26 July 2017

Card Declined: £14 Billion class action against MasterCard rejected

Summary

An application to bring what would have been the first "opt-out" class action in the UK has been rejected. The claim against MasterCard was brought by Mr Merricks on behalf of 46 million UK consumers seeking damages of £14bn for breaches of EU competition law. The judgment refusing to certify the claim as a class action is critical for businesses because it gives important guidance on the criteria future claims must meet to qualify as a class action under the UK's new regime.

Background

The claim was based on a decision of the European Commission of 19 December 2007 which held that various MasterCard entities had breached Article 101 TFEU in setting fees, known as multilateral interchange fees. These fees were paid to the banks that issued MasterCards ("Issuing Banks") for each cross border MasterCard purchase within the EEA. They were initially paid by the banks ("Acquiring Banks") providing services to the businesses accepting MasterCards ("Merchants"), but were then generally passed on to the Merchants in full.

The claim, brought before the Competition Appeal tribunal ("CAT"), was based on the argument that breaches of competition law by MasterCard had caused higher interchange fees for cross border transactions in the EEA, and also for domestic UK transactions made using MasterCard. Mr Merricks argued that Merchants passed on some or all of the inflated fees to consumers through higher prices for goods and services. Mr Merricks' claim required him to show both that interchange fees had been inflated by the breaches of competition law and, if so, how much of that "overcharge" had been passed on to UK consumers by Merchants.

Class certification

Mr Merricks applied for the claim to be certified as an "opt out" class action on behalf of UK consumers. Amongst other things, this required him to show that the claims of class members: (i) each raised common issues; and (ii) were suitable to be brought as a class action.

MasterCard resisted that application on a number of grounds, but most importantly on the basis that a number of the key issues in the case were not common to the members of the prospective class. In particular, the extent to which any higher interchange fees had in fact been passed on to consumers would vary from Merchant to Merchant and from product to product. Moreover, the loss suffered by any individual would depend on the amount she/he spent, what goods or service had been bought and from whom. In response Mr Merricks argued that these concerns could be avoided by use of

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the CAT's power in class actions to award aggregate damages, reflecting the total loss suffered by the class.

The CAT held that it was not fatal to the application that not all issues were common to the class: what was required was that the claims were nonetheless "*suitable to be brought in collective proceedings*". The CAT also accepted Mr Merricks' argument that its power to award aggregate damages could provide a work-around to the fact that the issue of loss was not common to all class members, but only if Mr Merricks could identify a sustainable method for calculating the aggregate damages and a reasonable and practicable means for estimating the individuals' losses which could be used to distribute those damages to the class members. Mr Merricks failed on both these requirements. The CAT found that there was inadequate data available in practice to calculate the level of pass-through from Merchants to consumers and so no award of aggregate damages could be made.

Moreover, the proposal for distributing any aggregate damages (a per capita distribution on an annualised basis) bore no relationship to individuals' losses and so could not be said even to accord with the fundamental requirement that damages should be compensatory.

Funding

Mr Merricks' claim was funded by a commercial litigation funder. Under the CAT's rules it has discretion to allow "costs and expenses" of the claimant to be paid from any award of damages remaining unclaimed by class members. An issue in this case was whether the funder's profit was a cost or expense of the claimant and so whether any unpaid award of damages could be used to pay the funder. The CAT, taking a purposive approach to interpreting the rules, held that the funder's profit was a cost and expense, clearing the way for payment of the funder from any unpaid damages. This issue was critical to the prospects of bringing future class actions, as this is the only possible source of recovery for a funder in cases that do not settle, and nearly all class action are likely to depend on commercial funding.

What does this mean for future class actions?

This is the second and by far the most significant attempt to bring a class action under the new UK regime. In both cases the CAT refused to approve them as class actions. At first glance this suggests that others are likely to be deterred from bringing class actions in future; however, on closer analysis, many of the arguments of principle have been determined in ways that favour would-be claimants.

The claim against MasterCard was overly ambitious, claiming on behalf of all UK consumers in respect of virtually all purchases they had made over a 16 year period. Fundamentally it failed as a result of its complexity. Future class actions will need to be more narrowly focused to succeed.

Businesses which might face class actions can take comfort from the fact that the CAT has been prepared to reject the first two claims that were made, notwithstanding a desire to see the new regime succeed. This suggests that the class certification process will not merely be a rubber stamp and that claims will be subject to proper scrutiny before clearing that initial hurdle.

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