercard was brought on a follow-on basis from the EU Commission's 2007 decision,[8] confirmed in 2014,[9] which found Mastercard to be in breach of Article 101 of the Treaty on the Functioning of the European Union. At that time, the Commission found that Mastercard had acted anti-competitively by setting its interchange fee—the transaction charge levied on the retailer's bank when a customer pays by credit card—at an artificially high level. The processing fee was significantly higher than the real cost of the transaction. In July 2016, Mastercard was successfully sued in the UK by the supermarket Sainsbury's over its fees,[10] resulting in a substantial award of damages and confirmation that Mastercard's charges breached both EU and English competition law. Significantly, this precedent meant that Mastercard's liability in respect of its fees was already firmly established. Following these decisions, Mr Merricks' argument took Mastercard's liability to its logical conclusion: the unlawful fees were passed on to consumers in general as retailers increased their own prices to accommodate them, resulting in inflated prices across the board. Therefore, anyone who bought goods in the UK during the 16 year period while the fees were in effect, regardless of whether they were a Mastercard customer or even a credit card holder, suffered a loss resulting from Mastercard's breach. Thus, potentially every consumer in this category would be a member of the class for the purposes of the claim.

The 16 year period covered by the claim obviously exceeds the usual limitation period of 6 years for claims of this type. However, in accordance with the provision of the Damages Directive[11] the limitation period does not begin to run until the claimant knows that there has been an infringement, and the identity of the infringing party. The rights of indirect purchasers to receive compensation in this situation under UK law were set out in the Sainsbury's decision in 2016.[12]

It should be noted that prior to the introduction of the Consumer Rights Act 2015, consumers seeking redress for the effects of price fixing or anti-competitive behaviour had to either actively opt in as a named participant in a claim, or bring proceedings on their own behalf. Notwithstanding the enduring problem of consumer inertia

8 COMP/34.574 Mastercard.

9 C-382/12P Mastercard and Others v Commission.

10 *Sainsburys Supermarkets Ltd v Mastercard International Inc* [2016] ECC 5.

11 Damages Directive 2014/104/EU.

12 *Sainsburys Supermarkets Ltd v Mastercard International Inc* [2016] ECC 5.

(see part 2 below), in cases where the loss to the consumer was relatively small, the cost and inconvenience of bringing a claim would almost certainly outweigh any likely award even for those consumers who were aware that a claim might be available. The result of this inaccessibility was that there was no meaningful route to redress for consumers, even where the trader had been found by a competent authority to have acted unlawfully. The Consumer Rights Act set out to close this gap via the introduction of a variety of demand-side remedies. The procedure set out in Schedule 8 represents one example, providing an opt-out class action procedure specifically for cases in the CAT (Cartwright 2016: 272).

The Consumer Rights Act 2015 made several significant changes to the Competition Act 1998. Arguably the most important was the introduction of an opt-out class action procedure under s.47B of the 1998 Act. The new procedure allows for an individual representative of a group, or class, of persons who have suffered detriment as a result of a breach of competition legislation to bring a claim for redress on behalf of the group as a whole (explained in Higgins 2016). The class of persons is not limited to consumers; there are no limits on its size but it may be as few as two.[13] However, the intention signalled by Parliament at the consultation stage of the Consumer Rights Bill was to target systemic infringements rather than individual disputes (Wisking et al 2013). The novel feature of this procedure is that under the opt-out process, if permission to bring a claim is granted, members of the group or class are automatically joined into the proceedings (and thus entitled to a share of any compensation awarded) unless they actively opt out.[14]

Under the new process, the gatekeeping role of the authorised bodies is removed. A claim may be brought by any person as a representative of a class of persons, whether of consumers or traders, affected by a breach of competition law, on behalf of the whole class, either in order to establish liability or (as in the instant case) on a "follow-on" basis where a finding of liability has already been made.[15] Further, the CAT may make an aggregate award of damages without inquiring into the losses sustained by each individual class member. The process is subject to a certification process, whereby CAT permission is required both for the claim itself to proceed, and for the proposed representative to be appointed. The requirement for permission was introduced in part to address businesses' concerns about a potential explosion of claims (Howells 2010; Hensler 2017). The 2017 application sought authorisation for Mr Merricks to be authorised as the class representative, and permission to proceed on the basis that the claim itself was eligible for collective proceedings. The proposed class of claimants was clearly extremely wide, comprising all individuals who purchased products or services of any kind from merchants in the UK accepting Mastercard cards between 1992 and 2008.[16] The scope of the claim presents clear practical and legal difficulties. Nonetheless, a method was proposed for the calculation of aggregated damages, based on the volume of commerce over the period in question, the amount of overcharging of retailers, and the level of so-called

[13] Competition Act 1998, s.47B(1).

[14] Competition Act 1998s.47B.

[15] Consumer Rights Act 2015 Schedule 8 s.47A.

[16] *Merricks v Mastercard & Ors* [2017] CAT 27 para 26.

"pass-through" whereby it was argued the excess charge was passed on to consumers. The original claim form thus valued the claim at around £14 billion.[17]

The CAT Decision

The application was strongly resisted by Mastercard and after a hearing lasting almost 3 days, including examination of detailed expert evidence, permission to bring the proceedings was denied. The CAT judgment offers a detailed analysis of the arguments made in the application. Implicitly it also offers an insight into the Tribunal's decision making and attitude to consumer responsibility.

The CAT considered carefully the questions of the suitability of the proposed class representative, whether the claim raised common issues rendering it suitable for collective proceedings, and the funding agreement entered into by the applicant.

On the first question, the CAT indicated that Mr Merricks would be a suitable representative, being a member of the class in question and there being no apparent conflict of interest in his position. The question of the funding agreement did not fall to be conclusively resolved, because the application was rejected on the second question of its suitability for collective proceedings.

Mastercard's liability was not discussed in any detail in the judgment, as the question of whether it had acted anti-competitively had already been conclusively resolved. The central reason why the CAT was not persuaded to allow the claim to proceed was that the proposed method of calculating damages was found to be neither accurate nor reliable.[18] First, the volume of commerce during the relevant period—i.e. the total value of payments made via Mastercard credit and Maestro debit cards by consumers to businesses selling in the UK—was impossible to determine with any degree of accuracy for a number of reasons. The available data explored in the expert evidence did not distinguish between (a) purchases made in the UK and overseas, or (b) purchases made for business or personal purposes. Thus, while the CAT felt that the volume of commerce was almost certainly overstated in the claim, the true figure was practically impossible to identify.[19] Similarly, there were a large number of variables present in any calculation of rates of overcharging or "pass-through", making these figures equally tenuous. The CAT noted that in view of the size of the claim, a margin of error of even 10% would make a very substantial difference in financial terms to the amount of any award.[20] In summary, the CAT simply concluded that the claims were not suitable for an aggregate award of damages and therefore permission to bring the action was denied.

It is instructive to examine the two key elements of the CAT's decision—definition of the class and calculation of damages—in greater detail.

[17] *Merricks v Mastercard & Ors* [2017] CAT 27 para 2.
[18] *Merricks v Mastercard & Ors* [2017] CAT 27 para 84.
[19] *Merricks v Mastercard & Ors* [2017] CAT 27 para 88.
[20] *Merricks v Mastercard & Ors* [2017] CAT 27 para 77.

Suitability for Collective Proceedings

One key reason why the CAT was not persuaded to allow the claim to proceed was the proposed definition of the class of claimants. The CAT decision contains a lengthy discussion of the method (referred to throughout the judgment as a "methodology") proposed to calculate the amount of damages, concluding that it was flawed in several respects. As noted earlier, one flaw which the CAT found especially problematic was that it was very difficult—probably impossible—to identify all the members of the class in question, particularly given that much of the expenditure concerned occurred some time ago, and class members may have died or no longer reside in the UK. Secondly the degree and mix of an individual's expenditure with different merchants over time would vary widely between class members, depending on their individual circumstances, preferences and habits, which themselves may have varied considerably within the 16 year period covered by the claim.

In principle, it is well established that there is a right to damages for so-called "indirect purchasers" where there is a breach of competition regulation resulting in an overcharge which is passed along the supply chain.[21] Indeed, the Damages Directive 2014 contained an explicit presumption that where an overcharge occurred as a result of a breach, the excess charges are passed on to the ultimate consumer.[22] The difficulty with the scope of the proposed class in the Merricks claim is not with the fact it is comprised of indirect purchasers. It is instead an evidential one, based on the practical impossibility of identifying and tracing each affected consumer and then collecting evidence of their individual claims. This difficulty is compounded by the fact that the burden of proof in demonstrating the amount of individual loss is on the indirect purchaser and not the defendant.[23]

Calculation and Measure of Damages

In addition to the evidential issues outlined above, the CAT also raised a more principle-based objection to Mr Merricks' suggested "top-down" method for calculation and allocation of damages. The claim was based upon the computation of an aggregated figure representing the whole amount of pass-through price increases for consumers during the period in question, with this amount then being distributed among class members.

The CAT found this method unreliable. Mastercard argued successfully that under the "top-down" distribution model proposed by Mr Merricks, the amount awarded to each individual class member would bear no direct relation to the loss they may have suffered.[24] It is well established as a matter of basic contract law that claimants may only recover compensatory damages which represent their own

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[21] *Sainsburys Supermarkets Ltd v Mastercard International Inc* [2016] ECC 5.

[22] Damages Directive 2014/104/EU.

[23] Damages Directive 2014/104/EU.

[24] *Merricks v Mastercard & Ors* [2017] CAT 27 para 57.

actual losses occasioned by the defendant's conduct.[25] Emphasising the restorative principle of damages, the CAT concluded that if there is no reliable method of calculating actual damages, even in a "very rough and ready" manner,[26] then no award can be made. The Consumer Rights Act amendments offer no guidance as to how damages should be distributed.

Further analysis of the calculation method points to two key problems which arguably will always present problems. The first is that, in a claim of this size and spanning so many years of activity, some degree of extrapolation will necessarily be needed. Arguably, some formula for limiting the amount of any claim is also required. A requirement for pinpoint accuracy in the identification of individual losses is not only unrealistic, it appears to run counter to the expressed aim of the legislation which is to render the collective redress process workable (BEIS 2012: 30). Given the insights of behavioural economics on the problem of consumer inertia, it would seem to undermine the whole purpose of the procedure to make the establishment of a claim even more technically challenging. The second is that at the point of bringing the claim, the size of the class will necessarily be unknown, regardless of the precise definition of its scope. This is so in part because of the historical nature of the claim, meaning that some members of the class may no longer reside in the UK. It is also the case because class members may decide to opt out after proceedings have been brought, perhaps because they consider that they can recover greater damages by bringing their own claim, or learn that they could join a different opt-in claim against the same defendant.

It is notable that in the same year as the original application, the Court of Justice of the European Union ("CJEU") had the opportunity to consider the question of computation of damages in class actions in a case concerning a Finnish cartel.[27] In its judgment the CJEU clearly acknowledges that so-called "umbrella damages" may be awarded in cases where the actions of anti-competitive cartels operate to raise the price of goods or services in a marketplace.[28]

The Court of Appeal Judgment

Mr Merricks appealed against the CAT's dismissal of the application and the Court of Appeal upheld his appeal.[29] The Court of Appeal noted that the CAT had erred in effectively conducting a mini-trial at the original hearing.[30] The question for the CAT was whether the claim had any real prospect of success. The Court of Appeal also opined that the CAT was wrong to conclude that an aggregated award of damages should be distributed on a compensatory basis.[31] There was in fact no requirement that the distribution should reflect the actual loss of a member of the claimant

[25] See e.g. *Alfred McAlpine Construction Limited v Panatown Limited* [2001] 1 AC 518.

[26] *Merricks v Mastercard & Ors* [2017] CAT 27 para 84.

[27] *Skanska Industrial Solutions and others* C-724/17.

[28] See also *Kone* C-557/12.

[29] *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2019] EWCA Civ 674.

[30] Ibid, para 56–61.

[31] Ibid, para 62.

class; the aggregated award amounted to vindication of the claimant's rights. In any event, distribution was a matter for determination following trial, not at certification stage.

The Court of Appeal also made reference to relevant Canadian caselaw providing guidance on the proper approach to claims for aggregate damages.[32] The collective claims procedure in Canada is similar in scope to that in the Consumer Rights Act (in fact the Consumer Rights Act regime is in part modelled on the Canadian version), and the relevant jurisprudence is more extensive and mature (Mulheron 2019). Therefore further reference to the Canadian authorities may be expected in future rulings.

Supreme Court Decision and Reasoning

Although the Court of Appeal refused its application, Mastercard obtained permission from the Supreme Court to appeal. The decision of the Supreme Court is of enormous significance and by the point at which the appeal was heard, most opt-out applications before the CAT had been placed on hold pending the outcome. The Supreme Court upheld the Court of Appeal's decision and provided important and valuable guidance on how the CAT should approach the certification process in future.[33] The case was remitted back to the CAT, which then approved the CPO as the first of its kind.[34]

Relative Suitability

In delivering the majority judgment, Lord Briggs explained that collective proceedings are designed to provide access to justice and the vindication of private rights where individual proceedings would be inadequate for this purpose.[35] This purpose should be borne in mind when interpreting the requirements of the certification process. The Court examined the meaning of "suitable" in this context. The new procedure requires that the individual claims should be suitable to be brought in collective proceedings,[36] and also that they should be suitable for an aggregate award of damages.[37] The Court concluded that "suitable" means suitable relative to individual proceedings (the relative suitability test).[38] In this case, the sum involved was very large but it was divided among a large number of consumers. Within that group there may be no single individual consumer for whom pursuing a claim would make economic sense. Therefore the Court found the claim was suitable for collective proceedings.

[32] Ibid, para 40–44.

[33] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

[34] *Merricks v Mastercard* [2021] CAT 28.

[35] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, para 45

[36] Competition Act 1998, s.47B(6).

[37] Competition Appeal Tribunal Rules 2015, SI2015/1648 r.79(2)(f).

[38] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, para 56–57

The reasoning here is surprising from a behavioural perspective, as it amounts to an explicit admission that litigation is not an appropriate route for low value individual claims even where traders have acted unlawfully. This in turn reinforces reliance on the active margin of consumers, and on third party funders, with the attendant issues discussed earlier.

Aggregated Damages

Difficult issues in calculating damages are an inherent element of collective proceedings. However, the Court noted that an individual claimant would not be deprived of a trial where there is a triable issue that the claimant has suffered loss, merely because of difficult issues surrounding quantification.[39] If these difficult issues would not have prevented an individual's claim from proceeding, it follows they should not stop the collective claim from being certified. In relation to damages, it is a fundamental requirement of justice that the court must do its best on the available evidence. This is the "broad axe" principle.[40] Lord Briggs went on to say that anti-competitive conduct may never otherwise be restrained if wrongdoers cannot be held to account by the "masses of individual consumers who may bear the ultimate loss from misconduct which has already occurred".[41] From a behavioural perspective this can be read as a clear statement that demand side remedies alone are not sufficient to prevent consumers suffering loss as a result of firms' wrongdoing.

As discussed earlier, the CAT accorded a great deal of weight to its ruling that the case was not suitable for aggregate damages. The Supreme Court stated that while this is a relevant factor for certification, it is not a condition.[42] One of the key purposes of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss, and the new procedure under the Consumer Rights Act modifies the ordinary requirement for a separate assessment of each claimant's loss.[43] The estimated size of the class of consumers has been estimated at 46million. If successful the claim would yield an average award of around £155 per claimant (Silver 2021: 7)—a stark contrast to the potential reward for funders. However, the judgment in this case opens a door to many more collective actions for what would otherwise be low-value individual claims for competition law breaches. It will be interesting to see what if any deterrent effect this has on firms.

It should be noted that a minority of the judges, while agreeing that the CAT was wrong to refuse certification of the claim on the distribution issue, disagreed with the relative suitability approach. Lord Sales and Lord Leggatt expressed concerns that collective proceedings confer substantial advantages on claimants and burdens on defendants which are capable of opportunistic exploitation.[44] They reasoned that

[39] Ibid, para 46–47.
[40] Ibid, para 51.
[41] Ibid, para 53.
[42] Ibid, para 61, 67–69.
[43] Ibid, para 77.
[44] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, para 116–119

simply requiring members of the class of claimants to show that they would face greater difficulties bringing individual claims would significantly diminish the utility of the certification safeguard. Nonetheless, as a result of the majority approach to relative suitability, it seems clear that it will in future be easier for collective claims to be brought on behalf of consumers.

The Influence of Behavioural Law and Economics

It is well established that the actions of engaged consumers can play a key role in driving competition in the marketplace (Fletcher 2016; Mak et al. 2020). The emerging study of behavioural economics has received a great deal of attention in recent years and the insights it reveals have been seized upon with enthusiasm by government and regulators including the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA) in an attempt to design more effective means of consumer redress (see e.g. Rischkowsky et al. 2008). Much regulatory activity in recent decades—particularly in the context of consumer credit regulation—has focused on so-called "demand-side" remedies, those which help the demand side of the market (i.e. consumers) to work more effectively in holding suppliers to account (Fletcher 2016: 4). However, as these measures become more mature, and their effects become better understood, evidence has begun to emerge that remedies which concentrate solely on the demand side do not offer adequate protection to consumers (CMA 2018). Indeed, in some sectors, they may actively impede competition (Fletcher 2016: 12). With public confidence in the efficiency of regulators declining (Bartram 2018), the question of whether it is appropriate to place enforcement of regulation in the hands of consumers is becoming more pressing. The Supreme Court's decision in *Mastercard*[45] offers a timely opportunity to review whether demand-side remedies alone—including collective remedies—are an appropriate means of protection, or whether more robust intervention on the supply side of the credit relationship is needed.

While there is no single definition of behavioural economics (or its later incarnations, variously known as "behavioural law and economics" and "the new law and economics") (Rischkowsky et al. 2008: 286), a common factor is the use of theoretical tools from psychology to understand consumers' behaviour and their decision making (Ariely 2008). Classical economic theory is predicated on the assumption that consumers will shop around and actively exercise choice, rewarding traders who behave appropriately and ultimately driving those who do not out of business. The implicit assumptions about consumers' decision making in the classical model are just that: assumptions, not supported by empirical evidence. The idea that people do not always adhere to logic or rationality in their decision making was proposed by Adam Smith as long ago as 1776 and explored more recently by popular theorists such as Ariely (2008). The ways in which proven behavioural biases and other influencing factors can be used to help organisations and individuals make better choices were outlined seminally in 2008 by

[45] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

Thaler and Sunstein in their work on nudge theory. Thaler and Sunstein state that a nudge is "an aspect of choice architecture that alters people's behaviour in a predictable way". The White House appointed Prof Sunstein as head of the Office of Information and Regulatory Affairs in 2011 (Weisman et al. 2009).

The use of nudges as instruments of social policy was enthusiastically adopted in other jurisdictions too, including by the UK Government which in 2010 established a so-called Behavioural Insight Team (a.k.a. the "Nudge Unit") (Ormerod 2010) to advise on policy making. The concept of the nudge is based on a rejection of the classical economic assumption that consumers can be relied upon to drive competition by making rational, informed decisions. Its influence on consumer policy in the UK and elsewhere should not be underestimated.

Behavioural economists propose that while consumer behaviour may not always be rational, it is usually highly predictable (Walker 2017: 3). For example, consumers are strongly influenced by factors such as the timing of decisions, and the way in which choices are framed (Ariely 2008). In general, consumers are poor at assessing probabilities; they care more about possible losses than potential gains and they display a very strong inertia bias, or tendency to the status quo (Thaler et al. 2003: 37–39). Notably in the field of financial services, consumers are disproportionately inclined to fall back on pre-selected default options even where these are sub-optimal choices (Walker et al 2015). The predictability of outcomes resulting from an analysis of the factors affecting consumers' decisions can be capitalised upon by firms who may use this information to exploit consumers (Walker 2017: 20). Equally however, argue its proponents, it can and should be used by regulators to assist or guide consumers to make better choices and to improve the effectiveness of regulation, specifically of consumer remedies.

Thaler and Sunstein characterise the nudge as a form of "libertarian paternalism", and they acknowledge some potential objections to and shortcomings of the model. However, other commentators have raised more fundamental ethical problems with their philosophy (se e.g. Hausman et al. 2010). Nudges seek to bypass the consumer's conscious decision-making process, including all the unconscious biases which may influence that process, in order to nudge their choice in the preferred direction of the choice architect. It can be difficult to reconcile this practice with the authors' claims to libertarianism and respect for individual autonomy (Bovens 2008). Indeed, some commentators have gone so far as to suggest that nudges "express contempt and disrespect for individuals as rational beings" (Yeung 2012: 137), and that their legitimacy as regulatory tools should therefore be questioned. Of course, this criticism assumes that individuals are rational beings whose choices are based on reason and evidence—an assumption which is energetically challenged by Thaler and Sunstein and others (Ariely 2008; Kahneman 2012).

Nonetheless as noted above, the central tenets of behavioural economics have been enthusiastically embraced by regulators in the UK.

Demand-Side Remedies

As a result of the insights offered by behavioural economics, the past decade has seen rapid development of demand-side remedies both in the UK and elsewhere. These are regulatory interventions or nudges which are designed to improve consumers' decision making, and thus assist them to buy services or products which offer better value and are more suited to their needs, or to avoid buying those which are unsuitable for some reason. While making consumers better-off as judged by themselves (Thaler and Sunstein 2008), such measures were also thought to have the important secondary effect of improving competition in the marketplace, as ethical suppliers are rewarded with increased business while unethical or overly costly providers or those who are less effective at meeting consumers' needs must change or die out. Many demand-side remedies involve disclosure or information provision, aimed at rectifying the information asymmetry which often exists between consumers and suppliers. For example, prior to entering into a credit transaction, lenders must advise consumers of the cost of credit on an APR (annual percentage rate) basis,[46] ensuring consistency and comparability of information.

However, more recently evidence has begun to emerge that demand-side remedies are not the panacea originally hoped for (Fletcher 2016: 12). For example, there is some evidence that disclosure of the APR can in fact be misleading for short-term borrowers (Agarwal et al 2015). In markets where competition is already low or where consumers are less engaged, it is clear that demand-side remedies do not materially improve competition (CMA 2018). Therefore, if consumers are not inclined to be proactive and tend to stay loyal to one firm, other firms will not experience external pressure to perform better, and development may be stifled as it becomes very difficult for new and innovative providers to break into the market. Retail banking is a good example of this kind of marketplace, where customers have historically proved very resistant to moving their current accounts even where their experience of their current provider is poor. This remains the case even when banks take significant measures to improve transparency and cash incentives are offered by competitors (CMA 2016).

The effectiveness of demand-side remedies typically depends on an active margin of engaged consumers—those who are active in seeking information, using it to make choices and calling suppliers to account when things go wrong—to protect the majority, who tend to be disengaged (Berg 2014: 222). This dependence on the active margin is a central feature of opt-in collective remedies. Demand-side remedies also depend upon the provision of information by traders. Yet there is evidence that this information is not readily received or understood by all consumers (Walker 2017), potentially placing those with particular vulnerabilities at an even greater disadvantage. In order for consumers to make informed choices about products and services, and to understand what redress they have if things go wrong, large amounts of sometimes complex information may need to be disclosed by traders. This information is often more easily accessed and understood by consumers who are educated, experienced and in a position to make an active choice (Bovens 2008). Those with

[46] Consumer Credit (Total Cost of Credit) Regulations 2010.

few choices (for example sub-prime or near-prime borrowers seeking credit) may benefit far less from information disclosure, even though this group is arguably in greater need of protection from exploitation by unscrupulous traders (Davies et al 2016).

In a marketplace where levels of engagement are varied, such as credit cards or other forms of short-term lending, interventions designed to protect one group of consumers may well have a detrimental effect on other groups. For example, there are some indications that the cap on interest rates for short term, high cost credit has made credit more difficult to access for so-called sub or near-prime borrowers, who are arguably those with the fewest choices of credit providers and the greatest need of credit facilities (Fletcher 2021). Thus in terms of the design of demand-side remedies, one size does not fit all. Engaged consumers, although often in the minority, may typically behave in more predictably sensible, prudent and rational ways, and thus be more effective in delivering the traditionally expected economic benefits of driving competition and transparency (Fletcher 2021). It is therefore vital that they remain engaged. An overly paternalistic approach ("libertarian" or otherwise) can be dangerous, resulting in active consumers becoming less active over time, as well as removing any intention of the disengaged majority to ever become engaged (Walker 2017: 25).

There is therefore a possible paradox, or at least an extremely delicate regulatory balance to be struck. If regulators take an overly paternalistic approach, placing too much emphasis on the demand side of the relationship, the rewards of being engaged may diminish and they risk disincentivising consumers to join, or remain in, the active margin. This can lead to poorer outcomes for all (Fletcher 2016). On the other hand, if enforcers play a reactive rather than pro-active role, depending on consumers to initiate claims, there is a real risk that traders who breach the regulations will not be sanctioned and that consumers who suffer loss as a result will miss out on compensation.

Therefore it is submitted that more radical regulatory action on the supply side is also needed to strike an appropriate balance and protect the interests of all consumer groups. Supply side remedies typically involve measures including price regulation and stricter rules on competition. Recent developments such as the cap on payday loan charges[47] and the FCA's latest proposals on price regulation (FCA 2018) indicate that the tide may be turning on the behavioural approach, and regulators may now be developing an appetite for more robust and intrusive regulation on the supply side. All of this indicates that the opt-out collective redress regime under the Consumer Rights Act 2015 is already ripe for review.

The Consumer Rights Act 2015 and Opt-out Collective Claims

The influence of the behavioural economics doctrine on the regulation of the consumer marketplace can clearly be seen from the foregoing. A behavioural system of regulation, meaning one which depends on behavioural factors to regulate the

[47] Financial Services (Banking Reform) Act 2013, s.131.

conduct of suppliers and consumers, necessarily places a great deal of reliance on the active margin of consumers. In some cases, claims must be initiated by consumers in order for sanctions to be imposed (so that in the absence of consumer action, traders may continue to flout regulation without detection or sanction). However, an over-reliance on the active margin to ensure that traders remain compliant can cause problems. Some of these problems are thrown into sharp relief by the Mastercard litigation.[48] The Supreme Court decision is highly significant, being the first of its kind to consider an application for CPO under the new procedure introduced by the Consumer Rights Act 2015. The decision offers some instructive insights into current judicial and regulatory attitudes to the principle of collective redress claims in the UK, and specifically claims initiated and driven by consumers rather than regulators. By extension it raises the question of whether, if consumers are drawn by behavioural factors to sub-optimal decisions, regulators and enforcers may also be vulnerable to the same behavioural weaknesses in decision making (Berggren 2012).

As noted earlier, the Consumer Rights Act 2015 made several significant changes to the Competition Act 1998, including the introduction of an opt-out class action procedure under s.47B of the 1998 Act. The new procedure allows for an individual representative of a group, or class, of persons who have suffered detriment as a result of a breach of competition legislation to bring a claim for redress on behalf of the group as a whole (explained in Higgins 2016). The intention signalled by Parliament at the consultation stage was to target systemic infringements rather than individual disputes (Wisking et al 2013: 71). Under the opt-out process, if permission to bring a claim is granted, members of the group or class are automatically joined into the proceedings (and thus entitled to a share of any compensation awarded) unless they actively opt out.[49]

Collective redress for consumers is not a new concept. As the CAT points out, by introducing collective claims on an opt-out rather than an opt-in basis under s.47B, the Consumer Rights Act 2015 simply creates "a new procedure not a new form of claim".[50] The new procedure was explicitly designed to extend the availability of collective action to consumers in competition claims, while retaining some safeguards to protect against the frequently expressed fear of a resulting tsunami of frivolous, vexatious or abusive claims (BEIS 2012: 30). One of the Government's stated reasons for introducing the new system was its open and candid acknowledgement that the existing (opt-in) system of collective redress "[did] not work" (Mulheron 2012: 49). The previous version of the Competition Act 1998 incorporated an opt-in class action procedure for competition claims before the CAT, but the procedure was subject to a number of very strict conditions and limitations. For example, actions could only be brought by an authorised body, and only in circumstances where a breach of competition law had already been established by the court (so-called "follow-on" claims).[51] There was no provision for collective settlement or collective redress schemes. In addition, potential claims were subject to often insurmountable

[48] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.

[49] Competition Act 1998s.47B.

[50] *Merricks v Mastercard & Ors* [2017] CAT 16, para 18.

[51] Competition Act 1998, old ss.47A(5), 47A(6).

practical problems relating to identifying potential claimants, and to funding the claim (O'Regan 2015). The effect of these limitations appears to have been to deter all collective claims, even meritorious ones. The only action ever brought under the old regime was initiated by Which? (the Consumers Association) against JJB Sports following a finding of price fixing in relation to replica football shirts. The Which? claim was settled in 2008 after fewer than 0.1% of affected consumers opted in to the proceedings (BEIS 2012).

The new procedure broadens the jurisdiction of the CAT to hear both standalone and follow-on claims, both of which may also continue to be brought in the High Court.[52] The CAT may award damages in collective actions,[53] and in assessing those damages it will not consider the damages due under each individual claim but will assess the claims as a group, with any unclaimed damages in an opt-out claim being paid to charity.[54] Where, as is frequently the case, claims settle, the CAT may approve collective settlements in opt-out actions, whether or not permission to proceed with the claim has been granted.[55]

It is notable that the Consumer Rights Act procedure is limited to breaches of competition law. Consumer groups might legitimately question why the remedy is available following a breach of competition legislation, but they do not have access to the collective procedure in case of a misleading act or omission by a financial services provider, for example. In those circumstances, consumers who cannot gain satisfaction from the retailer must either fall back on the highly unappealing prospect of individual proceedings, attempt to navigate the Ombudsman process, or seek to avail themselves of the existing group litigation order (GLO) procedure.[56] Recent attempts to extend the scope of the GLO, for example the potentially huge scale claim in *Lloyd v Google*,[57] have ended in disappointment for consumer advocates. Instead, consumer claimants and their lawyers must seek to frame their claims as competition infringements. This may be challenging in the financial services sector, where firms usually have very robust compliance procedures and consumer disputes are not normally considered to be competition law infringements (Bushell et al 2021: 782). Competition claims in the UK court typically follow on from a decision of a competition authority, or alternatively allege that the defendants participated in anti-competitive arrangements with competitors. However, a high proportion of the CPO applications issued to date allege abuse of a dominant position in a relevant market (often narrowly defined), resulting in artificially or unfairly high prices.[58]

[52] Consumer Rights Act 2015 Sch 8.

[53] Competition Act 1998s.47B.

[54] Competition Appeal Tribunal Rules 2015.

[55] Competition Appeal Tribunal Rules 2015.

[56] 19 PD 19B.

[57] *Lloyd v Google LLC* [2021] UKSC 50. See also *Jalla & Anr v Shell International Trading & Anr* [2021] EWCA Civ 1389.

[58] E.g. Case 1381/7/7/21 *Justin Le Patourel v BT Group plc, Case 1304/7/7/19 Justin Gutmann v First MTR South Western Trains Limited and another; Case 1305/7/7/19 JustinGutmann v London and South Eastern Railway Limited; Case 1404/7/7/21 David Courtney Boyle and Edward John Vermeer v Govia Thameslink Railway.*

Indeed, the CPO granted in September 2021 in *Le Patourel v BT Group plc* was obtained even though a liability (in the form of a breach of competition law) had yet to be established.[59] In this regard it has been suggested that the *Merricks* judgment may represent a step towards the creation of a generic opt-out procedure for consumer claims (Bushell et al 2021).

Collective claims may only be brought with the permission of the CAT via the making of a CPO, and collective claims must be brought by a representative,[60] which may be a consumer body or other group, a law firm or insurer, or indeed an individual (as in the *Merricks* claim). The representative need not be a party to the action. The CAT will only make an order where it is satisfied on two grounds. First that it is "just and reasonable" for the proposed representative to be appointed.[61] This raises the interesting question of whether the two criteria will always align—i.e. whether a just appointment will always be a reasonable one, or vice versa. It is not clear whether the two elements are separate tests or whether they should be assessed together. The second criterion is that all the claims should raise similar or related issues of fact or law.[62] The proposed representative will therefore need to prepare a detailed and convincing plan of how the claim will be managed, particularly with reference to funding, alongside the statement of claim (O'Regan 2015). Claims of this nature can be extremely lucrative for funders. In the *Merricks* case the CAT examined the terms of Mr Merricks' funding agreement in detail and approved a term which allowed the litigation funder to pull out of the claim if it looked likely that the funder's return would fall below £179 m (Harbord et al. 2022). The potential growth in collective claims therefore represents a very significant opportunity for third party funders to become involved in the litigation process.

At first sight, the opt-out model appears to be a neat solution to a key conflict in a regulatory framework heavily informed by behavioural economics, which is the dilemma of whether it is better or more effective actively to protect consumers, for example via price regulation (concentrating regulation on the supply side), or to arm them with information which allows them, or nudges them, to protect themselves (focusing on demand side remedies) (Hviid 2013). The opt-out regime addresses the problem exemplified by the Which?/JJB Sports claim, namely very poor take-up by consumers of opt-in actions. There has been considerable academic discussion of the limitations of the old opt-in class claim (Robertson 2002; Vogelsang et al 2007). The reasons for the very low level of engagement encountered by Which? are numerous and complex, but they probably involve a perception on the part of consumers that participation is onerous, costly and unlikely to result in any meaningful compensation (Rodger 2015: 260). One means of addressing this perception is via promotion of alternative routes to a remedy, for example via alternative dispute resolution processes including mediation and the Ombudsman scheme (BEIS 2012).

[59] Case 1381/7/7/21 *Justin Le Patourel v BT Group plc*.

[60] Consumer Rights Act 2015 Sch 8.

[61] Competition Appeal Tribunal Rules 2015.

[62] Competition Appeal Tribunal Rules 2015.

Alternative Dispute Resolution and the Financial Ombudsman Service

In recent years, the expansion in availability and consumer awareness of alternative forms of dispute resolution (particularly negotiation, mediation and the Ombudsman scheme) has significantly altered the landscape for low value consumer clams. The often-rehearsed problems of cost and delay associated with orthodox litigation have resulted in widespread judicial and regulatory support for these methods. Indeed, the requirement to engage with an informal dispute resolution process such as mediation is a prerequisite to bringing a small claim or fast-tracked claim in the County Court. The role of alternative forms of dispute resolution is therefore an integral part of any discussion of consumer redress.

The Financial Ombudsman Service (FOS) offers a well-established and formal dispute resolution service which is free to consumers. It might therefore represent an appealing alternative to consumers seeking redress for low value individual claims against financial services providers. The FOS strives, largely very successfully, to provide a consumer friendly and accessible route to a decision and, if appropriate, a remedy for financial services consumers (Kempson et al 2004). The FOS has expanded its offering and made significant improvements to its service to keep pace with the rapid increase in the number of claims over the past 2 decades (Galeza 2020).

However, some aspects of the service have been criticised. The methodical and process-heavy nature of pursuing complaints via the FOS along with its reliance on written accounts and evidence have led some to remark that it is a middle-class service which favours middle-class consumers (Kempson et al 2004)—a group which is already relatively well protected by its financial literacy and access to informed choice of products in the marketplace. Although the service is free to consumers, it is funded by financial services providers via a levy, leading some commentators to question whether it is “captured” or inherently biased towards businesses (see Gilad 2008). Because the FOS does not generally publish its decisions, there is no binding precedent system, with the result that two like claims could have different outcomes for the complainants. The FOS’s lack of enforcement powers has also led to criticisms that the service lacks teeth (Gilad 2008).

All these characteristics arguably mean that the FOS along with other alternatives to formal judicial process must remain alternatives, rather than replacements. Therefore there is still a need for consumers to be able to access a formal, public form of class claim.

The Active Margin

Viewed in the context of behavioural economic theory, the introduction of an opt-out rather than an opt-in mechanism for collective redress initially appears to have the characteristics of an effective regulatory measure. When faced with a range of choices, it is well established that consumers tend to fall back on defaults preferring

them to active choices. Under the opt-out mechanism, the default is the most favourable in terms of the probability of obtaining a remedy. However, the process does depend on at least one engaged consumer or representative at the active margin to initiate the claim, for the benefit of the whole group or class affected. The representative must be equipped to prepare a credible and thorough set of documentation, delineating the legal issues involve, and including the required information relating to funding. The procedure is not initiated by enforcement or regulatory authorities. This represents a potential risk factor in markets where the active margin is small. It has been observed that as markets become more complex, consumers increasingly lack the ability to remain fully informed about all the commercial areas they need to visit in their everyday lives (Hviid 2013). The financial services marketplace in particular is already very complex and information-heavy, making it difficult for even the most active consumers to navigate. So-called "consumer attention deficit syndrome" (Berg et al. 2012) exacerbates the risk of placing the onus on the consumer to actively seek a remedy. Indeed, it could lead to under- or non-enforcement of the regulations, especially where the loss to individual consumers is (or is perceived to be) relatively small. Clearly, even where a consumer representative reveals themselves, in order to be fully effective in practice, the mechanism must be enforced in a manner consistent with its aims.

As noted earlier, the class representative need not be a consumer or even an individual. It is easy to conceive of situations where third party funding bodies could bring proceedings. However, such funders are likely to be concerned with higher value or higher return situations, which may not necessarily represent the most serious or harmful regulatory breaches. Although damages-based agreements (where some damages are repaid to the claimants' legal representatives or funders) are not permitted under the new regime, the market for funding of collective actions is vibrant (O'Regan 2015) and it is likely that alongside those applications already in the queue, claimant lawyers are working to identify still more suitable cases to bring.

While some wariness has been expressed about the involvement of third party funders (Higgins 2016) and potential conflicts of interest arising, the possibility of funding via lawyers, insurers, consumer bodies or specially constituted action groups does at least go some way to addressing the risks associated with consumer inertia. This is perhaps the most commonly recognised behavioural bias, and it is explored by Thaler and Sunstein in their discussion of the so-called "status quo bias" (also referred to as the "yeah, whatever" heuristic) (Thaler and Sunstein 2008: 37–39). In essence this refers to the overwhelming tendency of consumers to do nothing rather than risk taking action which may or may not improve their situation. The status quo bias explains a number of seemingly non-rational tendencies of consumers, including their reluctance to switch bank or credit provider even where much better options are presented, and a tendency to stick with default options rather than exercising active choice (Thaler and Sunstein 2008: 16). In the context of regulatory breaches this translates to a failure to opt-in to a collective claim for compensation. This is so even in a situation like that of Which? where liability has already been decided in the consumer's favour, so that opting in can only lead to a benefit. The opt-in regime was therefore flawed in this respect. The introduction of an opt-out

mechanism represents an important step in addressing the problem of consumer inertia, but it is not a complete solution. The opt-out process still requires engagement from an active margin of consumers to allow claims to be initiated, leaving enforcers in the same reactive position as before.

The new procedure was tested for the first time in the recent application in *Merricks v Mastercard & Ors*.[63] While the application was unsuccessful, the CAT declined to grant a collective proceedings order allowing the claim to proceed, although it did indicate that Mr Merricks was an appropriate person to act as representative of the class. An exploration of the CAT's reasoning identifies some further limitations of the opt-out model. Although there can be no doubt that the new procedure was introduced with laudable intent, the decision illustrates some of the key problems which arise when enforcement is dependent on consumers initiating the legal process.

Post Brexit Developments

Mr Merricks' claim was initiated in 2017, after the result of the UK referendum on membership of the European Union (EU) which resulted in a narrow vote in favour of UK withdrawal from the EU (Brexit). However, at that time there was considerable uncertainty about the legal process of withdrawal, and it effects on domestic legislation. In the area of consumer law, the EU has been hugely influential over the development of the consumer protection landscape in the UK. However, a key consequence of Brexit is that the EU no longer has any influence over future developments in UK law, and vice versa. It seems likely that over the coming years, the UK will diverge from the EU in respect of consumer policy and legislation, and legal interpretation (HC Library 2021).

Remedies of any kind are only effective to the extent that they can be enforced. The defendants in the Mastercard litigation are named as Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe S.P.R.L. The first two entities are situated in New York and the third is in Belgium. After 1 January 2021 there is no automatic recognition in EU member states of a judgment of a UK court. Thus it is possible that even if the collective proceedings are ultimately resolved in favour of consumers, enforcement of the judgment may be difficult, time consuming and costly.

In a potential divergence from the domestic model outlined above, in 2020 the Council of the EU adopted a draft Directive on representative actions for the protection of the collective interests of consumers in the EU.[64] This forms part of the EU's 'New Deal for Consumers' package and provides redress and, critically from a supply side perspective, injunctive measures for groups of consumers affected by specific infringements of EU law. The EU considers such measures to be necessary to counter increasing risks to consumers resulting from globalisation and increasing

[63] [2017] CAT 16.

[64] OJ/L/409/1 4 December 2020.

digitalisation. It is submitted that these risks subsist for UK consumers notwithstanding the UK's exit from the European Union.

Conclusion

It is now some 7 years since the Consumer Rights Act came into force, offering a significant reform in the area of consumer redress.[65] The introduction of the new class action mechanism offered cause for genuine optimism among consumer groups who have long hoped that the enforcement gap around low value claims would finally be closed. While widely-reported fears of a slew of US-style class action claims (Croft and Fortado 2015) are probably exaggerated, it is clear that there has been a significant cultural and policy shift on private actions in competition law. As the first decision of its kind under the new regime introduced by the 2015 Act, the Supreme Court judgment and subsequent certification order continues to be scrutinised very carefully by in-house lawyers and advisers to all kinds of consumer-facing businesses.

At the individual level, the case represents the latest in a long series of claims against Mastercard. Fortunately for the company, such claims are likely to become less frequent in future, not least because interchange fees were capped in the UK in January 2015[66] (although the effectiveness of the cap is difficult to discern). Nonetheless the tribulations of the beleaguered lender have served as a salutary example to other banks and financial services providers. It is noteworthy that, while Mastercard's main rival Visa also faced investigation in 2007, Visa escaped formal sanctions by choosing to co-operate with the regulator the CMA and agreeing to reduce its interchange fee and make its charges more transparent (EC 2009). It might be argued that Mastercard, having battled through the intervening decade, an award of compensation might at the least have represented an opportunity to draw a line under its liability and go forward without the threat of having to defend the same allegations yet again.

More generally, the decision provides an insight into regulatory attitudes to consumer responsibility and engagement, and to the potential viability of similar class claims in the future. It seems clear that more claims will follow and legislators must assess whether restricting the CPO process to breaches of competition law remains appropriate.

The influence of behavioural economic theory was analysed, and the distinction between supply- and demand-side remedies was explored. The retreat from effective supply-side remedies delivering sanction or punishment for businesses—even where there is a documented breach of the law causing loss to consumers—is a troubling feature of the CRA 2015 regime (and one which has been discussed extensively elsewhere) (Cartwright 2016). The benefit of regulatory intervention in the marketplace is seriously undermined when that regulation does not deliver

[65] Consumer Rights Act 2015s.81.

[66] Consumer Rights (Payment Surcharges) Regulations 2012 SI2012/3110, r.4.

an accessible remedy for consumers in practice (Harker and Mehta 2013). The CPO process is designed in part to fill this gap.

Consumer inertia was discussed. The experience of the Consumers Association in the JJB Sports claim referred to earlier also indicates that the overwhelming majority of consumers are not sufficiently interested in or informed about the competition status of their transactions to consider legal action. This does not diminish the fact that they have suffered losses over an extended period, nor does it mean that traders who breach regulations should not face any sanction.

In the context of consumer protection it can be argued that treatment of these smaller claims is a highly revealing measure of the effectiveness of the regulatory regime overall. The active margin of engaged consumers are likely to make more prudent and advantageous decisions in general and much more likely to pursue redress via demand-side methods by virtue of their awareness, education, capacity and financial means (BEIS 2012). Those consumers who are least engaged are likely to be those with most to gain from supply-side interventions (Sheehy-Skeffington and Rea 2017). In the context of consumer credit there is evidence that the least engaged and most vulnerable of consumers (those with the fewest choices about the terms of borrowing, and whose decision making may already be impaired) are disproportionately penalised already because of their status (Davies et al 2016). This group is much less likely to be in a position to benefit from demand-side remedies (Sheehy-Skeffington and Rea 2017). Yet the FCA has stated that one key indicator of a market which is working well for consumers is social inclusion, and that fulfilling its own mission requires that when things go wrong there are mechanisms in place to support redress (FCA 2017). It remains to be seen whether the pursuit of collective proceedings will be driven by a lack of appropriate redress for consumers in these smaller claims. Some of the upcoming applications (e.g. the "trains" cases) are focused on relatively small classes in highly specific circumstances.

The progress of the Mastercard litigation was reviewed and the judgment of the Supreme Court appraised. Although the judgment provides important clarification on the conduct of proceedings, a number of questions remain unanswered.

In a regulatory playing-field dominated by demand-side remedies, the opt-in class action represents a crucial means of sanctioning recalcitrant providers and holding them to account. However, from a behavioural perspective the process is flawed at policy level because it places too much responsibility in the hands of the active margin of consumers, and in practice it appears it will incentivise funders perhaps more than consumers to select which claims to pursue.

The decision therefore prompts questions about the legitimacy of relying on consumers to enforce competition rules. After more than a decade of behavioural, demand-side remedies dominating the regulatory framework, it is time to reconsider supply-side interventions.

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Declarations

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