**The opt-out collective damages action as a means of claiming redress for infringements of competition law: the story so far and the potential challenges going forward.**

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(Abstract)

As the private enforcement of competition law has continued to develop around Europe in recent years,[[1]](#footnote-1) a particular feature of litigation in the UK, has been the number of collective actions being brought, in most cases on a ‘follow-on’ basis i.e. taking as their evidential basis, a regulatory finding of infringement against the defendants by either the EU Commission or the UK competition authorities.[[2]](#footnote-2) This increase in collective actions follows the introduction in the UK of an ‘opt out’ model of collective action under the Consumer Rights Act 2015. Of particular significance, was a decision of the UK Supreme Court in 2020 in the case of *Merricks v Mastercard* Inc,[[3]](#footnote-3) where the Supreme Court held that an opt-out follow-on action raised against companies in the Mastercard group in respect of the fixing of ‘multilateral interchange fees’, could proceed to trial. Remarkably, the action was brought potentially on behalf of approximately 46.2 million people, being an estimate of all UK resident adult consumers of goods and services over the 16-year period of the infringement. Furthermore, it was held by the Court that it sufficed that loss to the class as a whole could be proved rather than proving the level of loss to individual class members, even if making an aggregate award of damages to the class could be challenging.

While it is still early days to draw firm conclusions on the viability of the ‘opt-out’ model as an effective means of providing redress, certain challenges – or at the very least potential limitations – are becoming apparent. This paper will discuss some of the main ones. One potential challenge in some cases may be defining the members of the class. Another is the long-standing problem of the ‘passing-on’ defence and when an overcharge is deemed to be passed on down a supply chain.[[4]](#footnote-4) Then there are the issues of raising awareness among class members and apportioning any damages award amongst class members. Finally, there is the wider question of whether, when all is said and done, such actions will actually result in a meaningful transfer of welfare from the infringers to the victims. Does the cost of any damages pay-out simply become ‘priced-in’ by the infringers and if so, what are the implications of that?

It will be submitted that on balance there are indications that opt-out damages actions do have a role to play and that there may be some positive effects from the perspective of consumers. But equally, it will be argued that they are a somewhat blunt tool and that for some of the more egregious – but diffuse – competition law infringements, they will probably prove to be ineffective.[[5]](#footnote-5) Furthermore, there requires to be more analysis of the welfare issue and the extent to which this type of litigation really makes a meaningful contribution to leaving consumers who have been harmed by antitrust infringements better off.

1. Encouraged by the EU’s Damages Directive in 2014: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1. [↑](#footnote-ref-1)
2. See, for example, *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and others* CAT Case No. 1527/7/7/22; *Commercial and Interregional Card Claims II Limited v Mastercard Incorporated & Others* CAT Case No. 1442/7/7/22 [↑](#footnote-ref-2)
3. *Merricks v Mastercard Inc and others* [2020] UKSC 51. [↑](#footnote-ref-3)
4. See inter alia: *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24; [2020] 4 All E.R. 807; *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353. [↑](#footnote-ref-4)
5. See for example: *Michael O’Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16. [↑](#footnote-ref-5)