An examination of the legal conception of the consumer in the context of judicial application of three fairness tests

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Abstract

Many legal initiatives which fall under the broad remit of consumer law are designed to protect the interests of consumers in one way or another. However, to be capable of providing protection to consumers, the legal system must first be made to understand them. This goes beyond definitional features demarcating the characteristics of the legal class, and requires an understanding of who the consumer is, in terms of both their traits and their interests. This understanding makes up the legal conception of the consumer, which acts as a representative of actual consumer interests for the purpose of legal reasoning.

This thesis examines how the legal conception of the consumer is constructed, by analysing instances of judicial application of three fairness tests; the unfair terms test (Consumer Rights Act 2015), the unfair practices test (Consumer Protection from Unfair Trading Regulations 2008), and the unfair credit relationship test (Consumer Credit Act 1974). The approach of the court when constructing the conception of the consumer is assessed within a theoretical framework which distinguishes between an abstract approach to conception (based on assumptions regarding consumer interests and traits), and a behaviourally informed approach (based on the findings and methodology of behavioural economics). The normative ethic underlying the courts’ choice of approach is considered, as is the impact that reliance on different approaches has on legal outcomes produced under the three tests. The approach of courts is contrasted with that of regulators who play a significant role in the enforcement of consumer protection law.

It is suggested that the approach adopted when constructing the conception is important because it affects the legal system’s treatment of actual consumer interests. It is suggested that there is a degree of uncertainty regarding the correct approach to conception, and evidence of both abstract assumptive and behaviourally informed approaches is detected. This is contrasted with the behaviourally informed approach of regulators. It is argued that there are advantages to the adoption of a behaviourally informed approach for the purposes of assessing fairness in the context of consumer law. It is suggested that this could produce a more satisfactory form of legal reasoning, which will provide greater scope for protective legal outcomes and a more effective discourse between regulators and the courts. In turn, it is suggested that courts should place emphasis on the responsibility of suppliers when assessing fairness to allow them to maintain an appropriate balance between consumer and supplier interests.
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Dedication

To the memory of John Joseph Dunleavy; my father and my friend.
Part 1: The legal conception of the consumer: a framework for analysis

Introduction

There is an established body of law which may be referred to broadly as consumer law.¹ This is made up of legal rules applying to those defined as ‘consumers’ and its existence demonstrates a perceived need to treat those so designated differently from others, whenever aspects of consumer law arise. The creation of this body of law has for the most part been the result of social and economic regulation enshrined in legislation, as opposed to judicial development of the common law. However, many consumer-focused rules have a private law dimension and therefore rely on judicial interpretation and application within that context.

Collins has suggested that the growth of social and economic regulation has had an important effect on the system of private law.² He suggests that when faced with the challenge of integrating welfare regulation, the private law system has reconfigured itself to accommodate normative regulatory discourse as far as possible, which has potential implications for the process of legal reasoning.³ In recent years, there has been significant growth in recognition of behavioural economics as relevant to consumer protection regulation.⁴ This body of research seeks to examine and explain the relationship between psychology and economic behaviour, and its findings have contributed to debates regarding the perceived need for consumer protection rules. The emergence of this approach raises questions regarding the treatment of consumers under the law and specifically, whether new understandings adopted within the context of consumer protection regulation, are reflected in legal discourse when consumer protection measures are to be interpreted and applied.⁵

It is this treatment of consumers under the law, in light of the findings of behavioural economics, which will form the focus of the following thesis. The aim will not be to analyse who should (or should not) be considered to be a consumer as such, nor will it be to consider why consumers require different treatment from other legal subjects. Instead, the aim of this

¹ see I Ramsay, Consumer Law and Policy (3rd, Hart, 2012)
² H Collins, Regulating Contracts (OUP, 1999)
³ ibid, 51
⁵ Ramsay (n1) 63
thesis is to contribute to the understanding of how the interests of actual individuals, designated as consumers for the purpose of legal analysis, are treated under the law. Given the limitations of this work, the relationship between the legal conception of the consumer and actual consumers will be considered specifically within the context of judicial interpretation and application of three fairness tests. This will be done in light of regulators’ understanding of consumer interests and the issue of behavioural market failure.

The thesis will focus predominantly on the treatment of consumers under English law, as opposed to their treatment under EU law more broadly. Therefore, although much consumer law originates from EU initiatives and is subject to the jurisdiction of the ECJ, that level of law will only be considered where relevant to the understanding of English law. The reason for this is the wealth of research examining the conception of the consumer at EU level, but the relative lack of such research in regard to the practice of English courts specifically. Since the ECJ tends to leave the final determination of fairness to national courts, it seems sensible to ask how consumer interests are dealt with at that level in particular. Subsequent work can then compare the findings set out below with the goals of both UK and EU consumer law policy. Equally, it must be noted that understanding the English law approach specifically will be important as the UK plans to leave the EU and therefore sever its current ties with EU consumer law policy and practice. Questions regarding the future of UK consumer law and policy will need to be addressed as part of the Brexit process and this thesis should provide a contribution to such debates.

The remainder of this section will set out the theoretical basis of the following study. Part 2 will consider the understanding of consumer interests held by regulators tasked with consumer protection. Part 3 will then examine the judicial interpretation and application of three fairness tests relating to unfair terms, unfair practices, and unfair credit relationships. Part 4 will draw together and analyse the findings of the study. It will be suggested that there are advantages of reliance on a behaviourally informed understanding of consumers for the purpose of assessing fairness, but that this will inevitably increase the level of cost and complexity associated with legal reasoning in consumer protection cases.

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6 see T Wilhelmsson ‘The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law’ (2004) 27 JCP 317; D Leczykiewicz and S Weatherill (eds), The Images of the Consumer in EU Law (Hart, 2016)
The self-enclosed legal system and the legal conception of the consumer

The legal system can be thought of as self-enclosed. This is because the system concerns what is legal and the distinction between legal and non-legal is decided by the system itself. In this way the system of law, though closely connected to its surrounding environment, is separate from that environment. Features of the real world must be internalised by the system so that they can be subjected to the process of legal reasoning. This results in a reconstructed representation of the real world in legal terms, made up of a complex system of principles, rules, and concepts.

The term ‘concept’ can be defined as meaning;

[A] mental representation of the essential or typical properties of something, considered without regard to the peculiar properties of any specific instance or example [in other words] the meaning that is realized by a word or expression.

The conception of the consumer can then be understood as referring to the implicit understanding which accompanies use of the term ‘consumer’ and specifically the essential or typical properties of that particular characterisation. In this sense, the term consumer is capable of bearing objective meaning and content irrespective of any particular individual being.

In a legal context, the term ‘consumer’ serves two connected purposes. Firstly, the term can describe a specific legal status and therefore acts as a label to distinguish one subject from other subjects. To serve this purpose the term must relate to essential features which when possessed distinguish a subject as either being a consumer in law or else not. In this way, the term consumer is (legally) definitional and informs legal classification allowing for determination of which rules should apply to those subjects.

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7 N Naffine, Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person (Hart, 2009) 36
8 G Teubner ‘Alter Pars Audiatur: Law in the Collision of Discourses’ in R Rawlings (ed), Law, Society and Economy (Clarendon Press, 1997) 166; Collins (n2) 37-38
9 Teubner (n8) 166; F Lawson 'The Creative Use of Legal Concepts' (1957) 32 N.Y.U.L.Rev 907, 913
10 Teubner (n8) 166
11 Collins (n2) 37-38
14 Collins (n2) 43
The second purpose of the term is to embody a legal personality for the purposes of legal reasoning (the conceptual consumer or conception of the consumer).¹⁵ In this sense the conception of the consumer is a legal reasoning tool. It is the mechanism by which the self-enclosed legal system understands those individuals classified as ‘consumers’.¹⁶ This legal personality then acts as a representative of those who fall under the definitional class for the purpose of legal reasoning.¹⁷ It follows that the conceptual consumer will belong to the definitional class and will therefore possess that class’s essential distinguishing features. However, this does not mean that the conceptual consumer must reflect actual members of that definitional class beyond that, but simply that for the particular purpose of legal reasoning, consumers as a defined class are dealt with by reference to the legal understanding (conception) of the consumer. The traits of this conception are then important since it is those traits which will be considered when determining legal outcomes.

The process of conception

For the conceptual legal consumer to serve its role as a tool of legal reasoning it must possess content (implicit meaning). This will form the legal system’s understanding of consumer interests and traits. Broadly, the process of conception is made up of anything that affects the selection of information used to influence the content of the legal conception.

This selection of information, and therefore the process of conceptualisation, is conducted by relevant legal actors. Relevancy in this context must depend on the peculiarities of a specific legal system. A legislator may be able to promote a certain conception of the consumer by, for example, setting out the consumers characteristics clearly within legislation. The codification of the average consumer for the purposes of EU law is an example of this.¹⁸ The judiciary may also affect the conception of the consumer through their interpretation and application of the law. They could, for example, decide that legislative reference to an

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¹⁶ T Wilhelmsson ‘Consumer images in east and west’ in H Micklitz (ed), Rechtseinheit oder Rechtsvielfalt in Europa? (Baden-Baden, 1996) 53
informed consumer means a consumer with average knowledge or alternatively a consumer with specialist knowledge. These choices would shape the legal understanding of the consumer. Equally, the judiciary may contribute to the conception of the consumer by determining legal tests and standards. The ECJ’s development of the average consumer conception before codification serves as an example of this process.\(^\text{19}\)

In addition, a legal system may provide scope for other actors to affect the legal conception of the consumer. This might be through the exercise of regulatory power (particularly enforcement), the interpretation and application of legislation and/or through the publication of opinions, research and guidance. The influence of such actors will largely depend on their specific role within the legal system. If a given actor’s guidance is authoritative they might have scope to influence the conception of the consumer in law. However, if such guidance is of only minor relevance the actor may have limited scope to affect the conception. Equally, enforcement powers may provide scope for an actor to adopt its own conception of the consumer for those purposes, though this may be limited by the provision of specific mandates and predefined terms.

Within a given legal system then, the process of conceptualisation of the consumer may be conducted by different legal actors. The factors informing the conception may therefore differ depending on which actor takes charge of the process. This could cause there to be multiple conceptions of the consumer arising at different times and in different contexts. The result might be an unstable conception, difficult to define or predict with certainty. Equally, a particular conception might be generally accepted and therefore remain stable across the legal spectrum. Evidence of practice within the legal system is required to examine this issue. Such evidence should provide insight into the legal system’s understanding of consumer interests and traits.

Relationship between actual consumers and the legal conceptual consumer: the importance of assessment

As a legal personality the conceptual consumer does not necessarily reflect particular instances of actual consumers. Actual consumers are unique people who possess traits as a matter of fact; they cannot be modified for the purpose of legal reasoning. In contrast, the

conceptual consumer is ‘legal’ and therefore exists as an understanding alongside but separate from instances of actual consumers. This means that the conception of the consumer can be constructed and modified in different ways for the purpose of legal reasoning. It is possible then for the conceptual consumer to be understood as having certain traits even if actual consumers do not have those traits.

This is important because the law’s treatment of actual consumer interests will depend to a large extent on the legal conception of the consumer and the affect that the conception has on the process of legal reasoning. Understanding how the law treats actual consumers and why it produces the outcomes that it does, therefore requires consideration of the legal conception. This in turn should allow for critical analysis of the function of the law with regards to its underlying policy objectives.

For example, if the law intends for the legal conception of the consumer to be a close reflection of actual consumers, then any disparity between the traits of the conceptual consumer and the traits of actual consumers would be important and should lead to modification of the conceptual consumer to ensure that the conception succeeds in being an appropriate representative of consumers as a class. This raises questions regarding how well the legal system translates the interests and traits of actual consumers into the legal conception.

On the other hand, if the law does not intend for the conceptual consumer to reflect actual consumers then a disparity between the conceptual consumer’s traits and actual consumer traits might be expected and even encouraged. Such differences could not necessarily be categorised as mistakes but might give rise to a legal fiction. Frank defines legal fictions in the following terms:

One who employs a fiction makes a statement which deviates from or contradicts reality, but with full awareness of the deviation or contradiction. A fiction is a “conscious mistake” or a “conscious contradiction”. A statement made with full consciousness, at the moment of utterance, that it does not correspond to the truth of the matter, is a fiction.

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20 see P Oliver, Legal Fictions in Practice and Legal Science (Rotterdam University Press, 1975)
21 J Frank, Law and the Modern Mind (Brentano’s, 1930) 312
Frank develops this notion by distinguishing between legitimate legal fictions, made with full awareness of their untruth and intended to be understood as such, and legal myths, which are erroneous statements relied on without knowledge of their falsity. If the conceptual consumer is non-realistic and therefore a fiction, it must be asked whether the disparity between the conceptual consumer and actual consumers is intentional. If it is not intentional then the non-realistic conception of the consumer can be seen to be a legal myth and therefore a mistake. It might then be asked how this mistake came to be made and how to avoid it in future. However, if the use of a legal fiction is intentional then any disparity between the traits of the conceptual consumer and the traits of actual consumers cannot necessarily be seen as a mistake. It must then be asked why such a disparity was intended and whether it has been properly justified in light of its potential effect.

Once the relationship between actual consumers and the conceptual consumer is considered in this way a number of important issues arise, such as; how is the legal conception of the consumer constructed, how does that conception affect legal outcomes relating to it, is the conception intended to be realistic, and why has that approach been adopted? Consideration of these issues should inform an assessment of the extent to which the representative relationship that exists between the conceptual consumer and actual consumers is appropriate. This issue will form the basis of the following study.

**The practical and normative dimensions of the legal conception of the consumer**

The appropriateness of the representative relationship that exists between the legal conception of the consumer and actual consumers can be assessed at both a practical and normative level.

At a practical level, the impact of a particular consumer conception on instances of legal reasoning can be assessed to determine its effect. In this regard, it can be asked how closely the conceptual consumer reflects actual consumers, what affect the traits of the conceptual consumer have on specific legal outcomes, and what impact those outcomes have on the law of consumer protection more broadly.

The conception of the consumer can also be assessed at a normative level. Collins suggests that the content of law depends upon a rich dialogue between various competing normative

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22 Frank (n21) 320; Oliver (n200) 33
standards drawn from politics, morality, economics, public policy, conventions, and values internal to the legal system. These standards are translated into the legal system by relevant legal actors. It is submitted that the process of conceptualisation of the consumer, which determines the conceptual consumer’s qualities and traits, has the potential to be a conduit through which legal actors can translate normative influences into the law. As a legal construction, the conceptual consumer can be manipulated to bring about certain practical ends and the normative influences driving this can be assessed. In this regard, it can be asked why a particular conception of the consumer persists and why any particular approach to determining the traits of the conceptual consumer is favoured. These questions feed into the broader question of what the conception of the consumer ought to be in light of the practical ends which depend upon it. An important aspect of this broad question is the extent to which the conception of the consumer ought to be reflective of actual consumers which relates directly to the issue of the appropriateness of the representative relationship existing between the conceptual consumer and actual consumers.

**Fairness as a focus for study**

Both the practical and normative dimensions of the conception of the consumer can be explored in relation to the legal assessment of fairness. Fairness is a broad notion which conjures a wide range of implicit meanings and philosophical understandings. At a basic level however, the assessment of fairness can be understood as relating to an appropriate balance between the interests of different parties. In a legal context the assessment of fairness often takes place within the framework of open-textured rules, sometimes referred to as general clauses. These rules afford a margin of discretion to legal actors charged with their interpretation and application because they are framed in general terms relying on imprecise concepts or reference to broad principles and standards. The extent of this discretion can vary depending on the rule itself, however, whenever a rule is open-textured some discretion will exist and in the context of the assessment of fairness, that discretion will

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23 Collins (n2) 33
24 ibid
26 S Whittaker ‘Theory and Practice of the ‘General Clause’ in English Law’ in S Grundmann and D Mazeaud (eds), *General Clauses and Standards in European Contract Law* (Kluwer, 2006) 57
27 ibid 60
usually relate to the balance that is to be struck between the interests of the consumer on the one hand and the supplier on the other.

Since the legal system understands consumer interests through reliance on the legal conceptual consumer, the way in which that conception is constructed will be of central importance to any assessment of fairness in this context. In this regard, general fairness clauses provided fertile ground for consideration of the legal conception(s) of the consumer.

**Fairness: the practical dimension**

Before the interests of the consumer and supplier can be balanced, it must be decided who the consumer is and what interests they have. For example, if a law stated that contracts will be unfair unless consumers understand them, the law would require an appreciation of who the relevant consumers are, how they behave with regards to contracts, and the extent to which those consumers, behaving in that way, understand contracts. If the legal conception of the consumer suggests that consumers read contracts the assessment of fairness would probably be different than it would be if the conception suggested that consumers did not read contracts. It is these practical aspects of the relevant consumer which form the foundation of the fairness assessment. Therefore, the legal conception of the consumer may have a direct effect on the outcome of any fairness assessment which relies on it.

**Fairness: the normative dimension**

At a normative level, the assessment of fairness raises the question of how the interests of consumers *should* be balanced against the interests of suppliers. This requires consideration and reconciliation of competing normative influences and in this regard the assessment of fairness can be seen as a forum for normative debate.

Willett has produced a useful framework for assessing the normative aspects of the law in this regard. He has distinguished two approaches to contract law; the freedom oriented approach and the fairness oriented approach. These different orientations reflect general guiding philosophies which can be applied beyond the realm of contract law specifically to private law and regulation more broadly. The different orientations can be thought of as two

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29 ibid 17
ends of a spectrum whereby particular instances of law can be assessed as either more freedom oriented or more fairness oriented; the assessment is a matter of degree. 30

The freedom oriented approach is concerned with preserving the maximum possible level of freedom for the contracting parties. 31 Freedom of contract is understood as protecting the individual’s ability to define and pursue self-interest through the exchange of obligations with others. In this respect, the notion of freedom of contract promotes an ideal of individual autonomy. The corollary of this is that the freedom orientated approach also requires a high degree of self-reliance. It suggests that law should allow individuals to pursue their own self-interest without interference which means that legal protection should not be provided where that would limit the freedom/autonomy of other parties. Each party must then protect their own interests and in this way, they are required to be self-reliant. This approach to contract law reflects what Willett in subsequent work, has called a self-reliant ethic. 32 This ethic supports the freedom orientation by expressing a normative understanding which suggests that individual autonomy should be respected and that therefore people should be self-reliant and that they should be free to make whatever contracts they wish.

In contrast, the fairness approach is broader and focuses on the context of the relevant contract and the characteristics of the relevant contractors. 33 In this way the approach can be described as person-orientated in that it is concerned with the actual people party to the contract. 34 The fairness approach aims to ensure that certain interests, whether individual or societal, are protected from the potentially negative consequences of supplier-consumer relationships. This protection usually entails protecting the weaker consumer from the relational power of the supplier. 35 In this regard the perceived weakness of one party may justify paternalistic intervention in the contractual relationship and as a result, the restriction of individual autonomy. Therefore, unlike the freedom oriented approach, the fairness oriented approach permits limitation of self-interest and self-reliance. 36 In light of this the

30 ibid
31 ibid 19-22
32 C Willett ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) CLJ 412, 420-421
33 Willett 2007 (n28) 33
35 Willett 2007 (n28) 33
36 ibid 34

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fairness orientated approach can be seen as reflecting a protective ethic which suggests that the vulnerabilities and weaknesses of consumers should be acknowledged and dealt with as part of legal discourse.\(^{37}\) Where self-reliance is seen to be ineffective the protective ethic suggests that paternalistic intervention should be implemented if required.\(^{38}\) Despite this paternalistic aspect to the fairness approach it can nonetheless be understood as promoting a kind of contracting freedom which seeks to protect weaker contracting parties from the dominance of stronger ones, therefore allowing those weaker parties a greater/more effective degree of autonomy.\(^{39}\)

The important point to note about these different normative approaches to contract law is their different concern for the contextual background of the relevant contracting parties.\(^{40}\) The freedom orientation tends to rely on an abstract notion of the parties because that is all that is required for the protection of individual autonomy.\(^{41}\) So long as the parties meet minimum standards of capability they are assumed to be autonomous; other traits are generally irrelevant and should not be allowed to interfere with the binding nature of voluntarily agreed obligations. In contrast, the fairness approach is concerned with the parties’ characteristics since they make up part of the context which must be considered to ensure a suitable balance between their respective interests. It is these characteristics which guide the assessment of fairness and justify the perceived need for protection. Therefore, the traits of the parties should be permitted to affect the binding nature of voluntarily agreed obligations.

It follows from this that there is a relationship between the legal orientation, its underlying ethic, and the approach to the conception of the consumer within the forum of fairness assessment. In order to achieve a sufficient degree of protection a fairness oriented approach requires evidence of actual consumer traits and corresponding weaknesses. Therefore, it will require a realistic conception of the consumer which responds to and reflects actual consumer behaviour and expectations. In contrast, the freedom approach would be more

\(^{37}\) Willett 2012 (n32) 414, 424; see also R Brownsword, *Contract Law: Themes for the Twenty-first Century* (2nd, OUP 2006) 28-37  
\(^{38}\) Willett 2012 (n32) 414  
\(^{40}\) Willett 2007 (n28) 20-21; Wilhelmsson 1993 (n34) 32  
\(^{41}\) Willett 2007 (n28) 33
likely to ignore traits which suggest consumer weakness. This is because those weaknesses should not be allowed to undermine the notion of individual autonomy. The peculiarities of consumer behavioural traits are therefore excluded from legal discourse by limitation of the extent to which the conceptual consumer is allowed to depart from the ideal of a self-reliant actor. In light of this, it is submitted that different approaches to the conception of the consumer may reflect different normative influences guiding the development and application of law.

Framework for analysis: approaches to the conception of the consumer

Addressing the issues highlighted above requires more than a mere description of the interests and traits that the legal conceptual consumer is considered to have in any given context. Rather, it is important to consider how and why a particular conception of the consumer has been produced. This will allow for a richer understanding of consumer protection law and will allow for a more meaningful comparison of the practice of different legal actors in relation to different fairness tests. The following section will set out a framework which distinguishes between two different approaches to constructing a conception of the consumer; the abstract assumptive approach and the behaviourally informed approach. This framework will then be used to analyse how the legal conception of the consumer is constructed, and the effect that this has on the law of consumer protection. In addition, evidence regarding the reasons for adoption of either approach should reveal normative influences affecting the legal system’s understanding of the consumer for the purpose of assessing fairness.

The abstract assumptive approach to conception of the consumer

One approach to constructing the legal conception of the consumer can be described as ‘abstract assumptive’. This relies on abstract assumptions regarding the traits of consumers which provides the information necessary to construct the legal conception. It is these assumptions which then inform legal reasoning. The defining feature of this approach is that the assumptions made are not based on evidence of consumer traits but are instead the product of some other influence. It is possible that the assumptions made are intended to produce a realistic conception of the consumer. However, assumptions may also be influenced by a desire to produce an unrealistic conception and therefore influences other than the traits of actual consumers could be important. In light of this, the range of possible
outcomes that might be produced by the abstract assumptive approach is considerably broad. Nevertheless, so long as the root of the assumptions made is not actual evidence of consumer traits, those assumptions can be described as abstract and therefore the conception of the consumer arrived at will be a product of the abstract assumptive approach.

One abstract assumption frequently made is that people are rational. This has been integral to the development of the economic analysis of law and associated models.42 Consideration of this well-known assumption should help illustrate the nature of the abstract assumptive approach to construction of the legal conception of the consumer.

Rationality

Economic rationality may be defined specifically as ‘choosing the best means to the chooser’s ends’.43 In other words, a rational person would choose the option which satisfies him most from any given set of options. In this way, the rational person maximises his satisfaction or utility.44 This abstract assumption of rationality is a central tenet of a large proportion of economic analysis.45

The basic notion of rationality provides fairly little in terms of understanding behaviour. To say that people tend to make choices based on their preferences says nothing more than that people tend to do what they want to do because they prefer to do it.46 Economists have however built on this basic notion of rationality and have developed theories and models which attempt to describe and predict how people will behave if they are in fact rational. Perhaps the most well-known theory in this respect is the theory of rational choice. It is unnecessary to go into detail about this theory and its multitude of variations; it should suffice to point out the following feature of this and many other economic theories. In order to develop a model with descriptive and predictive power, economists must develop the notion of rationality and they do this by deducing certain assumptions along with it which

begin to provide structure for their analysis of rational behaviour.\textsuperscript{47} For example, it is often assumed that people have consistent preferences.\textsuperscript{48} In other words, it is assumed that people are able to make choices based on a preconceived idea of what they want and that these preferences remain stable over time.\textsuperscript{49} It is also often assumed that preferences are transitive.\textsuperscript{50} This means that if A is preferred to B and B is preferred to C, then A is also preferred to C.\textsuperscript{51} When these assumptions are collated they provide the foundation for models of behaviour which can be used to describe and analyse decision making behaviour in different settings.

It should be noted that the assumption of rationality and its associated assumptions are derived through a process of deduction.\textsuperscript{52} Rational people are assumed to have consistent and stable preferences because such preferences are thought to be essential features of rational behaviour, at least for the purposes of the economist’s endeavour.\textsuperscript{53} It has been suggested that this form of deduction contains an inherent normative quality.\textsuperscript{54} As has been noted, the basic rationality assumption is so broad as to provide very little concrete information. The understanding of what it means to be rational requires information and influence which can only be discovered by reference to other factors and it is submitted that the selection of these other factors must be normative because they cannot follow positively from the virtually content-less rationality maxim. This normative dimension introduces a degree of judgement with regards to how a rational being should behave if they are to maximise their own utility.

\textit{Economic man}

It is the collection of abstract assumptions which stem from, and includes the assumption that people are rational which make up what is sometimes referred to as \textit{homo economicus}

\begin{footnotesize}
\begin{enumerate}
\item A Pacces and L Visscher ‘Methodology of Law and Economics’ in B van Klink and S Taekema (eds) \textit{Law and Method: Interdisciplinary Research into Law} (Mohr Siebeck, 2011) 85
\item G Becker, \textit{The Economic Approach to Human Behaviour} (University of Chicago Press, 1990) 5-14
\item ibid
\item L Savage, \textit{The Foundations of Statistics} (John Wiley and Sons, 1954) 17-19
\item ibid
\item see Leff (n46) 457
\item Becker 1990 (n48) 5-14
\end{enumerate}
\end{footnotesize}
Economic Man is the conceptualisation of a decision maker who is imbued with the characteristics assumed to persist for the purposes of an economic theory or model. It is generally recognised that such a perfectly rational being does not in fact exist, however use of this fictional character is justified by the benefit gained from abstraction. This benefit varies depending on the economist’s objectives, however, broadly the justification regards the simplicity of *homo economicus* to be a useful feature by which economic behaviour can be understood, modelled, and therefore predicted. These predictions can be tested against empirical evidence to establish their accuracy. Economists often suggest that even if people are not necessarily rational to the extent of *homo economicus* or indeed even if they are sometimes irrational, the economic method by which behaviour is reduced and abstracted still provides accurate information regarding how people appear to behave in general. In this sense, it does not matter how people actually behave so long as the result at some level matches that predicted by models of rationality.

**The rational consumer**

*Homo economicus* is then a fictional figure who is conceptualised through a process of abstraction to produce a simplified representative of mankind. It is submitted that the legal conceptual consumer can be constructed in the same way. Abstract assumptions, like the assumption of rationality, can be used to inform the construction of the legal consumer. The personality and traits of the legal conceptual consumer can then be deduced, guided by the assumption of rationality, to produce a useful legal reasoning tool; the rational consumer.

Once conceived, it must be asked whether the rational consumer conception reflects real consumers’ interests and traits. This is a factual question to be determined on the basis of evidence. It must be asked whether the rational consumer was intended to reflect actual consumers. This is important because if it was, any disparity between it and actual consumers should be corrected. If the rational consumer is not designed to be reflective of actual consumers then it must be asked why this is the case. The answer may be that reliable

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56 ibid 221, 223-224
58 Friedman (n57) 159-160; Posner 2011 (n42) 3-4, 20-22
59 Friedman (n57) 152-153
60 ibid 158
61 ibid 158
62 Vriend (n54) 272
evidence does not exist to allow for a more accurate reflection of consumers, but equally rationality may be assumed despite conflicting evidence. This is certainly the case for homo economicus where, as was noted, such unrealistic assumptions are justified on the grounds that they are useful for economic analysis.63 In a legal context, a similar argument could be made so that the unrealistic conceptual consumer may be justified on the grounds that it is useful for the purposes of legal reasoning. The merits of this justification can then be assessed.

It should be noted at this point that the assumption of rationality is simply being used as an example to highlight the way in which the abstract assumptive approach may operate. Different abstract assumptions could also be made, such as that consumers do not read contract terms or that consumers always pay attention to price. These traits might be possessed by many actual consumers, however, unless the recognition of them is motivated and informed by actual evidence, they are assumptions made in the abstract and therefore produce an abstract conception of the consumer.

**Behavioural economics and the behaviourally informed approach**

Behavioural economics is concerned with investigation of actual human behaviour and its interaction with the economic environment. In this respect, it can be seen as a continuation of traditional economic analysis. However, when considered in more detail the field is characterised by a significant shift in methodological approach which often produces a rather different perspective than previous approaches to economic analysis have provided.

The origin of behavioural economics lies in criticism of the assumption of economic rationality. In 1957 Herbert Simon referred to ‘bounded rationality’ when reflecting on peoples’ limited ability to make rational decisions.64 This notion was later developed when researchers began to apply psychological insights to test economic assumptions.65 In a number of seminal articles, Tversky and Kahneman showed through empirical investigation, that individuals often systematically violate the rationality assumption.66 These experimental

63 see n58
64 H Simon, Models of Man: Social and Rational (Wiley, 1957)
65 C Camerer, G Loewenstein, and M Rabin (ed), Advances in Behavioral Economics (Russell Sage Foundation, 2003) 6
66 see for example D Kahneman and A Tversky 'Prospect Theory: Analysis of Decision Under Risk' (1979) 47(2) Econometrica 263; A Tversky and D Kahneman 'Rational Choice and the Framing of Decisions' (1986) 59(4) Journal of Business S251
findings challenged the rationality assumption on its own terms; that is its ability to describe and predict economic behaviour. It is this inductive methodological approach which now characterises behavioural economics. The field seeks to derive understanding from empirical evidence and experimentation. This has demonstrated that deductive models resting on assumptions of rationality often fail to describe actual behaviour, and therefore, that the methodology underpinning those models is limited. In contrast, behavioural economics claims to be able to produce a more accurate, and therefore potentially more useful, description of decision making behaviour.

The challenge behavioural economics has posed to reliance on the rationality assumption has important connotations for the abstract assumptive approach to the conception of the consumer. Behavioural economics suggests that reliance on assumptions about decision making behaviour can be risky if accuracy is intended. The result of the abstract assumptive approach might then be a conception of the consumer who behaves quite differently than actual consumers. Behavioural economics offers an alternative method by which the legal conception of the consumer can be understood. This does not rely on abstract assumptions but instead employs an experimental and empirical approach to allow for a more accurate understating of actual consumer behaviour. The following section will consider such an approach.

Evidence of the complexity and context dependency of behaviour: the bounds of rationality

An important aspect of behavioural economists’ challenge to reliance on assumptions regarding behaviour, is that actual behaviour is complex and context dependent. This makes it difficult to accurately predict how individuals will behave without empirical study. Therefore, an approach based on induction should provide a better understanding of behaviour when compared with one based on deduction. The following section will consider some of the findings of behavioural economics used to substantiate this claim. The aim is not to provide a comprehensive examination of the field as a whole, but rather to offer a range of examples demonstrating the type of evidence relied on to justify the value of a behaviourally informed approach to economic analysis.

**Bounded rationality**

Bounded rationality concerns the ability of individuals to process information and make choices. Studies focusing on aspects of bounded rationality have revealed a number of heuristics and biases which interact with the choice environment, often causing actual behaviour to differ from that predicted by assumptions of rationality. Reliance on these heuristics and biases may be productive, saving time and energy which can be used in other ways. However, despite their usefulness, such behavioural phenomena can lead to detrimental outcomes for individuals in certain settings. This is particularly true where behavioural traits are vulnerable to manipulation allowing for the exploitation of decision making behaviour.

*i. Availability (salience)*

Availability refers to individuals recalling to memory events experienced to aid decision making. This may relate to the probability of some state being true or false, or of the likelihood of some event occurring in the future. The more salient the memory of an event the more likely it is that the probability of that event occurring will be assessed as high. For example, Tversky and Kahneman have shown that if read a list of names containing nineteen famous women and twenty non-famous men, individuals are more likely to be able to recall the famous names than the non-famous, and subsequently are more likely to assess the list as containing more women than men. This is explained as a failure of the availability heuristic in the sense that the salience of the famous names distorts the assessment of the number of men compared to woman because the famous woman can be more easily recalled. This shows that the availability heuristic can lead to mistakes in assessing factors that impact decision making.

*ii. Anchoring*

Anchoring refers to the process by which people make decisions relative to a reference point

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68 A Tversky and D Kahneman ‘Judgment under Uncertainty: Heuristics and Biases’ (1974) 185 Science 1124, 1124
70 Tversky and Kahneman 1974 (n68) 1127; A Tversky and D Kahneman ‘Availability: Heuristic for Judging Frequency and Probability’ (1973) 5(2) Cognitive Psychology 207
71 Ibid 207
72 Ibid 221-222
or ‘anchor’.\textsuperscript{73} In one study subjects were asked to guess how many African countries are in the United Nations.\textsuperscript{74} Before guessing, subjects were given numbers generated by the spin of a wheel. These random numbers had a significant effect on the subjects’ estimates. For example, subjects given the number sixty-five guessed on average forty-five countries, whereas subjects given the number ten guessed twenty-five countries on average.\textsuperscript{75} Further investigation has shown that this behavioural trait may also affect awards of compensation.\textsuperscript{76} It seems that the more compensation a claimant asks for, at least in an experimental setting, the more they are likely to get because the initial claim acts as an anchor forming a reference point for the assessment of damages.\textsuperscript{77}

Anchoring seemingly violates the rationality assumption because the decision maker’s choice is being influenced by an external piece of information which has no bearing on the decision at hand. Some decisions may then be susceptible to manipulation through the exposure of the decision maker to arbitrary information designed to cause them to decide one way or another. Recent studies have highlighted this with regards to minimum payment requirements for credit card debt.\textsuperscript{78} The inclusion of a minimum payment requirement can act as an anchor which significantly affects how much of the debt is paid each month. Altering the minimum payment can have costly implications for consumers with regards to the accrual of interest and debt levels.\textsuperscript{79}

\textit{iii. Status-quo bias}

Status-quo bias causes some people to stick with the status-quo when presented with certain choices.\textsuperscript{80} This means that the default option in a given choice set could be of significant

\textsuperscript{73} Tversky and Kahneman 1974 (n68) 1128; D Kahneman ‘Reference Points, Anchors, Norms, and Mixed Feelings’ (1992) 51(2) Organizational Behavior and Human Decision Processes 296
\textsuperscript{74} Tversky and Kahneman 1974 (n68) 1128
\textsuperscript{75} ibid 1128
\textsuperscript{76} G Chapman and B Bornstein ‘The More You Ask for, the More You Get’ (1996) 10 Applied Cognitive Psychology 519
\textsuperscript{77} ibid; for discussion see C Sunstein ‘Behavioural Law and Economics: A Progress Report’ (1999) 1 American Law and Economics Review 115, 141-142
\textsuperscript{79} ibid
importance.\textsuperscript{81} This behaviour has been observed in a range of different contexts\textsuperscript{82} but has been perhaps most acute with regard to organ donation registration.\textsuperscript{83} A study conducted in 2003 showed that countries with an opt-in donor list system had significantly less registrations than countries where the default rule was to be automatically registered (opt-out system).\textsuperscript{84} At the time of the study, the UK which had an opt-in system saw around 17\% of people opt-in whereas Belgium, which had an opt-out system, saw only 2\% opt-out.\textsuperscript{85}

These findings are significant because they show that for some choices, individuals may not act rationally in the sense of choosing the best means to their ends, but may seek not to choose; that is, they may avoid choosing by sticking with the status quo. This renders the default option an important policy tool. It would also seem to follow from this that individuals do not always have clear and stable preferences, as is sometimes assumed to follow the assumption of rationality. If they did, it might be expected that the default option would make little difference where the preferred option could easily be selected.

\textit{iv. Optimism bias}

Another bias commonly observed is the optimism bias.\textsuperscript{86} This refers to the potential for people to assess favourable future events as more likely than is statistically probable, and is measured by comparing a person’s expectations about future events and either the actual events that occur or the probability of future events occurring.\textsuperscript{87} A bias for optimism has been observed in up to 80\% of people in some contexts.\textsuperscript{88}

The optimism bias can have both positive and negative effects.\textsuperscript{89} For example, being optimistic may reduce the risk of suffering from depression.\textsuperscript{90} It has also been shown that an over-optimistic assessment of performance for a particular task can lead to more effort and
therefore better performance. However, the effects of over-optimism can also have serious consequences when it comes to understanding risks. For example, people tend to underestimate their own level of risk in relation to certain health issues. This over-optimism can affect most sections of the population and does not necessarily depend on age or sex. One study highlighted that even subjects who accurately recognised the health risks of smoking, underestimated their own risk of addiction and therefore were over-optimistic about their long term health risks.

The problems with over-optimism are compounded by the fact that the bias is not necessarily countered by the provision of accurate information. When provided with such information, over-optimistic subjects may disregard it if it suggests a higher risk level than predicted and may only update estimates where the information confirms their bias in the sense that it suggests a lower or similar risk level than estimated. This may limit the effectiveness of information as a policy tool.

v. Loss aversion
Loss aversion describes how people tend to value gains less than they value avoiding loss; in other words, people would rather not lose something than gain something. This has been illustrated by Tversky and Kahneman in experiments designed to test the economic assumption of invariance which suggests that a preference for one thing over another should be independent of their descriptions. The following is an example adapted from Kahneman and Tversky’s work.

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92 Weinstein 1989 (n89) 1232
94 Weinstein 1987 (n93)
95 Slovic (n93)
97 ibid; for discussion see C Sunstein ‘The Storrs Lectures: Behavioural Economics and Paternalism’ (2013) 122 Yale L.J 1826, 1848-1849
98 Kahneman and Tversky 1979 (n66) 273; Tversky and Kahneman 1986 (n66) s258-s259
99 This is because where a decision maker is economically rational they should opt to maximise their utility; the way in which an end is described shouldn’t affect the utility to be derived from that end, therefore the description should be immaterial see Kahneman and Tversky 1979 (n66)
100 Kahneman and Tversky 1979 (n66) 273
Subjects were asked the following questions:

1) You have been given £1,000. You are now asked to choose between

   A: a 50% chance of gaining £1,000 or B: a guaranteed £500 gain

   (16% chose A and 84% chose B.)

2) You have been given £2,000. You are now asked to choose between

   C: a 50% chance of losing £1,000 or D: a guaranteed loss of £500

   (69% chose C and 31% chose D)

The fact that the majority of responders chose B over A and then C over D evinces the fact that invariance doesn’t necessarily predict choice behaviour. In the example given above A and C both equate to a 50% chance of ending with £2,000 and a 50% chance of ending with £1,000. B and D both equate to a guaranteed £1500. Since the majority of subjects preferred B in question 1 invariance would predict that they would prefer D in question 2 but this is not reflected in the results. Loss aversion explains why in the example given, preferences seem to change from risk averse behaviour in question 1 (preferring not to take a gamble on gaining an extra £500) to risk seeking behaviour in question 2 (choosing to take the risk of losing £1000 over the certain loss of £500).101 Because people tend to value not losing more than gaining they are willing to take a riskier choice which has the potential to avoid the loss. This pattern is observed in repeated problems and leads Tversky and Kahneman to suggest that people will generally be risk seeking towards avoiding loss and risk averse toward securing gains.102

vi. Framing effects and context dependence
Following from this observation another interesting behavioural peculiarity can be observed. When making some choices, people do not consider the outcome in terms of overall wealth, but rather base their preference on some other reference point.103 Tversky and Kahneman suggest that this will often be current wealth but point out that this will not always be the

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101 ibid 273
102 ibid 285-286
103 Tversky and Kahneman 1986 (n66) s258-s259
In the example above, the reference point for question 1 appears to be £1000 (current wealth when the choice is made) whereas the reference point in question 2 appears to be £2000 (current wealth when the choice is made). The reference point is important because it will be the point from which a choice is coded as either a gain or a loss. Manipulation of this reference point could affect choice behaviour.

When the importance of the reference point is considered, the role of choice presentation or ‘framing’ becomes clear; the way a decision is framed may alter the decision maker’s preferences and therefore choice. This phenomenon is often described as framing effects. A good example of how framing effects can alter a decision maker’s preferences is offered by McNeil et al and cited by Tversky and Kahneman.

Subjects were given the following problem in either the survival frame or in the mortality frame. They were then asked to indicate their preference for surgery or radiation therapy.

**Survival frame:**

Surgery: Of 100 people having surgery 90 live through the postoperative period, 68 are alive at the end of the first year and 34 are alive at the end of five years.

Radiation Therapy: Of 100 people having radiation therapy all live through the treatment, 77 are alive at the end of one year and 22 are alive at the end of five years.

**Mortality frame:**

Surgery: Of 100 people having surgery 10 die during surgery or the postoperative period, 32 die by the end of the first year and 66 die by the end of five years.

Radiation Therapy: Of 100 people having radiation therapy, none die during treatment, 23 die by the end of one year and 78 die by the end of five years.

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104 Kahneman and Tversky 1979 (n66) 274
105 Ibid; see also C Sunstein ‘Behavioural Analysis of Law’ (1997) 64(4) Uni.Chi.L.Rev 1175, 1180
106 Tversky and Kahneman 1986 (n66)
108 Tversky and Kahneman 1986 (n66) s254
109 McNeil et al (n107) 1259
When the problem was framed in terms of survival 18% of respondents favoured radiation therapy but when the problem was framed in terms of mortality 44% of respondents favoured radiation therapy. This problem is much more complex than a simple gamble and cannot be fully explained in terms of loss aversion. As Tversky and Kahneman note framing effects are not just a matter of presentation, they are also affected by norms, habits and expectancies. In this case for example, a fear of surgery or a general social perception regarding radiation therapy might affect the decision. Nonetheless, the results show how different frames can have a marked impact on preferences since in the survival/mortality example the material information provided in each frame is the same. The only difference between them is the way the data is described, yet this has a significant effect on the preferred option. Perhaps worryingly, this pattern was observed among experienced physicians as well statistically sophisticated business students and clinic patients.

Evidence demonstrating framing effects highlights the importance of context for choice. The traditional understanding of rationality suggests that when making choices individuals assess each option and select the one offering most utility. When given a set of options, the ranking of two preferences (A and B) should not be affected by the introduction of a new option (C); this is known as context-independence. However, evidence regarding framing effects suggests that decisions may often be context dependent to the extent that the same set of options may be assessed differently when they are presented in different frames. This means that the introduction of new options can affect decision makers’ valuations of existing options, despite the fact that they have no bearing on the utility to be derived from the preferred choice. For example, positioning an option between two extremes can cause it to be assessed more favourably than it would be if it were not the middle option.

Bounded willpower

Bounded willpower refers to the fact that people do not always have complete self-control and cannot always make optimal choices now to bring about some desired utility in the future.}

110 ibid
111 Tversky and Kahneman 1986 (n66) s257
112 ibid s255
115 Kelman et al (n113) 287- 288
116 ibid
future.\textsuperscript{117} A clear example of bounded willpower is addiction which often involves a long-term preference not to be addicted but a continuous struggle to resist making choices which would prevent that goal from being achieved.\textsuperscript{118}

Thaler has designed a simple model to help elucidate this feature of decision making behaviour.\textsuperscript{119} He identifies two selves; the planner and the doer.\textsuperscript{120} The planner is the part of the self in charge of making decisions about utility and preference over the lifetime of the decision maker but is not in charge of immediate consumption choices.\textsuperscript{121} The doer is in charge of immediate consumption choices and is generally concerned with immediate satisfaction.\textsuperscript{122} These two selves may conflict since the doer may want to choose based on immediate gratification, whereas the planner may prefer to accept less now for the promise of future gain. The relationship between the planner and doer is complicated by the presence of visceral factors such as cravings, emotions, pain, or hunger.\textsuperscript{123} These states have the ability to influence choice behaviour in ways which conflict with the decision maker’s perception of self-interest.\textsuperscript{124} It is possible then to perceive of the decision maker as torn between these two selves. One result of this battle is the prevalence of pre-commitment devices which bind the doer to certain courses of action allowing the planner to ensure future satisfaction.\textsuperscript{125}

Closely related to the notion of bounded willpower is present bias and hyperbolic discounting.\textsuperscript{126} Present bias refers to the fact that people often attach surplus value to things that can be enjoyed immediately.\textsuperscript{127} A choice between 1 now and 2 tomorrow might reveal a preference for 1. A choice of 1 in a year and 2 in a year and a day might reveal a preference

\begin{thebibliography}{99}
\bibitem{120} Thaler and Shefrin 1981 (n119) 394-395
\bibitem{121} ibid
\bibitem{122} ibid
\bibitem{123} Loewenstein 1996 (n119)
\bibitem{124} ibid 272-273
\bibitem{125} Thaler 1980 (n119) 54-56
\bibitem{127} R Thaler ‘Some Empirical Evidence on Dynamic Inconsistency’ (1981) 8 Economics Letters 201, 202
\end{thebibliography}
for 2. This is because when 1 is available now it has surplus value which isn’t present when considering the choice in the future. This is merely an illustrative example, however the phenomenon has been well documented and is described as a form of hyperbolic discounting.\textsuperscript{128} The effect of such discounting is a preference for the immediate gain despite a willingness to delay satisfaction for the same choice when assessed some time prior to the result.\textsuperscript{129} Decision makers then fail to behave according to their own predictions regarding future behaviour; when the future choice presents itself the preference for delaying satisfaction is reversed and the smaller, more immediate gain is opted for.\textsuperscript{130} This analysis compliments the planner/doer model and provides an alternative understanding of behaviour when compared with traditional economic modelling which often relies on an exponential discounting rate.\textsuperscript{131}

The concept of bounded willpower and the related phenomenon of present bias and hyperbolic discounting have a number of important implications for the assessment of decision making behaviour. In particular, these phenomena reveal that decision-making behaviour can be complex and that preferences may not be consistent over time but may conflict with each other resulting in behaviour which might appear to be irrational if assessed in light of the assumptions of traditional economic analysis.

**Bounded self-interest**

Bounded self-interest refers to the fact that decision makers sometimes appear to be influenced by concern for others and therefore do not always exploit opportunities to maximise their own self-interest.\textsuperscript{132} Rabin has posited three propositions in this regard:

(a) People are willing to sacrifice their own material well-being to help those who are being kind

(b) People are willing to sacrifice their own material well-being to punish those who are being unkind


\textsuperscript{129} ibid

\textsuperscript{130} K Kirby and R Herrnstein ‘Preference Reversals due to Myopic Discounting of Delayed Reward’ (1995) 6(2) Psychological Science 83, 83-84

\textsuperscript{131} see for example G Becker, M. Grossman, and K Murphy ‘An Empirical Analysis of Cigarette Addiction’ (1994) 84 American Economic Review 396

\textsuperscript{132} Jolls et al 1998 (n117) 1479
(c) Both (a) and (b) have a greater effect on behaviour as the material cost of sacrificing becomes smaller.\textsuperscript{133}

Evidence supporting the notion of bounded self-interest is derived from the results of game experiments in which participants make transactions within controlled parameters (the game). Predictions regarding participant behaviour can then be tested against observation of behavioural patterns in different settings.\textsuperscript{134} Such experiments have provided support for Rabin’s model, however they also suggest perceptions of fairness differ depending on the type of game being played,\textsuperscript{135} with factors such as the original allocation of entitlements/rights, the information available, and the level of complexity and competition being highlighted as relevant to outcomes.\textsuperscript{136} In addition, providing actors with anonymity has been shown to reduce the effect of fairness on choice behaviour which suggests that in some cases it may be the appearance of fairness as opposed to an actual desire to be fair which matters.\textsuperscript{137}

These observations suggest that whilst bounded self-interest is an observable phenomenon, the exact nature of that behavioural trait will be difficult to determine in any given context without first hand empirical observation.\textsuperscript{138} This conclusion is supported by findings such as those of Roth et al who investigated the behaviour of actors from different countries in identical game situations.\textsuperscript{139} They found that although these actors behaved in similar ways, their perceptions of fairness differed leading to different outcomes.\textsuperscript{140}

\textsuperscript{134} ibid; V Prasnikar and A Roth ‘Considerations of Fairness and Strategy: Experimental Data from Sequential Games’ (1992) 107(3) The Quarterly Journal of Economics 865; R Slonim and A Roth ‘Learning in High Stakes Ultimatum Games: An Experiment in the Slovak Republic’ (1998) 66(3) Econometrica 569
\textsuperscript{135} Prasnikar and Roth (n134) 886-887; A Schotter, A Weiss and I Zapater ‘Fairness and Survival in Ultimatum and Dictatorship Games’ (1996) 31 Journal of Economic Behaviour and Organization 37, 51-52
\textsuperscript{139} Roth et al (n136)
\textsuperscript{140} ibid 1092
Heterogeneity

The findings of behavioural economics reveal a number of interesting patterns of behaviour, many of which are systematic and predictable rather than random. However, the findings of behavioural studies also reveal differences in the behaviour of those studied. These differences can be seen in the fact that many behavioural studies produce evidence of individuals who do not exhibit the specific behavioural trait being studied. These unaffected respondents often make up a significant minority of subjects in the behavioural studies discussed and, in this regard, it is possible to observe that in addition to the many and varied behavioural patterns that have been documented, a pattern of heterogeneity within samples can also be identified. The recognition of this fact renders the understanding of behaviour particularly difficult.

There is a growing body of psychological research which focuses on examining and explaining differences in behaviour. For example, Kahneman has produced a relatively simple account of two different cognitive ‘systems’ which operate within individuals.\textsuperscript{141} System 1 is the intuitive or automatic thought process of a person.\textsuperscript{142} System 2 on the other hand is the rational thinking part of a person.\textsuperscript{143} With regards to Thaler’s model of bounded willpower, system 1 is akin to the ‘doer’ and system 2 is akin to the ‘planner’.\textsuperscript{144} This framework illustrates how the same choice could be processed in different ways depending on which system is triggered, since a choice processed by system 1 might be perceived quite differently than a choice processed by system 2. An individual’s decision-making behaviour may then vary across contexts and within contexts, and may be susceptible to manipulation if one system rather than another can be targeted.

The system 1 and 2 framework can also be used to highlight the fact that some people may be more likely to rely on one system more than they do the other. This creates the potential for different individuals to exhibit quite different behavioural patterns. A concept which is used to describe this is ‘need for cognition’.\textsuperscript{145} High need for cognition refers to individuals

\begin{footnotesize}
\begin{enumerate}
\item D Kahneman, \textit{Thinking Fast and Slow} (Penguin, 2011) 377-385; Sunstein 2013 (n97) 1838
\item ibid
\item ibid
\item ibid
\item Thaler 1980 (n119) 54-56
\end{enumerate}
\end{footnotesize}
disposed towards engaging in and enjoying effortful analytic activity.\textsuperscript{146} Low need for cognition on the other hand refers to those who do not. Evidence suggests that differences in need for cognition can lead to differences in the computation of information and therefore in behaviour.\textsuperscript{147} For example Haugtvedt, Petty and Cacioppo have shown that need for cognition can affect individuals’ responses to advertising, with high need for cognition individuals relying more on product attribute evaluation when developing attitudes than low need for cognition individuals.\textsuperscript{148}

In addition, studies have produced evidence suggesting that behaviour may also depend on factors such as culture,\textsuperscript{149} intelligence,\textsuperscript{150} demographics,\textsuperscript{151} and personality traits.\textsuperscript{152} When the wealth of these various findings are considered it becomes clear that, whilst behavioural patterns can be observed in some contexts, behaviour at an individual level is complex and context dependant. Equally, it must be noted that the findings of behavioural studies are rarely conclusive and that differences between individuals’ behaviour have been consistently observed. These differences may be quite important to any understanding of actual behaviour and should not therefore be overlooked.

Complexity, context dependence and the empirical imperative

The findings of behavioural economics support the conclusion that human behaviour is both complex and context dependent. Decision making behaviour has been shown to depend on perception of the choice environment and mental processes used to understand that environment as perceived. Therefore, rather than people being rational in the narrow economic sense, their decision-making behaviour is variable with different people behaving differently in different situations. Sometimes the results of such behaviour benefit the decision maker, but there is a risk that decision makers may suffer detriment caused by cognitive errors or biases. It is in light of this fact that behavioural economics has produced a

\textsuperscript{146} Cacioppo and Petty (n145) 806
\textsuperscript{147} ibid; S Smith and I Levin 'Need for Cognition and Choice Framing Effects' (1996) 9(4) Journal of Behavioral Decision Making 283
\textsuperscript{148} C Haugtvedt, R Petty and J Cacioppo 'Need for Cognition and Advertising: Understanding the Role of Personality Variables in Consumer Behavior' (1992) 1(3) Journal of Consumer Psychology 239
\textsuperscript{149} J Kacen and J Anne Lee 'The Influence of Culture on Consumer Impulsive Buying Behavior' (2002) 12(2) Journal of Consumer Psychology 163
\textsuperscript{151} M Lauriola and I Levin ‘Personality Traits and Risky Decision-Making in a Controlled Experimental Task: An Exploratory Study’ (2001) 31 Personality and Individual Differences 215
\textsuperscript{152} ibid 215
significant challenge to theories based on assumptions of rationality. Those theories, it is claimed, often fail to accurately describe and predict important aspects of economic behaviour and therefore the consequences flowing from that.\textsuperscript{153}

In contrast, behavioural economics is based on inductive rather than deductive reasoning. It relies on empirical observation and experimentation which allows behavioural economists to claim to be basing their conclusions on more accurate information and therefore to be producing a more realistic understanding of decision making behaviour.\textsuperscript{154} The corollary of this claim is that reliance on abstract assumptions is risky, since those assumptions are unlikely to be accurate given the evidence revealing the complexity and context dependency of decision making behaviour. Therefore, behavioural economics requires empirical evidence as a precursor to claims of accuracy and in this sense is subject to what may be described as an empirical imperative; failure to base conclusions on empirical evidence would expose those conclusions to the same type of criticism that has been levelled against reliance on the rationality assumption.

The limitations of behavioural economics

Before going further, it should be noted that behavioural economics has not escaped criticism. It has been suggested that, unlike theories based on abstract assumption, behavioural economics is unable to produce a unifying theory capable of predicting economic behaviour.\textsuperscript{155} As has been discussed, many economists relied on the simplified notion of \textit{homo economicus}, not because they believed that character to be an accurate representation of man, but because they derived value from analysis of his simple and orderly traits when examining a wide variety of situations.\textsuperscript{156} Behavioural economics can also be used to study a wide variety of situations, but satisfaction of the empirical imperative is often costly. In this regard, the field has been criticised for being incomplete in the sense that there are wide gaps in the knowledge and understanding of human behaviour, because there are areas of behaviour which have not yet been empirically assessed.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{153} Sunstein 1997 (n105) 1175
\item \textsuperscript{154} Lunn 2014 (n4) 20; Lunn 2012 (n67) 426-427; M Rabin ‘A Perspective on Psychology and Economics’ (2002) 46 European Economic Review 657, 658
\item \textsuperscript{156} see n57-63
\item \textsuperscript{157} Kelman (n155) 1586
\end{itemize}
A closely related issue is the generalisability of results. For example, Mitchell has suggested that in reality, whether a given individual will deviate from the rationality assumption is dependent on a range of personal and situational factors. In a similar vein, McKenzie emphasises that behavioural findings derived from laboratory experiments, cannot be generalised because real world decisions will be affected by factors such as feedback loops and learning. The root of these criticisms is that just because behaviour can be observed in a few specific settings, it should not be assumed that the same results would be observed in situations where a wide range of different factors might affect behaviour.

Some early responses to these criticisms rejected the point that behavioural economics cannot make predictions. Behavioural economics can predict the prevalence of certain behavioural traits in certain settings. Prospect theory serves as an example of this. However, the broader argument that all of the many and varied findings of behavioural economics cannot be unified by a general theory of behaviour have not been fully countered. A common response has been to suggest that behavioural economics is in its infancy and as such will produce a more complete picture of behaviour as time passes. However, that response seems unsatisfactory. The main thrust of behavioural findings suggests that behaviour is complex and context dependent, therefore fresh empirical evidence will always be needed before any new context is fully understood. Indeed, studies continue to provide evidence of the complexity of actual decision-making behaviour across contexts, without any signs of a unifying theory in development. In this regard, the limitations of generalising findings must be recognised. It cannot be assumed that findings based on observation of one group of subjects in one context, will be reflective of different subjects in different (even if similar) contexts. A more satisfactory response to these criticisms seems to be to accept that behavioural economics does not lend itself to the same type of unifying theory as does the

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161 Kahneman and Tversky 1979 (n66)
162 Sunstein et al (n160) 1608; R Spiegler, Bounded Rationality and Industrial Organization (OUP, 2011) 200
rationality assumption. This feature of behavioural economics seems to be that broad assumptions are often unable to account for the varied and complex reality of human behaviour. Instead, behavioural economics relies heavily on empirical evidence to support its claim to accuracy. Therefore, empirical observations are required before assumptions about behaviour can be declared accurate.

Despite these limitations, behavioural economics does reveal patterns of behaviour which can be observed and documented. The preceding section detailed a number of these patterns. Although such patterns should not be extrapolated to areas of decision making which have not been the subject of empirical investigation, they can provide a framework to help guide an understanding of behaviour. Particular behavioural traits can then be tested for where previous findings suggest that they may be likely to occur. Observation of patterns in one context can then be used to identify certain ‘flags’ which might highlight similar patterns in other settings. In this way, the findings of one study can be related to others, and the knowledge and understanding of behaviour should grow, guided by the findings of behavioural economics and its analysis.

The behaviourally informed approach to conception of the consumer

The preceding discussion has demonstrated some of the ways behavioural economics has challenged traditional economic assumptions regarding rationality. This casts doubt on how useful assumptions of rationality are when seeking to accurately understand behaviour. It is submitted that this is important when considering how the legal system constructs its understanding of consumer behaviour. The methodological imperatives of behavioural economics suggest that an accurate understanding of consumer behavioural traits may require consideration of empirical evidence revealing the important behavioural nuances that arise in different settings. An approach based on abstract assumptions may be inadequate in this respect if the intention is for the legal conception of the consumer to reflect actual consumer interests and traits. An alternative approach can be derived from the methodology of behavioural economics. This may be described as the ‘behaviourally informed’ approach and is premised on acceptance of the fact that consumer behaviour is best understood when examined empirically. This reveals important behavioural nuances which should inform the

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163 see for example D Laibson and R Zeckhauser ‘Amos Tversky and the Ascent of Behavioral Economics’ (1998) 16 Journal of Risk and Uncertainty 7, 26; Sunstein 1999 (n77) 147-149
legal system’s conception of the consumer, to the extent that an accurate reflection of consumer interests and traits is desirable.

In light of the findings of behavioural economics set out above, it might be expected that a behaviourally informed approach to the conception of the consumer would produce a rather complex picture. This would reflect the complexity of actual decision-making behaviour, including behavioural heterogeneity. In this regard, the behaviourally informed approach to conception would require interpretation of relevant evidence to allow for decisions regarding the conceptual consumer’s traits to be reached. The issue here would be how best to interpret available evidence when developing the laws understanding of ‘typical’ or ‘normal’ consumer behaviour. This may be a problem where conflicting evidence exists or where relevant evidence is lacking.

However, a behaviourally informed approach would not necessarily need to be based directly on first hand empirical accounts of behaviour, although in accordance with the underlying premise of the approach such evidence would be desirable. This is because behavioural economics reveals and describes patterns of behaviour which provide a framework for developing a more realistic understanding of behaviour when compared with an abstract approach. In this regard, a behaviourally informed approach would recognise that behaviour is best understood through empirical investigation, but it does not need to be fully formed in that respect. A behaviourally informed conception of the consumer could be based on recognition of the potential for consumers to exhibit complex and context dependent behavioural traits. Armed with this knowledge, legal actors would respond by seeking relevant evidence to allow the legal system to reflect behavioural reality to the extent possible. If it is concluded that there is not sufficient evidence to allow for a full understanding of consumer behaviour, this would be an example of the behaviourally informed approach in action, in the sense that it would reflect a recognition of the need for evidence to inform the legal conception of the consumer.

The abstract assumptive/behaviourally informed framework

The abstract assumptive and the behaviourally informed approaches are theoretically distinct. One is based on a deductive form of reasoning, whereby information needed to understand consumer behaviour is derived from abstract assumptions, and the other is based on an inductive form of reasoning, whereby information regarding consumer behaviour is
derived from its empirical study. In this regard, the approaches can be thought of as occupying opposite ends of a spectrum in which different conceptions of the consumer can be considered as either more or less abstract/behaviourally informed.

In reality, it may be difficult to determine where on the spectrum a particular approach to conception should fall. Abstract assumptions may closely resemble the findings of behavioural economics, and the poor practice of behavioural economics may produce an inaccurate conception indistinguishable from one constructed on the basis of abstract assumption. The difficulty of distinguishing different approaches in this regard may be compounded by a lack of detailed explanation regarding the approach adopted and the influences allowed to inform it.

It is submitted however, that the value of the analytical framework set out above is not in precise categorisation as such, but rather analysis of the approach adopted. In this sense, the framework is designed to allow for a discussion of the extent to which the approach to conception is more or less behaviourally informed. In addition, the intention behind the approach can also be considered by asking to what extent the relevant legal actor intended for the conception to reflect reality. An assessment can then be made of the relationship between the intention underlying the approach adopted and the results produced in practice. This means that in situations where the approach to conception is unclear, the framework set out should provide structure for its assessment by focusing attention on the nature of the influences informing the conception and also the intention underlying it, even if firm conclusions regarding its place on the spectrum cannot be reached without qualification. This analysis in itself will provide useful evidence aiding the understanding of this topic.

Despite the potential difficulties of determining the precise nature of any given approach to the conception of the consumer, the fundamental difference between the approaches is nonetheless important. The different approaches to conception concern the way in which the legal system translates actual consumer interests into legal reasoning, and they do this in fundamentally different ways. The legal outcomes based on the conception adopted will bind actual consumers, and in this regard, it is important to understand how and why the legal system chooses to develop its conception of the consumer, and also what effect this has on the treatment of actual consumer interests. Analysis of the different approaches to
conception should provide a framework within which to generate this understanding across different aspects of consumer protection law.
Part 2: Regulators, behavioural market failure, and the legal conception of the consumer

Introduction

Part 1 has introduced the notion of the legal conceptual consumer and has set out a theoretical framework designed to allow for analysis of it. In this regard, an abstract assumptive approach has been distinguished from a behaviourally informed approach. Part 3 will use this framework to assess the approach adopted by English courts when applying three fairness tests. Before engaging in that examination, this part of the thesis will seek to demonstrate the importance of a behaviourally informed approach for regulators working in the field of consumer protection. This will provide some important context for the analysis which will follow and will contribute to the conclusions drawn towards the end of this work.

Definition of regulator

For the purposes of this analysis a regulator is a body with delegated executive authority to intervene in a specified area of economic activity to attain some specified aim or goal (usually enshrined in legislation). These regulators are governed by a legislative framework, setting out the regulators purpose and powers. For example, section 25 of the Enterprise and Regulatory Reform Act 2013 establishes the Competition and Markets Authority (CMA) and section 25(4) states that the CMA “must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers”. The CMA has been granted various powers to assist it in satisfying this function such as the power to enforce consumer protection legislation,\(^1\) powers of investigation,\(^2\) and the power to make recommendations regarding proposals for legislation.\(^3\)

Role of regulators in consumer protection law

Regulators such as the CMA, are integral to the consumer protection regime. To understand why it is useful to consider what Ogus calls, the ‘system of economic organisation’.\(^4\) Ogus distinguishes between two such systems. One he calls the market system, which leaves individuals to pursue their own welfare subject to basic restraints (private law) which facilitate economic arrangements.\(^5\) Ogus describes the second system as ‘collectivist’. Under

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\(^1\) Enterprise Act 2002 Part 8
\(^2\) see for example Consumer Rights Act 2015 (CRA) sch5
\(^3\) Enterprise Act 2002 s7 as amended by Small Business, Enterprise and Employment Act 2015 s37
\(^4\) A Ogus, Regulation: Legal Form and Economic Theory (Hart, 2004) 1
\(^5\) Ibid
this system the state seeks to interfere with the market system to promote certain policy goals.\(^6\) It is submitted that the law of consumer protection can be seen as occupying a space between these systems. One aspect of the law is concerned with the provision of private law rights facilitating economic exchange. Another aspect is the achievement of certain social goals through enforcement of legally imposed responsibilities.\(^7\) The limitations of consumer protection enforcement through private law alone have been recognised for many years.\(^8\) This provides justification for reliance on regulators, who are considered to be well placed experts permitted to interfere in markets to ensure collectivist public interest goals are secured.\(^9\) It is in this context that regulators are given powers to enforce consumer protection rules.

The CMA for example, have the power to enforce the prohibition on unfair terms and unfair practices.\(^10\) This means that they engage in the assessment of fairness, and are able to take enforcement action to bring about binding legal outcomes. These powers must be used to satisfy the regulator’s purpose of promoting competition for the benefit of consumers.\(^11\) The use of consumer protection powers in light of that goal, requires the regulator to adopt an understanding of the consumer and their interests for the purpose of assessment. Just as courts must interpret and apply the average consumer conception, so must the regulator charged with identifying potentially unfair practices. The regulator’s understanding of that conception will affect their choices when engaging in regulatory activity.

In addition, as enforcers of consumer protection laws regulators have an important role to play in bringing cases before courts and presenting their understanding of the legal rules, including their understanding of consumer interests, in an attempt to persuade a court that particular legal outcomes should be produced. Indeed, many of the cases considered in Part 3, involve cases brought by the Office of Fair Trading (OFT) as a regulator responsible for protecting consumer interests. In addition, regulators play an important role in shaping the background understanding of what is acceptable within a specific market context. In this

\(^6\) ibid
\(^7\) C Scott ‘Enforcing Consumer Protection Laws’ in G Howells, I Ramsay and T Wilhelmsson (eds), Handbook of research on international consumer law (Elgar, 2011) 538
\(^9\) Ogus (n4) 28
\(^10\) Enterprise Act 2002 Part 8
\(^11\) Enterprise and Regulatory Reform Act 2013 s25
regard regulators publish guidance and policy documents, as well as setting standards expected of suppliers. All of these factors may contribute to consideration of what is fair in the context of consumer protection law.

In light of this, it is submitted that regulators are an important aspect of the law of consumer protection. They are tasked with day-to-day use of relevant legal rules to ensure that consumer protection law is effective at bringing about the desired collectivist goals. In this regard, regulators’ understanding of consumer interests has the potential to affect how the legal rules are interpreted and applied at the level of regulatory enforcement, but also less directly in court. It is therefore important to consider how regulators reach their understanding of consumers and how this relates to the understanding of consumers held by courts.

Regulators and behavioural economics

Many regulators have explicitly acknowledged their reliance on behavioural insights as part of their regulatory role. For example, the Financial Conduct Authority’s (FCA) CEO has stated;

I believe that using insights from behavioural economics, together with more traditional analysis of competition and market failures, can help the FCA assess problems in financial markets better, choose more appropriate remedies and be a more effective regulator as a result.\(^\text{12}\)

This sentiment has been echoed by the OFT,\(^\text{13}\) the CMA,\(^\text{14}\) Ofgem,\(^\text{15}\) Ofcom,\(^\text{16}\) and the European Commission\(^\text{17}\) amongst others. It is submitted that statements such as these


\(^{17}\)R van Bavel, B Herrmann, G Esposito, and A Proestakis, Applying behavioural sciences to EU policy-making (Publications Office of the EU, 2013) JRC Scientific and Policy Reports EUR 26033
demonstrate the importance of behavioural economics in what Ramsay has described as a new policy paradigm.\textsuperscript{18} This recognises the increasing reliance of regulators on a behaviourally informed approach to regulation, which signals a shift away from some of the abstract reasoning underlying more traditional forms of economic analysis.\textsuperscript{19} This is more than a simple policy choice, but is rather a necessary and inevitable consequence of the development of behavioural economics as a body of research. This is important for the present study because an increasing reliance on behavioural economics will affect regulators’ understanding of consumer behaviour and interests, which in turn, will affect their understanding of the consumer for the purpose of legal analysis.

Regulators’ behaviourally informed approach, the effective competition paradigm and behavioural market failure

The suggestion that a behaviourally informed approach to regulation is inevitable requires further explanation. It was suggested above that a regulator’s role within consumer protection can be understood as part of a collectivist system of economic organisation, in which the regulator is charged with securing public policy goals. To do this the regulator must understand that policy goal and within the context of consumer protection, they must understand the consumer and their interests.

It is submitted that UK regulators currently operate within an ‘effective competition paradigm’.\textsuperscript{20} This means that competition between suppliers for the custom of buyers is revered. Traditional economic analysis highlights the benefits of competition; suppliers will compete with each other to attract buyers who will in turn select the best deal from amongst offers made. Suppliers who consistently give buyers what they want will be successful whereas suppliers who do not will be driven out of the market. In this way buyers get the best deals because they exert demand pressure forcing suppliers to compete to deliver it. This is what the OFT described as the virtuous cycle between consumers and competition.\textsuperscript{21}

When this virtuous cycle operates efficiently, competition can be described as ‘effective’ because it produces desirable outcomes. However, traditional economics also highlights

\textsuperscript{19} P Lunn, \textit{Regulatory Policy and Behavioural Economics} (OECD Publishing, 2014) 18
\textsuperscript{20} see for example FCA, \textit{Promoting competition} (FCA, 2017) <https://www.fca.org.uk/about/promoting-competition> accessed 10 July 2017; Department for Business Innovation and Skills, \textit{Government’s response to the Consultation on the Strategic Steer to the Competition and Markets Authority} (2015) BIS/15/659
\textsuperscript{21} OFT 2010 (n13) 9
market failures (‘ineffective competition’) which reduce or eliminate these desirable outcomes, producing detrimental ones instead.\textsuperscript{22} It is usually the role of a regulator responsible for consumer protection to ensure that the benefits of effective competition are maximised whilst potential detriment is minimised. This will involve consideration of market outcomes and assessment of how those outcomes relate to consumer interests. It is at this point that the approach to determining ‘consumer interests’ becomes integral to the wider assessment of the extent to which competition is effective, and indeed if it isn’t, what should be done about it.

\textit{Behavioural market failure}

If the goal of market regulation is the attainment of effective competition and the avoidance of detriment, then regulators must be aware of potential market problems which might hinder their success. Persistent market problems are described and categorised under types of market failure.\textsuperscript{23} Examples include; information asymmetry, the existence of monopoly power, the potential for externalities, and the problem of public goods. A regulator tasked with securing the ‘best’ market outcomes might seek to avoid these problematic features of markets by using their power to intervene. For example, if a market exhibited information asymmetry, a regulator might provide information to all market actors in an attempt to avoid the potential market failure.

Since these examples of market failure are derived from traditional economic analysis they tend to be informed by assumptions regarding economic rationality, which means that the assessment of market outcomes is based largely on the interaction of rational beings.\textsuperscript{24} This limits the extent to which markets are considered to be failing, because the interests of non-rational beings are overlooked. However, analysis of behavioural economics has produced another type of market failure known as behavioural market failure.\textsuperscript{25} This form of market failure recognises that some behavioural traits may disrupt the virtuous cycle of competition because buyers cannot necessarily be relied on to choose the best offers available. Equally, it recognises that sellers may be able to use their knowledge of consumer behaviour to manipulate markets to ensure profitability without having to offer the best deal to

\textsuperscript{22} see for example Ogus (n4) 29-46
\textsuperscript{23} ibid; R Whish and D Bailey, \textit{Competition Law} (7\textsuperscript{th}, OUP, 2012)
\textsuperscript{24} P Lunn ‘Are Consumer Decision-making Phenomena a Fourth Market Failure?’ (2015) 38 JCP 315, 317-319
\textsuperscript{25} OFT 2010 (n13) 10; O Bar-Gill, \textit{Seduction by Contract: Law, Economics, and Psychology in Consumer Markets} (OUP 2012); cf Lunn 2015 (n24)
consumers.\textsuperscript{26} Research into such practices has revealed a number of strategies that suppliers might employ in this respect, including structuring costs to make it difficult for consumers to appreciate the total cost of the product on offer,\textsuperscript{27} increasing complexity to make choosing the best deal more difficult,\textsuperscript{28} taking advantage of over-optimism and myopia by delaying costs and making costs contingent on other factors,\textsuperscript{29} and using add-ons and bundled products to encourage consumers to purchase costly additional extras.\textsuperscript{30} Practices such as these seek to exploit consumer behaviour to encourage consumers to make choices which benefit suppliers regardless of whether this is the best option for the consumer.

In addition, once assumptions of rationality are relaxed, differences in consumer interests and behaviour can be considered more directly. This allows for the importance of behavioural heterogeneity for the operation and structure of markets to be highlighted. Differences in behavioural traits may cause some consumers to be more sophisticated than others.\textsuperscript{31} This means that they are more able to make decisions that satisfy their interests. In contrast, naive consumers may be much less able to extract value from the market and may be more susceptible to exploitation of behavioural traits. Where these differences in ability persist, there is the potential for markets to differentiate between consumers; offering good deals to sophisticated consumers which are subsidised by the exploitation of naive consumers.\textsuperscript{32} A market producing such detrimental outcomes may be described as suffering from behavioural market failure.

The problem with behavioural market failure is that it has the potential to disrupt or eliminate effective competition. As a result, suppliers who should be rewarded for their competitive advantage might not be, and suppliers who should be driven out of the market might be rewarded despite poor performance. The market may then produce detrimental

\textsuperscript{26} J Mehta (ed), \textit{Behavioural Economics in Competition and Consumer Policy} (ESRC Centre for Competition Policy, University of East Anglia, 2013); X Gabaix and D Laibson ‘Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets’ (2006) 121(2) \textit{The Quarterly Journal of Economics} 505; Bar-Gill 2012 (n25)
\textsuperscript{27} Gabaix and Laibson (n26); V Morwitz, E Greenleaf and E Johnson ‘Divide and Prosper: Consumers’ Reactions to Partitioned Prices’ (1998) 35(4) Journal of Marketing Research 453
\textsuperscript{29} M Armstrong and J Vickers ‘Consumer Protection and Contingent Charges’ (2012) 50(2) Journal of Economic Literature 477
\textsuperscript{30} O Bar-Gill ‘Bundling and Consumer Misperception’ (2006) 73(1) U.Chi.L.Rev 33
\textsuperscript{31} Bar-Gill 2012 (n25) 17; Gabaix and Laibson (n26); Armstrong and Vickers (n29)
\textsuperscript{32} ibid
outcomes with consumers paying higher prices than necessary, buying unnecessary products, or choosing products which perform less well than rivals. In this regard, behavioural market failure analysis is similar to traditional market failure analysis. However, the importance of behavioural market failure in this context is that it requires an understanding of consumer behavioural traits before the effectiveness of competition can be understood. A market considered effective when all of its participants are assumed to be rational, may be considered to be failing once it is recognised that some consumers are making poor choices because of supplier exploitation of certain behavioural traits.

If regulators are to ensure effective competition, and therefore satisfy their collectivist public policy goals, it follows that they must recognise and respond to behavioural market failure. This in turn requires the adoption of a behaviourally informed approach to regulation and in particular engagement with empirical investigation of specific markets to identify behavioural issues.\(^{33}\) In this respect, regulators’ adoption of a behaviourally informed approach can be seen as a necessary step towards ensuring an effective regulatory system premised on ‘what works’ in terms of achieving the relevant policy goal. Indeed, this is reflected in the administrative framework within which many regulators operate. For example, provision 3 of the Regulators’ Code requires regulators to base their activities on risk, which according to the code, necessitates the adoption of an evidence-based approach focused on allocating resources to the type of interventions that are most likely to be effective.\(^{34}\) Reliance on abstract assumptions regarding behaviour would fail to meet this requirement given the insights into actual behaviour produce by behavioural studies.

**Regulators’ understanding of the consumer: identification of market problems and choice of response**

**Behavioural economics as a framework for assessment**

Given the need for regulators to adopt a behaviourally informed approach, it is not surprising that there is ample evidence of regulators doing just that.\(^{35}\) This can be seen in regulators’ behaviourally informed frameworks designed to identify patterns of behaviour which suggest

\(^{33}\) OFT 2010 (n13) 38

\(^{34}\) Department for Business Innovation and Skills (Better Regulatory Delivery Office), *Regulators’ Code* (2014) BRDO/14/705 [3.1]

\(^{35}\) for an overview see Lunn 2014 (n19); Erta et al (n12)
potential market failure. These issues can then be further investigated to allow for greater understanding of any problems. In this way regulators can use the frameworks to guide their activities.

Different regulators have adapted different behaviourally informed frameworks in different ways, to suit the needs of their regulatory environment. One example is the OFT’s ‘Access, Assess, Act’ model, premised on the belief that for consumers to fulfil their role in the virtuous cycle of competition, they must be able to; access information about various offers, assess the offers in a well-reasoned way, and act on the information by selecting offers of the most value to the consumer. Where behaviour prevents consumers from meeting these criteria, the model highlights a potential limitation on effective competition which should then be further investigated.

This model was recently adopted by Ofgem in its investigation into the retail energy market. The regulator relied on a number of behavioural traits derived from patterns observed in behavioural experiments, to describe and explain consumer behaviour in that sector. The following table produced by Ofgem, shows how the behavioural framework assisted identification of behavioural market problems:

<table>
<thead>
<tr>
<th>Consumer biases and effects on the decision making process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bias</td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td>Limited consumer capacity</td>
</tr>
<tr>
<td>Status quo bias bias</td>
</tr>
<tr>
<td>Loss aversion</td>
</tr>
<tr>
<td>Time inconsistency</td>
</tr>
</tbody>
</table>

Ofgem 2011

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37 Ofgem (n15)
38 ibid 10 (table 3.1)
The FCA has also set out a behaviourally informed framework for identifying potential market problems. They rely on certain indicators suggesting problems within a market caused by consumer behavioural traits. For example, the FCA take ‘rip-offs’ (uncompetitively high margins) as a sign of consumer mistakes being exploited as part of a supplier’s overall strategy. The FCA suggests that persistent excess profitability, price dispersion unrelated to cost, and high penetration rates for high-margin unessential add-ons, are examples of indicators pointing to the existence of rip-offs. Once such problems are identified they can be further studied, using a behaviourally informed approach premised on accuracy and empiricism. For example, the FCA explain that warning signs such as ‘rip-offs’ may have many plausible explanations and emphasise the importance of understanding their root cause. This is discovered by considering all possible explanations and assessing them in light of the evidence available to discern which are most likely to be correct. The following graphic produced by the FCA illustrates this process:

These behaviourally informed frameworks illustrate how the field of behavioural economics has affected regulators’ assessment of potential market problems. The proof that actual behaviour is often different than that assumed by models of rationality, coupled with the potential effects of non-rational behaviour on the effectiveness of competition, requires regulators to consider the potential for markets to fail as a result of behavioural patterns. To

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39 Erta et al (n12) 29-30
40 ibid 34 (figure 4)
fulfil their role as guardians of effective competition, regulators must respond to such potential market problems and this requires an assessment of markets which is designed to recognise and understand the effect of consumer behavioural traits. As a result of this approach, regulators are presented with the reality of consumer behaviour and its effect on their experiences in the market place.

**Response to assessment**

Having used a behaviourally informed approach to identify and understand market problems a regulator must then choose how and whether to respond. The knowledge gained from a behaviourally informed assessment of the market can be used as part of this decision. In particular, the nature of the problem and its specific features should help the regulator decide if intervention could be effective and what type of intervention would be most likely to succeed. Two broad categories of regulatory measures can be identified. The first category is measures designed to enable consumers to become active participants in the virtuous cycle of competition. The second, is measures designed to protect consumers from the effects of behavioural market failure.

Measures designed to enable consumers seek to change their behaviour to rectify behavioural market problems by encouraging a more effective consumer response. This is sometimes referred to as debiasing.\(^{41}\) The essential feature of such measures is that they seek to address the problems caused by behavioural traits by encouraging consumers to behave differently so that the modified behaviour causes more effective competition. Behaviourally informed provision and manipulation of information, sometimes known as smart disclosure, would normally fall under this category of measure since the object of the measure is to trigger particular behavioural responses.\(^{42}\)

In contrast, the goal of protective measures is to insulate consumers from potential detriment caused by behavioural market failure. These measures are not concerned with the promotion of effective competition as such but are rather failsafe measures limiting the detriment suffered by consumers who fail to promote their self-interest. For example, as part

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\(^{41}\) C Sunstein and C Jolls ‘Debiasing through law’ (2006) 35 JLS 199


of its review of the domestic energy market the CMA recommended the implementation of a price cap for prepayment meter customers.\textsuperscript{43} This followed findings suggesting that the market was failing in a number of respects. Part of the problem was attributable to weak demand pressure which allowed suppliers to benefit from high tariffs charged to those who fail to switch.\textsuperscript{44} In response, the CMA proposed a set of measures designed to engage consumers and a second set, including the price cap, designed to protect consumers who fail to become engaged.\textsuperscript{45} In its final report the CMA explained that any cap should only apply to prepayment customers since they are at the most risk of suffering detriment and because a market-wide default tariff might actually reduce consumer engagement and disrupt competition between suppliers.\textsuperscript{46}

It might be suggested that measures designed to enable consumers would be considered preferable within the effective competition paradigm. Indeed, protective measures such as the CMA’s price cap, can be relatively controversial since they seem to acknowledge a failure of effective competition. However, whether a measure is designed to enable or protect, what can be detected is a recognition of consumer interests informed by appreciation of actual consumer behaviour. This then feeds into the perceived need for, and justification of, the market intervention proposed. The evidence supporting these measures is derived in part from a behaviourally informed assessment of the relevant market, which guides regulators towards responses that they believe will work. As a result of this, the nuances of actual behaviour are reflected in the proposed response. For example, the CMA’s energy measures aim to treat different consumers differently, so that those able to become engaged are encouraged to do so whilst those who may fail to change their behaviour are given specific protection. Regulation of the market has then been guided by an understanding of consumers in behavioural terms to the extent that diverse consumer interests are dealt with in different ways in an attempt to practice the most effective form of regulation.

**Regulators and the legal conception of the consumer**

Regulators’ adoption of a behaviourally informed approach will contribute to their understanding of consumer interests and it is submitted that this will inform regulators’

\textsuperscript{44} ibid [194]
\textsuperscript{45} CMA, *Energy Market Investigation: Notice of Possible Remedies* (2015) [56]-[60], [64]-[71], [91]-[95]
\textsuperscript{46} CMA 2016 (n43) [245]-[252]; CMA, *Energy Market Investigation: Provisional Decision on Remedies* (2016) [138]–[146]
conception of the consumer for purposes associated with legal reasoning. This means that the conception of the consumer constructed and employed by regulators when engaging in forms of legal reasoning, will exhibit complex behavioural traits, which differ depending on the situation to reflect actual consumer behaviour. This will be important whenever regulatory action intersects parts of the legal system, particularly in the context of private law rules concerning aspects of consumer protection.

Evidence of the impact of a behaviourally informed approach

i. Direct enforcement

Perhaps the clearest evidence of regulators employing a behaviourally informed conception of the consumer, should be their direct application and enforcement of relevant consumer measures. Regulators such as the CMA have various powers to enforce consumer protection rules, which often requires them to judge fairness.47 However, where such action is taken without recourse to the courts, there is relatively little evidence regarding the conception of the consumer employed. This is because the supplier has accepted the regulators interpretation of the law and has agreed to modify their practice, making it difficult to properly assess the understanding of consumer behaviour underlying the enforcement action. What can be said about these cases of direct enforcement, is that if regulators are relying on a behaviourally informed conception of the consumer (as suggested above), then that conception is affecting what is considered to be acceptable conduct within the relevant market. The practices of suppliers are then being changed based on regulators’ behaviourally informed understanding of consumer interests.48 Whether the result of this approach would be any different from one based on rational assumption would depend on the facts of a given case. Importantly however, the reasoning and justification given by the regulator in cases of direct enforcement will send signals to the market regarding what is considered to be acceptable within the legal framework of consumer protection law. Reliance on a behaviourally informed conception of the consumer as part of this discourse will set the tone and content of these signals, and as such will feed into the discourse and broader culture of the regulated sphere. This then provides content for future assessments of fairness, whether conducted by the regulator, the court, or indeed the market participants themselves.

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47 CRA sch3; Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277 Part 4; Enterprise Act 2002 Part 8
48 see for example FCA, Credit Card Market Study: Final Findings Report (2016) MS14/6.3,
ii. Cases brought to court

Where regulators are unable to directly enforce consumer protection laws themselves, they may seek orders of the court. This is another important way in which the work of regulators impacts the legal conception of the consumer. A number of the cases analysed below (Part 3) were initiated by the OFT exercising its consumer protection powers. As part of the adjudication process, the OFT made representations to the courts regarding its interpretation of the relevant consumer protection legislation. In so doing the regulator revealed and promoted its behaviourally informed conception of the consumer. This can be seen clearly in cases such as The Office of Fair Trading v Ashbourne Management Services where the regulator argued for recognition of a specific behavioural trait (over-optimism) and then called for an interpretation and application of the law in response to that.\(^49\) This argument was based on empirical evidence of actual consumer traits gleaned from consumer complaints and investigation into the market. The representations made by the regulator in that case had a clear effect on the legal outcome produced since the court recognised the relevant behavioural trait and applied the law in response to it.

The decisions in Office of Fair Trading v Abbey National Plc are equally illuminating.\(^50\) In this case, the OFT made robust representations regarding the correct interpretation of the exclusion clauses now contained in the Consumer Rights Act 2015 (CRA).\(^51\) They relied on their own behaviourally informed investigation into the personal current account market to argue that the legislation should be understood as requiring a court to assess the extent to which actual consumers exercise freedom of contract when agreeing to particular contract terms.\(^52\) They argued that this was necessary to ensure consumer protection through the operation of effective competition.\(^53\) Essentially the OFT suggested that banks’ terms were not subject to competitive market forces as a matter of empirical fact, and that if consumers are to be protected from detriment, the law must be interpreted to allow for it to respond to actual consumer behaviour.

\(^{49}\) [2011] EWHC 1237 (Ch), [2011] E.C.C. 31; see Part 3, 89, 132
\(^{51}\) CRA s64
\(^{52}\) Abbey (SC) (n50) 758; OFT, Personal Current Accounts in the UK: An OFT Market Study (2008) OFT1005
\(^{53}\) Abbey (SC) (n50) 757-759
The decisions in the Abbey case will be considered in more detail below, where it will be shown that the Court of Appeal accepted the OFT’s behaviourally informed argument.\textsuperscript{54} This is a clear example of a regulator’s conception of the consumer affecting legal outcomes. However, the Supreme Court rejected the OFT’s approach and reversed the decision. In so doing the Supreme Court made a number of statements regarding consumer protection law in general.\textsuperscript{55} In this regard, the OFT’s conception of the consumer did not directly affect the legal outcome produced, but it did instigate a discussion regarding the nature of consumer protection law, and in this regard, it did contribute to the process of legal reasoning and the normative discussion of appropriate legal policy.

\textit{iii. Legal interpretation and guidance}

Another important function of regulators is the production of policy and guidance specifying their interpretation of relevant powers, and details of their intentions with regards to using them. Unless a higher authority overrules the actions of the regulator, this policy will guide the interpretation and application of the law in that field. For example, the CMA has issued guidance on unfair terms legislation.\textsuperscript{56} This was originally composed by the OFT but has been adopted by the CMA as the new regulator responsible for leading enforcement in this area.\textsuperscript{57} The guidance document sets out the CMA’s understanding of the legislative provisions in detail and illustrates the CMA’s behaviourally informed interpretation of the law.

\textit{a) Good Faith}

Perhaps the clearest illustration of this is the CMA’s guidance regarding ‘good faith’. In reference to the House of Lords decision in Director General of Fair Trading v First National Bank Plc,\textsuperscript{58} the CMA elaborates on the concept of fair dealing, stating that traders should not take detrimental advantage of the consumer’s circumstances.\textsuperscript{59} The next section of the guidance is entitled “Consumer’s circumstances: how they behave in practice”.\textsuperscript{60} This starts with the assertion that consumers are vulnerable because they do not read standard contracts before agreeing to them and that it would be unrealistic to expect them to do so. The following two paragraphs explain how the field of behavioural economics has highlighted

\begin{itemize}
  \item \textsuperscript{54} see Part 3, 81
  \item \textsuperscript{55} Ibid, 84
  \item \textsuperscript{57} CRA s70, sch3
  \item \textsuperscript{58} [2001] UKHL 52, [2002] 1 AC 481
  \item \textsuperscript{59} CMA 2015 (n58) [2.23]
  \item \textsuperscript{60} ibid [2.25-2.29]
\end{itemize}
biases which restrict the consumer’s ability to act rationally. The result of these findings, according to the CMA, is that consumers are unlikely to give a proper assessment to remote or contingent terms even when such terms are transparent.61

This guidance is clearly behaviourally informed. The CMA are taking into account the wording of the legislation as well as precedents set down by the judiciary, but where there is scope to do so they are interpreting the legislation in light of their behaviourally informed understanding of consumer interests. As a result, the regulator’s interpretation of the law is based on a behaviourally informed conception of the consumer, which then allows for the aims of the legislation to be understood in light of actual consumer behaviour as empirically observed.

b) Core terms exclusion
Another illustrative example from the CMA’s guidance concerns the core terms exclusion. The CMA states that only terms constrained by competition have a realistic chance of falling within ‘the core exemption’.62 This is because the purpose of Directive 93/13 is the protection of consumers from detrimental distortions of competition. Therefore, the exclusions are not designed to allow for consumer protection to be ignored in relation to price and main subject matter, but rather that where the exclusions apply, the purpose of consumer protection can be served by other means, such as market forces.63

This is interesting because it reflects the OFT’s behaviourally informed interpretation set out in Abbey.64 Essentially, if consumers do not read the terms and are not meant to read them, then the terms cannot be subject to market forces and so the exclusions should not apply. However, the OFT’s argument did not find much support from the Supreme Court who took a more literal view of the legislative provisions and made a number of statements casting doubt upon the role of a behaviourally informed conception of the consumer, emphasising instead the importance of protecting consumer choice through the provision of transparent information.65 It is telling that the CMA do not refer to the decision in Abbey in this context, nor the arguments put forward regarding the importance of transparency and consumer choice. Crucially the CMA has adopted an interpretation which is more reflective of their

61 ibid [2.28]
62 ibid [3.5], [3.24]
63 ibid [3.3]; OFT, Consumer Contracts (2011) OFT1312 [6.13]
64 Abbey (SC) (n54)
65 ibid see Part 3
conception of the consumer. From the CMA’s perspective, if the purpose of the law is consumer protection, then the exclusions must be interpreted narrowly because otherwise actual consumers will not be protected from potentially detrimental practices.\textsuperscript{66} In this regard, the CMA seem to be influenced by the fact that consumers often do not read standard terms and do not subject ancillary terms to competitive pressure. These factors, informed by behavioural research, are referred to explicitly within the guidance and reveal the CMA’s understanding of consumer interests.\textsuperscript{67} It is submitted that the conception of the consumer adopted by the Supreme Court in \textit{Abbey} is so at odds with that adopted by the CMA in its guidance, that the two cannot be easily reconciled.

**Summary**

The examples discussed above show how the behaviourally informed approach adopted by regulators can influence their interpretation and application of law. Regulators’ understanding of consumers is informed by their research into, and experience of, actual consumer behaviour, and it has been suggested that this has the potential to affect certain legal outcomes. This raises interesting questions regarding the relationship between the courts’ approach to the conception of the consumer and the regulators’ approach. Specifically, it must be asked how the adoption of a behaviourally informed approach by regulators interacts with the approach of courts and what implications this has on the law of consumer protection. Part 3 will examine the courts’ approach to constructing the conception of the consumer within the context of three fairness tests. The issue of the relationship between the approach of regulators and courts will be returned to in Part 4.

\textsuperscript{66} OFT 2011 (n64) [6.13]

\textsuperscript{67} ibid [2.25]
Part 3: The judicial conception of the legal consumer: a case analysis of three fairness tests

Introduction

The following section will examine the approach of English courts to the construction of the legal conception of the consumer. This will be done within the context of three fairness tests; the unfair terms test, the unfair practices test, and the unfair credit relationship test. The behaviourally informed/abstract assumptive framework set out in Part 1 will be used to analyse a range of decisions concerning the interpretation and application of each test to provide evidence of judicial understandings of consumer interests and traits. The implications of different approaches will also be considered as part of this discussion.

Unfair terms in consumer contracts

Council Directive 93/13/EEC (the Directive) requires member states to ensure that unfair contract terms are not binding on consumers.¹ In the UK the Directive was originally given effect through the Unfair Terms in Consumer Contract Regulations (UTCCR) 1994 (SI 1994/3159), which were replaced by the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083). These have since been replaced by Part 2 of the Consumer Rights Act 2015 (CRA).

Section 62(4) of the CRA sets out the general fairness test in the following terms:

A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Section 62(5) explains that fairness is to be determined in light of the subject matter of the contract and the circumstances attending its agreement. This essentially replicates the Directive,² however, unlike the Directive and the UTCCR 1994/1999, section 62(4) applies whether terms have been individually negotiated or not.³ Section 63(1) directs attention to schedule 2, which contains a non-exhaustive indicative list of terms that may be unfair. This is generally known as the ‘grey list’.

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² ibid, art3-4
³ ibid, art3; UTCCR 1994 r3; UTCCR 1999 r5(1)
An unfair term will not bind a consumer, but the rest of the contract will continue to operate if practicable. Some terms are however excluded from assessment. Section 64(1) states:

A term of a consumer contract may not be assessed for fairness under s62 to the extent that:

(a) it specifies the main subject matter of the contract, or
(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

These restrictions only apply if a term is transparent and prominent. Transparent means expressed in plain intelligible language, as well as legible if written. Prominence is a new criterion and is not found in the Directive. It requires a term to be brought to the attention of the consumer to the extent that an average consumer would have been aware of it.

In addition to application in individual contract cases, the Directive requires provision for action by interested bodies against terms drawn up for general use. This is reflected in section 70 and schedule 3 of the CRA which gives enforcement powers to a range of relevant bodies.

**Purpose of the Directive**

The Directive has been described as a ‘comprise’, referring to the balance it strikes between consumer protection and respect for contractual freedom. As a result, some aspects of the Directive reflect a protective ethic whilst others reflect a more self-reliant ethic. For example, the Recital explains that consumers should be protected from supplier abuses of power and one-sided standard contracts. It is also clear that the fairness test, along with the requirement of transparency and the need for mechanisms of collective enforcement, are

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4 CRA s67  
5 CRA s64(2)  
6 ibid, s64(3)  
8 CRA s64(4)  
10 see Part 1, 21-24  
11 UTCCD Recital 9
designed to protect consumer interests. The ECJ describes this system of protection as based on:

[T]he idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.\(^{12}\)

The ECJ explains that because of this the fairness regime requires the ‘formal balance’ established by the contract to be replaced with an effective balance re-establishing equality between the parties.\(^{13}\)

There are however important limitations to this protection, such as the Directive’s limited applicability to non-negotiated terms and the core terms exclusions. These limitations were brought about as a response to criticism of the Commission’s original proposal for a directive.\(^{14}\) There was concern that the proposal went too far in allowing interference with contractual freedom.\(^{15}\) This view was forcefully expressed by Brandner and Ulmer, who commented:

In a free market economy parties to a contract are free to shape the principal obligations as they see fit. The relationship between the price and the goods or services provided is determined not according to some legal formula but by the mechanisms of the market. Any control by the courts or administrative authorities of the reasonableness or equivalence of this relationship is anathema to the fundamental tenets of a free market economy.\(^{16}\)

The limitations to the protective scope of the Directive therefore reflect a sensitivity to excessive market intervention. This sheds light on the Directive’s purpose. Consumers are seen as vulnerable to detrimental terms that they have not necessarily chosen, either


\(^{13}\) Case C-415/11 Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164 [45] (Aziz); Case C-618/10 Banco Espanol de Credito SA v Calderon Camino [2012] ECLI:EU:C:2012:349 [40]


\(^{15}\) ibid, 656

\(^{16}\) ibid
because they are non-core and non-negotiated, or because they are core but not transparent. Such terms, it seems, should be subject to assessment because the market may not protect consumers sufficiently. Intervention is warranted because of the negative impact that supplier exploitation of contractual power may have on the consumers’ economic interests and the internal market more broadly. In contrast, terms excluded from the Directive’s scope do not seem to require this oversight because it is assumed that market mechanisms will control them.

As a minimum harmonisation measure, the Directive permits member states to maintain a higher level of consumer protection to the extent permissible by EU law more broadly. In the UK, the Directive was ‘copied out’ despite the potentially confusing overlap that existed with the Unfair Contract Terms Act 1977. It may be inferred from this that the UK did not initially intend to produce a regime offering more protection than the Directive. In its current form, some changes have been made which increase the level of protection afforded to consumers. However, these do not seem to suggest any significant departure from the Directive’s underlying rationale, nor the balance that it is designed to strike between consumer protection and market freedom. For example, the Law Commission explained that its proposal for removal of the ‘non-negotiated’ limitation, would not pose undue restriction on contractual freedom since most negotiated terms would be excluded as core terms; and that where terms are assessed as a result of the change, ‘they are very unlikely to be found unfair, as the courts are not there to undo bad bargains’. Equally, the requirement of prominence was presented by the Law Commission as a clarification of the existing rules, resolving some of the uncertainty created by the Supreme Court’s decision in Office of Fair Trading v Abbey National Plc. The Commission recognised the slightly higher level of protection produced but stressed that traders could make their core terms prominent and

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17 UTCCD Recital; European Commission, *Unfair Terms in Contracts Concluded with Consumers: Commission Communication to the Council COM (1984) 55 final (Bulletin of the European Communities, Supplement 1/84)*
18 Brandner and Ulmer (n14)
19 Case 484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I-04785
22 Law Comm 2013 (n7) 95
23 Abbey (SC) (n50)
therefore avoid fairness assessment. They explained that the exclusions distinguish between terms subject to competition and those buried in ‘small-print’, and that:

Where consumers know about the terms proffered by traders, they are able to take them into account in their choices: in other words, the traders’ terms are subject to competition. If the information is available, the law should not seek to protect consumers from the consequences of their own decisions.

This shows that despite the protective reforms made to fairness regime, the UK test is nonetheless premised on subjecting only those terms that may avoid competitive scrutiny to a fairness assessment.

**Nature of the test**

For the purposes of this study, it must be asked how the fairness test should be understood against this backdrop, and specifically, what role the legal conception of the consumer plays as part of its application.

The test relies on the dual elements of significant imbalance and good faith to identify unfair terms. Significant imbalance relates to the rights and obligations of the parties under the contract but is not defined further. Good faith also lacks a clear definition. The Recital describes it as relating to ‘an overall evaluation of the different interests involved’ and may be satisfied where the supplier deals fairly and equitably with the consumer whose legitimate interests should be taken into account. This suggests that the assessment should be based, at least in part, on an appreciation of the consumer’s interests. However, what is not clear, is the extent to which the assessment should be based on the interests of actual consumers or is instead to be based on an abstract legal standard.

The fairness test may be applied to either a specific term in a particular transaction (concrete assessment), or more broadly as part of a challenge brought to protect the collective interests of consumers (collective assessment). The Directive makes clear that fairness should be assessed taking into account the nature of the goods or services involved and by referring to

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25 Law Comm (2013) (n7) 17-18
26 ibid, 17
27 CRA s62(4)
28 UTCCD Recital 16
29 UTCCD art7; CRA s70, sch3(8)
all circumstances attending the conclusion of the contract.\textsuperscript{30} This is said to be without prejudice to article 7 which makes provision for collective actions, suggesting that a more concrete form of assessment may have been envisioned where the assessment is being made of a specific contract in an individual case.\textsuperscript{31} However, whilst the CRA repeats the need to assess fairness at the time of contracting and to all circumstances attending its conclusion, there is no suggestion that these criteria do not also apply to collective challenges.\textsuperscript{32} In light of that, the features of assessment do not appear to differ between the two types of case.\textsuperscript{33} However, in the case of a collective challenge it is inevitable that the assessment of fairness will be abstract in the sense that it will not be specific to a particular transaction.

The CMA explain in their guidance on unfair terms, that reference to circumstances attending agreement requires them to apply the test as best they can, not on the basis of any particular contract, but rather by reference to “a correctly defined hypothetical consumer for that case”.\textsuperscript{34} They go on to explain that focus on circumstances attending the conclusion of the contract limits them to consideration of matters at that time, but allows consideration of special protection for vulnerable consumers where, for example, they may be pressured into agreement.\textsuperscript{35} This suggests that the CMA, whilst recognising that a collective challenge must be relatively abstract, envision the assessment of fairness taking place firmly within a factual context. In a collective case then, it must be asked how the typical consumer is to be ‘correctly defined’, and more specifically in the context of this study, whether this typical consumer is to be constructed on the basis of a more abstract assumptive or more behaviourally informed approach.\textsuperscript{36}

In individual (concrete) cases there is more scope for the fairness assessment to relate directly to the factual circumstances before the court. Indeed, in such cases the circumstances surrounding the conclusion of the contract will necessarily be specific to the particular consumer. However, this does not preclude a level of abstraction as part of the assessment.\textsuperscript{37} A court could consider imbalance and good faith by reference to a typical

\textsuperscript{30} UTCCD art4(1)
\textsuperscript{31} ibid
\textsuperscript{32} CRA 62(5)
\textsuperscript{33} G Howells and T Wilhelmsson, EC Consumer Law (1997, Ashgate) 100
\textsuperscript{35} ibid
\textsuperscript{36} see Part 1, 45-47
\textsuperscript{37} Howells and Wilhelmsson 1997 (n33) 99-102
consumer in the same way they would for collective challenges, but taking into account the specific factual circumstances before them.\textsuperscript{38} If such an approach is to be adopted, the question for the purpose of this study is the same as it is for a collective assessment; how is the conception of the typical consumer constructed?

Alternatively, courts could rely directly on the actual interests and traits of the particular consumer before them. They could ask, for example, whether the term was unfair given this particular consumer’s propensity for over-optimism or naivety. The understanding of the consumer would then be behaviourally informed, in the sense that it is based on empirical assessment of a consumer’s behavioural traits, as opposed to an abstract assumption. However, even if courts do look directly at the actual consumer, and assesses their behavioural traits, it is still pertinent to ask whether courts harbour any underlying perception of typical consumer behaviour against which the behaviour of the actual consumer is to be compared. For example, if the actual consumer was found to have a tendency towards over-optimism, a court might decide that this was abnormal based on an assumption that most consumers are not overly optimistic. Alternatively, informed by relevant empirical evidence, they might understand this to be ordinary consumer behaviour.

It is submitted that understanding why a court has decided that a term is or is not unfair may well depend on understanding this aspect of any legal reasoning in a concrete case. It may be particularly important for consideration of whether a supplier has dealt fairly and equitably with the consumer, and what makes up a consumer’s legitimate interests.

The ECJ’s interpretation of the fairness test

After initial signs that the ECJ would take on an active role in applying the unfair terms test directly,\textsuperscript{39} in \textit{Freiburger} the court limited its role to one of interpretation.\textsuperscript{40} In \textit{Aziz} the court provided guidance on the meaning of significant imbalance and good faith.\textsuperscript{41} It stated that significant imbalance requires national courts to engage in comparative analysis of the contractual arrangement and rules of national law that would otherwise apply, to establish whether the term places the consumer in a worse legal position.\textsuperscript{42} Good faith was interpreted

\textsuperscript{38} see for example ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373 (considered below)
\textsuperscript{39} Joined Cases C-240/98 to C-244/98 \textit{Océano Grupo Editorial} and \textit{Salvat Editores} [2000] ECR I-4941, [21]-[24]
\textsuperscript{40} Case C-237/02 \textit{Freiburger Kommunalbauten v Hofstetter} [2004] ECR I-3403 [22]-[23]
\textsuperscript{41} \textit{Aziz} (n13)
\textsuperscript{42} ibid [68]
as requiring courts to assess whether a supplier dealing fairly and equitably with the consumer, “could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations”.  

Set out in this way, the assessment of imbalance does not depend on the consumer conception adopted. Rather, it is centred on an objective analysis of a terms legal effect. In contrast, the description of good faith places the understanding of the consumer at the heart of the assessment by directing national courts to consider whether the consumer could be assumed to agree to the term. This would seem to be a rather hypothetical assessment, since it asks what might have happened if the consumer were actually able to negotiate the contract. This raises issues regarding how the conception of the consumer should be constructed and the role it plays within this assessment.

First, it is not clear to what extent the notion of fair and equitable dealing depends on the consumer’s interests and traits. This could be based on accepted rules of fair dealing without requiring any specific focus on the consumer as such. It might be argued that in the absence of a specific definition, what is ‘fair’ and ‘equitable’ should pertain to the interests of the consumer as the counterparty to the dealing activities. This would make sense in light of the Directive’s concern for protection of consumers’ economic interests.

This raises a second issue. It is not clear whether, or how far, it is reasonable for a supplier to make assumptions regarding the interests and traits of the consumer. What is reasonable will of course depend on the peculiarities of individual cases, but the meaning of good faith itself will depend on whether the ECJ envisioned an assessment requiring suppliers to consider the interests of a purely abstract consumer, or whether it meant for good faith to relate more directly to actual consumers by requiring reliance on a more realistic notion of a consumer acting within this hypothetical scenario.

In a concrete case, the question would be whether the supplier is to be prevented from drawing assumptions which conflict with their knowledge regarding the actual consumer dealt with. This could cause the requirement of good faith to be particularly protective of consumers and correspondingly burdensome for suppliers. It would also allow for increased protection of vulnerable consumers, at least where the supplier was aware of their

43 ibid [69]
44 Howells, Twigg-Flesner and Wilhelmsson (n9) 152; ParkingEye (n38) [108]
vulnerability and/or targeted them as members of a specific group. The alternative approach would be to require suppliers to consider the interests of an abstract consumer conception, such as the average consumer, regardless of the interests of the actual consumer party to the agreement. In collective cases, the issue is the extent to which the typical consumer can be assumed to behave in particular ways (economically rational for example), or whether the supplier should respond to evidence of particular vulnerabilities or patterns of behaviour which might impact upon the typical consumer’s willingness to agree in the hypothetical bargaining situation (in line with behavioural economics for example).

Finally, it is not clear to what extent this hypothetical scenario envisions a consumer who is able to influence negotiations on equal terms with the supplier. If the purpose of the hypothetical analysis is to draw attention to potential unfairness that may arise from the contract, but which the consumer would have avoided if they had the chance, then it would seem sensible to elevate the consumer so that they are on equal terms with the supplier. There are different degrees to which this could be done and it is not clear how far a national court should go in this respect. For example, should a national court treat the consumer as if they knew of the supplier’s business model or of alternative suppliers who might offer better terms? It must surely be the case that the consumer in this hypothetical negotiation would be aware of the legal effect of the term and therefore aware of the imbalance that it causes between the parties, otherwise the assessment of what the consumer might have agreed to would not seem to relate to the wider question of whether the term is unfair.

Taken together, these questions reveal that although the ECJ’s understanding of good faith places the interests of the consumer at the heart of the fairness assessment, it is not clear exactly who that consumer is or on what basis the legal conception should be constructed. Howells, Twigg-Flesner and Wilhelmsson have suggested that cases such as Aziz may demonstrate the emergence of a more free-standing European conception of fairness which highlights ‘ambitious goals’ in terms of the Directive’s protective potential. This is reflected in the high level of procedural protection procured as a result of the Directive’s interpretation in light of the principles of equivalence and effectiveness. This is justified by the inability of

45 Howells, Twigg-Flesner and Wilhelmsson (n9)147-153  
consumers to protect their own interests effectively.\textsuperscript{47} A similar trend can be seen in relation to the ECJ’s broad interpretation of transparency.\textsuperscript{48} As a result, national courts should consider both formal and grammatical intelligibility, but also whether an average consumer would be able to appreciate its economic consequences.\textsuperscript{49} This may stop short of requiring reliance on a behaviourally informed conception of the consumer since the average consumer standard which may well be abstract (this is considered in more detail below in the context of unfair commercial practices).\textsuperscript{50} However, it does suggest that the ECJ envisions national courts reflecting on the relative weakness of consumers when tasked with interpretation and application of the Directive.

This protective trend in ECJ case law may cast doubt on the appropriateness of a conception of the consumer which fails to translate consumer weaknesses into the process of assessing fairness. There is room in this regard for the ECJ to go further and explain how as a matter of EU law, the consumer’s interests and traits are to be determined as part of the application of the unfair terms test. This could be done on the basis of either an abstract assumptive or behaviourally informed approach. However, the ECJ has so far allowed national courts a wide margin of discretion to apply the fairness test in particular cases.\textsuperscript{51} Therefore, national courts have a degree of flexibility when choosing their conception of the consumer for the purpose of assessment. The uncertainty surrounding the role of the consumer within the Aziz guidance on good faith in particular, provides scope for national legal cultures to be expressed through differing applications of the rules. Recent rejection of a shift towards maximum harmonisation in this area may reaffirm a degree of national autonomy with regards to how different legal systems implement the protection contained in the Directive.\textsuperscript{52} However, where a national legal system fails to meet the protective agenda being established by the ECJ, they may find their approach challenged on the basis that more is needed to fulfil the Directive’s protective requirements.

\textsuperscript{47} see for example Banco (n13) [54]
\textsuperscript{48} Case C-26/13 Arpad Kásler, Hajnalka Kásler ne Rabi v OTP Jelzálogbank Zrt [2014] ECLI:EU:C:2014:282 [71]-[74]
\textsuperscript{49} ibid [74]
\textsuperscript{50} see Part 3, 109
\textsuperscript{51} S Weatherill, \textit{EU Consumer Law and Policy} (2nd, Elgar 2013) 151-153
In light of this backdrop, the remainder of this section will assess how the unfair terms test has been applied by English courts. The analysis will focus in particular on the extent to which courts have relied on a behaviourally informed or abstract assumptive approach when seeking to interpret and apply the test. It will then be asked whether the approach that has been adopted is appropriate in light of the Directive’s purpose and the rise of behavioural economics within consumer protection discourse.

**Director General of Fair Trading v First National Bank Plc**

The first case concerning the unfair terms test to reach the House of Lords, was *Director General of Fair Trading v First National Bank Plc (First National)*. The Director General sought an injunction against terms of certain consumer loan agreements, pursuant to regulation 8(2) of the UTCCR 1994. The terms allowed contractual interest to accrue after court judgment following default on the loan. Without the terms consumers would not have had to pay interest on the debt since the bank would have needed to seek to enforce the agreement in the County Court, which cannot charge statutory interest against a consumer under a regulated credit agreement. Therefore, as a result of the terms, consumers ordered to pay off the debt in instalments would still find themselves liable to pay contractual interest accrued at the original rate.

**Court of Appeal**

In the Court of Appeal Peter Gibson LJ considered the elements of the fairness test. He stated that good faith promotes “fair and open dealing” and aims to prevent “unfair surprise and the absence of real choice”. In addition, terms should be “reasonably transparent” and should not “operate to defeat the reasonable expectations of the consumer”. A significant imbalance would exist where terms give a supplier a significant advantage without a corresponding advantage to the consumer.

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54 Consumer Credit Act 1974 s141
56 *Director General of Fair Trading v First National Bank Plc* [2000] Q.B. 672 (CA), 686-688
57 ibid, 687 (Peter Gibson LJ)
58 ibid
Applying these elements, the term was found to be unfair. The court relied on the evidence of the Director General which was based on consumer complaints. This suggested that the term caused consumers ‘disagreeable surprise’. In addition, it produced consequences which were found to be less favourable to consumers than the usual legal rules, indicating an imbalance operating to their detriment with no specific benefit given in return. Therefore, the court found that the consumer was bound by detrimental terms of which they were not properly aware. The supplier’s use of such terms, coupled with their failure to ensure that consumers were informed, amounted to a lack of good faith; as the stronger bargaining party they had not sufficiently taken consumer interests into account.

The House of Lords
On appeal, the House of Lords overturned the decision and unanimously found that the term was not unfair. Each of the five Law Lords expressed an opinion but in doing so they all agreed with the reasoning of Lord Bingham.

Lord Bingham explained that a significant imbalance occurs where “a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour”. He also explained that good faith relates to “fair and open dealing” which requires terms to be expressed “fully, clearly and legibly, containing no concealed pitfalls or traps” with prominence given to disadvantageous terms. This requires that suppliers not take advantage of a consumer’s “necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, [or] weak bargaining position”. Lord Bingham added that this concept is not unfamiliar to English law in that the test looks to standards of commercial morality and practice.

With this being a collective challenge, Lord Bingham began his application of the test by focusing on the position of the typical parties to the agreement at the time the contract is made. He suggested that borrowers typically approach banks seeking a sum, which banks will

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59 ibid, 688  
60 ibid  
61 ibid  
62 First National (HL) (n53)  
63 ibid [17] (Lord Bingham)  
64 ibid  
65 ibid  
66 ibid
lend if satisfied that repayment with interest will occur on time.\textsuperscript{67} This is the essential bargain. Neither party would suppose that the bank would forgo part of the loan or interest, and if such a loss was foreseen, the loan would not be made.\textsuperscript{68} In addition, Lord Bingham found that the obligation to repay with full interest is clearly and unambiguously expressed in the contract, removing any doubt about the consumer’s responsibility.\textsuperscript{69} There was therefore, nothing unbalanced or detrimental about the arrangement. Indeed, Lord Bingham stated that “the absence of such a term would unbalance the contract to the detriment of the lender”.\textsuperscript{70}

Analysis: the approach to constructing the conception of the consumer and its effect on legal reasoning

Despite almost identical interpretations of the test, the Court of Appeal and House of Lords reached opposite conclusions regarding the fairness of the term. It is submitted that this is because they adopted different approaches when constructing their conceptions of the consumer. As a result, the courts based their analyses on different understandings of consumer interests and traits, which then informed their perceptions of fairness. The Court of Appeal understood that the typical consumer might be unaware of the effect of the relevant term. This finding had an empirical route in complaints made to the Director General.\textsuperscript{71} The court was persuaded that some actual consumers were surprised as a matter of fact and in turn the legal conception of the consumer was made to reflect that. In terms of the spectrum of different approaches to conception set out in Part 1, the court’s approach can be seen as being towards the behaviourally informed end of it.\textsuperscript{72}

The consequent understanding of the typical consumer as unaware and disagreeably surprised is a central feature of the Court of Appeal’s subsequent fairness assessment and leads to the finding of a lack of good faith.\textsuperscript{73} It can be said with some confidence then that the conception of the consumer did contribute to the legal outcome produced, in the sense that the legal reasoning proffered to explain and justify the court’s conclusion is heavily infused with this particular understanding of consumer interests and traits. This connects the legal act of balancing the interests of the consumer and supplier at the collective level, with the

\textsuperscript{67} ibid [20]
\textsuperscript{68} ibid
\textsuperscript{69} ibid
\textsuperscript{70} ibid (Lord Bingham)
\textsuperscript{71} C Willett, \textit{Fairness in Consumer Contracts: The Case of Unfair Terms} (Ashgate, 2007) 182-183
\textsuperscript{72} see Part 1, 45-47
\textsuperscript{73} First National (CA) (n56) 688
conflict that exists between actual consumers and the supplier on an individual level, as evidenced by the complaints made to the regulator. As a result, the legal reasoning which occurs is more directly related to the actual interplay between real consumer and supplier interests.

In contrast, the House of Lords focused on an abstract assumptive understanding of the typical parties to the agreement. This allowed Lord Bingham to conclude that neither party would expect the bank to forgo its contractual interest. Lord Millett went so far as to state that the consumer would be surprised at the need to spell this out. A reading of the written terms supported this deduction. As a result, the conception of the consumer constructed is found to be not only aware of the term, but also aware of its purpose as forming part of the essential bargain. This conclusion can be reached because evidence of actual consumer surprise, which was central to the Court of Appeal’s assessment, is not relied on to inform the House of Lords’ understanding of consumer interests. This prevents some actual consumer traits from being reflected as part of the fairness assessment, which is based on the traits of the abstract typical consumer conception instead.

Mitchell has described this approach as empirical, in that the Lords tried to determine what expectations consumers would actually have in this context. She relies on Lord Millett’s statement that consumers would expect to pay contractual interest on the debt as evidence of this. The difficulty with this analysis is that it focuses solely on the court’s consideration of what the consumer would expect without considering how the conception of the consumer is constructed. The House of Lords do not base their conception of the consumer on any explicit empirical evidence. Instead they deduce abstract assumptions about what the typical consumer would expect. For example, it is decided that the typical consumer would be aware of the term because it is set out in the contract. It must be assumed then that the typical consumer reads and understands contracts. Such assumptions are not, it seems, based on evidence of actual consumer behaviour.

74 First National (HL) (n53) [55] (Lord Millett)
76 Mitchell (n75) 658
77 see for example M Faure and H Luth ‘Behavioural Economics in Unfair Contract Terms: Cautions and Considerations’ (2011) 34 JCP 337, 349
It is submitted that the House of Lords’ reliance on an abstract assumptive approach has a significant impact on the legal outcome produced. It is the assumptions regarding the typical consumer’s traits which allow the conclusion that consumers would expect suppliers to refuse to lend if there was any prospect of having to forgo the interest due. Therefore, the term in question would also be expected. In contrast to the conclusion reached by the Court of Appeal, there can be no lack of good faith on the ground that the supplier should not have relied on a term that the consumer did not fully understand, since the typical consumer (constructed in the abstract) was aware of the term and its effect.

It is not immediately clear whether the Lords intended for their assumptions, and therefore their consumer conception, to be a reflection of actual consumer behaviour. The Lords seem to be suggesting that in their view a typical consumer would actually understand that interest is payable until the loan is repaid in full. This assumption might seem sensible given the nature of the agreement and the widespread use of consumer credit facilities. However, it must be noted that the House of Lords’ understanding of this typical consumer contradicted the evidence regarding consumer complaints, the view of the expert regulator, and the decision of the Court of Appeal. In addition, when considering why the problems facing defaulting debtors are not dealt with by powers granted to courts under the Consumer Credit Act 1974, the Lords seem to recognise a different reality. For example, Lord Bingham stated:

> It is readily understandable that a borrower may be disagreeably surprised if he finds that his contractual interest obligation continues to mount despite his duly paying the instalments ordered by the court.

Similarly, Lord Millett suggested that the legal outcome would come as a ‘nasty shock’ to consumers. These findings are supported by the evidence of complaints made to the Director General, however they did not render the term unfair because, as Lord Bingham explained, the problem is caused by the lack of procedural safeguards not the term itself. The supplier was not required to inform consumers of these potentially helpful provisions, nor was it customary for them to do so.

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78 Mitchell (n75) 658-659
79 ibid
81 Consumer Credit Act 1974 s129, s136
82 First National (HL) (n53) [24] (Lord Bingham)
83 ibid [59] (Lord Millett)
84 ibid [46]-[47] (Lord Bingham)
It is unclear how the recognition of consumer surprise can be reconciled with the earlier finding of the fully informed typical consumer. If consumers are surprised by the outcome of the contract after default, at the time of contracting they must have either expected a different outcome or not given the event any thought. When they are then required to bear the costs of longer repayment, they believe that the contract is unfair because that is not what they expected. If they were happy with the clause at the time of contracting, but were not happy once it took effect, then there is a suggestion of a lack of understanding. Therefore, it seems that the House of Lords knew that some consumers were actually surprised by the effect of the clause but did not build this trait into their conception of the typical consumer when assessing fairness, choosing to rely instead on the typical consumer who is assumed to have understood the terms.

The difficulty with this approach is that the process of legal reasoning engaged in when assessing fairness becomes devoid of the important nuances upon which the challenge to the contract term is based. It is submitted that this renders the judgment unsatisfactory. The term is being challenged because some consumers end up paying more than they expected and they feel that this is unfair. As an expert regulator, the Director General must have been persuaded that those consumers had a legitimate grievance. However, when the House of Lords assess the fairness of the term, they do so by reference to an abstract consumer conception which does not reflect the very interests and traits which give rise to the complaint in the first place. Once the assessment of fairness is removed from this essential contextual background, the unfairness complaint necessarily melts away.

The problem with this is not necessarily the outcome in terms of a finding against the Director General. It is rather that the legal reasoning presented by the court fails to explain why in this particular factual scenario, the balance that takes place under the test should favour the supplier’s interests at the expense of the consumers. By proceeding as if consumers are aware of the term and its effect, despite evidence some consumers were clearly not, the House of Lords missed an opportunity to use legal reasoning to elucidate what it means for a term to be unfair in light of the actual conflict that exists between consumer and supplier interests. For example, Lord Bingham suggested that a lack of good faith might relate to taking advantage of a consumer’s lack of experience. However, any relevant lack of experience on behalf of those consumers aggrieved by the terms effect, is seemingly overlooked when the typical consumer is simply assumed to understand the ‘essential
bargain’. The question that then arises, is why the typical consumer should be so conceived, particularly given the factual context within which this dispute has arisen. However, this is a question to which the House of Lords do not provide a firm answer.

One way to analyse the different approaches of the Court of Appeal and House of Lords is to consider the underlying normative stances that seem to guide/support their expressions of legal reasoning. Willett’s analysis of First National led him to conclude that the Court of Appeal’s approach is more fairness orientated and reflects a protective ethic.\(^8\) This is because the court focused on the traits of the relevant parties, finding that consumer weakness justified interference in supplier contractual freedom. In contrast, Willett understood the House of Lords’ approach to be more freedom orientated in that they emphasised that suppliers would not lend if the hardship faced by indebted consumers was allowed to interfere with their contractual rights.\(^9\) In addition, the House of Lords did not require the supplier to take steps to inform consumers about the term’s effect or about the courts’ powers of review, which the consumer might have relied on to avoid the accrual of interest. In this way, the court’s reasoning can be understood as implying that the supplier could assume that the consumer would be self-reliant and therefore able to look after his own interests.\(^10\)

The courts’ different conceptions of the consumer can be understood in light of this analysis. The Court of Appeal adopted a behaviourally informed approach because that was seen as necessary to promote a protective ethic. In contrast, the House of Lords appear to have been reluctant to accept that consumers did not understand the terms because to do so would undermine the freedom of the supplier. Therefore, the typical consumer is understood as expecting the term, not because actual consumers tend to expect it, but because that is required to ensure protection of contractual freedom. This looks like an example of a legal fiction.

This raises the issue of whether a self-reliant normative ethic can be justified in this context. However, the need to explain the policy considerations that flow from and inform this stance is largely avoided by reference to the traits of the abstract conception of the consumer, who

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\(^8\) C Willett ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) CLJ 412, 421-422

\(^9\) Willett 2007 (n71) 188-200

\(^10\) ibid
masks the effect of the legal outcome on the interests of actual consumers. A significant thread of the legal reason for concluding that the term is not unfair therefore remains hidden within the implicit dimension of the court’s judgment. The policy discussion that could be relevant to the assessment of fairness, which balances the interests of all affected, is not then (openly) engaged with. This leaves the decision open to criticism for not accurately reflecting the conflict that exists between consumer and supplier interests in light of behavioural reality. The potential response, that the test is a legal one for the court to determine, leaves much to be desired in terms of substantive and transparent legal policy.

**Office of Fair Trading v Abbey National Plc and Others**

*Office of Fair Trading v Abbey National Plc* concerned bank charges levied against consumers for use of overdraft facilities. The OFT wanted to assess the fairness of terms associated with these charges under regulation 5 of the UTCCR 1999. However, the banks argued that as part of the remuneration provided for banking services, the terms were excluded from assessment according to regulation 6(2). In response, the OFT argued that the exclusions to assessment must be given a restrictive interpretation. In *First National* the House of Lords had suggested that too broad an interpretation of the exclusions would defeat the purpose of the fairness regime. Lord Steyn stated that, “in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended.” In light of this the Lords made a distinction between core and ancillary terms, the latter being assessable. The term in that case was considered to be ancillary because it only took effect on default, and so was not excluded from an assessment of fairness. The OFT sought to persuade the court in this case that a similar interpretation should apply.

**Court of Appeal**

The Court of Appeal agreed with the OFT and interpreted the exclusions narrowly. The main purpose of the Directive was identified as consumer protection, but it was noted that the exclusions limit this. The court considered the *travaux préparatoires* of the Directive to help determine how these conflicting aims are to be reconciled, and concluded that the exclusions

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89 *First National* (HL) (n53) [12] (Lord Bingham) [34] (Lord Steyn)
90 ibid [34] (Lord Steyn)
91 ibid [12], [34], [43]
92 *Abbey* (CA) (n88)
93 ibid [33]
exist because terms which are the product of both parties’ contractual freedom do not require judicial oversight since both parties will be aware of their content and effect.\textsuperscript{94} However, other terms should be assessable for fairness given the risk of consumer detriment. This analysis was supported with reference to Bright, who explains that this understanding of the Directive fits with consumer behaviour, in that consumers do not typically focus on terms other than those concerning price and quality of goods.\textsuperscript{95} Bright states that there is no real market for non-core terms which explains the need for protection.\textsuperscript{96} In light of this, the Court of Appeal concluded that the purpose of the legislation as a whole, must be understood as requiring an assessment of terms which cannot be assumed to have been policed by market forces.\textsuperscript{97}

\textit{The essential bargain}

Having identified the purpose of the legislation, the Court of Appeal developed the essential bargain test to guide its application of the exclusions.\textsuperscript{98} The notion of ‘essential bargain’ reflects the fact that certain core aspects of the agreement will be important to consumers and may therefore be excluded from assessment. Terms ancillary to the essential bargain cannot be excluded from assessment since they may not have been the subject of attention. The court made clear that the elements forming the essential bargain are to be assessed from the typical consumer’s perspective, rather than the supplier’s, given the significance attached to the lack of bargaining power in the \textit{travaux préparatoires}.\textsuperscript{99} This reflects the protective purpose of the Directive.\textsuperscript{100}

When applying the essential bargain test the court referred to the submissions of both parties.\textsuperscript{101} The OFT presented a case based on a behaviourally informed conception of the consumer, highlighting that the charges were contingent, that consumers did not know how and when they occur, that consumers were not entitled to use the overdraft services under

\begin{thebibliography}{9}
\item \bibitem{94} ibid [64]-[69], [80]
\item \bibitem{95} ibid [70]-[80]; S Bright ‘Winning the Battle Against Unfair Contract Terms’ (2000) 20 LS 331, 343-344
\item \bibitem{96} ibid
\item \bibitem{97} \textit{Abbey} (CA) (n88) [64]; E Macdonald and R Atkins, \textit{Koffman & Macdonald’s Law of Contract} (8th, OUP, 2014) 224
\item \bibitem{98} \textit{Abbey} (CA) (n88) [86]
\item \bibitem{99} ibid [92] (Sir Anthony Clarke MR); see also \textit{Office of Fair Trading v Foxtons Ltd} [2009] EWHC 1681 (Ch), [2009] C.T.L.C. 188 [28-40]
\item \bibitem{100} see Whittaker ‘Unfair Contract Terms, Unfair Prices and Bank Charges’ (2011) 74(1) MLR 106, 113-115
\item \bibitem{101} \textit{Abbey} (CA) (n88) [93]-[114]
\end{thebibliography}
the contract, and that the charges constituted an uneconomical way of borrowing.\textsuperscript{102} The banks’ argued that the factors raised by the OFT were irrelevant and that the necessary information was provided to consumers in plain intelligible language, giving them the opportunity to read and understand the terms; the assumption being that consumers could and should do just that.\textsuperscript{103}

Despite finding force in the banks’ submissions, the court found that the terms should be assessable for fairness because they could not be assumed to be part of the essential bargain. The fact that the charges levied were contingent was important in this regard.\textsuperscript{104} The court cited the Law Commission who suggest that consumers are less likely to consider terms which only apply in certain circumstances and that therefore such terms should not be excluded from review.\textsuperscript{105} The court also stated that consumers are ‘unlikely in the extreme’ to read all of the banks contract terms and that the requirement that terms be in plain and intelligible language is not enough protection on its own where the term is one of many and does not feature in advertising.\textsuperscript{106} The court considered the terms to be akin to default charges which were not in any real sense chosen by consumers when entering into the transaction.\textsuperscript{107} As such, the terms were of an ancillary nature and could not be considered to be part of the essential bargain.\textsuperscript{108}

The range of factors considered by the court shows their concern for understanding the interaction between consumer behavioural traits and the specific features of the bargaining process. The court used evidence relating to actual consumer behaviour to inform their understanding of the typical consumer and in this regard their approach can be described as falling towards the behaviourally informed end of the spectrum of approaches set out in Part 1.\textsuperscript{109} It might be noted, that the courts approach was not robustly empirical and that at times they did rely on broad assumptions regarding typical consumer behaviour. However, the court was not concerned with whether the terms should be prohibited. Instead, it was attempting to interpret the legislation in line with its purpose. The conclusion reached is not that consumers definitely need protection, but rather that the potential for protection should

\textsuperscript{102} ibid [99]  
\textsuperscript{103} ibid [102]  
\textsuperscript{104} ibid [111]  
\textsuperscript{105} ibid [105]; Law Commission, \textit{Unfair Terms in Consumer Contracts} (Law Comm No 166, 2002) [3.32]  
\textsuperscript{106} Abbey (CA) (n88) [98]  
\textsuperscript{107} ibid [107]-[109], [111]  
\textsuperscript{108} ibid [109]  
\textsuperscript{109} see Part 1, 45-47
not be limited given the risks of consumer detriment. This reasoning is supported by a behaviourally informed conception of the consumer in the sense that it is the information gleaned from that which suggests that the protective purpose of the Directive requires a more creative interpretation.

In normative terms, this decision can be understood as being fairness orientated in the sense that it is concerned with the interests and traits of relevant parties, and as promoting a protective ethic in that it realises that consumers may not always be capable of being self-reliant by making use of objectively transparent information. In adopting their narrow interpretation of the exclusions as a response, the Court of Appeal did not just acknowledge that consumers are behavioural, but also that the law should reflect that fact if it is to be effective in providing an appropriate degree of consumer protection.

Supreme Court

The Supreme Court overturned the Court of Appeal’s decision. The consumer-focused perspective was rejected, and the transaction considered objectively. The court found the charges to be part of the price because they formed part of the monetary consideration given in exchange for banking services. The very fact that these charges made up a considerable part of the banks’ revenue stream led Lord Walker and Lord Phillips to this conclusion. The court accepted that the exclusions must be construed restrictively but found that the charges fell squarely within them. In addition, it was doubted whether the core/ancillary terms distinction is useful. Lord Phillips explained that once remuneration is identified regulation 6(2) will apply preventing fairness assessment, even if such remuneration is ancillary or incidental. In contrast to the approach of the Court of Appeal, this did not depend on an understanding of consumer behaviour. As a result, the Supreme Court’s decision provides relatively little explicit evidence regarding the practical application of the conception of the consumer in law, however, analysis of the reasoning set out in support of the conclusion reached provides some indication of the conception relied on.

110 see Part 1, 21-24
111 Willett 2012 (n85) 426-427
112 Abbey (SC) (n88)
113 ibid [73], [113]
114 ibid [47], [87]-[88]
115 ibid [43]
116 ibid [46], [112]
117 ibid [78] (Lord Phillips)
118 Whittaker 2011 (n100) 113
The Supreme Court’s rather literal interpretation of the price exclusion seems to be driven by legal policy premised on an understanding of a relatively self-reliant consumer. The opinions of a number of the Lords make this clear. Lord Walker, for example, considered the Court of Appeal’s findings and concluded that although the travaux préparatoires of the Directive highlights a balance between consumer protection and contractual freedom, it also balances consumer protection and consumer choice.\textsuperscript{119} In support of this he cited Collins, who discusses the development of the Directive.\textsuperscript{120} Collins notes that there were arguments for a more protective directive but that ultimately the Council of Ministers decided in favour of a regime focused on competition, with clarity in terms of ‘plain and intelligible’ language being enough to protect consumers in most cases.\textsuperscript{121} In light of this, Collins concludes that “[w]hat matters primarily for EC contract law is consumer choice, not consumer rights”.\textsuperscript{122}

Lord Mance adopted similar reasoning. He emphasised the importance of transparency, citing the work of Brandner and Ulmer.\textsuperscript{123} He went on to state:

> The court should no doubt read and interpret the contract in the usual manner ... [b]ut there is no basis for requiring it to do so by attempting to identify a ‘typical consumer’ or by confining the focus to matters on which it might conjecture that he or she would be likely to focus. The consumer’s protection under the Directive and Regulations is the requirement of transparency on which both insist. That being present, the consumer is to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract...\textsuperscript{124}

Lord Mance also stated, that whilst the legislation is concerned with the freedom of contract, it is not concerned with whether consumers have actually exercised it.\textsuperscript{125}

These comments reveal the assumptions regarding consumer behaviour underlying the Supreme Court’s decision. The consumer is assumed to be capable of reading terms and it is assumed therefore that with regard to price terms, transparency is the key protective element of the regulations; so long as the terms are transparent the self-reliant consumer can

\textsuperscript{119} Abbey (SC) (n88) [44]
\textsuperscript{120} Collins (n9)
\textsuperscript{121} ibid 238
\textsuperscript{122} ibid
\textsuperscript{123} Abbey (SC) (n88) [109]; Brandner and Ulmer (n14)
\textsuperscript{124} Abbey (SC) (n88) [113] (Lord Mance)
\textsuperscript{125} ibid
make a choice as to whether to accept them.\textsuperscript{126} Leaving aside whether this is a correct interpretation of European law,\textsuperscript{127} it is clear that this understanding of consumers is not based on evidence of consumer behaviour. It is rather a legal abstraction; that being an assumption made as a matter of law regardless of its factual accuracy. This assumption allows the fairness regime to be understood as providing protection by respecting free choice. As Baroness Hale explains:

As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice. We buy all sorts of products which a sensible person might not buy and some of which are not good value for the money. We do so with our eyes open because we want the product in question more than we want the money.\textsuperscript{128}

The connection between protecting free choice and consumers’ eyes being open is important. If the typical consumer was not understood as being capable of reading and understanding terms, this legal policy of protecting free choice would be at risk of being undermined by the reality of consumer behaviour, in a similar fashion to theories of rational choice depending too heavily on assumptions of rationality. This might make it difficult to justify a literal reading of the exclusions, which might provide more scope for challenge of contract terms. In this sense, the abstract consumer conception contributes to the decision reached by providing a convenient legal fiction to support a conclusion which can be justified without the need for extensive consideration of the actual conflict that exists between (some) consumer and supplier interests.

As a result, consumers who do not share the abstract typical consumer’s traits will not necessarily have their interests protected. Significantly, they may not even have the opportunity to have a court assess the merits of their case, in that a court will not recognise detriment caused by consumer behaviour falling below the abstract standard. This issue also applies to regulators wishing to challenge the fairness of terms on behalf of consumers (as the OFT were seeking to do in this case). So long as terms are objectively transparent, there is no argument to be made which suggests that price terms should be assessed for fairness because the court has essentially bound itself to rely on the legal fiction which proves that

\textsuperscript{126} ibid; M Schillig ‘Directive 93/13 and the ‘Price Term Exemption’: A Comparative Analysis in Light of the ‘Market for Lemons’ Rationale’ (2011) 60 ICLQ 933, 956

\textsuperscript{127} see Weatherill (n51) 155

\textsuperscript{128} Abbey (SC) (n88) [93] (Baroness Hale)
consumers will (or should) read the terms. In this regard, the court’s normative stance appears to be freedom orientated and based on a self-reliant conception of the consumer.\(^{129}\)

The consumer should be assumed to be capable of reading and understanding clear terms because that is what is necessary for the law to be able to protect the contracting parties’ free choice.

**Analysis: the approach to constructing the conception of the consumer and its effect on legal reasoning**

It is submitted that the Supreme Court’s approach is problematic because it rests on a potentially unrealistic premise. In terms of the bank charges at issue, a large number of consumers do seem to have entered into the contractual relationship without fully understanding the terms.\(^{130}\) The result of this was a lack of competition and a substantial degree of consumer detriment. If, as is stated by the Supreme Court, the purpose of the legislation is to protect consumer choice then this evidence of consumers bound by terms of which they did not fully understand, is significant. In effect, some consumers have become bound by terms which they did not really choose.

One immediate response to this might be that what is important is not whether consumers did choose but whether they had the opportunity to choose, and that the requirement of transparency deals with this. In theory, if terms are transparent consumers should be able to protect themselves by making an informed choice as to whether to enter a bargain.\(^{131}\) The Supreme Court seem to accept this and support for their objective approach may be found in the ECJ’s subsequent Käslar decision.\(^ {132}\) In that case the ECJ drew a core/ancillary terms distinction in regard to interpretation of ‘main subject matter’ but not in relation to price which appears to have been understood more simply.\(^ {133}\) The ECJ did, however, note that the price exclusion is limited to an assessment of adequacy as opposed to other issues such as mechanisms of calculation, leaving some aspects of price terms assessible (at least in

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\(^{129}\) Willett 2012 (n85) 428

\(^{130}\) OFT, Review of the Personal Current Account Market (2013) OFT1005rev


\(^{132}\) Käslar (n48)

\(^{133}\) ibid [49]-[50]; E Macdonald ‘Inequality of Bargaining Power and ‘Cure’ by Information Requirement’ in L DiMatteo and M Hogg (eds), *Comparative Contract Law: British and American Perspectives* (OUP Oxford 2016) 157, 163
It is not clear how this understanding of the exclusion will develop, particularly with regard to difficulties that arise when determining whether an assessment of price relates to adequacy or not, but as it stands the decision in Kásler does cast some doubt on the more complex approach adopted by the Court of Appeal, at least for price terms.

The difficulty with relying largely on transparency to ensure a suitable level of consumer protection however, is that this may not be enough on its own to address problematic terms. There is behaviourally informed analysis substantiating this, and it can be seen on the facts of Abbey where despite the terms being found to be transparent, the regulator identified high levels of consumer detriment. As a result, it may be argued that in addition to the need for transparency, the exclusions should be read purposively so as not to thwart the protective nature of the Directive as a whole. In that regard, the advantage of the approach adopted by the Court of Appeal, which allows for recognition of behavioural nuances, is that it directs courts to consider the reality of the conflict that exists between consumers and suppliers in terms of contracts binding consumers to obligations of which they were not necessarily aware; even if such obligations can be described as part of the price if considered in the abstract.

In response to the decision in Abbey, the CRA now contains an additional requirement of prominence which may be seen as a compromise between the approaches of the Court of Appeal and Supreme Court. To avoid assessment, excluded terms must now be both legible and presented so as to ensure that consumers can take them into account when making decisions. This responds to some of the Court of Appeal’s concern with regard to unpoliced terms by emphasising that transparency does not just relate to words in the abstract, but also contextual salience and consumer attention. It also alleviates the Supreme Court’s concern regarding complexity by allowing the issue of what counts as a price term to remain a matter of objective construction.

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134 Kásler (n48) [56]-[57]; Abbey (SC) (n88) [91]
135 Abbey (CA) (n88) [98]
137 OFT 2013 (n130)
138 Kásler (n48) [37]-[39]
139 CRA s64(3); Law Comm 2013 (n7) 42-45
This does not however resolve the underlying issue of reliance on either a behaviourally informed or abstract assumptive approach when seeking to understand consumers. Rather it moves that issue towards what it means for a term to be transparent or prominent. The CRA defines prominence in relation to the average consumer, and the ECJ in Kásler did the same with regard to transparency. Therefore, the courts’ approach with regard to constructing their conception of the average consumer will now be a defining feature of the type of protection that is afforded under the CRA, at least in regard to the extent of price term exclusion. (The image of the average consumer will be considered in detail below in the context of unfair commercial practices).

**Office of Fair Trading v Ashbourne Management Services Ltd**

Another case involving a collective challenge brought by a regulator is Office of Fair Trading v Ashbourne Management Services Ltd. Ashbourne provided services to gym clubs, including drafting membership contracts. A number of these contracts included minimum membership clauses with no, or minimal, provision for cancellation. The OFT challenged the fairness of these terms and sought injunctions against their use. Sitting in the High Court, Kitchin J agreed with the regulator and found many of the terms to be unfair, with the exception of terms specifying a minimum membership not exceeding twelve months with sufficient provision for cancellation.

At the outset Kitchin J stated that since this was a collective challenge, following First National he must have regard to the typical parties to the transaction. For this, he adopted the notion of an average consumer who is reasonably well informed and reasonably observant and circumspect. Kitchin J noted that this typical consumer reads documents and seeks to understand them but went on to say that the standard is variable and must take colour from the context. He explained by way of example, that a sophisticated consumer would be expected to have a greater understanding of terms than a vulnerable, naïve or

140 Kásler (n48) [74]
141 see Part 3, 109
143 ibid [173]-[175]
144 ibid [128]
145 ibid
credulous consumer. The average consumer in this case was found to be a member of the public interested in using low end gym clubs advertised at a relatively low monthly price.146

From the perspective of this consumer, Kitchin J assessed the extent to which the terms were plain and intelligible. He criticised the lack of consistency in terminology but concluded that the average consumer reading the contract carefully, would know that the contract was binding for a minimum period.147 Having concluded that the terms were transparent, Kitchin J turned to assess their fairness. He noted that the offer of a comparatively low price induced consumers into the bargain, and that once signed up they were ‘locked’ into paying for the minimum period.148 This was problematic because evidence suggested that many consumers tended to overestimate their need/desire for continued access to gym services. In light of this, Kitchin J updated his conception of the typical consumer so that they also tended to overestimate their need for continued access.149 From this perspective, the minimum membership terms had the effect of requiring the typical consumer to pay for services that they no longer wanted. It was therefore found that the defendants had exhibited a lack of good faith by deliberately designing their contracts to exploit consumer over-optimism.150

Kitchin J described the bargain as containing a ‘trap’ into which the average consumer was likely to fall.151 A significant imbalance only existed however, where contracts failed to provide for escape from the minimum term.152 Therefore, contracts for a minimum term not exceeding twelve months with some provision for escape, were not found to be unfair.153

Analysis: the approach to constructing the conception of the consumer and its effect on legal reasoning

The decision in this case is interesting. When determining who the typical consumer should be, Kitchin J adopted the average consumer conception, who is reasonably well informed, observant and circumspect. As a result, he deduces that the terms are transparent because they could be read and understood. This appears to produce a rather abstract understanding of typical consumer behaviour, which following Kasler, would seem to be the correct approach to assessing transparency. However, it is not clear how abstract the ECJ envisions

146 ibid [155]
147 ibid [158]
148 ibid [163]-[164]
149 ibid [164]
150 ibid [171]-[173]
151 ibid [173]
152 ibid [174]
153 ibid
this version of the average consumer to be.\textsuperscript{154} Indeed, in \textit{Ashbourne} Kitchin J can be seen to be adopting what has been referred to as a targeted average consumer, meaning an average member of a targeted group.\textsuperscript{155} This causes the conception to become less abstract in the sense that consideration of typical behaviour becomes connected to the traits of that targeted group.

The transparency assessment is however only a starting point and when turning to assess fairness Kitchin J went on to acknowledge that actual consumers are often over-optimistic about their demand for future gym club use. Apart from resonating clearly with the lexicon of behavioural economics,\textsuperscript{156} the recognition of consumer over-optimism is interesting because it seems to contradict the average consumer’s other traits of being reasonably well informed, observant and circumspect. This can be seen in the fact that the typical consumer was found to have understood the terms yet fallen into the trap contained therein. The court’s analysis was based on evidence of actual consumer behaviour produced by the OFT, which demonstrated consumer over-optimism and its effect on consumer choice. Ashbourne were aware of this ‘notorious fact’.\textsuperscript{157} This allowed the court to engage in a behaviourally informed assessment of fairness which in turn, allowed Kitchin J to appreciate the conflict that exists between the actual consumers who had complained about the terms and the supplier benefiting from their use. When the supplier’s conduct was assessed from this perspective, the lack of good faith became clear.

As a result of this approach, consumers were afforded a degree of protection from a business practice designed to exploit their behavioural traits. Had the typical consumer conception not been so informed however, it would have remained abstract and it seems likely that the transparent terms would not have been unfair for the same reasons that the terms in \textit{First National} were not unfair; the typical consumer understood them, they were an essential aspect of the bargain, and the parties agreed to contract on that basis. This would reflect the normative stance seen to underlie the decision in \textit{Abbey}, in that the abstract typical consumer would be seen to have made a free and informed choice. Instead, the decision in \textit{Ashbourne} can be seen as being more fairness orientated and as reflecting a more protective

\textsuperscript{154} Howells, Twigg-Flesner and Wilhelmsson (n9) 152, 153
\textsuperscript{155} P Cartwright ‘The Consumer Image Within EU Law’ in C Twigg-Flesner (ed), \textit{The Research Handbook on EU Consumer and Contract Law} (Elgar, 2016) 199
\textsuperscript{156} see Part 1, 28-45
\textsuperscript{157} \textit{Ashbourne} (n142) [164]
ethic. This is not without limits since the fact of consumer detriment alone was not enough to produce unfairness. Rather, Ashbourne’s exploitation of that weakness was integral to the finding of a lack of good faith and therefore the conclusion in this case.

The significance of this decision lies in its demonstration of how the unfair terms test can be interpreted and applied whilst taking into account findings regarding actual consumer behaviour. The court’s approach to constructing the conception of the consumer is the essential variable in this regard. By being open to consideration of the OFT’s behaviourally informed argument, Kitchin J was able to deal with what seems to have been a behavioural market failure and therefore an important type of problematic term. Indeed, the decision influenced the Law Commission’s proposal for a new addition to the grey list of terms which explicitly highlights cancellation payments as a cause for judicial concern. This does not mean that such terms are unfair, but it does mean that they are particularly worthy of scrutiny. As the Law Commission notes:

Such terms often exploit consumers’ behavioural biases... consumers tend to focus on their present needs, and underestimate the likelihood that circumstances will change in the future.

The fact that the approach in Ashbourne led to the inclusion of a new grey list term based on potential unfairness caused by exploitation of behavioural traits, shows why a behaviourally informed conception of the consumer is so important to the fairness regime as a whole. Without it, terms which both legislators and regulators agree are problematic would not necessarily be tackled by courts.

Before moving on, one final point should be made here. It might be suggested that the inclusion of a term on the grey list is not indicative of support for a behaviourally informed approach in general but is rather a way to clarify that such terms do not fall under the exclusion from fairness assessment. Support for this may be found in the Law Commission’s report which notes that traders should be able to rely on the exclusions where terms are transparent and prominent but that the grey list flags up terms known to exploit behavioural biases and therefore should not be capable of exclusion. This is described as a

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158 CRA sch2(5); Law Comm 2013 (n7) 63-65
159 Law Comm 2013 (n7) 63
160 ibid, 25
“compromise between classical and behavioural economic approaches”. However, grey list terms are not automatically unfair and must still be assessed by a court. As part of this assessment it becomes necessary for the relevant behavioural bias giving rise to the need for grey list status to be recognised. It should not necessarily be assumed that the bias has been exploited in every case; that would prejudice the interests of traders. Equally though, it would seem strange if the court adopted too abstract a conception of the consumer, thereby preventing the relevant behavioural trait from being observed. This would produce an assessment of fairness which ignores the risk of behavioural exploitation, by focusing on a more rational conception of the consumer. It seems more in line with the underlying rationale giving rise to changes in the fairness regime, to have courts consider what evidence there is for the existence of pertinent consumer behavioural traits and where there is convincing evidence (as there was in Ashbourne), to have the court incorporate that into their understanding of the typical consumer. This would amount to a behaviourally informed approach.

*ParkingEye Ltd v Beavis*

*ParkingEye Ltd v Beavis* concerned the fairness of parking charges. ParkingEye managed a car park on behalf of the owners of a retail park. Customers were permitted to park there for two hours without charge, however if they overstayed they would incur an £85 charge. These terms were displayed prominently. Mr Beavis parked his car for nearly three hours and was charged. When ParkingEye sought to enforce this against him, Mr Beavis challenged it on two grounds. The first was that it was a penalty and therefore not enforceable under common law. The second was that it resulted from an unfair term under the UTCCR’s 1999. The case reached the Supreme Court after Beavis’ arguments failed before the Court of Appeal.

Unlike the other cases considered, *ParkingEye* is an example of an individual fairness challenge as opposed to a collective one, although it should be noted that it was understood to be a test case which may have introduce a level of abstraction into the assessment.

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161 ibid
164 *ParkingEye* (SC) (n162) [295]
The penalty doctrine

The Supreme Court unanimously rejected the submission that the charge was unenforceable under the penalty doctrine. Delivering a joint leading judgment Lord Sumption and Lord Neuberger recognised that the charge was designed to deter users from overstaying and did not reflect a pre-estimate of damages.165 However, the court found that the charge was nonetheless enforceable since ParkingEye had a legitimate interest in influencing the conduct of customers which would not be satisfied by damages for breach of contract.166 This was because the charge was seen as necessary to allow ParkingEye to meet their objective of efficient management of the car park, which included maintaining an income stream sufficient to cover operating costs and a profit.167 Apart from that interest, ParkingEye would have been unable to show loss resulting from a customer’s breach since it had no legal interest in the land itself.168 The Lords added that this does not give parties free reign to impose penalty charges since the charge must not be out of all proportion to the charging party’s interest.169 However, in this case £85 was neither extravagant nor unconscionable when compared with charges imposed by local authorities for overstaying in public car parks.170

Unfair terms

With regards to fairness, a number of the Lords recognised the ECJ’s guidance in Aziz which was described as the leading case on the matter.171 In what seems to be a departure from First National, most of the Lords agreed that the relevant term did create an imbalance in the parties’ rights and obligations because it put the consumer in a less favourable position than would have prevailed under the general legal rules.172 However, a majority of the court found no lack of good faith and therefore no unfairness.173 Lord Toulson dissented on this point and in so doing accused Lord Sumption and Lord Neuberger of watering down the fairness test.174

165 ibid [99]
166 ibid [99] (Lord Sumption and Lord Neuberger)
167 ibid [98]-[99]
168 ibid [97]
169 ibid [100]
170 ibid
171 ibid [105]; Aziz (n13)
172 Aziz (n13); see also Freiburger (n40) [21]; Lord Mance found no imbalance, although it should be noted that he did not clearly distinguish between consideration of the issue of significant imbalance and good faith in the same way as the other Lords, ParkingEye (n162) [208]-[213]
173 ParkingEye (SC) (n162) [109]
174 ibid [315]
The Majority

Lord Sumption and Lord Neuberger, with whom Lord Clarke and Lord Carnwath agreed, stated that the same considerations showing the term not to be a penalty showed it not to be unfair.\textsuperscript{175} Having found an imbalance in the parties’ rights and obligations, the Lords turned to consider whether this arose contrary to good faith. It was recognised that the term is of a type contained on the grey list, since it requires a consumer to pay a disproportionately high sum for breach, however this does not seem to be given much weight as part of the overall assessment.\textsuperscript{176} The Lords emphasised that ParkingEye had a legitimate interest in imposing the charge to deter breach.\textsuperscript{177} This was fundamental to the contractual relationship and underpinned ParkingEye’s business model.\textsuperscript{178} Having recognised this, Lord Sumption and Lord Neuberger went on to consider the ECJ’s guidance set out in Aziz. The ECJ had stated that when considering good faith, a national court should ask if the supplier, dealing fairly and equitably with the consumer, ‘could reasonably assume that the consumer would have agreed to the relevant term in individual contract negotiations’.\textsuperscript{179} As noted above, this puts the conception of the consumer at the heart of the assessment, however, it is important to stress that the good faith question is framed in terms of what the supplier can reasonably assume. The issue then, is whether the supplier is required to consider consumers in light of their behavioural complexity (behaviourally informed conception), or if they are able to assume that consumers will behave in a particular way (abstract assumptive conception).

Lord Sumption and Lord Neuberger adopted the latter approach. They recognised that the question requires an artificial assessment, but stated that it is workable as an objective test; the question is not whether the actual consumer would have agreed, but whether a hypothetical reasonable consumer would have agreed.\textsuperscript{180} This appears to bring assessments of fairness in individual challenge cases into line with those where a collective challenge is made to terms more generally, in the sense that both seem to depend on an understanding of a typical/hypothetical consumer conception. The Lords concluded that in this case the supplier could assume that consumers would agree to the term. In support of this they relied

\begin{itemize}
\item \textsuperscript{175} ibid [104]
\item \textsuperscript{176} ibid [103]-[105]; UTCCR 1999 sch2(1)(e) (now CRA sch2(6))
\item \textsuperscript{177} ParkingEye (SC) (n162) [107]
\item \textsuperscript{178} ibid
\item \textsuperscript{179} Aziz (n13) (emphasis added) [69], Opinion of AG Kokott [78]
\item \textsuperscript{180} ParkingEye (n162) [108]
\end{itemize}
on a number of factors which reveal something about their approach when constructing the hypothetical reasonable consumer conception.\textsuperscript{181}

First, Lord Sumption and Lord Neuberger acknowledged that consumers often used the car park and so assumed that they probably would agree to its terms.\textsuperscript{182} The Lords recognised that this may not always be good evidence but was persuasive here because the consumer could not have avoided reading the prominent notices. This is an example of deductive reasoning. The Lords are suggesting that the hypothetical reasonable consumer can be assumed to have agreed because they did actually park their car having seen the notices and signs. Of course, this deduction requires that the consumer be treated \textit{as if} they had read and understood the terms, otherwise their assent to them could not be deduced from the act of parking alone. The Lords make this assumption clear as part of their assessment of the penalty doctrine when they state that consumers choosing to use the car park, “must regard the risk of having to pay £85 for overstaying as an acceptable price for the convenience of parking there”.\textsuperscript{183}

It might be argued that the approach here is empirical in the sense that the court is looking at the behaviour of consumers to determine what the reasonable consumer would agree to. However, the same criticisms levelled at that analysis of the \textit{First National} decision can be applied here.\textsuperscript{184} The conclusion rests on an abstract assumptive approach to the conception of the consumer, which colours the interpretation of the consumer’s actions. It is assumed then that the typical consumer is are aware of transparent terms and must therefore be accepting the risk contained therein.

The second point supporting the Lords’ conclusion, is that the reasonable consumer has every reason to accept the contract terms.\textsuperscript{185} They get two hours free parking in return for accepting the risk of incurring a fine. The Lords note that this risk is entirely within consumers’ control and that all the reasonable consumer needs to avoid it is a watch.\textsuperscript{186} This suggests the reasonable consumer is understood to be confident of their own self-reliance when making the contract. They can be assumed to be willing to agree to the term because

\textsuperscript{181} ibid \[108]-[110]\textsuperscript{182} ibid \[108]\textsuperscript{183} ibid \[100] (Lord Sumption and Lord Neuberger)\textsuperscript{184} see Part 3, 77\textsuperscript{185} ParkingEye (n162) \[109]\textsuperscript{186} ibid
they know that they have control over incurrence of the fine. This assumption is implicit in the Lords’ reasoning since they accept that the level of charge acts as a deterrent, suggesting that a consumer would not be willing to pay £85 for two hours plus of parking. It follows that if the consumer was risk averse, or acutely aware of their own carelessness, they would not necessarily accept the term given the risk of its incurrence. This aspect of the reasonable consumer is then important for the court’s assessment of fairness; it is only because the consumer is confident in their ability to avoid the charge that they are willing to accept the terms. Based on these considerations, Lord Sumption and Lord Neuberger declare that the hypothetical reasonable consumer would accept what they see as objectively reasonable terms, and therefore, that the supplier acted in good faith.

**Lord Toulson’s dissent**

Lord Toulson reached a different conclusion. He explained that, whereas the penalty doctrine is based on the principle that parties should be kept to their bargains, the fairness test is based on the principle that consumers need special protection from disadvantageous terms. Therefore, suppliers are required to put themselves in the consumer’s shoes and consider if it would be fair to assume that the consumer would agree to a term. This places a burden on suppliers to adduce evidence to satisfy the court that they could. In Lord Toulson’s view, ParkingEye had failed in this regard. He referred to a number of ‘telling points’, such as the fact that the term allowed for no flexibility, that the fine amounted to a substantial sum of money (in this regard he compared the £85 to the basic state pension of £115 per week), and that the total cost of running the car park was extracted from a minority of over stayers. These points cast doubt on whether a consumer would agree. In addition, Lord Toulson rejected the suggestion that the business model adopted was the only one available since other providers provide parking for free.

By way of conclusion, Lord Toulson criticised Lord Sumption and Lord Neuberger for substituting their view of the terms reasonableness for the question of whether the

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187 ibid [98]
188 ibid [109]
189 ibid [295]
190 ibid [309]
191 ibid
192 ibid [314]
193 ibid [310]-[313]
194 ibid [314]
consumer could be assumed to agree to it.\textsuperscript{195} This, he stated, makes the fairness test the same as the test under the penalty doctrine, which waters down the protection afforded.\textsuperscript{196} The nature of the evidence required to satisfy Lord Toulson in these circumstances is unclear. However, his emphasis on the need to protect consumers and reluctance to make assumptions about what consumers would agree to, suggests a relatively high burden for suppliers in terms of convincing the court that actual, as opposed to hypothetical consumers could be assumed to agree to the disadvantageous terms. This might suggest the need for a more behaviourally informed approach.

\textit{Analysis: the approach to constructing the conception of the consumer and its effect on legal reasoning}

Lord Toulson’s criticism of Lord Sumption and Lord Neuberger’s approach has merit. The adoption of the hypothetical reasonable consumer allows the Lords to conclude that consumers would accept objectively reasonable terms because the conception is constructed so that it shares their view. This is why the same considerations apply for assessment of the penalty issue as for the fairness issue; both are essentially an assessment by the court of whether the relevant term meets the standard of reasonableness. It should be noted that the Lords’ understanding of reasonableness in this context seems to be linked to a respect for contractual freedom. As part of their analysis, the Lords cited the Advocate General’s opinion in \textit{Aziz} with approval, where she states that the good faith requirement is designed to limit inroads into freedom of contract.\textsuperscript{197} In this regard, the hypothetical reasonable consumer conception, which is created via an abstract assumptive approach, can be seen as a tool allowing the court to conclude that the term is fair without requiring too intense an investigation into the supplier’s choice of business model. Consumer weaknesses, such as over-optimism, are then prevented from allowing for a challenge to contract terms and suppliers can assume that consumers would agree to certain potentially detrimental terms if engaged in individual negotiations. In normative terms, this reflects a freedom orientation and a corresponding self-reliant ethic.

The result produced is interesting, especially when considered in light of behavioural market failure and the decision in \textit{Ashbourne}.\textsuperscript{198} ParkingEye’s business model was based on the

\begin{footnotes}
\item[195] Ibid [315]
\item[196] Ibid
\item[197] Ibid [106]; \textit{Aziz} (n13) AG [73]
\item[198] \textit{Ashbourne} (n142)
\end{footnotes}
assumption that consumers would not voluntarily incur the £85 charge. However, they were able to predict with enough accuracy to make a significant profit, that a number of consumers will ultimately do so when bound by the terms in question. In light of this, ParkingEye had essentially exploited the statistically significant number of consumers who will overestimate their ability to avoid the fine by designing a business model which charges them for their failure and uses that to subsidise other consumers. As a result, ParkingEye could offer a product which appeared cheap, but which was actually very expensive for an inadvertent self-selecting few.

This looks like an example of behavioural market failure. In Ashbourne the assessment of fairness responded to the supplier’s exploitation of consumer behavioural traits by updating the conception of the consumer so that they shared the relevant weakness. The supplier was found to have acted in bad faith when they deliberately took advantage of this. However, in this case Lord Sumption and Lord Neuberger rejected the suggestion that the term should be found to be unfair because it exploits the potential for consumers to underestimate risk. They stated that the reasons why consumers overstay are irrelevant, and that consumers should bear the risk of overstaying because they are in a position to organise their own time. This clearly disregards any concern for consumers who exhibit detrimental behavioural traits such as over-optimism. Instead, all consumer interests are determined by reference to the hypothetical reasonable consumer, who is assumed to be able to organise their time.

Similarly, Lord Mance addressed and rejected the over-optimism argument put forward by counsel for Beavis. He distinguished Ashbourne in this regard, on the basis that in that case even the defendants accepted that it was a notorious fact that consumers failed to attend gym clubs for the full term of the contract. He stated that Kitchin J in Ashbourne did not simply find all of the terms unfair, but rather balanced all of the interest involved at each stage. In light of this he rejected Beavis’ case and the argument that the court should respond to the propensity for some consumers to be over-optimistic.

199 see McGaughey (n80)
200 ibid
201 Ashbourne (n142)
202 ParkingEye (n162) [111]
203 ibid [111]
204 cf Ashbourne (n142)
205 ParkingEye (n162) [210]-[211]
Approaching the assessment in this way reduces the scope for protection of consumers because the hypothetical reasonable consumer does not necessarily share their traits and therefore does not necessarily reflect their interests. This limits the extent to which courts must balance the different interests involved because the interests of consumers are supplanted by hypothetical interests instead. As a result, detriment stemming from particular traits, such as over-optimism, are not recognised because the hypothetical reasonable consumer does not experience it. Equally, the actual disparity of bargaining strength between the parties does not seem to be reflected in the assessment carried out. Instead, any disparity is assessed hypothetically. Furthermore, whilst good faith may require the supplier to take consumer interests into account, as a result of Lord Sumption and Lord Neuberger’s approach, the relevant interests become those of the hypothetical consumer, as opposed to those of actual consumers. Seen in this way, the assessment of fairness becomes removed from the reality of the conflict that exists between those consumers bound to pay the fine and the supplier seeking to make a profit. In turn, consideration of the potential behavioural market failure that may have occurred is inhibited.

The adoption of a more behaviourally informed approach would not necessarily have led to a finding of unfairness. However, it is submitted that the legal reasoning supporting the conclusion reached would have taken a different shape. Instead of the court rejecting the challenge because the consumer is assumed to be able to understand the term and avoid the charge, the court might have considered more directly how the term actually affects the interests of consumers. Evidence pertinent to that question could then have been considered. For example, it might have been asked how long after the two-hour period consumers tend to overstay. This would have given some idea of the extent to which consumers were narrowly overstepping the mark or were flagrantly flouting the permitted parking period. Equally, it might have been asked how frequently consumers challenge the imposition of the fine. This might have given an idea of how often consumers thought the fine unfair or alternatively how often they accepted or expected the fine as a consequence of their behaviour. By assessing such evidence, a court should be able to build a picture of typical consumer behaviour which would allow for a judgment regarding how detrimental this term is to typical consumer interests. Armed with this knowledge the Supreme Court could then have engaged in a more meaningful assessment regarding whether ParkingEye could fairly assume that consumers

206 see UTCCD Recital 16
would agree to the term. ParkingEye’s knowledge and their reasons for using this business model would be relevant in this regard.

It might be that despite evidence of detriment the Supreme Court would nonetheless have decided that suppliers could assume that consumers would agree because consumers should look after their own interests. This would mirror the actual decision in this case, however the reasoning of the court would then be more transparent since they would be reaching that conclusion in light of an assessment of actual consumer interests, rather than doing so on the basis of an abstract legal fiction. Equally, behavioural evidence might have revealed a mixture of different consumer interests which would then have needed to be fed into the balance struck between consumer and supplier interests, and in particular whether ParkingEye acted in good faith. For example, if many consumers were shown to have understood and benefited from the term, that might be evidence of ParkingEye's good faith, despite knowledge of detriment suffered by some consumers. However, according to Lord Toulson, once a significant imbalance is shown to exist it is for the supplier to justify the terms usage and therefore to make this type of argument.\textsuperscript{207} It might be added that this evidence should be particularly robust where the term is included on the grey list, especially if, as the Law Commission claim, it is the grey list that protects consumers from exploitation of their behavioural traits.\textsuperscript{208}

In practical terms, the different approaches adopted by the majority and Lord Toulson, show how different approaches to conception of the consumer do have an effect on legal reasoning associated with the fairness test. Since Lord Toulson did not specify the evidence needed to decide the fairness issue, it is difficult to determine the extent to which he was advocating for a behaviourally informed approach. However, he did explain that whereas the penalty test is based on the notion of the sanctity of contract,\textsuperscript{209} given the need for protection, the fairness test justifies a burden on suppliers to prove fairness.\textsuperscript{210} This signals a much more protective ethic when compared with the majority’s judgment, which when considered alongside the Court of Appeal’s decisions in \textit{First National} and \textit{Abbey}, and the High Court’s decision in \textit{Ashbourne}, might support suggestion that a more behaviourally informed approach is required if a high level of consumer protection is to be secured.

\textsuperscript{207} ParkingEye (n162) [309]; on this issue see Law Comm 2013 (n7) 98-99
\textsuperscript{208} Law Comm 2013 (n7) 24-25
\textsuperscript{209} ParkingEye (n162) [309]
\textsuperscript{210} ibid
The conception of the consumer and unfair contract terms: analysis and conclusion

The analysis of cases concerning English courts’ interpretation and application of the unfair terms test reveals evidence of a behaviourally informed and abstract assumptive approach. This demonstrates that both approaches are possible. However, it is clear that the authoritative trend favours an abstract assumptive approach as reflected in the Supreme Court’s relatively consistent reliance on the image of a hypothetical reasonable consumer. This label was used by Lord Sumption and Lord Neuberger in ParkingEye\(^{211}\) and reflects the conception adopted by the House of Lords in First National and the Supreme Court in Abbey.\(^{212}\)

The cases suggest that the hypothetical reasonable consumer is understood to be capable of making their own choices so long as they have access to relevant and transparent information.\(^{213}\) Equally, they seem to be aware of the commercial context of the contracts they enter and are able to assess terms in an objectively reasonable fashion.\(^{214}\) In this respect, the consumer as conceived tends to be reasonably self-reliant.\(^{215}\) A more thorough analysis of the decisions reveals that these traits are not derived from evaluation of empirical evidence regarding actual consumer behaviour, but are instead the product of abstract judicial assumption. The resulting notion of a hypothetical reasonable consumer is not necessarily intended as a realistic reflection of consumer interests and traits, and is therefore a legal fiction. Lord Mance’s statement that “the consumer is to be capable of reading the relevant terms and identifying whatever is objectively the price and remuneration under the contract”, is a typical example of the type of assumption made in this regard.\(^{216}\) This does not mean that the image of the consumer relied on is necessarily fanciful (consumers may well be capable of reading the relevant terms for example), but rather that the image is not derived from, and does not depend on, an appreciation of empirical evidence relating to the way in which consumers tend to behave in reality. Put simply, the conception of the consumer is often more legal than it is factual.

\(^{211}\) ibid [108]
\(^{212}\) First National (HL) (n53); Abbey (SC) (n88)
\(^{213}\) ParkingEye (SC) (n162) [108]; Abbey (SC) (n88) [113]
\(^{214}\) ParkingEye (SC) (n162) [109]; First National (HL) (n53) [55]
\(^{215}\) Willett 2012 (n85)
\(^{216}\) Abbey (SC) (n88) [113] (Lord Mance)
Reliance on an abstract approach when constructing the conception of the consumer has important implications for the legal reasoning produced when assessing fairness. This is particularly apparent with regard to good faith, which according to the Recital, requires an overall evaluation of the different interests involved.\textsuperscript{217} Reliance on an abstract conception of the consumer causes the assessment of fairness to become dependent on that consumer’s interests and traits, rather than on the interests and traits of actual consumers. There is then a risk that the fairness assessment becomes too removed from the actual conflict that exists between supplier and consumer interests. This may prevent forms of detriment suffered by (some) consumers from being recognised as grounds for challenging terms. Equally, factors pertinent to assessment of good faith might not be reflected in the overall assessment. For example, the claim in ParkingEye is premised in part on detriment caused by exploitation of consumer over-optimism. This is rejected by the court, not because there is a lack of empirical evidence to support such a claim,\textsuperscript{218} but because in their judgment, all the consumer needs to avoid this detriment is a watch. The difficulty with this is the mechanism used to balance the different interests involved. The fairness decision does not explicitly balance the interests of those consumers who are overly optimistic and the supplier who may be deliberately exploiting that. Instead, the conclusion is based on the assumption that the hypothetical reasonable consumer has not suffered detriment. Therefore, it does not matter whether the supplier knew that some consumers were inadvertently falling into the trap of having to pay against their expectations, nor does it matter that the term affects a particular group or groups of consumers more than others, even if those groups were specifically targeted.

It is submitted then, that reliance on an abstract approach when constructing the conception of the consumer narrows the scope for analysis of factors that may be relevant to consumer interests. This inevitably narrows the scope for protection of consumers from potentially detrimental contract terms. Issues indicating behavioural market failure might therefore be overlooked. In addition, distortions of effective competition will not necessarily be rectified by regulators, since they will be bound by the precedent set by courts. The capacity for improving the market in the interests of consumers created by the open-textured fairness clause, is as a result stunted.

\textsuperscript{217} UTCCD Recital 9
\textsuperscript{218} see for example Part 1, 32-33
At this stage it is important to consider why an abstract approach may have been adopted. The two most plausible (overlapping) explanations relate to respect for contractual freedom and the cost and complexity of litigation. The issue of cost and complexity is relatively straightforward; reliance on a simplified image of the consumer allows courts to assess fairness without the need to rely on empirical evidence.\(^{219}\) This will take less time and will therefore incur less cost than if the reverse were true. It also limits the scope for fairness claims based on behavioural arguments and therefore may reduce instances of litigation.

Concern for contractual freedom can be seen in a number of the decisions analysed. In *Abbey* it can be seen in Lord Walker’s statement that respect for consumer choice as opposed to consumer protection is central to the law, and in Baroness Hale’s statement that as a general proposition consumer law in the UK seeks to provide an informed choice not protection from unwise choices.\(^{220}\) These sentiments supported the court’s restrictive interpretation of the exclusion provisions. In *ParkingEye*, Lord Sumption and Lord Neuberger explicitly endorsed the Advocate General’s statement in *Aziz*, where she said that the requirement of good faith is designed to protect freedom of contract by limiting inroads into it.\(^{221}\) It follows that good faith is a mechanism by which consumer protection is limited despite contract terms causing detrimental imbalance. When viewed from this perspective, the abstract image of the consumer can be seen as a legal standard imposed by the court to control the nature and type of protection afforded to consumers, which in turn protects suppliers from an erosion of their contractual freedom. As a result, the English courts’ interpretation of the fairness test can be understood as being informed by a self-reliant ethic, which in many ways reflects the traditional individualist emphasis of private law reasoning.\(^{222}\)

It is submitted that whilst the legislation can support this approach, it is not necessarily appropriate. A balance must be struck between the interests of suppliers and consumers and in that regard consumer protection should be limited. However, if the unfair terms test is designed as a response to problems associated with standard form contracts,\(^{223}\) and if it is

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\(^{220}\) *Abbey* (SC) (n88) [44], [93]

\(^{221}\) *ParkingEye* (n162) [106]; *Aziz* (n13) AG [73]


\(^{223}\) see for example, F Kessler ‘Contracts of Adhesion: Some Thoughts about Freedom of Contract’ (1943) 43(5) Colum.L.Rev. 629; R Korobkin ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70(4) U.Chi.L.Rev. 1203
intended to afford real protection to consumers’ economic interests, then it seems important for courts to exercise the discretion created by the fairness test to allow for a more informed consideration of reasons why particular terms might actually affect consumers, given the behavioural reality that persists. It is this need for a more expansive interpretation of the unfair terms test which seems to have led Lord Toulson to criticise Lord Sumption and Lord Neuberger for watering down the protection afforded under the legislation.

Indeed, the very issue that the test is designed to tackle is consumers lack of attention to non-core terms. This is despite the level of transparency of those terms, as evidenced by the fact that transparency alone does not cause a non-core term to be fair. In light of this, opting to base the entire assessment of fairness on an image of the consumer who would be likely to subject the non-core terms to a degree of competitive pressure, seems to undermine the regime as a whole. In effect, what reliance on the abstract assumptive conception of the consumer seems to do, is ask what the consumer would agree to if they were economically rational, whereas what seems to be required is to ask what the consumer would do if they had more economic power. The difference between these hypothetical questions is not insignificant. Consumers do not tend to act perfectly rationally and therefore if they were given more economic power, they would not necessarily change their behaviour, but they might seek to protect themselves from the consequences of their own human fallibility. In this regard they could protect their interests by, for example, making provision for underestimation of risk, or protecting themselves on default.

An alternative (behaviourally informed) approach

The case analysis conducted does however reveal an alternative approach. Despite the dominance of the hypothetical reasonable consumer, there is evidence of a tension between that conception and a more behaviourally informed conception. Courts have, on occasion, recognised that consumers may not necessarily be fully informed and may make poor decisions, even when given the opportunity to consult transparent information. This can be

225 Faure and Luth (n77)
226 ParkingEye (n162)
227 see for example Foxtons (n99) [92]
228 CRA s62, s68; Explanatory Note to the Consumer Rights Act 2015 [322]
seen in the Court of Appeal’s decisions in *First National*\(^{229}\) and *Abbey*\(^{230}\), as well as in the High Court’s decision in *Ashbourne*.\(^{231}\) It should be noted that the trend identified in this respect, is not that the conceptual consumer has certain traits or behaves in a particular way, but rather that the consumer has the *potential* to behave in a range of ways and therefore should not necessarily be understood on the basis of abstract assumption alone. Instead, the consumer should be understood in light of the relevant context, drawing where possible on empirical evidence of actual consumer behaviour. Consideration of this evidence and arguments based on it, highlights actual consumer traits which are then fed into the assessment of fairness, allowing courts to engage in legal reasoning more directly relevant to the conflict that exists between consumer and supplier interests. Instead of assuming, for example, that consumers can manage their own time, courts can look at evidence regarding typical consumer behaviour and ask whether a supplier could fairly assume that consumers would nonetheless agree to a term.

This does not however mean that freedom of contract must be sacrificed on the altar of paternalism. The approach allows courts to recognise actual consumer interests and then to engage in a balance between them and supplier interests. If a normative stance is adopted calling for ardent protection of a traditional individualist understanding of contractual freedom, then that can inform the balance ultimately struck. However, the difference between the abstract assumptive approach and the behaviourally informed approach, is that such a decision would need to be justified in light of evidence regarding behavioural reality, taking into account any detriment that might exist.\(^{232}\)

The advantage of this approach is that whilst being flexible and providing judicial discretion, it requires courts to engage in a more meaningful balancing exercise between the interests of consumers, who as a group are not (relatively) well protected by contract law, and the interests of suppliers who often are.\(^{233}\) In addition, it has the advantage of broadening the scope for arguments relating to unfairness by allowing for important behavioural realities to be considered by courts. This is particularly important in collective cases brought by

\(^{229}\) *First National* (HL) (n53)
\(^{230}\) *Abbey* (CA) (n88)
\(^{231}\) *Ashbourne* (n142)
\(^{232}\) Such as the findings of behavioural economics set out in Part 1, 28-45
\(^{233}\) Kessler (n223)
regulators tasked with improving effective competition. As regulators become increasingly reliant on an approach based on behavioural investigation and insight, there will be areas where detriment is discovered because of behavioural market failure. This does not necessarily mean that contract terms must be rendered unfair, but it does warrant an approach to the assessment of fairness which allows for the legal system to respond to such information so that appropriate legal responses can be worked out and applied. The behaviourally informed decision in Ashbourne, which led to the introduction of a new form of grey listed term, is a good example of this. However, the precedent set by decisions such as Abbey and ParkingEye, which narrow the scope for fairness arguments, will surely hinder regulators with evidence of problematic terms, who know that if assessed from the perspective of an abstract hypothetical consumer, might not be seen as such. An approach allowing for the reality of consumer experiences to be fed into the assessment of fairness, so that courts can analyse the merits of the behavioural arguments, seems preferable to an approach which uses an abstract standard to prevent the argument from being made in the first place.

It must be recognised that the more expansive the assessment of fairness, the more room there will be for disputes. This will potentially increase instances of litigation, subjecting suppliers’ contractual freedom to a wider range of attacks. The response to this must be that the introduction of the test is designed to achieve a level of protection despite the increased cost that this brings, both literally and in terms of supplier freedom. The goal in that sense must be compared with the costs of achieving it. If detriment suffered outweighs these costs, intervention becomes justified. Focused empirical study is necessary to inform such a calculation. That is beyond the scope of this work. The contribution made here however, is to highlight that there is a choice of approach and that there are reasons why a more behaviourally informed understanding of consumers might be appropriate when assessing the fairness of contract terms. The analysis set out above should then be considered in light of research into costs if that becomes available. This would relate to a wider discussion

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234 see Part 2  
236 CRA sch2(6); Law Comm 2013 (n7)  
237 Beale (n219) 116
regarding the appropriateness of any market intervention risking increased costs for suppliers and consumers.  

Conclusion

The case analysis has revealed that there is a tension between assessment of unfair terms based on an abstract conception of the consumer and assessment based on a more behaviourally informed conception. This reflects the tension inherent in the legislation itself, which tries to protect consumers from unfair terms whilst maintaining respect for contractual freedom.  

It is clear that the conception of the consumer is of central importance in this regard. The conflict between normative persuasions leading to the promotion of either a protective or self-reliant ethic is largely reflected in different judicial approaches when seeking to understand and analyse consumer interests and traits. These different understandings then inform perceptions of fairness and therefore legal outcomes.

Regardless of the normative legal policy promoted however, it has been suggested that reliance on a behaviourally informed approach may be more appropriate in this context. This allows for a more meaningful assessment of the balance that should be struck between the interests of suppliers and consumers, and requires more in terms of justification for fairness decisions in light of the effect that a term has on actual consumer interests, whether assessed in a concrete or collective case. It has been suggested that this could provide more scope for consumer protection by allowing regulators to raise issues of behavioural market failure when appropriate to do so. Ultimately however, a court would retain the power to protect contractual freedom as part of the balance struck between consumer and supplier interests if that is considered to be the most suitable legal outcome.

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239 Collins (n9) 252; Law Comm 2013 (n7) 25
Unfair commercial practices: the average consumer conception

Introduction

The Consumer Protection from Unfair Trading Regulations 2008 (CPUTR) implement Directive 2005/29/EC (The Unfair Commercial Practices Directive (UCPD)) and have the effect of prohibiting unfair commercial practices. A commercial practice is defined broadly and includes conduct connected with the promotion, sale, or supply of products to consumers. Regulation 3(3) sets out a general fairness clause stating that a practice will be unfair if it contravenes the requirements of professional diligence and materially distorts, or is likely to materially distort, the economic behaviour of the average consumer. Regulation 5 (misleading actions), regulation 6 (misleading omissions), and regulation 7 (aggressive practices) set out specific prohibitions for the most common types of unfair practice. Under each the practice must cause, or be likely to cause, the average consumer to take a transactional decision that he would not otherwise have taken. A ‘transactional decision’ is a decision concerning whether, how, and on what terms to purchase, make payment, retain/dispose of a product, or exercise a contractual right. Under these specific prohibitions there is no separate requirement for contravention of a professional diligence standard. In addition to the general and specific clauses, schedule 1 sets out a ‘black list’ of practices considered to be unfair in all circumstances.

With some limited exceptions, the Directive has maximum harmonising effect. Therefore, national provisions should not go beyond it even if intended to create a higher level of

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2 CPUTR reg2
3 CPUTR reg3(3)
5 CPUTR reg5(2)(b) and (3), reg6(1), reg7(1)(b)
6 UCPD art2(k); Case C-281/12 Trento Sviluppo srl and another v Autorità Garante della Concorrenza e del Mercato [2013] ECLI:EU:C:2013:859
7 Case C-435/11 CHS Tour Services GmbH v Team4 Travel GmbH [2013] ECLI:EU:C:2013:574
9 UCPD art3(9)-(10)
consumer protection. However, the Directive is said to be without prejudice to contract law or product safety rules and where it conflicts with other specific community rules, those rules shall prevail. In addition, the Directive provides some discretion to member states regarding enforcement. In the UK, the CPUTR attach criminal sanctions to violation of the prohibitions and rely primarily on regulators to enforce the legal rules. In 2014 Part 4A was inserted into the Regulations giving individual consumers a private remedy where an unfair practice has affected their choice to make payment or contract with a trader.

Purpose and nature of the test

The UCPD specifies its purpose, albeit briefly, in article 1. This states that the Directive aims to contribute to the functioning of the internal market and produce a high level of consumer protection by harmonising member state rules on unfair commercial practices. The rationale for a directive was set out in the Commission’s 2001 Green Paper, which highlighted the detrimental effect of divergent rules on cross-border trade and consumer confidence. A mixed legislative approach, with a broad framework directive harmonising commercial practice rules alongside more specific rules in some areas, was suggested and adopted in the Commission’s follow up paper. This was seen as having the advantage of being comprehensive and ‘time-proof’, in that new practices can be dealt with as they emerge without additional specific rules. In this regard the Commission intended to strike a balance between certainty and adaptability.

The high level of protection referred to concerns consumers’ economic interests. The notion of causing a consumer to take a transactional decision that they would not have taken otherwise reflects this. The rationale underlying such protection relates to the risk of market failure caused by practices distorting consumers’ ability to make informed, and

10 Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV [2009] ECR I-02949 [52]
11 UCPD art3(2)-(3), art3(4)
12 UCPD art11
13 CPUTR reg8-18
14 CPUTR reg19
15 Consumer Protection (Amendment) Regulations 2014 SI 2014/870, reg3
16 UCPD art1
20 ibid
21 UCPD Recital 6, 14
therefore efficient choices.\textsuperscript{22} However, the fairness regime is not intended to protect the economic interests of individual consumers specifically, but relates to collective consumer interests more generally.\textsuperscript{23} This requires a degree of abstraction to accommodate the differences between consumers, which is achieved by tailoring the assessment of fairness to the average consumer. This legal conception then acts as a representative of actual consumer interests for the purpose of assessing fairness. However, abstracting away from the interests of specific consumers also serves an important regulatory function, by providing a benchmark for assessment across the internal market. In this regard, the average consumer conception acts as a standard designed to “navigate a course between the rich diversity of actual consumer behaviour and the need for an operational regulatory benchmark”.\textsuperscript{24}

An important question that arises then, is to what extent reliance on the average consumer conception allows for this ‘rich diversity of behaviour’ to be translated into the fairness assessment, particularly in light of the growing importance of behavioural economics within consumer protection discourse.\textsuperscript{25} If control of commercial practices is premised (at least in part) on the need to protect consumer interests, then those interests, even if considered collectively, must have some relevance to the fairness assessment. In this regard, it is important to consider the extent to which the average consumer conception concerns a factual assessment of actual consumer behaviour or whether it reflects a purely abstract legal standard. If the conception is intended to reflect actual consumer behaviour, it can be asked how this is achieved and to what extent the outcome produced is satisfactory. On the other hand, if the conception is not intended to reflect actual consumer behaviour, then it must be asked why this is the case and what effect it has on the level of consumer protection provided.

\textbf{The average consumer: a purely abstract standard or factual test?}

Despite its central role, the average consumer concept is not explicitly defined as part of the Directive. Guidance as to its meaning can however be found in the Recital which states that it

\begin{itemize}
\item \textsuperscript{22} Proposal for UCPD COM (2003) 356 (n4) [16]
\item \textsuperscript{23} UCPD Recital 18; Follow-Up to Green Paper COM (2002) 289 (n18) [25]; G Howells, C Twigg-Flesner and T Wilhelmsson, \textit{Rethinking EU Consumer Law} (Routledge, 2017) 67
\item \textsuperscript{25} see Part 1 and Part 2
\end{itemize}
is appropriate to protect all consumers from unfair commercial practices.\textsuperscript{26} However, it notes that the ECJ found it necessary when applying Directive 84/450/EEC,\textsuperscript{27} to consider the effect of advertising on a notional typical consumer. Therefore, the Directive takes as its benchmark the notion of the average consumer who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as interpreted by the ECJ.\textsuperscript{28} This interpretation of the average consumer is reflected in regulation 2(2) of the CPUTR’s.\textsuperscript{29}

The notion of an average consumer can be traced to the ECJ’s Gut Springenheide decision.\textsuperscript{30} That case concerned the sale of eggs described as ‘6 grain – 10 fresh eggs’ referring to the fact that the eggs came from birds fed a diet of six different cereals. In fact, only 60% of the birds’ diet was made up of these cereals. The question arose as to whether this would be misleading.\textsuperscript{31} The referring court sought guidance as to whether the actual expectations of consumers needed to be ascertained to answer this, which may require assessment of empirical evidence.\textsuperscript{32} Alternatively the court asked if the assessment required examination of an objective notional purchaser’s expectations instead. If that was correct then the court asked for guidance as to how that test should be defined.\textsuperscript{33}

The ECJ did not deal with these questions individually but instead considered the matter as a whole.\textsuperscript{34} The court noted that when cases arose requiring assessment of whether something is misleading, this has been done without resort to surveys or expert evidence.\textsuperscript{35} Instead, assessments have considered the presumed expectations of the average consumer who is reasonably well informed and reasonably observant and circumspect; therefore national courts should be able to do the same.\textsuperscript{36} The ECJ did not however rule out reliance on surveys.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{26}] UCPD Recital 18
\item[\textsuperscript{28}] UCPD Recital 18
\item[\textsuperscript{29}] CPUTR reg 2(2)
\item[\textsuperscript{30}] Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung [1998] ECR I-04657 (Gut Springenheide)
\item[\textsuperscript{31}] Council Regulation 1907/90/EEC of 26 June 1990 on certain marketing standards for eggs [1990] OJ L173/5, art10(2)(e)
\item[\textsuperscript{32}] Gut Springenheide (n30) [15]
\item[\textsuperscript{33}] ibid
\item[\textsuperscript{34}] ibid [27]
\item[\textsuperscript{35}] ibid [28-30]
\item[\textsuperscript{36}] ibid [31]-[32]
\end{enumerate}
\end{footnotesize}
or expert evidence, but left it to national courts to determine whether such evidence is needed.\textsuperscript{37} In addition, the court stated that it is for national courts to determine the percentage of consumers that it thinks would need to be affected to justify the imposition of a ban on the relevant practice or representation, ruling out the notion of a predetermined statistical test.\textsuperscript{38}

It is this notion of the average consumer which is now enshrined in the unfair commercial practices regime. It is perhaps unfortunate that the ECJ did not deal directly with the questions addressed to it, since the guidance given does not explicitly clarify whether courts should attempt to assess the actual expectations of consumers, or whether the test is purely legal and objective. The answer given is that it is the ‘\textit{presumed expectations}’ of the average consumer which matter.\textsuperscript{39} This could mean that national courts should use knowledge of actual consumer traits to reach a decision regarding expectations of the average consumer (factual test), or that national courts have discretion to determine the average consumer’s expectations regardless of the expectations of actual consumers (legal standard). It could also allow for some mixture of the two.

\textit{The average consumer as a deregulatory tool}

The Recital explains that the Directive takes the average consumer as its benchmark “in line with the principle of proportionality”.\textsuperscript{40} This suggests that the principle has some bearing upon its adoption. Advocate General Trstenjak considered this in her opinion in \textit{Mediaprint}.\textsuperscript{41} She stated that the average consumer conception seeks to strike an appropriate balance between the dual aims of consumer protection and the free movement of goods.\textsuperscript{42} She went on to state:

\begin{quote}
Consideration of a “reasonably well informed and reasonably observant and circumspect average consumer” is to be interpreted, from a legal point of view, as meaning that in order to safeguard an appropriate relationship between both aims, correspondingly high requirements are to be imposed … The consumer is considered,
\end{quote}

\textsuperscript{37} ibid [35]-[36]  
\textsuperscript{38} ibid  
\textsuperscript{39} ibid [31], [37]  
\textsuperscript{40} UCPD Recital 18 (emphasis added)  
\textsuperscript{41} Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag GmbH v "Österreich"-Zeitungsverlag GmbH [2010] ECR I-10909 (Mediaprint), Opinion of AG Trstenjak  
\textsuperscript{42} ibid [102]
from the point of view of community law, to be capable of recognising the potential risk of certain commercial practices and to take rational action accordingly.\textsuperscript{43}

This explanation for reliance on the average consumer suggests that the conception has been adopted to set a high benchmark of consumer behaviour based on abstract assumptions regarding consumer capabilities. These assumptions do not appear to be intended to reflect the reality of actual consumer behaviour but are rather designed to control the assessment of fairness to avoid excessive interference in market freedoms. From this perspective then, the conception looks to be much more legal than factual.

Conceived in this way the average consumer has been a useful deregulatory tool employed by the ECJ to challenge national measures restricting development of the internal market under the pretext of consumer protection.\textsuperscript{44} An early example of this is the \textit{Mars} case.\textsuperscript{45} \textit{Mars} concerned the extent to which a national measure restricting the free movement of goods was compatible with the Treaty.\textsuperscript{46} The goods in question were ice cream bars in packaging containing a statement that they were 10\% larger than their predecessors. Although the statement was true, it was suggested that this was misleading because the size of the ‘+10\%’ sign covered more than 10\% of the packaging.\textsuperscript{47} The ECJ made short work of rejecting this argument, stating:

\begin{quote}
Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase.\textsuperscript{48}
\end{quote}

This gives the impression that the average consumer conception is predominantly legal and that it is for the court to determine how that consumer would think and behave regardless of the facts. Use of the term ‘deemed’ in the passage supports this understanding. As a result,

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\textsuperscript{43} ibid [103]
\textsuperscript{44} S Weatherill ‘Empowerment is Not the Only Fruit’ in D Leczykiewicz and S Weatherill (eds), \textit{The Images of the Consumer in EU Law} (Hart, 2016) 203, 206; V Mak ‘Standards of Protection: In Search of the ‘Average Consumer’ of EU Law in the Proposal for a Consumer Rights Directive’ (2011) 19(1) European Review of Private Law 25, 28-29
\textsuperscript{45} Case C-470/93 \textit{Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH} [1995] ECR I-01923 (\textit{Mars})
\textsuperscript{46} Treaty Establishing European Community art30
\textsuperscript{47} \textit{Mars} (n45) [21]-[22]
\textsuperscript{48} ibid [24]
\end{flushleft}
the average consumer conception neither depends on nor (necessarily) reflects the traits of actual consumers for the purpose of legal reasoning.\textsuperscript{49}

The \textit{Mars} decision illustrates how an abstract conception of the consumer can be used to justify particular legal outcomes and can in this sense be thought of as an instrument of legal policy.\textsuperscript{50} The assumption that consumers could use information to look after their own interests allows for the protective measure to be seen as unnecessary and therefore, to the extent that it hinders the function of the internal market, disproportionate.\textsuperscript{51} Another ECJ decision illustrating this point is \textit{Darbo}, which concerned jam described on its label as ‘naturally pure’.\textsuperscript{52} A gelling agent had been added to the jam and was duly labelled on the list of ingredients. In addition, the jam contained levels of certain atmospheric pollutants which were incorporated into the jam via the ingredients used. Article 2(1) of Directive 79/112/EEC stated that labelling must not mislead a purchaser to a material degree.\textsuperscript{53} Article 2(1)(a)(i) specified particular factors that may be relevant to this assessment including the nature, properties and composition of the product in question.\textsuperscript{54} The ECJ was asked if use of ‘naturally pure’ in this context could be misleading under the Directive.

The court began its assessment by stating that it was for the national court to determine whether an appellation or advertisement would be misleading, taking into account the expectations of the average consumer who is reasonably well informed and reasonably observant and circumspect.\textsuperscript{55} The court went on to suggest that consumers who are concerned with the composition of a product will first look at the list of ingredients (the inclusion of which is mandated by EU law).\textsuperscript{56} In light of this understanding of consumer behaviour, the court concluded that an average consumer could not be misled by the phrase

\begin{thebibliography}{9}
\bibitem{49} Recent research suggests consumers may be affected by the size of promotional markings, see \textit{K Purnhagen and E Herpen 'Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars judgment'} (2017) 40 JCP 217
\bibitem{50} Weatherill 2016 (n44) 203
\bibitem{51} see also, Case C-362/88 GB-INNO-BM v Confédération du commerce luxembourgeois [1990] ECR I-677
\bibitem{52} Case C-465/98 Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG [2000] ECR I-02297 (Darbo)
\bibitem{54} ibid art2(1)(a)(i)
\bibitem{55} \textit{Darbo} (n52) [20]
\bibitem{56} ibid [22]
\end{thebibliography}
‘naturally pure’ because they would know of the presence of the gelling agent having read the list of ingredients.\textsuperscript{57}

Similarly, the ECJ rejected the suggestion that use of ‘naturally pure’ would be misleading given the presence of atmospheric pollutants in the product. The Finnish government had suggested that the term naturally pure would produce an expectation of a “pure and natural product, free of any impurity or extraneous substance”.\textsuperscript{58} The ECJ stated that this argument could not be upheld because an average consumer would expect such pollutants.\textsuperscript{59} Support for this was taken from the existence of legislation regulating the levels of such compounds within food; they are not banned outright. The ECJ considered that the average consumer might be misled if the level of pollutants was particularly high, however they concluded that the levels were in fact low.\textsuperscript{60} This assessment was based on the levels specified in relevant regulations.\textsuperscript{61} Essentially then, the average consumer would only be misled by ‘naturally pure’ if pollutant levels exceeded the legislative standard.

This decision is interesting for two reasons. Firstly, the average consumer conception applied is understood to be concerned with the composition of the product in question. This then allows the court to assume that they would read the ingredients listed. As with the decision in \textit{Mars}, the traits recognised do not seem to be based on evidence of actual consumer behaviour but are instead the product of abstract assumption. It is probably not unreasonable to assume that the consumer who cares about a product’s contents will take the time to read information provided about it. However, in the absence of any empirical evidence to support this claim the court can only be making an assumption. The findings of behavioural economics would suggest caution in this respect if the intention is to produce a realistic conception of the consumer.\textsuperscript{62}

Secondly, the ECJ relied on the existence of legislation to help it determine the average consumer’s response to the practice which played a role in persuading the court that the average consumer would not be misled by the term ‘naturally pure’. It seems unlikely that the majority of consumers would as a matter of fact, be aware of the legal limit set on the levels

\textsuperscript{57} ibid [21]
\textsuperscript{58} ibid [26]
\textsuperscript{59} ibid [27]
\textsuperscript{60} ibid [27]-[33]
\textsuperscript{61} ibid [31]-[32]
\textsuperscript{62} see Part 1, 28-45
of lead and cadmium allowed in certain food products. This suggests that the ECJ’s consideration of the average consumer’s traits is not necessarily based on empirical fact. Even in the absence of any relevant empirical evidence it would seem instinctively more sensible to assume that consumers do not pay a great deal of attention to detailed regulatory provisions when making an assessment of advertising statements such as ‘naturally pure’. The conclusion to be drawn then, is that the ECJ is not attempting to accurately determine how consumers would actually respond to the advertisement but are instead using the assessment of the average consumer’s response to impose a legal standard. This standard suggests that so long as the requirements set out in the legislative provisions are satisfied, the average consumer would be unlikely to be misled by the information provided.

It is submitted that both Mars and Darbo serve as examples of the ECJ adopting an abstract assumptive approach when seeking to understand the average consumer’s traits, which suggests that the conception is not necessarily intended to be a realistic reflection of actual consumer behaviour. This understanding of the average consumer and it subsequent application has an important deregulatory effect; by applying the abstract conception of the average consumer the ECJ are able to cast doubt on the need for protective national measures which interfere with free movement rights. In this regard, the average consumer conception may be a deliberate legal fiction constructed to permit the realisation and justification of internal market policy.

63 Weatherill 2016 (n44) 203-206
65 S Weatherill, EU Consumer Law and Policy (2nd, Elgar 2013) 50-53

A high level of consumer protection and variation of the average consumer

It is clear then that the average consumer conception can be based on abstract assumptions and therefore be made to produce a standard of rational behaviour. The image of a self-reliant and confident consumer that flows from this has been an important intellectual device used by the ECJ to justify deregulatory legal outcomes and has been an important component in the policy of negative harmonisation designed to facilitate market integration. However, it should be noted that the UCPD fairness regime is intended to create a system of consumer protection and in this sense can be seen as a form of (re)regulation. Therefore, the fairness regime may impose different demands on the average consumer conception than has
previously been the case.\textsuperscript{66} In their guidance on the UCPD, the European Commission state that the average consumer is not someone who needs only a low level of protection because of their ability to utilise information.\textsuperscript{67} On the contrary, that conception is employed to strike the \textit{right} balance between consumer protection and market freedom, and therefore must be considered in light of article 114 of the Treaty which refers to a high level of consumer protection.\textsuperscript{68} Given the inherent tension between consumer protection on the one hand, and the protection of market freedom on the other, it must be asked what this \textit{right} balance is and specifically in the context of this thesis, whether that requires consideration of actual consumer traits.

Duivenvoorde has argued that the abstract conception of the average consumer sets too high a benchmark to allow for a high level of consumer protection, and therefore fails to strike the right balance.\textsuperscript{69} This is because only consumers sharing the average consumer’s traits of being reasonably well informed and reasonably observant and circumspect will be protected. For example, information which misleads the majority of consumers but which would not mislead an informed consumer will not necessarily be considered unfair since the average consumer might not be affected. This is likely to produce a low level of consumer protection, at least in the sense that a large number of affected consumers will not meet the threshold for protection.\textsuperscript{70}

If the average consumer conception is used to set an abstract standard of rational consumer behaviour, which assumes that consumers are able to recognise risks and take rational action accordingly,\textsuperscript{71} then Duivenvoorde’s criticisms would seem to be well founded. As set out in Part 1, behavioural economics illustrates various ways in which ordinary people fail to make rational choices.\textsuperscript{72} Basing assessment of the effect of commercial practices on a sophisticated (rational) market actor will prevent the nuances, complexities, and irrationalities of actual

\begin{thebibliography}{99}
\bibitem{Weatherill2016} Weatherill 2016 (n44) 203-210
\bibitem{ibid2016} ibid 26; Treaty on the Functioning of the European Union art114
\bibitem{Mediaprint} Mediaprint (n41), Opinion of AG Trstenjak
\bibitem{Part1} Part 1, 28-45
\end{thebibliography}
consumer behaviour from being translated into the fairness assessment, which may in turn result in a low level of consumer protection.\textsuperscript{73}

However, it must be noted that the average consumer conception is not necessarily static. Instead it is capable of variation. For example, in \textit{Estee Lauder} the ECJ was asked for guidance regarding whether use of the term ‘lifting’ to describe the effects of a cosmetic product might be misleading.\textsuperscript{74} The term had been legitimately used in a number of member states, however the point was made that German consumers would understand the term differently. After setting out the average consumer test, the ECJ stated:

\begin{quote}
[I]t must be determined whether social, cultural or linguistic factors may justify the term ‘lifting’, used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States ...
\end{quote}

Although, at first sight, the average consumer – reasonably well informed and reasonably observant and circumspect – ought not to expect a cream whose name incorporates the term ‘lifting’ to produce enduring effects, it nevertheless remains for the national court to determine, in the light of all of the relevant factors, whether that is the position in this case.\textsuperscript{75}

In effect, this passage recognises the potential for different average consumers with varying social, cultural or linguistic traits.\textsuperscript{76} By allowing these differences to be relevant to assessment of the average consumer’s presumed expectations, the understanding of that consumer becomes linked to actual consumers existing within the market. This does not necessarily mean that the average consumer conception is no longer an abstract legal standard, but it does demonstrate that the standard can be varied depending on the context within which it is assessed. Therefore, whilst the average consumer is not necessarily the same as actual consumers, it can be made to share some of their traits, thereby translating them into the assessment of fairness.\textsuperscript{77}

The potential for variation of the average consumer is enshrined in the UCPD. Article 5(1)(b)

\begin{flushright}
\textsuperscript{73} Duivenvoorde (n69) 196-201
\textsuperscript{74} Case C-220/98 \textit{Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH} [2000] ECR I-00117 (\textit{Estée Lauder})
\textsuperscript{75} ibid [30]
\textsuperscript{76} Mak describes this as a ‘pluriform concept’; Mak 2011 (n44) 30
\textsuperscript{77} see also, Case C-112/99 \textit{Toshiba Europe GmbH v Katun Germany GmbH} [2001] ECR I-07945; Howells and Wilhelmsson (n70) 384
\end{flushright}
of the Directive states that a practice will be unfair if:

[I]t materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.\(^{78}\)

This reflects the fact that the average consumer is not a static abstraction and that it depends on consideration of actual consumers for some of its content. The UCPD goes further in this regard. Article 5(3) specifies that if a practice will only distort the economic behaviour of a vulnerable consumer group because of their mental/physical infirmity, age or credulity, and that is foreseeable, then an average member of that group will form the standard for assessment.\(^{79}\) In this scenario the average consumer relied on is clearly intended to be different from other average consumers since the vulnerable average consumer should reflect the traits of actual consumers rendered vulnerable by them. Therefore, the expectations and behaviour of this average consumer should (to a certain extent) reflect the expectations and behaviour of those vulnerable consumers specifically affected by the commercial practice in question.

**Analysis**

At this stage it is possible to identify three manifestations of the average consumer conception; the standard average consumer, the targeted average consumer, and the vulnerable average consumer.\(^{80}\) These conceptions will apply in slightly different circumstances and are structured to reflect actual consumers in different ways. The standard average might be seen as the most abstract conception, reflecting general social, cultural and linguistic traits shared amongst the relevant population. The targeted average will share the distinguishing traits of the targeted group, thereby aligning the abstract standard more closely with some specific contextual factors. The vulnerable average consumer will perhaps reflect actual consumers most closely since it will share their particular vulnerabilities, and in this regard may provide the most scope for protection. It should be noted however, that this conception has been criticised for being too narrow in terms of the types of vulnerability

\(^{78}\) UCPD art5(1)(b)

\(^{79}\) UCPD art5(3)

\(^{80}\) see for example P Cartwright 'The Consumer Image Within EU Law' in C Twigg-Flesner (ed), *The Research Handbook on EU Consumer and Contract Law* (Elgar, 2016) 199
recognised.\textsuperscript{81} In addition, the criteria for its application are restrictive rendering it difficult to satisfy in most cases.\textsuperscript{82}

These different manifestations of the average consumer illustrate how that conception is capable of variation. In light of this it seems pertinent to ask why the conception varies. The answer seems to be that the conception varies to satisfy its purpose of balancing consumer protection and market freedom in light of the principle of proportionality. In this regard, the default position is that unhindered market freedom is desirable and that consumers benefit from this by engaging as active market participants. This is a fundamental axiom of the internal market and is reflected in the abstract average consumer conception.\textsuperscript{83} However, it is also recognised that there is the potential for unfairness to arise which might harm the interests of consumers. Therefore, the principle of proportionality may require a more protective approach where risk of harm can be demonstrated.\textsuperscript{84} This can be achieved through variation of the average consumer conception as occurs when a trader has targeted a particular group or where they engage in a practice which foreseeably affects a vulnerable group specifically. It is submitted that this need for variation reflects the fact that proportionality depends heavily on context, and that the assessment of fairness must be able to adapt in light of that if it is to allow for the aims of consumer protection and market freedom to be balanced appropriately.\textsuperscript{85}

This line of reasoning can also be applied to the average consumer conception more generally. If the competing interests of securing a high level of consumer protection and market freedom are to be balanced proportionately, the average consumer (whether standard, targeted, or vulnerable) must be considered contextually. Therefore, whilst the average consumer may start as an abstract notion, to emphasise the importance of avoiding disproportionate restrictions on trade, what it means to be reasonably well informed, observant and circumspect must depend on the particular context. This explains why social, cultural, and linguistic traits are relevant to the average consumer conception; they are important features of the context within which a practice operates. This also explains why the

\textsuperscript{81} Incardona and Poncibo (n69) 28-29; Duivenvoorde (n69) 191
\textsuperscript{82} ibid; Cartwright 2016 (n80) 214-216
\textsuperscript{83} T Wilhelmsson ‘Consumer Images in East and West’ in H Micklitz (ed), Rechtseinheit oder Rechtsvielfalt (Baden, 1996) 53, 55; V Mak ‘The Consumer in European Regulatory Private Law’ in D Leczykiewicz and S Weatherill (eds), The Images of the Consumer in EU Law (Hart, 2016) 381, 386
\textsuperscript{84} Weatherill 2016 (n44) 215-216
\textsuperscript{85} Weatherill 2016 (n44) 216
Commission have highlighted the importance of behavioural insights in their guidance on the Directive. They explain that these insights show how consumers can be misled by information, and that therefore national courts should take these factors into account when assessing fairness. This suggests that in appropriate cases the average consumer should be made to reflect actual consumer traits.

In line with this understanding of the average consumer conception, Willet has suggested that it might be capable of providing a suitably high level of consumer protection. He notes that the definition of the average consumer as being reasonably well informed and reasonably observant and circumspect was relegated from the main text of the Directive to the Recital in the final draft. He therefore questions the extent to which the average consumer of the Directive is tied to previous decisions of the ECJ. In addition, he suggests that many of those decisions concerned measures designed to limit the free movement of goods, and therefore that the arguments made were not particularly robust nor based on strong evidence of the need for consumer protection. When the issue is more firmly focused on actual consumer detriment, courts might be more willing to adapt the average consumer conception in response to strong arguments regarding the need for a high level of consumer protection. The potential for variation of the consumer is important in this regard, since it is through that mechanism that courts will be able to respond to such arguments. Therefore, Willett concludes that the average consumer can and should be informed by evidence of actual consumer traits, allowing it to serve the Directive’s protective purpose.

There are some indications that this assessment of a behaviourally informed conception of the average consumer could be correct. For example, the specific prohibition of misleading practices refers to the effect of the overall presentation of information with provision made

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86 Commission Guidance on UCPD SWD(2016) 163 final (n67), 52
88 ibid 270; see also Trzaskowski (n69) 383
89 Willett 2010 (n87) 270; see also Weatherill 2016 (n44) 206
90 Weatherill 2016 (n44) 206-209
91 Willett 2010 (n87) 269-270

122
for the average consumer to be misled by it despite it being true.\textsuperscript{93} The Commission’s guidance explains that this reflects the findings of behavioural economics and that such findings may be particularly relevant in this regard.\textsuperscript{94} In addition, some black listed prohibitions seem to be informed by an appreciation of the nuances of consumer behaviour and the ability of traders to exploit consumer vulnerabilities. For example, in \textit{Purely Creative} the ECJ explained that para 31 of the black list protects consumers from use of the term ‘prize’ which seeks to:

\begin{quote}
    [E]xploit the psychological effect created in the mind of the consumer by the perspective of having won something and to cause him to take a decision which is not always rational and which he would not have taken otherwise.\textsuperscript{95}
\end{quote}

Whilst these factors do not necessarily provide guidance on the operation of the general fairness test, they do provide insight into the notion of unfairness underlying the regime as a whole, and as the ECJ makes clear, an irrational psychological response to a particular practice may be relevant in this regard.\textsuperscript{96}

Elements of this protective trend can also be seen the ECJ’s interpretation of the Directive. In \textit{Nemzeti} for example, the ECJ decided that a commercial practice need only affect one consumer and that it was irrelevant that they could gather correct information from elsewhere, where false information had been provided.\textsuperscript{97} This decision was reached against the advice of the Advocate General who counselled against extending the notion of a commercial practice to cover one off instances of business-to-consumer interaction.\textsuperscript{98} In justifying its findings however, the ECJ stated that the Directive’s objective is to protect consumers in full against unfair practices because they are assumed to be in a weaker position with regard to their level of information, their economic power, and their experience of legal matters.\textsuperscript{99}

\textsuperscript{93} UCPD art6(1); CPUTR reg5(2)(a)
\textsuperscript{94} Commission Guidance on UCPD SWD(2016) 163 final (n67), 52-53
\textsuperscript{95} Case C-428/11 Purely Creative Ltd and Others v Office of Fair Trading [2012] ECLI:EU:C:2012:651 [49]
\textsuperscript{97} Case C-388/13 Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft [2015] ECLI:EU:C:2015:225
\textsuperscript{98} ibid Opinion of AG Wahl [22]-[31]
\textsuperscript{99} Nemzeti (n97) [53]
This reasoning shows that concern for consumer protection in this context is predicated on the vulnerability of consumers. In this regard, the decision casts doubt on the extent to which the average consumer should be constructed abstractly to give effect to a self-reliant ethic. Instead, it can be argued that a protective ethic informs the notion of fairness underlying the commercial practices regime, and that therefore this should be reflected in the notion of an average consumer. It must however be noted, that the notion of a rational abstract conception of the average consumer is still prevalent as evidenced by the Advocate General’s comments in *MediaPrint.* In addition, despite the Commission’s reference to behavioural insights in their guidance, there is not a clear line of ECJ cases demonstrating how they are to be used to inform the average consumer conception. One decision that stands out in this regard is *Teekanne.*

*Teekanne*

*Teekanne* concerned the labelling of a variety of flavoured tea marketed under the name ‘Felix raspberry and vanilla adventure’. The packaging contained phrases such as ‘fruit tea with natural flavourings’ and ‘only natural ingredients’ as well as depictions of raspberries and vanilla flowers. The product itself did not in fact contain any raspberry or vanilla, instead the tea contained natural flavourings with similar tastes. The question for the ECJ was whether this was misleading despite the accurate list of ingredients provided as required by law.

Once again, the ECJ stated that the standard to be applied in answering such questions is that of the average consumer who is reasonably well informed, reasonably observant and circumspect. The court acknowledged its earlier decision in *Darbo* to the effect that consumers concerned with the composition of a product will read the list of ingredients, however, they also explained that labelling includes pictures and symbols as well as the list of ingredients. Where one aspect of the labelling is misleading, ambiguous, contradictory or inconsistent it may not be enough for the list of ingredients to be full and factual to correct a

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100 *Mediaprint* (n41), Opinion of AG Trstenjak
102 *Teekanne* (n101) [36]
103 ibid [37]-[38]
misleading impression created by the overall packaging.\textsuperscript{104} Therefore, the ECJ could not rule out the possibility that the impression produced by images of vanilla flowers and raspberries would mislead the average consumer.\textsuperscript{105} The final assessment was left to the national court, however the ECJ directed them to consider the words and depictions used as well as the, “location, size, colour, font, language, syntax and punctuation of the various elements on the fruit tea’s packaging”.\textsuperscript{106}

This decision can be contrasted with \textit{Darbo}, despite the ECJ’s acknowledgement of the guidance given in that case. In \textit{Darbo} it was assumed that the average consumer would not be misled because they would know the product’s composition having read the ingredients. As a result, the suggestion that consumers might understand naturally pure to mean free from extraneous substances could not be entertained.\textsuperscript{107} In \textit{Teekanne} however, the court recognised the fact that the average consumer might not rely solely on the ingredients list but might be influenced by other aspects of the labelling. It is submitted that the difference between these decisions lies in the ECJ’s approach when constructing the average consumer conception. In \textit{Darbo} the court adopted a purely abstract and legal approach whereby the traits of the consumer were derived from consideration of the legislative and regulatory requirements rather than actual consumer behaviour. This allowed the court to ensure that traders complying with the legislative requirements were not penalised by a restriction on the free movement of goods. In this regard, the ECJ did not seem to be concerned with the realism or accuracy of the conception relied upon.

In contrast, the decision in \textit{Teekanne} suggests a more behaviourally aware conception of the consumer.\textsuperscript{108} The ECJ seems concerned to avoid purely abstract assumptions, such as those made in \textit{Darbo}, and instead requires a more detailed assessment of the effect that the packaging would actually have on consumer decision making behaviour. In this regard, the ECJ directs national courts to consider the factors that it thinks actual consumers might be misled by, such as, for example, the size and font of any relevant text. It is unclear whether the ECJ based their judgment on empirical evidence, although it is clear that the factors referred to reflect the body of behavioural studies revealing the impact of framing on

\textsuperscript{104} ibid [40]-[41]
\textsuperscript{105} ibid [41]
\textsuperscript{106} ibid [43]
\textsuperscript{107} Darbo (n52) [27]
\textsuperscript{108} Schebesta and Purnhagen (n101)
decisions. In any case, their approach does appear to be behaviourally informed in the sense that they are responding to the potential for consumer behaviour to be complex by allowing the average consumer to reflect some of the nuances of actual consumer behaviour for the purpose of assessing fairness.

It is submitted that the difference between *Teekanne* and *Darbo* may be significant. Although the decision in *Teekanne* is not concerned primarily with the UCPD, it demonstrates how a more behaviourally informed conception of the average consumer could be applied in line with the protective ethic inherent in the fairness regime. When combined with references to the need to protect consumers as weaker market actors, and the European Commission’s recognition of the importance of behavioural economics for the interpretation of the UCPD, the *Teekanne* decision suggests that there could be a shift towards an understanding of the average consumer which is more reflective of actual consumer behaviour. As a result, there may be more scope to suggest that the average consumer conception should be constructed on the basis of a more behaviourally informed approach, at least when compared with the rational image of that legal personality found in previous ECJ decisions.

*For national court to decide*

So far it has been suggested that the average consumer conception is designed to balance the dual aims of consumer protection and market freedom in line with the principle of proportionality. An abstract legal conception seems to be well suited to protecting market freedoms since it allows for a high benchmark of average consumer behaviour to be set. However, a high level of consumer protection would seem to require a more realistic factually informed conception which responds to and reflects actual behavioural traits. The determination and application of the average consumer standard has generally been designated as a matter for national courts in individual cases. In *Interflora (No.5)* Kitchin LJ stated that national courts will have to exercise their own judgement to determine the

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109 see Part 1, 34-36; see, *Commission Guidance on UCPD SWD(2016) 163 final* (n67), 52


111 Schebesta and Purnhagen (n101) 594-595; Willett 2010 (n87) 269-270

112 Weatherill 2016 (n44) 216; Willett 2010 (n87) 270

113 Incardona and Poncibo (n69); Trzaskowski (n69)

114 see for example *Gut Springenheide* (n30) [30]-[32]
average consumer’s expectations and that:

[T]he court may be able to put itself in the position of the average consumer without requiring evidence from consumers, still less expert evidence or a consumer survey. In such a case, the judge can make up his or her own mind about the particular issue he or she has decided in the absence of evidence and using his or her own common sense and experience of the world.115

The balance between the average consumer as an abstract standard and its variation based on actual consumer traits, is then a matter for the national judge. It is important to note in this regard, that courts have consistently emphasised that empirical evidence is not needed to perform this task. Indeed in Gut Springenheide, the very notion of reliance on the average consumer conception was supported by the assertion that in using that device courts have avoided reliance on expert witnesses and consumer surveys.116 In Interflora (No.1) Lewison J doubted the utility of such evidence, suggesting that it should only be accepted where it provides ‘real value’ and that it must be justified in light of the costs of allowing it.117 In Interflora (No.2) he added that “judges should be robust gate keepers in that respect”.118 Comments such as these suggest that when constructing and applying the average consumer conception, courts may be reluctant to rely on empirical evidence demonstrating the actual expectations and traits of real consumers. It is however clear, that courts have the option of basing their understanding of the average consumer on such evidence where they deem it appropriate to do so.119

Summary

The original question posed was whether the average consumer conception is based on abstract assumptions (legal standard) or whether it is designed to be behaviourally informed (factual test). Based on the preceding analysis the answer to this seems to be both. The conception was originally developed to set a high benchmark of consumer behaviour to allow for the protection of market freedoms. This allowed the average consumer to be used as a deregulatory tool, challenging national measures designed to restrict the free movement of goods. However, the average consumer conception is also intended to allow for a high level

115 Interflora Inc and another v Marks & Spencer plc (No.5) [2014] EWCA Civ 1403 [114]-[115]
116 Gut Springenheide (n30) [31]-[32]
117 Marks & Spencer Plc v Interflora Inc and Interflora British Unit [2012] EWCA Civ 1501, [150]
118 Interflora Inc v Marks and Spencer Plc (No.2) [2013] EWCA Civ 319, [5] (Lewison J)
119 Gut Springenheide (n30) [35]
of consumer protection, and in this regard the conception can be varied within a given context to allow it to reflect (some) relevant traits of actual consumers.

In light of this, it is submitted that the average consumer conception masks an inherent tension underlying the UCPD fairness regime. On the one hand the regime is designed to protect market freedoms and on the other it is designed to protect consumers. This is reflected in the tension between the average consumer’s abstract roots and its contextually sensitive variations. Indeed, the tension is also reflected in academic assessment of the conception, with some criticising the standard for demanding too much in terms of consumer self-reliance,120 and others suggesting that the conception is capable of being relatively protective.121 Ultimately it is for national courts to resolve this tension. They have the power to determine and apply the average consumer conception, therefore they are able to decide whether the relatively high abstract benchmark consumer, or a more realistic variation, should be adopted in line with the principle of proportionality. In turn, it is national courts who have the power to promote a self-reliant or protective ethic.122

The average consumer and unfair commercial practices: analysis of cases under English law

The following section will consider how the average consumer conception has been applied by English courts in the context of unfair commercial practice assessment. In this regard, it will be asked whether the approach adopted reflects an abstract assumptive approach or whether a more behaviourally informed approach can be detected. The extent to which different approaches impact the level of consumer protection will also be considered in light of the importance of behavioural economics.

Office of Fair Trading v Officers Club Ltd

There are relatively few reported decisions from English courts in which a court has been required to apply the average consumer conception when determining the fairness of a commercial practice. Office of Fair Trading v Officers Club Ltd provides an example which predates transposition of the UCPD but nonetheless reveals insight into an English court’s

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120 see for example Duivenvoorde (n69); Incardona and Poncibo (n69)
121 see for example Willett 2010 (n87)
122 C Willett ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) CLJ 412
128
This case concerned the extent to which a practice was misleading under regulation 2(2) of the Control of Misleading Advertisements Regulations 1988 which implemented Directive 84/450/EEC. The Officers Club advertised products for sale at a 70% discount along with a notice stating that discounted goods had been on sale at the higher price at six or more branches for a minimum of 28 days in the preceding six months. This was technically true, however the OFT challenged this practice because the original price charged had only been set to allow for the goods to be offered later at 70% off. The OFT contended that this would mislead consumers who would understand the advert as meaning that the items were previously offered at an appropriate sale price which the seller expected to be able to sell significant quantities of the goods at. In response, the Officers Club argued that they had complied with the Code of Practice for Traders on Price Indications, referred to in section 25(1) of the Consumer Protection Act 1987. In addition, they argued that the consumer had all the information needed to understand the offer and would not have been misled in the way contended by the OFT.

Sitting in the High Court, Etherton J made short work of rejecting the Officers Club’s suggestion that compliance with the code equated to compliance with the regulations. He noted that the guidance provided in the code was designed to provide some certainty for traders but also to afford flexibility for regulators to prevent misleading practices despite compliance with the letter of the code.

In assessing whether the practice was misleading, Etherton J referred to the ordinary reasonable consumer of the class to which the advert was addressed as the touchstone for assessment. He later described the test as a ‘mixed question of fact and law’. Citing the judgment of Lord Parker in *AG Spalding v AW Gamage*, Etherton J also stated that the application of the test required the court to reach a view on the question of the expectations of the consumer “irrespective of whether or not there is any actual evidence from consumers”. Such evidence, according to the judge, is not necessary and may be unhelpful, since evidence given by too few consumers would not necessarily be representative of the range of relevant consumers and evidence given by too many would accumulate costs.

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123 [2005] EWHC 1080 (Ch)
124 SI 1988/915
125 Officers Club (n123) [103]
126 ibid [122]
127 ibid [146], [164]
128 ibid [146]; *AG Spalding v AW Gamage* (1915) 32 RPC 273, 286
disproportionate to its evidential value.\textsuperscript{129} This view was reflected in the judge’s rejection of a report compiled by the Nottingham University Business School on behalf of the OFT.\textsuperscript{130} The report examined the effect of reference prices on purchasing behaviour and found that in some contexts high reference prices increased consumer perceptions of value. Etherton J noted that the report did not consider the practice of the Officers Club specifically and referred to a passage from the report which stated that the research had focused on practices in the USA and that it would be unwise to make assumptions regarding the UK market.\textsuperscript{131} In light of this he stated that although the report may be of importance in some contexts it was of no value in determining the proceedings.

In applying the mixed question of fact and law Etherton J accepted that the ordinary reasonable consumer would expect the advertiser to have set the original price at a level appropriate for sale, and further, that significant quantities of the goods would actually have been available at that price.\textsuperscript{132} These expectations were derived from implied representations which were understood to exist as part of the context of the practice. In this regard Etherton J rejected the notion that the consumer would simply read the information provided and interpret it literally. The Officers Club had not set the higher prices at an appropriate level and had only made limited quantities of goods available at those prices, therefore the practice was found to be misleading.\textsuperscript{133} Notably however, Etherton J decided that although the consumer would be misled in this way, he would not be misled by the seller’s intention to sell the goods at the higher price purely to allow him to sell at the advertised discount rate later.\textsuperscript{134} Etherton J stated that the OFT had not made out its case in this regard and that he saw no reason why the ordinary, reasonable consumer would consider themselves misled upon discovering this intention.

\textit{Analysis}

This decision is interesting because it serves as a clear example of a court resisting the influence of what might be considered a behaviourally informed approach to the construction of the conception of the consumer. Etherton J’s rejection of the Nottingham Business School
report is a clear example of why behavioural economics might not be helpful to a court in this context. As noted above, behavioural economics reveals behaviour to be complex and context dependent which limits the generalisability of findings. In recognising this, Etherton J refused to rely on a study which primarily examined behaviour in the USA and did not examine nor explain the particular behavioural traits of consumers affected by the specific practice in question.

Equally however, Etherton J did not accept a purely abstract conception of a rational consumer who simply reads information literally and takes nothing for granted. Instead, the conception of the consumer is given meaning in light of the relevant context. This allows Etherton J to consider how the practice would actually affect consumers, which informs the distinction made between genuine and artificial prices; the latter being potentially misleading because consumers typically expect the former. In this regard, the approach appears to allow the perceived interests of actual consumers to be translated into the assessment of fairness. In addition, the fact that provision of accurate information was not enough to cause the consumer to fully understand the sales practice limits the extent to which this decision can be interpreted as being based on a strongly self-reliant ethic, and in that sense can be contrasted with decisions such as Mars and Darbo.

Given the rejection of a purely abstract approach and the resistance to what might be described as a behaviourally informed approach, it must be asked to what extent the conception adopted is intended to accurately reflect actual consumers. This is difficult to determine since it is hard to separate the legal and factual elements of the assessment. For example, it might be asked whether it is a factual or legal determination which leads Etherton J to decide that the consumer would expect the original price to be genuine, but not expect the seller’s motivation to be to continue to sell at that price. These could be factual assessments of what consumers actually do, or Etherton J could be deciding that the consumer should be considered to expect a certain thing because that is what the law requires. The former finding seems to be presented as a factual one in the sense that Etherton J had been convinced that some consumers would actually be misled. However, the latter finding seems to reflect an element of abstraction, in the sense that Etherton J qualified his conclusion by stating that there seems to be no evidence to contradict the assumption that the consumer would not be misled by the Officers Club’s motivation and that the OFT had failed to make its case in that regard.
In many ways the approach taken in this case may seem unremarkable, however it is submitted that the case illustrates the importance of understanding the conception of the consumer as a tool of legal reasoning. The legal outcome produced is based on an assessment of the consumer’s expectations, therefore the process of legal reasoning which takes place depends on the conception of the consumer adopted. Those expectations and the conception more broadly, are to be determined by the court and do not need to be based on evidence. In this regard the test is legal. However, the findings which relate to the consumer’s traits are presented as facts; the consumer is likely to expect X or Y in this context. As a result, the legal consumer is made up of a mixture of legal abstraction and factual assumption, but it is not necessarily clear whether particular traits are the product of one or the other. This is important because the effect that either the legal abstraction or the factual assumption have on the process of legal reasoning cannot then be clearly considered and understood. As a result, legal abstractions can be adopted without clear justification. For example, it can be stated that consumers read the list of ingredients in a product to protect market freedom, without the need to explain that this is a legal standard designed to protect suppliers as opposed to consumers. Equally, the quality of factual analysis can be shielded by the mantra that it is for the court to determine the average consumer’s traits. This makes it difficult to argue that a court has got the assessment wrong since evidence which might support that conclusion can be disregarded.

**Office of Fair Trading v Ashbourne Management Services Ltd**

*Office of Fair Trading v Ashbourne Management Services Ltd*\(^{135}\) has been discussed in some detail in the previous section with reference to the court’s application of the fairness test contained in the Consumer Rights Act 2015 (full details of the facts can be found there).\(^{136}\) In addition to the unfair terms issue, the defendants were also reporting or threatening to report consumers who had breached their contract to credit reference agencies. The OFT contended that such practices were unfair under the UCPD. It therefore fell to the judge to assess whether this was the case.

Kitchin J employed the average consumer conception to assess both the contract terms and commercial practices. He recognised that this consumer is reasonably well informed, and

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\(^{135}\) [2011] EWHC 1237 (Ch), [2011] E.C.C. 31

\(^{136}\) Part 3, 89
reasonably observant and circumspect.\textsuperscript{137} However, he also identified the group of consumers to which the relevant practices were targeted. These were consumers using low end facility gym clubs advertised at a relatively low monthly price.\textsuperscript{138} These consumers were recognised as being over-optimistic with regards to their future use of gym club facilities and so, in taking ‘colour from the context’, the average consumer was also imbued with this trait.\textsuperscript{139}

Kitchin J’s discussion of the law in this case provides some insight into the average consumer conception. In making it clear that the conception is variable and takes colour from the context, his decision supports the point made above about the average consumer standard being designed to allow for actual consumer traits to be taken into account. In this case it was accepted that consumers do often overestimate their future use of gym club facilities. This notorious fact was relied on to inform the traits of the average consumer. As a result, the average consumer could read and understand the terms of the contract but their decision to enter into the contract could nonetheless be distorted by other behavioural traits such as over confidence. In this regard, the abstract qualities of being reasonably well informed and reasonably observant and circumspect seem to have given way to the dominant trait in this context which is over-optimism.

The image of the average consumer constructed with clear reference to the behaviour of actual consumers provides an example of a protective average consumer conception informed by empirical evidence. It should be noted however that the recognition of overconfidence seems to have been accepted largely because both parties before the court accepted it as a notorious fact. In that regard, this is not an example of a court relying on evidence derived directly from behavioural economics, but it does stand out as an example of a court relying on behavioural economics type arguments to adjust the average consumer conception so that it reflects actual consumers more accurately. This allows for the high benchmark of a rational consumer to be lowered to allow protection of consumers duped into a poor bargain by a supplier keen to exploit their behavioural weaknesses.

When assessing the fairness of the commercial practices complained of specifically, Kitchin J provided relatively little detail to explain his decision. He stated that using (or recommending) contracts containing unfair terms would lead the average consumer to take transactional

\textsuperscript{137} Ashbourne (n135) [128]
\textsuperscript{138} ibid [155]
\textsuperscript{139} ibid [173]
decisions that they might not have done otherwise. He also accepted that threats to report consumers to the credit reference agencies would amount to an unfair practice because any unpaid fees owed were either the product of an unfair term or an amount claimed for liquidated damages rather than a debt. In support of this analysis Kitchin J cited three specific examples of actual consumers who had endured the relevant practices. These examples provide some sense of the relationship between the practice and the effect that it had on the specific consumer. For example, one case relied on is that of a Mrs Dorothy Francis, who signed up for memberships for herself and her daughter and then attempted to cancel the contracts made after discovering that the service provided was not suitable for her needs. She succumbed to threats made by Ashbourne regarding a report to a credit reference agency for fear of the consequences of a poor credit rating. Examples such as this are used to provide evidence of what actual consumers did in response to the relevant practices and are used to support the finding of unfairness.

The approach here is interesting because it certainly seems as though Kitchin J is relying on empirical evidence of actual consumer experiences to assist him in applying the average consumer standard. This shows that such evidence can be directly relevant to a fairness assessment based on the average consumer conception. It also shows that the average consumer conception can be made to reflect the actual behavioural traits of consumers. It is difficult to say with any certainty whether these individual examples informed Kitchin J’s decision, or whether they are simply relied on to support his conclusions informed by other criteria. Equally, it is unclear to what extent these consumers are ‘average’ in the legal sense of that word. Either way, the fact that the average consumer standard is being compared with actual examples of consumer behaviour suggests a strong link between the two entities and one which may have been influential in this case. The result seems to be a fairly protective approach to the assessment of fairness which responds to actual consumer traits assessed within the context of the transaction as a whole.

140 ibid [227]
141 ibid [232]
142 ibid [235]-[238]
143 ibid [235]
Office of Fair Trading v Purely Creative Ltd

Office of Fair Trading v Purely Creative Ltd provides a more recent example of court practice. This case concerned a range of practices by which consumers were told they had won one of a number of prizes. Consumers were given options for how to claim their prize, each of which would incur a cost such as premium rate call or postal charges. As part of each practice consumers were provided with a prize, but in the vast majority of instances that prize would be worth less than the cost of responding, and in this way the defendants made a profit. The OFT challenged the fairness of these practices arguing that they were prohibited under the CPUTR’s black list. Sitting in the High Court, Briggs J provided a detailed assessment of the practices at issue and in so doing made a number of useful comments regarding the average consumer conception.

Before turning to apply the legislation, Briggs J considered the average consumer conception broadly. He suggested that the assumption of the average consumer being reasonably well informed, reasonably observant and circumspect reflects the fact that the legislation as a whole seeks to protect only those consumers that take care of themselves and not the ignorant, careless or over-hasty consumer. This suggests that the reference to those rational traits is intended to set a minimum bar for the level of consumer protection, below which the consumer will not be afforded legal assistance. Briggs J also noted that the regulations include a general requirement for the provision of a high level of consumer protection, but that this should not be interpreted as calling for a low hurdle in terms of unfairness since consumer protection should not become so paternalistic as to constitute a barrier to free trade. This clearly accords with the idea that the average consumer conception is designed to act as a legal standard which limits the extent of consumer protection against unfair commercial practices.

In addition, Briggs J highlighted the fact that EU jurisprudence on the subject encourages judges to make the assessment of the average consumer’s expectations themselves rather than rely on empirical or statistical evidence. In support of this Briggs J cited with approval the dicta of Etherton J in OFT v Officers Club discussed above. Interestingly the defendants

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145 CPUTR sch1(31)
146 Purely Creative (n144) [62]
147 ibid [70]-[74]
148 ibid [64]; Officers Club (n123) [146]
in this case argued that the average consumer standard requires the court to assume that consumers would read the terms of the offer made in its entirety. In support of this they cited the ECJ’s decision in Darbo. Briggs J rejected this argument explaining that the Darbo case was simply one example of the application of the average consumer test and that the decision was influenced by the existence of specific legislative requirements. He went on to state:

I consider that the question whether the average consumer would read the entirety of the (frequently very small) print of a particular promotion raises fact-intensive issues as to the application of regs 5 and 6, rather than being capable of resolution by an invariable and irrebuttable presumption of the type contended for by the defendants.

This passage is interesting because although Briggs J recognised the average consumer conception as a legal standard, he also appears to recognise that it has an important factual element to it. In this regard he is unwilling to assume that consumers would read the terms in their entirety without some factual evidence (or at least an assessment of the factual reality) to support him in doing so. It might be concluded then that Briggs J interpreted the average consumer conception as one informed by both fact and law.

Turning to the specific practices challenged as being unfair, Briggs J provided a detailed and thorough application of the provisions of the UCPD and considered whether the practices should be declared unfair under the black list and whether the practices were also prohibited by application of regulation 5 and 6. It will suffice to consider application of the average consumer conception to just one of the relevant practices.

The first promotion considered is referred to in the decision as promotion 5. As part of this promotion consumers were offered a number of prizes, one of which was a watch described as a ‘genuine Zurich’ wrist watch. This was claimed to be misleading since the watch was not in fact made or assembled in Switzerland. Briggs J decided that the average consumer would attribute a higher value to a watch made in Switzerland than elsewhere. Therefore, he found that the reference to ‘Zurich’ in the description of the watch would mislead the

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149 Darbo (n52)
150 Purely Creative (n144) [67]
151 ibid [67] (Briggs J)
152 ibid [97]
average consumer because it would cause the consumer to attribute a higher value to it than they would have done otherwise.\textsuperscript{153}

This example is deceptively simple. It appears to be common knowledge that consumers attribute a higher value to Swiss watches than to other watches. Briggs J acknowledges this fact and allows for the average consumer to share this trait. However, it should be asked how and why this conclusion was reached. There is nothing in the case to suggest that empirical evidence was relied on. Indeed, Briggs J specifically doubted its usefulness.\textsuperscript{154} That suggests that this particular trait of the average consumer is derived directly from the judge’s own assumption about what consumers generally expect. This might not be controversial with regards to the assessment made in this case, but the point is worth considering since it reveals a lot about the average consumer test more generally.

The assumption made regarding consumers’ appreciation for the value of watches is clearly a factual one; it is posited as a matter of fact that consumers do generally value Swiss watches more than other types of watch. This factual assumption is transformed into a legal assumption when the average consumer is imbued with that trait; the legal average consumer values Swiss watches more than other watches. The difficulty with this approach is the very wide margin for error. It should be asked why the judge thinks that consumers value watches in this way and whether that corresponds to reality. If consumers did not value Swiss watches more than other watches then their decision to enter into the transaction might not be affected, and therefore this aspect of the practice might not be found to be unfair. The point to be taken from this is that the average consumer standard allows a judge to transform his own perception of fact into the legal standard without clear evidence to support his judgment. This is an example of the judge using his knowledge and experience of the world to determine what the expectations of the average consumer would be.

A final example from this case should help illustrate this point. The information given to consumers relating to the prizes available was set out as follows:\textsuperscript{155}

- £25 000 Cash x 1
- Argos Vouchers x 1000

\textsuperscript{153} ibid [97], [106]
\textsuperscript{154} ibid [6], [64]
\textsuperscript{155} ibid [82]
A Zurich Watch x 10 000+
A New Car (or £10 000 Cash) x 4
A 42” HD Ready LCD TV x 20
£750 of Premium Bonds x 100

The OFT contended that the information provided in the format set out above was misleading since when added together it gave the impression that the chance of winning a prize better than a watch was just over 1/10. In reality 99.92% of all prizes allocated were watches which meant that the chance of winning a better prize was actually closer to 0.8/100. The OFT suggested that the average consumer would ignore the ‘+’ sign which follows the number of watches available and would instead make a calculation based on the numbers alone.

Briggs J rejected this argument and decided that the average consumer would not have any difficulty in understanding the information provided.156 It is worth citing the key passage in this regard at some length:

Doing the best I can, I consider that the average consumer would think that the representative quantities were a statement of the number of each type of prize available to be “won”, and I can see no good reason why the average consumer should fail to appreciate from the inclusion of the plus sign after the most numerous award that a potentially unlimited number of what were therefore the lowest value items were available to be “won”, depending on the take-up of the promotion by consumers. I do not therefore accept that the average consumer would think, from reading the representative quantities, that he had a one in ten chance of obtaining something better than the Swiss watch under promotion 5.157

It is notable that Briggs J starts this passage by qualifying his reasoning with the phrase, ‘doing the best I can’. This suggests that either the judge lacks information to work with or that he is struggling to decide the matter. Briggs J then proceeded to decide that the average consumer would not discount or misunderstand the plus sign and it is telling that he makes the point that he has no reason to suggest otherwise. This suggests that if he did have reason to suggest otherwise he might have found differently. The result of this approach then is that the judge has to make a decision regarding the relevant expectation of the average consumer.

156 [ibid [102]-[103]
157 [ibid [103] (Briggs J)
in a situation in which he does not seem to know how actual consumers would respond. Therefore, the judge defaults to assuming that the consumer would understand the (technically true) information provided. The difficulty with this is that based on the body of work exploring decision making behaviour it is entirely plausible that consumers could ignore the ‘+’ sign and therefore miscalculate their odds. Of course the consumer might not; the point is that the judge in this case does not know. This lack of knowledge must be considered in light of the court’s aversion towards relying on empirical evidence, which certainly limits its ability to actually discover the truth of the situation. The result is a factual assumption about consumer behaviour that may or may not be accurate.

When taken together, the assumption made about consumer perceptions of value with regards to Swiss watches and the assumption made about the way consumers would calculate the odds of winning a prize based on a specific presentation of information, reveal something about the nature of the average consumer conception and its application. The test operates at the whim of judges who are able to call upon their own understanding and knowledge of consumer behaviour to assist them in determining what the average consumer would expect as a matter of fact. However, if the judge does not know how consumers might actually behave he has three options open to him. He can consult the evidence available. This on its face might seem like the best option if the intention is for the average consumer’s expectations to be a good reflection of actual consumer expectations. However, courts have limited the usefulness of this option by expressing resistance to certain forms of empirical evidence. Instead a judge might try to guess the consumer’s expectations. If accuracy is intended, this approach would seem to be problematic given the findings of behavioural economics which suggest that even the simplest forms of decision making behaviour can be surprisingly complex. Finally, a judge might revert to an assumption that consumers are ‘rational’; so long as accurate information is available the consumer will not be misled. This abstract assumption is legal as opposed to factual and in effect fills the void created by the judge’s lack of knowledge. In this regard, it is not necessarily designed to produce an accurate reflection of consumer behaviour but it does provide a tool for the purposes of legal reasoning and helps produce a legal outcome. Despite this, when applied in cases such as Purely Creative these legal assumptions appear to be presented as part of a factual analysis of a practices probable effect.

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158 see Part 1, 28-45
It is submitted that the result of this approach is that the average consumer conception will reflect a factual assessment of actual behavioural traits where the judge believes that he knows how consumers would behave, but that the standard will reflect an abstract legal understanding of a more rational consumer whenever the judge lacks that factual belief. This makes it very difficult to predict the outcome of the average consumer assessment with any accuracy since so much will depend on the judge’s subjective appreciation of consumer behaviour. Therefore, in some instances the average consumer will set a standard which actual consumers should meet if they are to be protected from certain practices, and in others the average consumer conception will reflect the behavioural traits of actual consumers and therefore not require the consumer to meet any specific standard before protection is applied.

This raises another important issue; the average consumer conception can be made to be legal and abstract, or factually informed, or a mixture of the two, and it is judges who have the power to do this. The conception will affect the assessment of fairness and will affect the perception of the balance to be struck between consumer protection and market freedoms. Therefore, the court has the power to use the average consumer conception to pursue different policy driven outcomes. This can be seen in the contrasting decisions of Darbo and Teekanne, where in the earlier decision market freedom was promoted, whereas in the later decision, consumer protection was promoted. The question that arises from this is whether it is appropriate for judges to be able to use the average consumer conception in this way; especially in light of their reluctance to rely on certain types of empirical evidence, which in turn reduces the potential scope for behavioural economics based arguments to be made convincingly. As a representative of consumers as a class, the average consumer conception is an integral factor in the law’s understanding and treatment of their interests and it is clear that the choice of approach when interpreting and applying the average consumer has significant implications for those consumers affected by the legal decision. It might be argued then that the law should reflect consumer interests more closely.

*Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd*

*Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* concerned a petition for the winding up of a company (PLT) which provided anti-marketing services in

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159 *Darbo* (n52)
160 *Teekanne* (n101)
return for payment of a monthly fee.\textsuperscript{161} This involved PLT registering consumers with the Telephone Preference Service (TPS) and the Mail Preference Service (MPS). The company also provided a complaints service. The Secretary of State alleged that PLT were omitting material information by failing to inform consumers that registration with the TPS and MPS was free to the public. Initially PLT undertook to provide the information to new customers, but later sought permission to vary that undertaking. This was refused as a preliminary matter by Hodge J sitting in the High Court,\textsuperscript{162} however that decision was criticised by the Court of Appeal who set it aside.\textsuperscript{163}

The central issue which arose in this case was the correct interpretation and application of the phrase ‘material information’ for the purpose of determining what amounts to a misleading omission. In Purely Creative material information had been defined as information that the average consumer needs to make an informed decision, as opposed to information that would be helpful.\textsuperscript{164} In finding for the Secretary of State, Hodge J accepted that the average consumer would need to know that part of the service offered could be enjoyed for free.\textsuperscript{165} This was because the average consumer would need that information to be able to assess the value of the transaction and make an informed decision. In this regard, Hodge J stated that although there is no general obligation on a supplier to reveal its mark-up there is an obligation to reveal that the service offered can be obtained for free from an alternative supplier.\textsuperscript{166} In addition, the omission would cause the average consumer to take a transactional decision that they would not have done otherwise.\textsuperscript{167} This was despite the fact that such a consumer was reasonably well informed, and was evidenced by the reluctance of PLT to provide the information in question.\textsuperscript{168}

On appeal, Briggs LJ criticised the decision of Hodge J and concluded that the matter could not be decided as a preliminary issue but needed to be fully investigated at trial.\textsuperscript{169} In reaching this conclusion Briggs LJ, building on his judgment in Purely Creative, provided some further guidance regarding the information that the average consumer needs to make an

\textsuperscript{161} [2015] EWCA Civ 76, [2016] B.C.C. 404
\textsuperscript{162} Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd [2013] EWHC 3626 (Ch)
\textsuperscript{163} PLT (n161)
\textsuperscript{164} Purely Creative (n144)
\textsuperscript{165} PLT (n161) [41]
\textsuperscript{166} ibid [42]
\textsuperscript{167} ibid [44]
\textsuperscript{168} ibid
\textsuperscript{169} PLT (n161)
informed choice. He stated the average consumer may need certain information regarding alternative products and their prices when making a transactional decision, however, since the average consumer is well-informed, observant and circumspect, it must be asked whether the average consumer needs to obtain that from the supplier or whether they can be expected to find it themselves. In this regard, Briggs LJ recognised shopping around as a characteristic of the average consumer who is assumed to be well-informed, observant and circumspect specifically to avoid protection of the ‘ignorant, careless or the over-hasty’ consumer.

In light of this, Briggs LJ explained why a supplier is not obliged to disclose information about their own business model including factors such as profit and costs. He explained that although such information is inward facing, and therefore not generally available from other sources, it is not information that the average consumer needs to make a decision. When assessed objectively, the consumer can be assumed to be able to make up his own mind about the value of the product offered compared to the price demanded. The average consumer can also assess whether they can afford the product themselves and do not need information from the supplier to do so.

The contrasting decisions of Hodge J and Briggs LJ reveals some of the inherent tension existing within the UCPD regime, which are then expressed in the application of the average consumer conception. Using his common sense and experience of the world Hodge J appears to have identified an unfair practice which causes consumers to enter into what seems to be a bad bargain. They do this because they are not aware of the fact that they can get the same product for free directly from the scheme’s operators. It seems clear that the average consumer is misled in this respect because the evidence before the court suggests that the practice only works when consumers are not told that they can get the service for free. This in turn suggests that consumers are not necessarily aware of the service and therefore are not making an informed choice when signing up after receiving a cold call designed to get them to make an immediate decision. The approach here is not necessarily empirical. Hodge J is making assumptions about consumer behaviour and preferences. However, he does seem to

170 ibid [30]-[33]  
171 ibid [31]-[32]  
172 ibid [30]  
173 ibid [33]
be doing so in line with his understanding of the facts and so the average consumer conception applied is manipulated to reflect the factual reality as Hodge J sees it.

In contrast, the comments made by Briggs LJ reflect the legal aspect of the average consumer conception. He emphasises the importance of the abstract rational qualities of being reasonably well informed, observant and circumspect in light of the need to protect the free movement of goods. The average consumer can then be assumed to be able to gather relevant information for themselves, limiting the scope of the concept of material information. This abstract approach protects suppliers from having to tell consumers that products are available elsewhere for free, which Briggs LJ seems keen to avoid as a matter of legal policy. This is then, an example of the average consumer conception being manipulated to impose a standard of consumer behaviour which permits certain commercial practices by rendering them fair regardless of actual consumer behaviour.

Despite this, Briggs LJ recognised that these assumptions regarding the average consumer are merely a starting point and that they may yield to particular aspects of the context. In this regard a trial was needed to allow for full assessment of all the features and circumstances of the practice in question. Therefore, although Hodge J had not addressed the question of whether the average consumer needed to obtain the material information from the supplier and had been wrong to conclude that a supplier has a duty to inform consumers that a service was being offered elsewhere for free, the matter could not be decided without the “intense forensic analysis” only possible through trial. Briggs LJ stated that whether information is material is a contextual question and that the necessary contextual facts had not been established.

In light of this it would not be fair to conclude Briggs LJ understood the average consumer to be perfectly rational. He did however use an abstract understanding of the conception to cast doubt on the analysis of Hodge J, who seems to have gone too far in protecting consumer interests at the expense of supplier freedom; at least in the absence of clear ‘forensic analysis’ supporting his conclusion. It is submitted that comparison of Hodge J and Briggs LJ’s approaches demonstrates how the average consumer conception can be manipulated to

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174 ibid [33]-[39]
175 ibid [32]
176 ibid [44]
177 ibid
reflect either an abstract standard or a more factually sensitive model. This also shows how those different understandings of the consumer conception permits different forms of legal analysis to be conducted when assessing fairness of that basis.

**Unfair commercial practices: the average consumer conception and the role of behavioural economics**

It is clear from the preceding analysis that the average consumer conception operates as an abstract standard. This is reflected in decisions of the ECJ and English courts, which demonstrate that reliance on the conception prevents the interests and traits of ignorant, careless, or over-hasty consumers from influencing the assessment of fairness. In addition, it is clear that it is for courts to determine the average consumer’s traits, and in this regard the issue is a legal one. However, the analysis above suggests that the average consumer also serves an important (factual) function by allowing for certain aspects of actual consumer behaviour to be translated into the assessment. In this sense the conception accommodates legal and factual assessment of consumer behaviour and as a result could be based on abstract assumption or could be behaviourally informed.

The analysis of English cases suggests that within a UK context, it may be unwarranted to describe the average consumer as an “economists’ idealistic paradigm of a rational consumer”. Rather, when assessing fairness, English courts seem to have adopted a relatively nuanced approach, using the average consumer conception as a lens through which relevant features of behavioural reality can be understood. The abstract nature of the average consumer conception has not then prevented courts from conducting a contextually sensitive analysis of commercial practices and their effect on the ability of consumers, as represented by the average consumer, to make an informed choice. In light of this, it can be said that whilst the average consumer conception is an abstract legal standard, it has a substantial factual element to it, which has allowed English courts to show a degree of sensitivity to consumer protection concerns.

For the purposes of this thesis, this raises two overlapping but distinct issues. The first relates to how English courts have constructed the factual aspect of the average consumer

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178 *Purely Creative* (n144) [62]
179 see for example *Gut Springenheide* (n30) [36]; *Interflora (No.5)* (n115) [114]
180 Incardona and Poncibo (n69), 35; Cartwright (n80), 204-207
181 Koutsias and Willett (n96) 39
conception when determining fairness, which concerns whether the average consumer could and should be informed by behavioural evidence and analysis. The second issue concerns the normative aspect of the conception and the extent to which factual assessment of typical consumer behaviour should bear on the normative balance that the average consumer conception is designed to produce.

The factual aspect of the average consumer conception

Due to the abstract nature of any assessment of unfair practices, the process of distilling the likely impact of a commercial practice on the average consumer can only accommodate a fairly broad factual assessment of typical consumer behaviour.\textsuperscript{182} Consideration of English decisions applying the average consumer conception suggest that courts have, for the most part, made a genuine attempt to reflect what they understand as typical consumer behaviour, assessed within the context of a particular practice through reference to the average consumer. It must be noted however, that the analysis of those decisions does not reveal signs of what might be considered to be a robustly behaviourally informed approach. Instead, the courts’ approach seems to be based on assumptions of fact regarding typical consumer behaviour. The information influencing these assumptions is not always clear. It is plausible that in some instances the court may be informed either directly or indirectly by empirical research into actual consumer traits, which would cause the average consumer to become a behaviourally informed conception. However, courts have signalled their reluctance to rely on such evidence, which suggests that it is likely to play only a minor role in their analysis, if any.\textsuperscript{183}

In other instances, the court may be relying on what has been referred to in this context as a judge’s common sense and experience of the world.\textsuperscript{184} This permits reliance on abstract assumptions regarding normal consumer behaviour without the need for recourse to empirical evidence or analysis. Whilst this may provide an adequate source of information to deal with some cases that arise, and may indeed produce a high level of consumer protection, it is submitted that complex and often counterintuitive features of actual human behaviour may make it difficult for courts to accurately appreciate the typical effect that a commercial practice has on consumer choice.\textsuperscript{185} In addition, the case analysis suggested that when courts

\textsuperscript{182} Sibony 2014 (n96) 936-938
\textsuperscript{183} See for example; Interflora (No.5) (n115) [115]
\textsuperscript{184} ibid
\textsuperscript{185} For an overview see Part 1, 28-45
are unsure as to how consumers would typically react to a practice, they may revert to reliance on a default legal assumption that the average consumer will simply read and understand available information.

To the extent that courts want to reflect the reality of consumer behaviour within the fairness assessment, the potential role of behavioural science is relatively clear; the findings of such research can be used to provide evidence relating to typical patterns of consumer behaviour in different settings. As was discussed with regard to regulators’ reliance on behavioural economics, courts could either draw on specific behavioural studies looking at features of consumer behaviour in a given setting, or they could rely more broadly on identified patterns of behaviour to guide consideration of behaviour across contexts. This evidence would not necessarily provide a simple picture of homogenous consumer traits, but it would provide evidence that a court could assess to inform its understanding of typical behaviour. This could then inform the average consumer standard to ensure that an appropriate level of protection is produced.

Given the rationale for controlling unfair commercial practices, arguments for a behaviourally informed understanding of the average consumer are compelling. The unfairness test is premised on the need to tackle practices distorting consumer choice because such distortion has negative implications for both consumers and the market more broadly. Behavioural economics demonstrates how significant an appreciation of behavioural phenomena can be for accurate understanding of decision making processes. Therefore, if the purpose of the law is to truly improve the market by prohibiting practices which (illegitimately) cause consumers to make detrimental choices, an appreciation of the reality of consumer behaviour and the effect that market practices have on it, would seem to be essential. Conversely, too abstract a conception of the average consumer is likely to attract criticism focusing on the unrealistic understanding of consumer behaviour forming the basis of a fairness

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187 See Part 2
188 A Tor ‘Some challenges facing a behaviourally-informed approach to the Directive on unfair commercial practices’ in T Toth (ed), Unfair Commercial Practice: The Long Road to Harmonized Law Enforcement (Pazmany Press, 2013) 9, 16-18
189 Sibony (n96), 934-935; Trzaskowski (n69) 387
190 Recital 8, 14
191 See Part 1
assessment.\textsuperscript{193} This is particularly true given that the Directive purports to afford a high level of consumer protection and has maximum harmonizing effect, thus preventing national legal systems from providing a higher level of consumer protection in areas covered by it.\textsuperscript{194} In this regard, it is submitted that courts should, to the extent possible, encourage and be receptive to relevant arguments based on behavioural analysis when considering the factual aspect of the average consumer conception. This should allow them to better assess the potential impact that a practice might have on typical consumer behaviour as a matter of fact and would allow for arguments regarding the need for variation of the average consumer standard to be heard.

Courts should not however accept any and all evidence relating to human behaviour when determining the average consumer’s traits. Etherton J’s rejection of the OFT’s report in\textit{ Officers Club} was justified for the reasons that he gave,\textsuperscript{195} and the dicta of Lewison J in\textit{ Interflora (No.2)}, suggesting that courts must be robust gate keepers when it comes to the admittance of empirical evidence, is surely correct given the need to manage time and expense associated with adjudication.\textsuperscript{196} In addition, it must be recognised that courts may need to reach a legal conclusion in the absence of empirical evidence and therefore may need to rely on abstract assumptions when considering the probable effect of a commercial practice on consumer behaviour.

However, if the courts are to distil an appropriate representative of collective consumer interests, it is submitted that they should have the relevant factual information regarding the reality of consumer interests and traits available to them.\textsuperscript{197} Therefore, the general reluctance of English courts to rely on evidence pertinent to a behavioural understanding of typical consumer traits may be problematic if the UCPD regime is to be applied satisfactorily. Courts should then be encouraged to develop appropriate rules which permit reliance on such evidence whilst maintaining efficient and proportionate adjudicative processes.\textsuperscript{198} Such rules may become particularly important as regulators rely increasingly on a behaviourally informed approach to their work, since the extent to which they are able to present courts

\textsuperscript{193} see for example, Incardona and Poncibo 2007 (n69)
\textsuperscript{194} Duivenvoorde (n69); Willett 2010 (n87); 251-252; Wilhelmsson 2004 (n64) 323
\textsuperscript{195} Officers Club (n123) [150]
\textsuperscript{196} Interflora Inc v Marks and Spencer Plc (No.2) [2013] EWCA Civ 319, [5] (Lewison J)
\textsuperscript{197} Trzaskowski (n69) 391
\textsuperscript{198} Sibony (n96) 938-939; see also K Weatherall ‘The Consumer as the Empirical Measure of Trade Mark Law’ (2017) 80(1) MLR 57
with behavioural evidence may influence decisions regarding when and how to enforce the CPUTR. Conscious development of sensible rules permitting such evidence to be used to tackle problematic practices should allow judicial discourse to accommodate and respond to issues relevant to regulatory and policy discourse more broadly, which includes issues related to new understandings of behaviour and its consequences.

The normative aspect of the average consumer conception
The discussion so far has focused on the factual aspect of the average consumer and the extent to which it does (or does not) represent typical consumer behaviour as a matter of fact. There is however a second, normative, aspect to the average consumer.199 This raises the issue of whether the conception should reflect actual consumer behaviour given the need to balance the fairness regime’s conflicting aims of paternalistic market intervention and the avoidance of overly burdensome regulation.200 The average consumer conception contributes to this balance by allowing courts to manipulate the consumer traits factored into the assessment of fairness, thereby affording a degree of control over that legal process. The ECJ’s development of the average consumer conception to support its negative harmonisation agenda serves as an example of how this can work.201 Analysis of English courts’ reliance on that conception also demonstrates this. Reference to the average consumer provides courts with discretion, allowing them to switch between factual and legal influences when deciding the traits that the average consumer has. This in turn allows for higher or lower levels of consumer protection to be produced, guided by either a self-reliant or protective ethic.

It must be recognised that, whilst behavioural science can (and should) provide factual information that might be used as evidence of typical consumer behaviour, it cannot provide normative information to determine the standard against which a practice should be judged.202 For example, Tor raises two issues that he believes should be considered before adopting a behaviourally informed approach to assessing the fairness of commercial

199 Mak (n24), 4-8
200 ibid, 6
201 see for example Gut Springenheide (n30); Case C-120/78 Rewe Zentrale v Bundesmonopolverwaltung fur Branntwein [1979] ECR 649; S Weatherill ‘The Role of the Informed Consumer in European Community Law and Policy’ [1994] 2 Consumer Law Journal 49, 50-52; see also Howells and Wilhelmsson (n70) 380; Mak 2011 (n44) 29
202 Trzaskowski (n69) 391
practices.\textsuperscript{203} The first is the extent to which deviations from rationality are considered to be legitimate concerns for consumer protection law, and the second is choosing an average consumer conception in light of behavioural heterogeneity.\textsuperscript{204} Both issues are of significance since choices one way or another will affect whether certain practices are prohibited. However, it is submitted that these issues do not concern the extent to which behavioural economics is relevant to the assessment of fairness as such, but rather relate to the normative balancing exercise that must be conducted as part of the process of interpreting and applying the law. In this regard, it is for courts to choose the influences and information relied on when determining the average consumer’s traits to ensure that an appropriate normative balance is maintained between the need to assess practices for fairness and the need to limit interference in supplier freedom. Knowledge of how consumers typically behave and the consequences of practices on their interests should provide factual information that informs this assessment, but ultimately it will be determined by consideration of relevant normative persuasions.

It is submitted however, that when determining this normative aspect of the average consumer conception it must be recognised that behavioural science can provide evidence that might convincingly refute understandings of behaviour based on abstract assumptions designed to control the assessment of fairness. This may undermine the integrity of any fairness assessment based on too abstract a conception of the average consumer. For example, if a court decides that a practice designed to exploit consumer over-optimism is not unfair because the average consumer would not be over-optimistic, behavioural analysis proving that consumers are typically over-optimistic would undermine the external validity of the fairness assessment, including the justification for the legal outcome flowing from it. This is because the court has relied on a legal fiction to determine that the practice is not problematic; they have deliberately manipulated the average consumer conception so that it does not reflect typical consumer behaviour to protect a legal policy goal. The justification for not prohibiting the practice is that it does not harm the consumers economic interests, but this seems weak if in fact there is ample evidence to the contrary.

\textsuperscript{203} Tor (n188) 9  
\textsuperscript{204} ibid
Reliance on a legal fiction to justify a decision may be legitimate in some circumstances.\textsuperscript{205} It may provide a degree of certainty for example, and may be a useful means by which complicated factual circumstances can be simplified for analysis. If the average consumer was always constructed as a highly abstract, fictional, and clearly normative personality, then the utility of this legal device might justify its use. People would (at least in theory) know that reference to an average consumer does not relate to actual consumer interests but is instead a purely legal test.\textsuperscript{206} However, this is not necessarily the case for the UCPD and CPUTR, as the analysis set out above shows. There is a need to reflect the reality of consumer behaviour to meet the objectives of the Directive, therefore the average consumer conception is often used as a conduit through which relevant aspects of actual consumer behaviour can be (and should be) translated into the assessment of fairness. To do otherwise would seem to undermine the reason for assessing commercial practices by reference to their effect on consumer behaviour in the first place; that is to test for potential market distortions. Therefore, whilst the average consumer serves an important normative function, it also represents actual consumer interests, and so there is a limit to how far it can be satisfactorily abstracted away from those interests to satisfy normative concerns.

This does not mean that normative considerations are not important; they are an essential part of the overall control of commercial practices, particularly under the specific prohibitions which lack a separate professional diligence requirement.\textsuperscript{207} It does however mean that in addition to drawing on relevant behavioural evidence when assessing the factual aspect of the average consumer conception, courts should justify normative choices made when constructing the conception more broadly, in light of the behavioural reality that persists. Therefore, if a court believes that over-optimism is a careless trait, and so should not be relied on when determining fairness, that normative judgment should be made clear in light of the evidence that exists. This will not shield the choice from scrutiny but would prevent the justification provided from being said to rest on uninformed assumptions. The normative reasons underlying those assumptions would then be made explicit and would not be masked by mere reference to the average consumer without further explanation. It is submitted that

\begin{itemize}
  \item \textsuperscript{205} see for example D Lind ‘The Pragmatic Value of Legal Fictions’ in M Del Mar and W Twining (eds), \textit{Legal Fictions in Theory and Practice} (Springer, 2015) 83
  \item \textsuperscript{206} This assumes that the legal fiction is not intended as a deception, see L Fuller ‘Legal Fictions’ (1930-1931) 25 Ill.L.Rev. 363, 366-368
  \item \textsuperscript{207} CHS Tour Services (n7)
\end{itemize}
this normative guidance would be particularly helpful to regulators seeking to interpret and apply the CPUTR in light of the behavioural evidence on which they are increasingly reliant.208

The analysis of English decisions did not reveal a clear normative stance leading to the manipulation of the average consumer standard, as seen in some of the negative harmonisation cases of the ECJ. Ruling out protection of the ignorant or over-hasty consumer, as was the case in Purely Creative, might provide some evidence of the English courts’ normative perspective, however the subsequent analysis of the commercial practice in that case does not seem to have required too much of the average consumer in terms of observation or circumspection; at least when faced with a commercial practice seemingly designed to exploit consumer traits.209 Equally, the analysis of Briggs LJ in PLT might indicate a normative policy with regard to consumers being treated as if they do not need information regarding the availability of a product for free from elsewhere. However, that analysis was qualified by the need for forensic analysis at trial.

At times, the difficulty in drawing clear normative guidance from the analysis of the courts is due to the lack of a clear distinction between the factual and legal aspects of the average consumer standard when engaging in the assessment of fairness. In this regard, the influences drawn on to inform the average consumer’s traits are hard to discern, which means that in some cases the courts could be making an assumption as a matter of law, perhaps in order to protect legitimate commercial practices, or they could be making assumptions as to the factual reality that persists. This makes it hard to predict how courts will assess practices in future. The average consumer could be a more or less behaviourally informed conception for the purposes of any given assessment. In addition, whilst the approach of English courts has suggested a relatively protective ethic in this context, it is open for future courts to promote a more self-reliant ethic by adopting a higher standard of ‘average’ consumer behaviour.210

Whatever ethic is promoted, it is submitted that there is a risk that the expression of legal reasoning associated with the assessment of fairness will not reflect the differences between factual and legal assessment but will simply explain that the average consumer has the relevant trait and therefore that the practice is (or is not) unfair. This could be improved by

208 see Part 2
209 Purely Creative (n144)
210 Willett 2012 (n122), 433-436
reliance on behavioural evidence as part of the assessment which would require courts to be clearer about whether the traits of the average consumer have been adopted in light of factual assessment of typical consumer behaviour, or despite that reality. The reasons given for a decision would then begin to reveal the normative influences motivating the courts’ construction of the average consumer conception.

Conclusion

The unfair practices regime is an example of an abstract assessment of fairness relating to the collective interests of consumers. The notion of an average consumer acts as a representative of these collective interests for the purpose of assessing fairness. However, that conception of the consumer also serves as a legal standard, allowing courts to balance the conflicting aims of ensuring a high level of consumer protection and facilitation of internal market freedoms. The preceding analysis has suggested that in performing this function the average consumer can be made up of both factual and legal influences and that in this regard it is possible for elements of both a behaviourally informed and abstract assumptive approach to be operative. In light of the assessment of English decisions, it has been suggested that there are compelling reasons why reliance on behavioural economics as a source of information may be important when considering the factual aspect of the average consumer conception, so that the likely effect of a practice on typical consumer behaviour can be understood. It was also suggested that the average consumer conception serves an important normative role too, and that whilst behavioural information might not necessarily be reflected in the standard for that reason, explaining why the average consumer should not reflect actual consumer traits is important. This should allow for the normative reasoning underlying choices regarding the average consumer’s traits to become more transparent, which in turn should provide some insight into the normative nature of the fairness test as a whole.
Unfair credit relationships

The unfair credit relationship test (UCRT) was inserted into the Consumer Credit Act 1974 (CCA) by the Consumer Credit Act 2006,¹ and replaced the narrower extortionate credit bargain provisions.² Section 140A of the CCA allows a court to make an order under section 140B if it determines that the creditor-debtor relationship is unfair because of the terms of the agreement (or any related agreement), the way in which a creditor has enforced his rights under the agreement (or a related agreement), and/or anything done or not done by or on behalf of the creditor.³ Unlike the other fairness tests considered, this test can apply to both consumers and non-consumers, so long as the debtor is an individual.⁴

When making a fairness assessment the court should consider all matters it thinks relevant, including those relating to the creditor and those relating to the debtor.⁵ Once a relationship is found to be unfair section 140B grants courts broad scope to interfere with it by (for example) changing its terms, ordering the creditor to repay sums, or setting the debtor’s obligations aside.⁶ Such an order may be made following an application by a debtor or surety, or in response to proceedings which concern the credit agreement or a related agreement,⁷ however once the relationship is alleged to be unfair to the debtor, it is for the creditor to prove otherwise.⁸

Purpose and nature of the test: from extortionate bargains to unfair relationships

The most striking feature of the unfair credit relationship regime is its scope.⁹ The relevant legislative provisions set out the fairness test in broad and open-ended terms, which provides courts with wide discretion to assess all aspects of the creditor-debtor relationship. This discretion is not limited by statutory guidance directing the court as to what should be taken

¹ Consumer Credit Act 2006 ss19-22
³ ibid s140A(1)(a)-(c)
⁴ CCA s189(1)
⁵ ibid s140A(2)
⁶ ibid s140B(1)(a)-(g);
⁷ ibid s140B(2)
⁸ ibid s140B(9)
into account beyond the instruction that the court should have regard to ‘all matters it thinks relevant’. This has led some to criticise the test for being too vague. It is clear however, that the test was designed to be flexible, as the Department of Trade and Industry’s (DTI) White Paper leading to the introduction of the test explained:

The objective of reform will be to target any unfair credit transaction, widening the scope of the current ‘extortionate’ definition, to ensure account is taken of unfair practices as well as the cost of credit. Any assessment must be flexible enough to accommodate all circumstances affecting the use of credit, while giving certainty to all interested parties about what is acceptable and what is not.

The White Paper stressed that the extortionate credit bargain test tended towards too narrow an assessment of debtor-creditor conflict by focusing attention on interest rate levels and by limiting assessment to the time of agreement. The new provisions are designed to avoid this by allowing courts to focus on a wider range of issues, including creditor practices more broadly and matters arising after the striking of the initial agreement. Detailed guidance on factors relevant to this assessment was therefore seen as unhelpful, since it might inadvertently lead to a restriction on the matters considered. The inevitable result of this is a broad test, and despite the DTI’s suggestion to the contrary, a corresponding lack of certainty regarding how it is to be interpreted and applied.

An important point to note at this stage is that the test focuses on the relationship that exists between the debtor and creditor. This relational approach reflects the significance attached to both economic and social rationales for intervention in this area. The White Paper presented a broad protective regime, which included new regulatory powers and an alternative dispute resolution scheme, in addition to the new fairness test, as the quid pro

10 CCA s140A(2)
12 See for example Yates v Nemo Personal Finance 14 May 2010 (unreported) Manchester CC [17]
13 DTI (n2), [3.33]
14 ibid, [3.31]; R Goode (ed), Consumer Credit Law and Practice (Loose-leaf, LexisNexis, 1999), [47.81]-[47.84]
16 Hansard HL Deb 8 November 2005, vol675(56), colGC159 (Lord Sainsbury of Turville)
17 Rosenthal (n11), 5; R Goode, ‘Written evidence submitted to the House of Lords Select Committee on the European Union’ (2005) [22]
18 DTI (n2); see generally, I Ramsay, Consumer Law and Policy (3rd, Hart, 2012) Chapter 7
quo for an expansion of consumer credit as a driver of economic growth.\textsuperscript{19} This relational focus causes the unfair relationship test to be concrete in the sense that any consideration of fairness must relate specifically to an actual consumer and any relevant creditors.\textsuperscript{20} Section 140D did originally require the OFT to publish guidance on how it thought the unfair terms test might interact with Part 8 of the Enterprise Act 2002, suggesting that enforcement in the collective consumer interest may have been envisioned.\textsuperscript{21} The guidance produced recognised that Part 8 enforcement might be required where, for example, a common factor is likely to make a number of relationships unfair.\textsuperscript{22} The regulator did recognise however, that each case would need to be considered on its merits, taking into account the particular circumstances of any borrowers, and that action under other consumer protection rules might be more suitable when dealing with potential infringements.\textsuperscript{23} Since responsibility for regulation of consumer credit has passed from the OFT to the FCA section 140D has been repealed,\textsuperscript{24} and it seems more likely that regulatory action protecting collective consumer interests would manifest itself through enforcement of the FCA’s detailed handbook which includes an obligation to treat customers fairly.\textsuperscript{25}

The UCRT therefore appears to be predominantly concrete and specific to a particular creditor-debtor relationship. It might be asked then how consideration of the conception of the consumer is relevant. As with the other fairness tests considered, the importance of the conception of the consumer relates to its potential to affect the exercise in legal reasoning carried out. The issue that arises is not necessarily who the consumer should be understood to be, since it is clear that the court should focus on the actual individual before it. Rather, the issue is how well the court is able to recognise, interpret, and translate the relevant interests and traits of that consumer into the assessment of fairness. This may seem like a straightforward exercise, however, it is submitted that the significance of behavioural economics and its impact on the consumer policy agenda, shows that the understanding of consumer decision making is subject to different interpretations and different methodological

\textsuperscript{19} DTI (n2), Foreword by Patricia Hewitt
\textsuperscript{20} Goode 1999 (n14) [47.14]
\textsuperscript{21} DTI (n2), [3.41]
\textsuperscript{23} ibid, [4.17]
\textsuperscript{24} Repealed by Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013/1881 Pt 5 art.20(40)
\textsuperscript{25} FCA, \textit{Handbook} (2018), [PRIN 2.1.1(6)], [CONC 2.2]
<https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html> accessed 18 April 2018
approaches, and that these differences in approach are important. It is pertinent to consider then, how courts reach their understanding of the relevant consumer in this context and the effect that this has on any judgment regarding fairness.

In addition, it is submitted that the legal conception of the consumer forms part of an important normative context within which the assessment of fairness takes place, so that the consideration of the actual individual debtor’s behaviour and interests will be judged against a background understanding of consumer behaviour and interests more generally. In other words, part of the consideration of an individual consumer’s behaviour will involve an assessment of the extent to which that behaviour is ‘normal’ and/or ‘appropriate’. This underlying conception of consumers generally may have significant implications for the balance struck under the UCRT regime. The question that arises then, is how this conception is to be constructed and specifically in the context of this thesis, whether it is based on abstract assumption or is behaviourally informed.

An example will help illustrate this point. A consumer (C) challenges the fairness of a credit relationship with a supplier (S), on the basis that S mis-sold C a loan by offering credit to C at the point of sale for funeral services relating to the death of a close relative. C argues that whilst they understood the bargain, S had exploited their vulnerable state by providing credit to encourage the purchase of an expensive product on emotional, rather than economic grounds. Under section 140A a court would need to consider C’s behaviour in this context including what they decided and why. Understanding what C decided to do may be relatively straightforward, but the understanding of why may be heavily influenced by the choice of lens through which C’s choices are interpreted. Through the lens of rational choice theory for example, C’s decision may be explained in terms of revealed preference, but through a behavioural lens it may be explained in terms of emotional bias.

Having considered the evidence relating to C’s choice the court would then be required to form a value judgment regarding C’s behaviour as part of the wider fairness assessment. This requires reflection on C’s behaviour in light of some background understanding of consumer

26 see Part 1 and Part 2
27 see for example Brown 2016 (n9)
behaviour more generally. The existence of this background understanding raises the issue of how the courts form their conception of the ‘consumer’ since, as was discussed in Part 1, there are different ways in which this understanding may be formed. In this case the court could compare the behaviour of C with an understanding of consumer behaviour informed by behavioural studies. For example, it might be asked what evidence exists regarding the effect of this type of practice on consumers in this kind of situation. In contrast, a court could adopt an abstract conception, such as the hypothetical reasonable consumer, as the relevant benchmark of ‘normal’ consumer behaviour to judge C’s behaviour instead. It might then be assumed, that even under conditions of grief, consumers can make good decisions if provided with relevant information, or in contrast, that all decisions made in these circumstances are always subject to exploitation as a matter of policy. Whichever approach is adopted, the assessment of fairness will be informed to some extent by an underlying preconception regarding ‘normal’ consumer behaviour. It is submitted therefore, that the choice of approach used when seeking to judge C’s behaviour could significantly impact how the court reaches its conclusion regarding whether the relationship is unfair.

Judicial application of the unfair credit relationship test

There are relatively few reported appeal cases concerning the UCRT and only one dealt with by the Supreme Court. The following section shall focus on the Court of Appeal’s decision in Harrison v Black Horse Ltd29 and the Supreme Court’s decision in Plevin v Paragon Personal Finance Ltd.30 These decisions set important precedents regarding the interpretation of the UCRT and offer examples of judicial application of the test, which allows for detailed examination of the role of the consumer as part of it.

**Harrison v Black Horse Ltd**

_Harrison v Black Horse Ltd_ is significant for being the first case requiring the Court of Appeal to apply the UCRT to particular facts.31 Black Horse sold Mr and Mrs Harrison a payment protection insurance (PPI) policy during negotiations for a loan agreement and gained a substantial undisclosed commission from the insurers. Subsequently the Harrisons sought to have their relationship with the lender declared unfair under section 140A. At first instance, the Harrisons failed to show that their relationship with the lender was unfair due to

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30 Plevin v Paragon Personal Finance Ltd [2014] UKSC 61, [2014] 1 W.L.R. 4222
31 Harrison (CA) (n29)
breaches of the relevant statutory rules governing the sale of PPI policies. Before the Court of Appeal their argument focused largely on the ground that the level of commission was so high that it should have been disclosed to allow them to make an informed choice.

Understanding the consumers

Despite finding that the undisclosed commission was ‘startling’, and that many would find it unacceptable for a lender to profit from such conduct, the court rejected the Harrisons’ appeal. Tomlinson LJ, giving the only judgment, considered the factual background and circumstances of the case. He recognised that the Harrisons had taken out similar agreements before, including PPI policies, and expected there to be a policy in this case. In addition, it was accepted that the Harrisons were not subject to undue pressure and had received all relevant information concerning the PPI, but had only scan read it. In light of this Tomlinson LJ stated:

I do not approach the case on the basis that [the Harrisons] were sophisticated in financial matters, but it would be both patronising and unwarranted on the evidence to suggest that they would have had any difficulty in understanding the essential features of the entire transaction.

The approach adopted here is clearly focused on the actual consumers party to the credit relationship. Tomlinson LJ suggests that he is relying on the evidence before him to determine what traits the consumers had as a matter of fact, rather than an assessment of an average or reasonable consumer’s traits. However, it should be noted that the court did subsequently find that the Harrisons were operating under a misapprehension regarding the need to take out PPI as part of the broader loan transaction, which does not seem to fit well with the view of them as having no difficulty understanding the entire transaction. The court found that this mistaken belief was self-induced and was not caused by anything said or done by the supplier. As a result, it could not give rise to unfairness.

33 Harrison (CA) (n29) [58]
34 ibid [19]-[20]
35 ibid [20]
36 ibid [22] (Tomlinson LJ)
37 ibid [60]
38 ibid
**Fairness**

In rejecting the Harrisons’ case, Tomlinson LJ stated that the touchstone of the fairness test must be the relevant regulatory standards rather than a visceral instinct that the conduct is ‘beyond the pale’.39 The regulatory rules governing the supplier’s conduct did not require disclosure of commission, therefore the relationship could not be said to be unfair on that basis.40 Indeed, Tomlinson LJ stated that it would be anomalous to find a relationship to be unfair where no regulatory rules have been breached.41 This attracted strong criticism and led to the decision being overruled.42 The problem being that such an approach goes too far in limiting the courts’ discretion under section 140A-140B since it causes fairness to become linked to breach of the rules leaving little scope for consideration of factors relating to the debtor, such as their vulnerability or lack of understanding.43 It might be argued that this limits the protective potential of the UCRT in that it seems to suggest that the supplier is free to conduct their business as they see fit so long as the rules are followed.44

The overruling of Harrison on the basis that it went too far in limiting courts’ discretion under section 140A seems uncontroversial. However, there is another aspect of this case which has received less attention. This relates to the way in which the court interpreted the behaviour of the debtors and, in particular, the value judgments made regarding how their behaviour ought to affect the fairness assessment. Specifically, it is submitted that the analysis carried out by the court in this case suggests that the behaviour of the Harrisons was interpreted and judged in light of an underlying preconception of consumers as relatively self-reliant.45

In this regard, there are three significant factors of the case. The first is that the consumers had received all of the information required under the regulatory rules. The second is that the consumers thought that the PPI policy was required as part of the main loan transaction, and the third is that the terms of the agreement, combined with the very high level of commission, seemed to offer poor value. The reason why it seems ‘unacceptable’ for creditors to profit from high undisclosed commission in this context, is because they seem to be exploiting the failure of some consumers to appreciate that PPI is not mandatory, by

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39 Harrison (CA) (n29) [58]
40 ibid
41 ibid
42 Plevin (SC) (n30)
43 Brown 2016 (n9), 236-237
44 Goode describes the court as adopting an ‘almost caveat emptor approach’, Goode 1999 (n14) [47.155]
45 Brown 2016 (n9)
extracting excessive value from them. This is a clear example of behavioural market failure and led to significant regulatory intervention in the market.46

It is submitted that part of the reason why the courts failed to recognise unfairness in these circumstances is because of an underlying assumption that the consumers had been able to make, and therefore should be treated as if they had made, a free and informed choice. This can be seen, for example, in the decision of the County Court where it was stated:

In this case the Claimants were given relevant information, they chose not to seek quotations from any other source, and they accepted that it was a 5-year policy at a price of £10,200. It was their choice, and they did not implement any precautionary steps of their own.47

It is also worth noting that the judge then referred to the comment of Baroness Hale in Abbey, who stated that the law aims to offer consumers an informed choice rather than protect them from unwise choices.48

A similar willingness to interpret the Harrisons’ behaviour through the lens of a relatively self-reliant and rational consumer can be seen in the decision of the High Court, where it was stated:

The Harrisons must in truth have realised that the PPI was optional or if not, this was a mistaken impression of their own making. They should therefore be treated as having had a real opportunity to consider whether or not to take the PPI. In that context they could consider its cost, relative, for example, to the cost of the main loan.49

What this passage shows is that whilst the court recognises the consumers’ mistake, they do not regard this as a vulnerability that has been exploited but see it as something that the consumers could and should have overcome. The significance of this is that the consumer is seen to be at fault, justifying the assumption that the choice was free and informed. The supplier cannot then be said to have exploited the consumer because it seems relatively clear that the consumer could have avoided the policy, and therefore the high commission. This

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47 Harrison (CC) (n32) [29] (Marston J)
49 Harrison (HC) (n32) [60]
was a significant factor cited by the High Court when distinguishing this case from the decision in *Yates v Nemo Personal Finance*, in which an undisclosed commission was seen to be unfair in circumstances where the consumer had been misled by a broker into believing that PPI was mandatory.\(^5\)

Interpretation of the Harrisons’ misapprehension as a self-induced consumer error allowed Court of Appeal to conclude that the size of commission would have been irrelevant since the consumers already had the material information relating to cost and must have made an informed choice about the product on that basis.\(^5\) Tomlinson LJ acknowledged that the FSA’s decision not to impose a regulatory rule requiring the disclosure of commission was based in part on an assumption that unbundling the PPI premium from the cost of the loan would be enough to create competition in this market, rendering disclosure unnecessary.\(^5\) As it turned out, the regulator’s analysis was flawed, and Tomlinson LJ accepted that consumers (including the Harrisons) did not shop around for cheaper products because they believed that the PPI policy was a condition of the loan despite the unbundling rule.\(^5\) However, the suggestion that this rendered the relationship unfair was rejected because the decision not to compare policies was the consumers’ fault and not attributable to the supplier.\(^5\) The court can then be seen as understanding that the consumer could have acted differently. In this regard, whilst the main reason for finding that the relationship was not unfair was the lack of a regulatory rule requiring disclosure, underlying that reasoning is the view of the Harrisons as capable self-reliant consumers who could and should have looked after their own interests.

**The relevance of behavioural economics**

The preceding analysis suggests that whilst the Court of Appeal focused on a factual assessment of the individual consumers’ traits, they seem to have been influenced in their interpretation of them by an underlying conception of consumers as rational and self-reliant. This affects the court’s judgment regarding the consumers’ level of fault and therefore

\(^{50}\) *Harrison* (HC) (n32) [60]; *Yates v Nemo Personal Finance* (unreported) Manchester CC, 14 May 2010  
\(^{51}\) *Harrison* (CA) (n29) [59]-[62]  
\(^{53}\) *Harrison* (CA) (n32) [60]; Competition Commission 2009 (n46)  
\(^{54}\) *Harrison* (CA) (n32) [60]
contributed to the perception of the relationship as fair. It is pertinent to consider then how the court’s analysis might have been different if influenced instead by an underlying conception of the consumer based more closely on evidence relating to behavioural patterns in this market.

It is clear that there was a widespread tendency for consumers to believe that PPI was either required, or that it would improve the chances of acceptance for a loan.\textsuperscript{55} In addition, the Competition Commission found the market for PPI to be failing in a number of respects which included difficulties faced by consumers when searching for and understanding PPI policies, due largely to the way in which the products were marketed and sold.\textsuperscript{56} As a result, the market suffered a serve lack of competitive pressure which led to high prices and a lack of innovation. Of particular significance is the Competition Commission’s findings relating to the advantages of point-of-purchase sales, which refers to the ability of the supplier to sell PPI at the same time that a consumer seeks to purchase a loan.\textsuperscript{57} The Competition Commission concluded that part of this advantage related specifically to consumer behaviour.\textsuperscript{58} This is because a large proportion of consumers fail to consider PPI until it is offered, which, when combined with the widespread perception that PPI increases the chance of acceptance, the belief that PPI was only available from the credit provider, and the fact that PPI was often sold on an advised basis, rendered it difficult for some consumers to properly assess the value of product.\textsuperscript{59} This is reinforced by the finding that creditors found it easier to convince customers to purchase PPI during face-to-face or telephone sales, compared with internet sales.\textsuperscript{60} This suggests that the context within which the PPI choice was presented affected some consumers’ behavioural response and therefore their decision to purchase.\textsuperscript{61}

Taken together this does not necessarily suggest that the relationship between the Harrisons and Black Horse was unfair. Rather, the evidence available provides an alternative picture of ‘normal’ consumer behaviour in this market. Had the court considered the choices of the Harrisons in light of this behavioural evidence, the court might have found it more difficult to assume that their misapprehension was something that they could and should have

\textsuperscript{55} Competition Commission (n46) [5.49]
\textsuperscript{56} ibid, [1.144]-[1.146]
\textsuperscript{57} ibid, [5.88]
\textsuperscript{58} ibid, [5.100]
\textsuperscript{59} ibid, [5.93]-[5.96], [5.144]
\textsuperscript{60} ibid, [5.98]
\textsuperscript{61} see Part 1, 34-36
overcome. On the contrary, this particular mistake seems to have been a common behavioural response to the structure of the sales process and indeed has led to a prohibition of PPI sales in this context. In this regard, the Harrisons’ mistake could be interpreted as a weakness or vulnerability rather than as a culpable lack of care. It would then be easier to accept that the consumers’ choice was not necessarily ‘informed’ and that disclosure of the large commission may have triggered a more critical response to what was a very one-sided deal. This would provide more scope to suggest that the supplier, whilst not necessarily doing anything to directly exploit consumer weaknesses, may have passively exploited the failing market by choosing to utilise their point-of-sale advantage.

One interesting point about the Court of Appeal’s analysis in the case, is that Tomlinson LJ did actually consider the regulatory discourse surrounding this particular aspect of the PPI market. In this sense, his decision might be understood as an example of a court deferring to the expertise of a regulator who has already made an assessment of fairness based on research into consumer behaviour. The difficult with this however, is that despite consideration of the problems within the market and recognition of the fact that the regulator’s analysis of the need for disclosure was flawed, the Court of Appeal justified the finding of a lack of unfairness by reference to the fault of the consumers. This seems unconvincing in light of the broader behavioural analysis suggesting that suppliers were exploiting a significant behavioural market failure and the fact that the bargain struck in this case seemed to offer such poor value to the consumers. Assessment of the consumers’ misapprehension in light of this broader behavioural context might have improved the analysis of the court in this respect.

This discussion is inevitably hypothetical. It does however raise an important point, which is that despite the assessment of fairness being concrete, and therefore based on a factual assessment of consumer traits, the perspective courts adopt when judging those traits may affect the assessment of fairness. In this regard, whether the court adopts an abstract assumptive of behaviourally informed approach when seeking to understand typical consumer behaviour may have important implications for the assessment overall. In Harrison, the courts seemed to treat the consumers as if they fully understood the bargain by assuming that they would not have had any difficulty in doing so, despite evidence of only a scant review of the terms, and their mistaken belief that the PPI policy was necessary to ensure

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62 Competition Commission 1999 (n46); Competition Commission 2010 (n46)
acceptance of the loan. Given the broader evidence relating to consumer behaviour in the market for PPI and the wide-ranging exploitation of that behaviour by suppliers, it is submitted that the court’s reasoning might have been different had it paid closer attention to the behavioural evidence regarding the reasons why miss-selling of PPI was so prevalent.

**Plevin v Paragon Personal Finance Ltd**

The decision in *Harrison* was not appealed to the Supreme Court, however the issue of whether the non-disclosure of a large commission could render a relationship unfair was raised in the subsequent case of *Plevin v Paragon Personal Finance Ltd* which did reach the Supreme Court for consideration.63

**Court of Appeal**

In the Court of Appeal *Plevin* was dealt with alongside the case of *Conlon v Black Horse*.64 In both cases consumers complained of unfairness caused by the fact that the premium paid for PPI policies was made up of a substantial commission (71% in *Plevin* and 40% in *Conlon*). In addition, the consumer in *Plevin* complained that the regulatory rules had been breached since the broker selling the policy failed to assess its suitability for their purposes. This raised the issue of whether the relationship with the supplier could be rendered unfair by failure of the broker. The answer to which turned on interpretation of section 140A which refers to ‘things done by, or on behalf of’ the creditor.65

In assessing the extent to which the non-disclosure of commission could create unfairness in a credit relationship, the court accepted *Harrison* as binding authority for the proposition that in the absence of some breach of the regulatory rules, failure to disclose commission would not cause unfairness.66 The court therefore disregarded evidence that the consumer would have acted different if they had known of the commission.67 Despite this conclusion, the judges were unanimous in their discomfort at the state of the law.68 Briggs LJ in particular emphasised his disapproval of *Harrison* stating that:

> I would have regarded a visceral instinct that the relevant conduct was beyond the pale as a persuasive starting point in the analysis whether such conduct gave rise to

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63 Plevin (SC) (n30)
65 CCA s140A(1)(c)
66 ibid, [25]-[26], [58], [63]
67 ibid, [22]-[23]
68 ibid, [26] (Briggs LJ) [80] (Beatson LJ) [81] (Moses LJ)
an unfair relationship, all the more so where, ... the standards imposed at the time by
the regulatory authorities manifestly failed to prevent the abuse of point of sale single
premium PPI, to an extent that it has since become a national scandal, and has been
prohibited for the future.69

Given the restraint imposed by Harrison, when assessing the second point raised by the
appeal, the court were moved to interpret section 140A to give effect to what they saw as the
protective purpose of the legislative regime.70 The words ‘on behalf of’ were therefore
interpreted broadly to encompass any action beneficial to the creditor in bringing about the
credit agreement.71 This was favoured over the narrower interpretation of something akin to
agency. The court suggested that because the test is designed to produce consumer
protection, it would be inappropriate to interpret the provision narrowly, thereby reducing
the court’s ability to assess the transaction in its entire context.72 In light of this the case was
remitted for rehearing.

Supreme Court

The decision in Plevin was appealed to the Supreme Court, where the credit relationship was
found to be unfair.73 In contrast to the approach of the Court of Appeal however, the
Supreme Court based their conclusion on non-disclosure, rather than the broker’s breach of
the regulatory rules. Lord Sumption, giving the leading judgment, explained that the fairness
test was broad and based on judicial discretion.74 In this regard the matter was for the court
to determine relying on forensic judgment. Prevailing standards of commercial conduct and
regulatory rules may therefore be important to the assessment, but they cannot be the
‘touchstone’ since a wider range of considerations may also be relevant.75 In this sense
Harrison was misguided and was therefore overruled.76 The Court of Appeal’s wide
interpretation of ‘on behalf of’ was also overruled and the narrower interpretation of it
meaning ‘something akin to agency’ was adopted.77

69 ibid, [26]
70 ibid, [46], [52], [85]
71 ibid, [52]-[56], [63]
72 ibid
73 Plevin (SC) (n30)
74 ibid, [17]
75 ibid; cf Harrison (CA) (n29) [58]
76 ibid, [16]-[17]
77 ibid, [34]
Assessment of fairness

Having overruled Harrison, Lord Sumption applied the correct interpretation of the test to the facts.\(^\text{78}\) His approach suggests an inherent structure to the assessment. The first step requires consideration of the state of affairs existing between the parties to determine whether any unfairness exists.\(^\text{79}\) The second step is to consider whether this can be attributed to one of the factors set out in section 140A(1)(a)-(c). In this case the issue was whether the unfairness was caused by something done or not done by the creditor.\(^\text{80}\)

Was there some unfairness in the relationship?

Regarding the first step in the assessment, it is clear that Lord Sumption focused on the individual consumer. He stated that factors relevant to an assessment of fairness include the characteristics of the borrower, including, their sophistication or vulnerability, the facts that they could reasonably be expected to know, and the range of choices available to them.\(^\text{81}\) This is what one might expect given the UCRT’s focus on the individual debtor-creditor relationship. Lord Sumption added to these factors the extent to which the supplier was or should have been aware of these matters.\(^\text{82}\) This is readily understandable since the assessment of fairness must balance both parties’ interests.

In finding the relationship to be unfair, Lord Sumption relied on a number of points.\(^\text{83}\) The first is a point of principle; “that a sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor”. The second seems to be a legal standard; that whilst the consumer must be assumed to have awareness of some commission (since this was stated in the information given to her and because of the commercial context of the transaction), there is a tipping point whereby commission becomes so large that the debtor’s ignorance of it must be unfair. In this case that point had been found to be surpassed, which was supported by evidence suggesting that Mrs Plevin would have acted differently had she known the size of the commission. It was said that this was of critical relevance. The final point explains why this evidence was not surprising; any reasonable consumer in this situation would question whether the PPI represented value for money.

\(^{78}\) Ibid, [18]-[20]  
\(^{79}\) Ibid  
\(^{80}\) Ibid, [19]  
\(^{81}\) Plevin (SC) (n30) [17]  
\(^{82}\) Ibid  
\(^{83}\) Ibid, [18]
It is submitted that this analysis, when considered within the behaviourally informed/abstract assumptive framework, is somewhat blurred in the sense that it is not clear how and why the court concluded that the consumer’s behaviour was reasonable. On one hand the court clearly relies on assumptions regarding the consumer’s knowledge. These assumptions may have been based on factual evidence available to the court or could be an example of the application of an abstract standard. This could also be considered as reflecting what the supplier should have been able to assume, although the court does not express the point in that way.

On the other hand, the court refers directly to the characteristics of the individual consumer which gives rise to evidence of ‘critical relevance’ and contributes to the conclusion that the tipping point in this case had been reached. The difficulty with this, is Lord Sumption’s comment that this particular consumer characteristic was not surprising because a reasonable consumer would behave in the same way. The question then is how the court constructs this view of the reasonable consumer; is it based on an abstract legal standard or is the court drawing on its knowledge of typical consumer behaviour to try to reflect the most probable consumer response? One might expect more reference to behavioural evidence if the court were relying directly upon it, although it should be noted that the court did refer to the Competition Commission’s report on PPI which does in fact focus on consumer behavioural traits in this context. Therefore, this evidence may have influenced the court’s interpretation of typical consumer behaviour. The court’s exact approach is however unclear.

In this case, the conception of a reasonable consumer and the actual consumer happened to share the same traits and therefore the distinction between the two does not seem to be material. However, in other cases these two consumers may not share the same traits. The approach adopted by the court when determining how a reasonable consumer would behave may then be of critical importance. Whether the court adopts an abstract standard focusing on rationality for example, or whether they draw on behavioural evidence regarding actual consumer traits, could change what is considered to be ‘reasonable’ in any given context. As was noted above with regards to the Harrison decision, this is important because the lens through which an individual consumer’s behaviour is interpreted and the underlying standard

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84 Plevin (SC) (n30) [1], [18]; Competition Commission 1999 (n47)
85 I Ramsay ‘Changing Policy Paradigms of EU Consumer Credit and Debt Regulation’ in D Leczykiewicz and S Weatherill (eds), The Images of the Consumer in EU Law (Hart, 2016) 159, 172-178
against which it is judged, might have a significant impact of the ultimate balance struck under the fairness test.

Under this first stage of Lord Sumption’s approach, it is the courts’ ability to recognise factors that might give rise to unfairness which are potentially affected by the underlying conception of reasonable consumer behaviour. Too abstract a view of what it is reasonable to expect of consumers might blind the court to what are significant and detrimental features of relationships, as was seen to some extent in *Harrison*, where the court were perhaps too ready to assume that the debtor’s choice was informed. In contrast, a more behaviourally informed understanding of what can be reasonably expected of consumers as a matter of factual reality, could broaden the scope of this first part of the assessment, allowing for more potentially relevant features of a relationship to be understood as problematic, in that they may give rise to consumer detriment.

*What is expected of the supplier?*

Increasing the extent to which courts are able to identify aspects of consumer behaviour which may give rise to unfairness in a credit relationship does not necessarily mean that more relationships will be found to be unfair. When discussing the test generally, Lord Sumption recognised that although the legislation is concerned mainly with the hardship to debtors, it also requires the court to consider all matters it thinks relevant, including concern for both consumer and supplier interests.\(^{86}\) He stated that harshness alone will not usually be enough to render a relationship unfair because such harsh features of a transaction are often necessary to protect the legitimate interests of suppliers.\(^{87}\) He went on to state that Parliament could not have intended for relationships to be reopened on the basis of unequal bargaining power alone since most consumer credit transactions will exhibit such features.\(^{88}\) This then raises the question of precisely how the interests of the consumer and supplier are to be balanced and in particular how the traits of the consumer feed into the assessment of what it would be reasonable to expect of a supplier. It is submitted that there are two overlapping but distinct issues that must be considered in this regard. The first is the supplier’s knowledge of the consumer’s characteristics, which will depend to an extent on a

\(^{86}\) *Plevin (SC)* (n30) [10]; CCA s140A(2); Lomnicka describes fairness in this context as a ‘double-faceted concept which depends on the characteristics and activities of both the debtor and creditor, E Lomnicka ‘Unfair Credit Relationships: Five Years On’ (2012) 8 J.B.L 713, 718

\(^{87}\) *Plevin (SC)* (n30) [10]

\(^{88}\) Ibid

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court’s approach when determining their underlying conception of the consumer. The second is what courts expect of suppliers ‘in the interests of fairness’. This may be informed by an understanding of the consumer but does not necessarily need to depend on that information.

The supplier’s knowledge of consumer characteristics

Under the first step in Lord Sumption’s assessment, the extent to which the supplier was or should have been aware of the consumer’s characteristics is important. For example, deliberate exploitation of a consumer’s weakness would seem more likely to be unfair than inadvertent exploitation. If the evidence shows that a supplier did know of some consumer characteristic as a matter of fact, then this issue would seem to be straightforward. However, it is submitted that the way courts interpret and judge the behaviour of an individual consumer will be significant when considering what a supplier could and should have been aware of.

Generally speaking a supplier should be entitled to expect consumers to behave ‘normally’ unless they have some special knowledge to the contrary. If, for example, it is understood that consumers normally read information given to them, then suppliers will be able to protect their interests by providing consumers with information. If, however, it is widely understood that consumers normally read only the first page of a contractual document, then suppliers may be expected to know that information on every other page is unlikely to be digested. In light of this, courts’ perception of supplier knowledge is likely to be informed by their understanding of normal consumer behaviour. If courts draw on empirical evidence of consumer behaviour, that will inform their view of what is normal. This does not mean of course that because one research paper identifies an obscure behavioural trait that suppliers will be expected to be aware of it, but it does mean that widespread and well-known behavioural patterns may affect what is considered to be ‘normal’. In contrast, a court could adopt a legal benchmark of normal consumer behaviour, which a supplier can then be treated as expecting regardless of evidence to the contrary. An example of this would be the contract law rule that a signature on a contractual document can be treated as assent to its terms.

As noted above, the decision in Plevin does not make clear whether the conclusion that Mrs Plevin’s behaviour was reasonable was based on an abstract standard or informed by

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89 ibid, [17]
90 L’Estrange v F Graucob Ltd [1934] 2 KB 394
empirical assessment of typical consumer behaviour. It is clear however, that the court thought that the supplier could and should have been aware of the importance to the consumer of information regarding the size of the commission.\textsuperscript{91} This fact then fed into the next aspect of the assessment, which is what the court expects a supplier to do (or not do) in the interest of fairness.

**What is expected of suppliers?**
The second issue that arises with regards to creditors in this context, is what courts expect of them in light of the normative fairness standard.\textsuperscript{92} This will be informed by (\textit{inter alia}) the characteristics of the consumer measured against the standard of typical consumer behaviour, as well as what the supplier knew or ought to have known. However, whilst these factual aspects of the overall assessment will inform the conclusion reached, it is for courts to apply relevant normative standards to determine what would amount to unfairness in any given case. Indeed, the open and vague nature of the fairness regime as a whole provides considerable discretion for courts to shape the level of protection afforded to consumer interests in this regard.\textsuperscript{93}

In \textit{Plevin} the question arose as to whether the supplier’s omission caused the relationship to be unfair.\textsuperscript{94} Lord Sumption emphasised that the lack of a legal duty to disclose commission could not be determinative. The question therefore was not whether the supplier had met his legal obligations but whether the unfairness that existed required the supplier to do more to mitigate it. In light of this Lord Sumption stated that a supplier will be responsible for omissions if he fails to take steps which; (i) it would be reasonable to expect him to take in the interests of fairness and (ii) would remove or mitigate the unfairness to the extent that the relationship could no longer be described as unfair.\textsuperscript{95}

The court decided that the supplier should have disclosed its knowledge to the consumer since they were the only party involved with all of the relevant information.\textsuperscript{96} Given the importance of this information to the consumer the court decided that it would be reasonable to expect the supplier to have provided it. This would have removed the

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\textsuperscript{91} \textit{Plevin (SC) (n30) [20]}
\textsuperscript{92} ibid, [19]-[20]
\textsuperscript{93} Goode 1999 (n14) [47.184]
\textsuperscript{94} \textit{Plevin (SC) (n30) [19]}
\textsuperscript{95} ibid
\textsuperscript{96} ibid, [20]
unfairness because the consumer would then have been able to make an informed choice; a conclusion supported by the fact that Mrs Plevin would have acted differently if she had known of the level of commission. The relationship was therefore found to be unfair.

This second aspect of the fairness assessment regulates the responsibility of the supplier by allowing the court to interfere in a relationship whenever the supplier has not acted in line with what the fairness standard expects of them. The *Plevin* judgment shows that an assessment of the individual consumer’s characteristics, and the supplier’s knowledge of this, will be relevant when making this determination. Those factors contribute to the consideration of what could amount to unfairness and therefore what it might be reasonable to expect of suppliers. Indeed, the reasoning set out by Lord Sumption when explaining why the creditor should have done more suggests that the traits of Mrs Plevin and her corresponding interests were a dominant consideration. It is the significance of the information on the consumer’s ability to make an informed choice which seems to justify interfering in the creditor’s freedom, by requiring them to disclose information where they otherwise had no legal obligation to do so. When compared with the decision in *Harrison*, this seems to reflect a protective ethic which may be more in line with the original intention of Parliament when introducing the unfairness test in place of the extortionate credit bargain provisions.

**Summary**

The analysis of *Plevin* illustrates the importance of the conception of the consumer to the assessment of fairness. It is clear that the court were influenced by evidence relating to the actual consumer’s traits. However, it is equally clear that an understanding of reasonable consumer behaviour was also influential. In this regard, the way in which a court reaches its judgment of reasonableness may affect the process of deciding whether a relationship is unfair, since it may affect both the courts perception of the actual consumer’s behaviour and the assessment of supplier responsibility. However, it is not clear from *Plevin* itself how a court should go about trying to understand what amounts to reasonable consumer behaviour. It is submitted that courts could either rely on abstract assumptions or they could seek to draw on behavioural evidence in an attempt to work out what can realistically be

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97 ibid
98 *Plevin* (SC) (n30) [17]-[20]
99 Brown 2016 (n9), 244
expected of consumers in different circumstances. This lack of guidance regarding the correct approach leaves open the potential for courts to deal with cases differently, perhaps motivated by the desire to promote a more or less protective ethic depending on the circumstances of the case, which may indeed reflect the original intention for a broad test based to a large extent on judicial discretion.\textsuperscript{100}

**Unfair credit relationships and the conception of the consumer: analysis**

It is not inevitable that the conclusion reached regarding fairness under section 140A turns on the consumer’s wants or needs. Factors relevant to the supplier, such as the need to be competitive, the prevailing standards of commercial conduct, including observation of regulatory rules, and the need for certainty in dealings with consumers, may all contribute to, and may ultimately sway, the final conclusion regarding the fairness of a relationship. This is because the fairness assessment is at its core normative and, whilst it is designed to be protective, it reflects the need to balance both consumer and supplier interests.\textsuperscript{101} However, what the discussion of Harrison and Plevin shows, is that the interests and traits of the individual consumer party to the relationship, can, and it is submitted often will, be a significant factor influencing the normative analysis carried out. The concrete nature of the fairness test requires courts to attempt to understand the reality of the consumer’s characteristics set within the context of the credit relationship. This seems to be what Lord Sumption meant in Plevin when he referred to the need for forensic analysis.\textsuperscript{102} It has been suggested however, that the court must adopt a perspective or lens through which an individual consumer’s behaviour is to be interpreted. In addition, a court must rely on an underlying conception of normal consumer behaviour to allow for a value judgment to be made regarding the individual consumer’s traits. It is in this sense that the differences between an abstract assumptive and a behaviourally informed approach, when constructing the legal conception of the consumer, becomes particularly relevant to the application of section 140A.

Neither the decision in Harrison nor Plevin allows for a firm conclusion regarding the courts’ approach when constructing the conception of the consumer. This is because in both cases the reasoning of the court does not draw a clear distinction between the factual assessment

\textsuperscript{100} Goode 1999 (n14) [47.161]-[47.184]; Brown 2016 (n9), 257
\textsuperscript{101} DTI (n2), [3.34]
\textsuperscript{102} Plevin (SC) (n30) [17]
of the individual consumer’s behavioural traits, and the normative issue of what the consumer could and should have been expected to know and/or do. There are signs in Harrison of an underlying perception of consumers as being capable of self-reliance through rational economic action.103 This seems to colour the court’s understanding of what the consumers did and why they did it, which feeds into the conclusion that their choice in that case was informed. In Plevin, it seems that a more protective ethic may be reflected in the court’s view of what could be expected of consumers, which feeds into the conclusion that the choice made in that case was not informed and therefore required disclosure of the commission.104 Whilst this shift in the understanding of what it would be reasonable to expect of consumers may have been informed by evidence regarding the behavioural patterns observed in the market for PPI,105 it is also plausible that the courts’ approach was abstract in both cases, but with slightly different assumptions regarding normal consumer behaviour.

Whether constructed on the basis of abstract assumption, or determined by consideration of behavioural evidence, it is clear that in both cases considered the underlying conception of the consumer relied on played an important role in bridging the gap between the factual assessment of the individual relationship and the normative assessment of the requirements of fairness. In this regard, the understanding of normal consumer behaviour forms the fulcrum around which the balance between consumer and supplier interests is conducted. Responsibility for any potential unfairness is then measured against this notion of normal behaviour.

This can also be seen in cases decided since Plevin. In Julie McMullon v Secure the Bridge Ltd, for example, a (quasi-commercial) credit relationship was found to be fair despite the County Court recognising that it was ‘inappropriate’ and having the propensity to give rise to unfairness.106 When assessing fairness, both the County Court and Court of Appeal relied directly on evidence regarding the actual parties to the case. In rejecting the debtor’s appeal, the Court of Appeal emphasised that the supplier had acted properly.107 In contrast, the debtor was found to have provided false information, to have understood the transaction,
and to have been aware of the risks inherent in agreeing to it.\textsuperscript{108} The irrationality of the choices made by the debtor in agreeing to such a poor bargain were explained on the basis that she was in a desperate situation and was under financial stress.\textsuperscript{109} The Recorder concluded that the debtor knew what she was doing and had only herself to blame for the difficulties she faced.\textsuperscript{110} The Court of Appeal agreed stating that:

[I]t was the urgency of the debtor’s need and desire for the re-mortgage, and her determination to do whatever was necessary to achieve her objective, which led to the credit agreement, rather than any abuse of position, undue influence or non-disclosure on the part of the [supplier].\textsuperscript{111}

\textit{McMullon} was not necessarily a consumer case since the loan made was for quasia-commercial purposes. However, it provides a useful example of the application of the UCRT following \textit{Plevin}. The case illustrates a pattern of analysis whereby the individual consumer’s behaviour is assessed as a matter of fact, judged against some notion of reasonable behaviour, and then balanced with the supplier’s behaviour and interests. Whilst the normative influences informing assessment of a commercial relationship may not necessarily be replicated in a consumer case, this pattern of analysis generally will.

This can be seen, for example, in the case of \textit{Swift Advances Plc v Okokenu}.\textsuperscript{112} In this case a consumer defaulted on a loan and sought to have the credit relationship declared unfair in response to possession proceedings. The consumer’s argument was summed up by Hand HHJ as that it would be bad faith to lend to those who are likely to default.\textsuperscript{113} The loan was made based on a procedure described as self-certification.\textsuperscript{114} This meant that the lender relied on information provided by the consumer regarding his ability to repay the loan without further investigation. The consumer was found to have behaved ‘mendaciously’ in that he understood the bargain but provided false information to the supplier with regard to his income.\textsuperscript{115} In contrast, the supplier was found to have acted properly throughout. In response to the suggestion that the supplier should have done more to check whether the information provided to it was accurate, it was noted that self-certification had fallen out of favour since

\begin{itemize}
\item \textsuperscript{108} ibid [60], [93]
\item \textsuperscript{109} ibid [18], [39]
\item \textsuperscript{110} ibid [42]
\item \textsuperscript{111} ibid [77] (Hildyard J)
\item \textsuperscript{112} [2015] CTLC 302 (CC)
\item \textsuperscript{113} ibid [24]
\item \textsuperscript{114} ibid [51]
\item \textsuperscript{115} ibid [18], [43], [46]
\end{itemize}
the transaction, having been shown to be entirely unsatisfactory.\textsuperscript{116} Despite this, it was found that at the time of the transaction the practice was considered to be appropriate for its purpose. In this regard, the transaction when agreed, was done so on the basis of the usual relationship between the debtor and the supplier, following the conventional procedures. The judge stated that he saw no basis for criticising the supplier in light of this and suggested that the change in wisdom since the transaction cannot be taken as evidence of unfairness in the relationship where none existed before.\textsuperscript{117}

It is clear from this decision that the traits of the actual consumer, and in particular their conduct, will be factored into the assessment of fairness. However, as was seen in \textit{McMullon}, these traits will be understood against an underlying perception of normal consumer behaviour, and the supplier will not necessarily be held responsible for what is understood to be the consumer’s failure to look after their own interests. In this regard, the supplier was not expected to take steps beyond the usual commercial practice, to ensure that the agreement was suitable for the consumer’s needs. This is particularly interesting since the practice relied on was in fact unsuitable and did actually cause hardship for many consumers who were granted credit only to default following the 2008 credit crisis. Indeed, reliance on such practices now, in light of responsible lending rules, would be likely to be unfair.\textsuperscript{118}

What decisions like \textit{McMullon} and \textit{Swift} show is that the courts’ perception of the consumer’s behaviour can be an integral part of the overall assessment of fairness. Specifically, assessment of consumer responsibility for behaviour giving rise to circumstances that seem unfair, may justify a finding to the contrary, particularly where the supplier is seen to have acted properly.\textsuperscript{119} Given the normative nature of any fairness assessment, it is submitted that this must be correct; the consumer’s behaviour and their responsibility for it, should be taken into account and compared with that of suppliers. This is the only way in which a fair balance between both party’s interests can be produced. However, it is submitted that attention must be paid to the route by which the court determines levels of responsibility for features of a relationship. The assignment of responsibility depends, at least in part, on interpretation of factual information. It is submitted therefore that the understanding of consumer behaviour

\textsuperscript{116} ibid [45]-[46]
\textsuperscript{117} ibid
should be as accurate as possible to ensure that the assignment of responsibility is appropriate. Drawing on behavioural science where available has the potential to assist legal reasoning in this regard.

The relevance of behavioural economics to the assessment of fairness

As with other areas of the law considered above, it is submitted that the potential role of behavioural science in this context is as a body of evidence, and more broadly understanding, regarding behaviour generally and in specific contexts.\(^\text{120}\) This evidence can be relied on to inform the understanding of behaviour by providing a lens through which to interpret particular traits or more broadly as a catalogue of phenomena that can act as a guide when contemplating typical behavioural responses. Familiarity with this type of empirical investigation is likely to affect what is considered to be normal consumer behaviour, which in turn will inform what can reasonably be expected of consumers. Therefore, reliance on an approach which seeks to understand consumer traits from a behavioural perspective, could affect the factual assessment of individual consumer behaviour when assessing fairness in a concrete case.

This does not of course determine that a given relationship is or is not unfair. What it does do however, is allow for a broader range of consumer behavioural traits to be understood in a way that behavioural economists would argue is more accurate when compared with models of behaviour based on abstract assumptions.\(^\text{121}\) This includes scope to identify behaviours that might otherwise go unnoticed, such as over-optimism or reliance on problematic heuristics.\(^\text{122}\) It also includes scope to attach different value judgments to behaviour, which when assessed in the abstract might look to be the product of free choice, but when considered from a behavioural perspective, appear to be inherent vulnerabilities or limits of cognition. The adoption of a more behaviourally informed approach then, would potentially improve the ability of courts to recognise potential unfairness in relationships relating to particular behavioural traits. In turn, this should provide more scope for consumers to


\(^{122}\) For an overview see Part 1, 28-45
challenge relationships that they believe to be unfair, despite for example, having been given all of the relevant information. Given the concrete and relational nature of the assessment, an individual consumer would still need to persuade a court on the basis of that evidence that their particular relationship was actually unfair.

In addition to the effect that this behaviourally informed perspective might have on the way courts interpret and judge individual consumer behaviour, it might also have an effect on the way supplier behaviour is assessed. This is because a behaviourally informed understanding of normal consumer behaviour may suggest that suppliers either were, or could have been, aware of certain behavioural realities as a matter of fact. This will be relevant when considering what the fairness standard expects of suppliers. A simple example would be the propensity for consumers to be over-optimistic when agreeing to gym membership contracts as seen in the case of Ashbourne. It is submitted that it would be difficult for a supplier to argue that they were not aware of this behavioural trait once evidence is accepted proving that it was typical in a particular context. The behaviour of suppliers must then be considered in light of this knowledge. Where a supplier acts (or fails to act) so as to exploit certain behavioural traits, of which they must have been, or should have been aware, it becomes easier to treat suppliers as responsible for detriment that then results. This may be particularly important where claims of unfairness are linked to a business model designed to exploit particular behavioural traits.

Reliance on behavioural evidence when seeking to understand and judge an individual consumer’s behaviour does not however restrict the courts’ ability to promote either a protective or self-reliant ethic. A court might, for example, decide that suppliers should be able to assume that consumers are rational economic actors, capable of digesting information and maximising their welfare. This would be a normative choice. A credit relationship would

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125 see for example, Plevin (SC) (n30)
126 see for example, Ashbourne (n124); For a discussion of behavioural market failure in the context of consumer credit specifically see P Ali, I Ramsay and C Read ‘Behavioural Law and Economics: Regulatory Reform of Consumer Credit and Consumer Financial Services’ (2014) 43 C.L.W.R 298
127 Brown 2016 (n9) 257
not necessarily be fair because the consumer did (or could) read information and make a utility maximising decision; it would be fair despite the behavioural reality that persists.

In this regard, the wide discretion afforded to courts, particularly the lack of a fixed structure and clear guidance for the assessment of fairness, allows for legal policy to be applied without the need for manipulation of the conception of the consumer.128 This allows for a departure from the pattern inherent in Willett’s normative framework as set out in Part 1,129 which links a freedom approach to the promotion of a self-reliant ethic, and a fairness approach to a protective ethic. Instead, the court is able to adopt a fairness type approach, which is contextual and focuses on the actual parties to the relationship but has scope to promote different ethics to different degrees depending on the case at hand. The analysis of the cases applying the UCRT above suggest that this is what courts have generally done. Indeed, cases such as *McMullon* and *Swift* suggest that courts have focused on the actual traits of the particular individual consumer before them but have nonetheless tended towards a relatively self-reliant ethic, especially where the debtor is seen as underserving and the supplier has acted reasonably.130

The relevance of behavioural evidence in this context is its ability to improve courts’ assessment of the factual aspect of the fairness assessment by providing information pertinent to an understanding of consumer behaviour. This should be considered when determining what it would be reasonable to expect of consumers, without necessarily forcing courts to protect consumers against any weakness thereby uncovered. The advantage of such an approach, is that the final analysis and conclusion regarding whether a relationship is or is not unfair, should reflect a more sophisticated understanding of the conflict that actually exists between the interests of the consumer and the supplier. The application of the relevant normative standard(s) should then be justified in light of that.

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130 This may also be reflected in decisions pre-dating *Plevin* particularly in regard to the assessment of interest rates, see A Aldohni ‘Loan Sharks v Short Term Lenders: How do the Law and Regulators Draw the Line?’ (2013) 40(3) J.Law & Soc 420, 436-441; Lomnicka (n86) 722
Conclusion

When considering the UCRT, it must be noted that the fairness assessment is ultimately normative and that given its broad and flexible nature, it provides courts with wide discretion. Reliance on behavioural evidence to inform courts’ conception of normal consumer behaviour does not therefore mean that more relationships will have to be found unfair when compared with an underlying conception of consumers as rational economic actors. Drawing on such evidence simply changes the factual assessment of the specific relationship. This will be important when assessing the reasonableness of consumer behaviour, but it is still for a court to determine what it expects of suppliers in the interests of fairness. Therefore, whilst recognition of consumer behavioural traits may be central to this, there are many other factors that will also be relevant. It is submitted that what is important, is that courts justify their normative stance and fairness conclusions in light of factual reality as far as is possible. In this regard, the court should try to understand the reality of consumer behaviour as best it can, with all of the evidence available to it, and it is submitted that drawing on information produced by behavioural science affords a better approach for doing this, than reliance on assumptions regarding normal consumer behaviour made in the abstract.
Part 4: Analysis and conclusions

Introduction

The preceding analysis has examined judicial approaches to construction of the conception of the consumer under three fairness tests. This was done using the abstract assumptive/behaviourally informed framework set out in Part 1 and in light of the increasing importance of behavioural approaches to regulation discussed in Part 2. The study has demonstrated that the legal conception of the consumer varies so that in some instances it is behaviourally informed whereas in others it is based on abstract assumption. Some variation between the different tests is not surprising given that they are designed to address different (though sometimes overlapping) problems. References to the consumer therefore arise in different legal contexts. For example, some tests require a concrete assessment based on an individual consumer, whereas others require assessment based on collective consumer interests. However, the study revealed that variation of the conception is an issue within each test, as well as between them. It also shows how different approaches to conception can be relevant at both an individual and collective level. An important finding therefore, is that a degree of tension exists between judicial assessment of fairness based on behaviourally informed understandings of consumers, and assessment based on abstract assumptions.

It is submitted that part of the reason for this tension is the lack of clear guiding principles regarding the correct approach. There are signs of a self-reliant ethic running through the law reflecting what may be described as an individualist approach, which has dominated English private law discourse for many years. However, all three tests reflect elements of a protective agenda and in recent years behavioural findings and analysis have informed understanding of what this requires. This puts pressure on idealised notions of rationality in the legal context, particularly as regulators bring their expert understandings of the need for

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1 see Part 1 and Part 2
2 see for example Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 31
3 Mak has produced similar findings within EU law, see V Mak ‘The Consumer in European Regulatory Private Law’ in D Leczykiewicz and S Weatherill (eds), The Images of the Consumer in EU Law (Hart, 2016) 381
consumer protection to bear on judicial processes of decision making. This creates a degree of uncertainty of approach, whereby it is unclear exactly how courts will construct their conception of the consumer. As a result, it becomes difficult to fully understand how protective of consumer interests a particular fairness assessment will be.

The following section will examine this tension further, by considering how different approaches to understanding consumer behaviour affect the process of legal reasoning associated with fairness assessment. This will draw together some of the main findings from the analysis of the three tests to produce a more holistic understanding of the relationship between the conception of the consumer and the assessment of fairness. The discussion will consider fairness at a level of generality, rather than under each test specifically, focusing on the common analytical structure connecting assessments of fairness at a theoretical level. A final summary of the points raised by the thesis will consider the extent to which a behaviourally informed approach should be adopted for the purpose of assessing fairness. Issues raised by the study giving rise to the need for further research will also be set out.

Legal reasoning and fairness: the tension between abstract assumptive and behaviourally informed understandings of the consumer

At a broad level, a fairness assessment can be understood as requiring a court to balance the interests of different subjects. Fogler and Cropanzano have constructed a theory of fairness in the context of organisational justice which provides a useful framework for examination of the effect that different conceptions of the consumer have on this balancing exercise. The theory suggests that there are three interrelated components needed to create a perception of unfairness. The first is the existence of an unfavourable condition or state. In the consumer law context this can be thought of as consumer detriment. The second condition is the attribution of responsibility for this detriment to the relevant person. Under the three fairness tests considered, responsibility for detriment could be attributed to either the supplier or the consumer as part of the process of determining whether the criteria for

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6 see Part 2, 58-63; For example, a large number of the cases considered in Part 3 were brought by the OFT
7 H Collins, Regulating Contracts (OUP, 1999), 256
8 R Fogler and R Cropanzano ‘Fairness Theory: Justice as Accountability’ in J Greenberg and R Cropanzano (eds), Advances in Organisational Justice (Stanford University Press, 2001) 1
9 ibid, 3-7
unfairness have been satisfied. The third and final condition is that a normative standard of justice has been breached.¹⁰

Consideration of the effect that different approaches to constructing the conception of the consumer have on these ‘fairness’ criteria, allows for the analysis of approaches under each of the tests to be connected at a more theoretical level. This permits a broader assessment of the extent to which a more behaviourally informed or a more abstract assumptive approach should be preferred. The theoretical analysis produced can then be used to support consideration of different approaches more specifically in relation to a given fairness test.

i. Identifying detriment

The first of Fogler and Cropanzano’s conditions requires the identification of detriment.¹¹ Each of the three fairness tests considered is designed to tackle detriment of one form or another. Under the unfair terms test this issue arises with regard to the existence of a significant imbalance in the parties’ rights causing detriment to the consumer.¹² It also arises with regards to good faith as interpreted by the ECJ in Aziz, in the sense that the more detrimental a term, the less likely it is that the consumer would agree to it.¹³ For unfair practices, detriment relates to the taking of a transactional decision that would not have been taken otherwise.¹⁴ In this regard the detriment concerns the inappropriate influence that a trader may have on consumers’ collective economic interests, as represented by the average consumer conception. Under section 140A the scope for recognising consumer detriment is broader and can be understood as forming the foundation of an unfairness claim, in the sense that it will be the aspect of the relationship that the consumer complains is unfair.¹⁵

Each fairness test considered concerns protection of consumer interests specifically, whether at an individual or collective level. However, the tests also reflect a desire to facilitate an effective market more broadly¹⁶ and can therefore be understood within the effective

¹⁰ ibid, 3
¹¹ ibid, 6
¹² Consumer Rights Act 2015 s62(4) (CRA)
¹³ C 415/11 Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164 (Aziz); see Part 3, 70-73
¹⁵ Consumer Credit Act 1974 (CCA) S140A
competition paradigm discussed in Part 2. As a regulatory technique, the adoption of a fairness clause seems well suited to satisfying these concerns. Fairness is a flexible concept, and when used as part of a legal test it can be adapted to assess a range of different instances of detriment falling within a particular field of scope. Therefore, one test can be used to police a large section of economic activity to help maintain effective competition.

However, the approach used when seeking to understand consumers will affect a court’s ability to recognise consumer detriment when assessing fairness. This is because the approach adopted affects the information available to a court when dealing with a particular case. The abstract assumptive approach limits the factual information regarding actual consumer behaviour that is translated into the process of legal reasoning. As a result, information required for an understanding of certain forms of consumer detriment may be lacking, reducing the scope for recognition of unfairness. In contrast, a behaviourally informed approach should draw on empirical evidence to discover actual consumer traits, which behavioural economics suggests might not necessarily be identifiable or fully understandable based on abstract assumptions alone. Therefore, in some circumstances a behaviourally informed conception could translate understandings of consumer traits into a fairness assessment, allowing for forms of detriment to be recognised that would otherwise go unnoticed. In this regard, it is likely that a more behaviourally informed conception of the consumer would increase the scope for identification of detriment under legal tests of fairness.

In addition, where detriment is recognised, the courts’ ability to appreciate the extent of it may be affected by their conception of the consumer. For example, it might be accepted that consumers do not read small print but nonetheless assumed that as rational beings they could if they wanted to. The use of small print may then be seen as detrimental but considered a minor inconvenience. If, however, there was some accepted behavioural evidence suggesting that consumers are actually unable to read small print, perhaps because


17 Part 2, 51-54


19 see Part 1

20 see for example Ashbourne (n2)
of a significant cognitive limitation,\textsuperscript{21} then the use of small print might be considered a more severe form of detriment and therefore more likely to be unfair. In this way, just as different understandings of consumer traits may affect a courts ability to recognise forms of detriment, it may also affect the understanding of any detriment identified.

It was suggested in Part 2 that behavioural research is important for regulators because it provides information pertinent to understanding how behaviour influences the effectiveness of competition.\textsuperscript{22} This information is essential to both understanding the goals of regulation and the strategies needed to satisfy them.\textsuperscript{23} In the context of judicial application of fairness tests a similar point can be made. If the reason for relying on flexible open-textured rules is to provide scope for courts to deal with the conflicts that arise between consumer and supplier interests, then it is important that the courts’ approach permits information pertinent to that issue to be bear on the assessment of fairness. As Wilhelmsen notes, “the legal conceptual apparatus controls the formulation of legal problems that are perceived as juridically relevant”.\textsuperscript{24} In light of this, it is submitted that if courts do not engage with behavioural evidence when constructing their conception of the consumer, there is a risk that they will blind themselves to problems that fairness tests are designed to address. The legal reasoning that occurs under a fairness assessment may not then reflect the conflict that exists between consumer and supplier interests but may instead proceed as if there is no conflict. This may be particularly problematic if regulators perceive a need to tackle certain aspects of behavioural market failure since courts may be unable to reflect this concern as part of their legal reasoning under a given test. To the extent that forms of consumer detriment are excluded from judicial assessment in this way, the broader goals of fostering effective competition through regulatory enforcement of fairness tests may be hindered.\textsuperscript{25}

In terms of assessing detriment then, it may be argued that at a theoretical level, a behaviourally informed approach seems to offer scope for a more satisfactory form of legal

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\textsuperscript{21} see for example, J Cacioppo, R Petty, J Feinstein and W Blair ‘Dispositional Differences in Cognitive Motivation: The Life and Times of Individuals Varying in Need for Cognition’ (1996) 119(2) Psychological Bulletin 197

\textsuperscript{22} Part 2, 50-54


\textsuperscript{25} Willett 2012 (n4), 421-422 (original emphasis)
analysis when compared with an approach based on abstract assumptions.

**ii. Assessment of responsibility**

Fogler and Cropanzano’s second condition requires attribution of responsibility for detriment identified. Under the unfair terms test, this is reflected in the notion of good faith which connects a contractual imbalance to a form of supplier responsibility. For unfair practices the issue of responsibility is reflected in the need for a lack of professional diligence causing distortion of consumer choice. Under the specific prohibitions it is satisfaction of the criteria defining the prohibited practice which signals supplier fault. The assessment of credit relationships requires unfairness to be caused by one of the factors set out in section 140A(1)(a)-(b); each of which concerns a form of supplier responsibility. In addition, under each test consideration of consumer responsibility may be relevant as part of the overall assessment of fairness. Generally speaking, if responsibility for detriment is attributed to the consumer, this may negate a finding of unfairness against the supplier, depending on the circumstances of a particular case.

It is submitted that the process of attributing responsibility can be broken down into two overlapping but distinct elements. The first is establishing the factual information relevant to the determination, and the second is applying normative criteria in light of that. The second element is a *should* question; for example, what should have been done to satisfy fairness. This will be considered below as part of the normative condition of Fogler and Cropanzano’s model. The first element of the process concerns the factual nexus between detriment that exists and the subjects of a fairness assessment. Assessing responsibility in this regard involves consideration of factors such as what was done/not done in light of what was known and what was intended. These factual aspects of the assessment then inform the application of the normative standard.

When considering the responsibility of consumers, courts’ understandings of their behaviour may affect an assessment of what they have/could have done, as well as what they knew/could have known. For example, an assumption that consumers can typically

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26 Fogler and Cropanzano (n8), 13
27 CRA s64(4); UTCCD Recital 16
28 CPUTR reg3(3)(a)
29 Case C-435/11 CHS Tour Services GmbH v Team4 Travel GmbH [2013] ECLI:EU:C:2013:574
30 CCA s140A(1)(a)-(b)
31 Fogler and Cropanzano (n8), 19-20
understand contract terms may lead a court to conclude that detriment caused by ignorance of terms is attributable to the fault of the consumer.\textsuperscript{32} In an individual assessment, a court might recognise that the consumer did not read the terms, but in light of the assumption regarding typical consumer behaviour, perceive this as a culpable failure negating unfairness.\textsuperscript{33} A behaviourally informed approach would base such assessments on available evidence of actual consumer behaviour. Therefore, in collective cases the issue would be whether evidence suggests that consumers would or could behave in a given way, and in individual cases the issue would be whether in light of the available evidence, it is realistic to conclude, for example, that the consumer could have acted differently. The practical effect of adopting such an approach is that it would be more difficult to simply assume that consumers could have avoided detriment by acting rationally, in light of evidence suggesting that this may actually be quite difficult for them to do.

The fact that actual individuals fail to act rationally in systematic and predictable ways is one of the core lessons of behavioural economics.\textsuperscript{34} A failure to acknowledge this as part of the factual element of the attribution of responsibility may therefore undermine the integrity of a fairness assessment. In effect, ignorance of the relevant factual reality may cause the assessment to treat the consumer (whether abstract or individual) as if they could have behaved differently which will inform the application of normative standards. Of particular significance would be the implication of a finding regarding how a consumer could behave for the assessment of how they should behave. Attributing responsibility to a person on the basis that they should have acted differently, when as a matter of fact, it seems unlikely that they were capable of doing so, seems to offend the notion of fairness as opposed to satisfying it. In this regard, the more the findings of behavioural economics and other behavioural sciences are developed and disseminated, the harder it will be for courts to ignore the relevance of behavioural reality when assessing levels of consumer responsibility. In light of this, it is submitted that regardless of the normative standards relied on to inform the overall assessment of fairness, drawing on evidence pertinent to an understanding actual behaviour is important when assessing the responsibility of consumers for detriment suffered in the context of consumer-supplier interaction.

\textsuperscript{32} see for example Office of Fair Trading v Abbey National Plc [[2009] UKSC 6, [2010] 1 A.C. 696 [113] (Lord Mance)
\textsuperscript{33} see for example Harrison v Black Horse Ltd [2011] EWCA Civ 1128, [2012] E.C.C. 7
\textsuperscript{34} For an overview see Part 1, 28-45; see also, D Kahneman, Thinking Fast and Slow (Penguin, 2011)
In addition to consumer responsibility, the facts connecting a supplier to detriment identified is also important when assessing fairness. Understanding how a supplier’s conduct has contributed to detriment may depend on how courts understand consumer behaviour. For example, a failure to draw consumers’ attention to an onerous aspect of a bargain might be seen as unimportant if it is understood that consumers could have discovered that information for themselves. However, if it is accepted that consumers were unable to discover such information, it might be easier to conclude that a supplier’s conduct was a significant contributing factor to detriment suffered. Equally, courts’ understandings of typical consumer behaviour may be of particular significance when considering what the supplier knew or could have known. For example, if a court concludes that consumers tend to be over-optimistic, then there is more scope to find that a supplier could have discovered this. If however, a court concludes that consumers are typically rational, then it becomes easier to conclude that the supplier was unlikely to have been aware of such an atypical trait. In this regard, courts’ understanding of consumers may affect assessment of the extent of supplier responsibility.

As with the assessment of consumer responsibility, it is submitted that when considering the factual element of supplier responsibility, it is important to reflect the reality of consumer behaviour as part of the process of legal reasoning. To do otherwise might undermine the integrity of the assessment by basing considerations of fault on unrealistic factual premises. For example, assuming that consumers are not typically over-optimistic, and concluding therefore that a supplier could not have known of a particular problem caused by such a trait, would seem weak if there is a robust body of empirical evidence suggesting that consumers are indeed overly optimistic. In effect, the failure to recognise and reflect evidence of the factual reality distorts what should be, at this stage, a predominantly factual assessment.

It must however be recognised that legal reasoning associated with a fairness assessment may not make a clear distinction between consideration of the factual aspect of the reasonability assessment and the normative aspect. In other words, the could and should issues may be conflated. When a court says that a consumer could have read the information,

35 see for example Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd [2015] EWCA Civ 76, [2016] B.C.C. 404
36 see for example Plevin v Paragon Personal Finance [2014] UKSC 61, [2014] 1 W.L.R. 4222
37 see for example Ashbourne (n2)
38 see for example Part 1, 32-33
what they may mean is that the consumer should have done so. The difficulty with engaging in and presenting legal reasoning in this way is that it becomes opaque to the extent that normative influences are masked by reference to factual assumptions. In addition, the justification for the overall conclusion regarding fairness may be weakened if the explanation provided suggests that it is based on a factual could issue, which does not necessarily reflect reality. Therefore, legal reasoning which clearly establishes the factual basis on which normative judgments are reached, seems to be more satisfactory than reasoning which fails to distinguish between considerations of what could and what should have been done.

iii. Applying the normative standard
The final condition of Fogler and Cropanzano’s theory of fairness asks whether an ‘ethical standard of interpersonal conduct’ or a ‘normative standard of justice’ has been breached.\(^39\) In the context of legal tests of fairness, the issue is whether in light of the detriment that exists, and the (factual) assessment of responsibility for it, there is as a matter of law some unfairness that should be rectified. In this regard, where there is detriment, and where the supplier bears a degree of responsibility for that, it is more likely that a court will find a term, practice, or relationship unfair. Such a finding is not however inevitable and must depend on application of relevant normative standards.\(^40\)

Courts have varying degrees of discretion to apply normative standards under the three fairness tests considered. The more specific and therefore restrictive the test, the less scope a court has to explicitly consider different normative influences. Under section 140A a court has wider scope to consider such issues than it does under the unfair terms test, which requires normative analysis to be contained within the notion of good faith. This is still a broad and open-textured standard but it produces a degree of constraint in terms of the expression given to judicial normative analysis.\(^41\) Under the unfair practices regime, consideration of professional diligence should provide scope to assess normative considerations, however this element of the assessment is not always available.\(^42\) Therefore, under the specific prohibitions normative analysis is reflected through determination and application of the average consumer standard.

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\(^39\) Fogler and Cropanzano (n8), 3

\(^40\) ibid


\(^42\) see for example CHS Tour Services (n29)
Despite these differences in legal scaffolding, it is clear that normative considerations will be an integral aspect of any fairness assessment. Fairness is a flexible concept which depends for meaning on contextual interpretation. As with any legal decision, this must be justified in accordance with prevailing standards of acceptable legal argument, including respect for characterising features of the legal framework within which the assessment arises. Therefore, when deciding whether there has been some unfairness, courts must explain how the relevant factual features of a case interact with applicable normative standards to produce the appropriate legal outcome. What is particularly interesting about fairness in this regard, is that it provides discretion, allowing courts to choose and apply appropriate normative principles as part of the assessment itself. This makes it difficult to distil all normative influences that might be relevant to an assessment, however, the distinction made in Part 1 between a protective and a self-reliant ethic provides a useful dichotomy with which to consider such issues. Those ethics are essentially broad descriptions of different normative persuasions which can be used to describe the normative aspects of different fairness assessments.

It has been suggested above that courts’ understanding of consumers may affect assessments of detriment and the factual aspect of responsibility. The information produced by those assessments will inform application of relevant normative standards, which in turn will establish whether any unfairness has occurred. It follows therefore that courts’ understanding of consumers will affect this final aspect of Fogler and Cropanzano’s model. One important consequence of this, is that the justification for the legal outcome produced will be expressed in terms reflecting the courts’ understanding of the consumer. This has implications for both the transparency of legal reasoning and the integrity of justifications for legal decisions.

With regards to transparency, when examining cases under the unfair terms and unfair practices tests, it was noted that courts may manipulate the conception of the consumer to make it easier to promote a self-reliant ethic. Essentially, the court can adopt an

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45 ibid; Part 1, 21-24; Adams and Brownsword (n4)
46 Willett 2012 (n4); see also Brown 2016 (n43)
47 see Part 3, 102-108, 144-152
understanding of typical consumer behaviour which allows the consumer to be treated as if they had the traits necessary to fulfil the image of a rational self-reliant actor. Underlying this choice of recognised consumer traits is an implicit normative persuasion but this is not necessarily expressed as part of the judgment given. This may cause legal reasoning to become opaque since an important normative standard has been masked by reliance on a manipulated conception of the consumer. Instead of explaining that consumers should read terms, for example, or that a supplier should be able to expect them to do so, the court relies on the legal fiction to make the process of explaining and justifying the desired legal outcome easier. In contrast, reliance on a behaviourally informed approach should be more transparent in the sense that the reason for the courts understanding of consumer traits and interests should be much clearer, so long as the court explains the conclusions drawn on the basis of the evidence available.

In addition to the issue of transparency, where a justification for a legal decision depends on the application of normative standards to particular facts, it might look weak if the conception of the consumer relied on to inform the factual assessment is seen to be unrealistic. For example, if a court decides that a credit relationship is not unfair because a supplier could not be aware of a consumer’s vulnerability, despite widespread knowledge that suppliers design business models to exploit that trait, the justification for the fairness decision might be challenged on the basis that the court has misapplied the relevant normative standard because they have not fully understood the factual reality of the situation. It would seem unsatisfactory to suggest that unfairness does not exist because consumers could and should be self-reliant, if empirical evidence indicates that such a view is unrealistic. In this regard, the more behavioural economics informs understandings of consumer-supplier interactions, particularly in the field of consumer protection regulation, the harder it will be for a court to ignore important behavioural realities when assessing fairness, at least to the extent that it is considered desirable for legal judgments to have

48 see for example R Incardona and C Poncibo 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution’ (2007) 30 JCP 21
49 Adams and Brownsword (n4)
50 L Fuller 'Legal Fictions’ (1930-1931) 25 Ill.L.Rev. 513, 520-524
51 see for example Incardona and Poncibo (n48); J Trzaskowski 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive’ (2011) 34 JCP 377
external validity and credibility beyond the internal logic of the legal system itself.  

This final point of validity and credibility raises a question regarding the relationship between the purpose of a given assessment of fairness and the nature of the legal reasoning that judges employ when conducting it. Where an exercise in legal reasoning is based on the factual reality that persists with regards to the subject of the assessment, it may be described as direct. For example, if an assessment of fairness takes into account the interests of a specific individual consumer, then that process of reasoning would be direct in relation to their interests. In contrast, where legal reasoning affecting a particular subject is conducted without reference to the factual reality surrounding that subject, then it may be described as removed. It is submitted that the more removed the assessment of fairness from the actual interests and traits of the consumers affected by a decision, the less germane that decision will be to the conflict that exists between consumers and suppliers. This may in turn limit the scope for effective competition to be fostered as a result of decisions under the fairness tests.

Justifying a legal outcome with direct reference to the interests of those affected by it seems to be more satisfactory than doing so indirectly by reference to a fictional representative, if the purpose of assessing fairness is to engage in a meaningful balance of the competing interests of relevant subjects. This seems to be particularly true if that fictional representative fails to reflect those affected by a decision. This seems obvious when considering an individual concrete assessment of fairness. If the legal reasoning applied to a concrete assessment is not based on the interests of those subject to it, the assessment would become abstract. However, it is submitted that this point also applies to collective assessments of fairness, where a degree of abstraction is inevitable. In such cases, it can be said that the closer that the abstract representative consumer reflects the interests of actual consumers, the more direct and relevant to the actual conflict between supplier and consumer interests the assessment of fairness will be. The application of relevant normative standards will be informed by an appreciation for the factual reality that persists as opposed to potentially fictional assumptions made in the abstract. The justification provided for a legal outcome should then (in theory) reflect the actual interests of consumers. Of course, in a collective assessment the interests of consumers will be merged so that any given consumers interests

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may not necessarily be reflected.⁵³ However, the process of assessing the actual collective interests of consumers should account for their differences by requiring some justification for the notion of collective consumer interests reached, in light of the evidence available. Permitting such evidence to form part of the assessment of fairness may then be important.

In light of these points, it is submitted that a behaviourally informed conception of the consumer could in theory, produce a more transparent and robust form of legal reasoning, when compared with an abstract assumptive conception, for the purpose of assessing fairness. The application of the normative standards would need to be carried out in light of behavioural reality as opposed to despite it, which should allow for the actual conflict that exists between consumer and supplier interests to be resolved transparently. However, it is important to recognise that the issue is one of degree. The closer the assessment of fairness is able to reflect the actual interests and traits of consumers, the more direct justifications for legal outcomes will be and vice versa. Consideration of the extent to which any specific fairness test should be based on a more behaviourally informed conception of the consumer would then depend on how direct or removed the assessment in that context ought to be.

**Focusing on supplier responsibility**

It is important to recognise at this point, that analysis of decisions under the three fairness tests suggested that an abstract approach allows courts to manipulate the legal conception of the consumer to ensure that a self-reliant ethic is promoted. This might be seen as an important function of consumer conceptions, particularly for abstract assessments of fairness. However, whilst a behaviourally informed approach would limit such manipulation, courts would nonetheless be able to promote whichever normative ethic they prefer. This can be achieved by balancing the consideration of consumer interests with supplier responsibility. Put simply, detriment stemming from forms of consumer behaviour does not need to be seen as unfairness. The extent to which a practice, relationship, or term is considered unfair, for example, will depend on whether detriment identified is attributable to a ‘wrong’ of the supplier. Courts’ control then stems from manipulation of supplier responsibility rather than consumer traits. This allows for greater transparency of legal reasoning because the competing interests of consumer and supplier are dealt with directly. The steps taken when

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⁵³ A Tor ‘Some challenges facing a behaviourally-informed approach to the Directive on unfair commercial practices’ in T Toth (ed), *Unfair Commercial Practice: the long road to harmonized law enforcement* (Pazmany Press, 2013) 9, 16-18
balancing those interests and the reasons given for that, should make the underlying normative stance clearer by explaining what is expected of suppliers in light of actual consumer behaviour. This would allow courts to deal more fully with issues that arise as a result of behavioural findings that do not fit well into the abstract rational consumer mould.

It must be noted, that courts have more discretion under the unfair credit relationship test than under the unfair terms and practices tests. This is due to the tests different legislative structures and may affect courts’ ability to shift focus from consumer traits to supplier responsibility when seeking to satisfy normative impulses. For example, the unfair terms test requires a lack of good faith. The ECJ have interpreted this to mean that a supplier must be able to assume that a consumer would agree to the term if individually negotiated. This is potentially problematic because the question is artificial. The consumer and supplier would not enter individual negotiations and indeed if they did, the supplier would exercise its superior bargaining power and drive the bargain that it wanted, which is the very problem the test is designed to address. As a result, the question lends itself to an abstract assessment and this is what has occurred. If courts were to depart from this abstract consumer focused assessment and instead ask more broadly whether the supplier acted in good faith, they could manipulate that standard more easily to allow for assessment of supplier responsibility in light of behavioural reality. This might be more satisfactory than trying to fit normative analysis into consideration of what the supplier could assume under the Aziz formulation.

Similar analysis can be made of the unfair commercial practices regime. Consideration of professional diligence should allow courts to assess supplier responsibility directly. However, the specific prohibitions do not allow this. Therefore, supplier responsibility must be considered indirectly by altering the average consumer standard. It might therefore be suggested that consideration of professional diligence should be allowed under the specific prohibitions to provide more room for the conception of the average consumer to become

54 CRA s62(4)
55 Aziz (n13) [69]
57 see Part 3, 65-73
58 see ParkingEye (n56)
59 Aziz (n13)
61 CHS Tour Services (n29)
responsive to behavioural nuances. Without a change in the law however, it seems inevitable that the average consumer conception will need to reflect normative influences as well as reflecting factual assessment of typical consumer behaviour. It is important then that courts express their normative reasoning clearly when determining the average consumer’s traits, to ensure that consideration of supplier responsibility can be discerned from consideration of what is typical consumer behaviour.

**Legal reasoning and fairness: some practical implications of different approaches**

The analysis of legal reasoning and fairness above demonstrates how different conceptions of the consumer affect the courts’ ability to identify the existence and extent of detriment, assess the factual aspect of responsibility, and apply relevant normative standards. It is submitted that these aspects of legal reasoning have significant implications for the scope of legal protection afforded under the fairness tests considered, as well as implications for the scope of legal discourse on issues of consumer protection. In turn, this affects the relationship that exists between courts and regulators operating in this field. These issues will be examined in more detail below followed by consideration of the time and cost implications of adopting a behaviourally informed, as opposed to an abstract assumptive approach.

**The scope for consumer protection**

Consumer protection stems from the existence of an applicable fairness standard, and its application in specific cases. The protection produced will however depend on the extent to which courts are able to identify, assess, and where appropriate rectify aspects of consumer detriment. In this regard, it is not surprising that the case study set out in Part 3 revealed a broad correlation between the adoption of a more behaviourally informed understanding of consumer traits and protective legal outcomes. The practical explanation for this is straightforward, but nonetheless important. A behaviourally informed approach attempts to produce a realistic conception of the consumer, which allows for a broader consideration of potential detriment arising from particular behavioural realities. In contrast, an abstract assumptive approach often produces an understanding of consumers which does not necessarily reflect the nuances of their behaviour. Therefore, a behaviourally informed approach provides courts with more information that might be relevant to a finding of unfairness.

This does not mean that a court must adopt a behaviourally informed approach to recognise forms of unfairness. Courts may be able to manipulate their conception of the consumer to
produce a wide range of different results. However, the findings of behavioural science demonstrate that it is difficult to appreciate the complexity of behavioural phenomena in the absence of empirical study.\textsuperscript{62} Therefore, whilst the approach adopted when conceptualising the consumer does not necessarily indicate the level of consumer protection afforded, because the final outcome will depend to a large extent on the normative standards applied, it is highly likely that a behaviourally informed approach will allow for more forms of detriment to be identified and assessed, which in turn will increase the scope for legal protection of consumer interests.\textsuperscript{63} In this regard, a well-functioning behaviourally informed approach is more likely than an abstract assumptive approach to allow for a high level of consumer protection.

To the extent that a fairness test is designed to produce a high level of consumer protection, it can be argued that reliance on a behaviourally informed approach would therefore be more effective than reliance on abstract assumption. In this respect, the reason for reliance on broad open-textured fairness clauses as a means of tackling forms of consumer detriment, seems to be that such clauses provide scope for courts to deal with a wide range of potentially problematic consumer-supplier interactions as they arise. Such broad forms of judicial control are justified because of the pervasive and costly consequences of exploitation of consumer weaknesses.\textsuperscript{64} This exploitation has negative implications for individuals but also social and economic implications more broadly.\textsuperscript{65} Reliance on vague standards such as fairness provide the legal flexibility needed to respond.\textsuperscript{66} A narrow view of consumer behaviour, and therefore consumer detriment, would seem to act against this type of intended protection, by reducing the potential breadth of a fairness regime. In contrast, a broader understanding of consumer behaviour would allow more forms of detriment to be dealt with under a given fairness test.

\textsuperscript{62} see Part 1
\textsuperscript{63} see for example Duivenvoorde’s analysis of the average consumer conception and the aim of achieving a high level of consumer protection, B Duivenvoorde, \textit{The Consumer Benchmarks in the Unfair Commercial Practices Directive} (Springer, 2015), 196-201
\textsuperscript{65} Citizens Advice, \textit{Consumer Detriment: Courting the Cost of Consumer Problems} (September 2016)
Arguments for high levels of abstraction that arise in the context of contract law, such as the need for commercial certainty, seem to have less weight in this context where the purpose is interference in what might otherwise seem to be autonomous interaction. For example, Beale suggests that one reason for abstraction in commercial contract cases is the reduction in the scope for legal challenges to be brought against binding contracts.\(^67\) This makes sense if the primary goal is contractual integrity but under the three fairness tests, whilst such integrity may be of concern, scrutiny of potentially problematic consumer-supplier interaction must surely be of more significance, given the existence of the tests in the first place. Abstracting away from the reality of consumer behaviour to avoid recognising behavioural traits which give rise to forms of detriment would seem to undermine a fairness test if it is premised on the need to tackle consumer detriment.\(^68\)

It might be argued, that abstraction is an important control mechanism used to intentionally limit the scope of fairness regimes, and indeed some aspects of the case analysis set out in Part 3 would support this view. This reflects the tension between the need for consumer protection and respect for market freedom. The response to this must be that the intended scope of protection is a matter of degree and the more a fairness assessment reflects the actual behaviour of consumers the greater the scope for protection. However, the adoption of a behaviourally informed understanding of consumers does not necessarily mean that more forms of interaction will be rendered unfair. Recognising detriment is just one part of the overall fairness assessment. Other aspects of the assessment, such as supplier responsibility, might provide a more satisfactory form of control over the interference with market freedoms. Therefore, whilst a more behaviourally informed approach does not necessarily cause more forms of interaction to be unfair, it does increase the potential effectiveness of fairness tests by allowing for recognition of more forms of detriment relevant to its purpose and therefore increases the scope for consumer protection.

The scope of legal discourse
Another implication of legal reasoning based on different conceptions of the consumer, is the scope provided for legal discourse.\(^69\) The dialogue used by courts when expressing legal

\(^67\) Beale (n4) 116
\(^68\) Sibony (n60), 905
\(^69\) G Fletcher ‘Law as Discourse’ (1991) 13 Cardozo L.Rev. 1631; Y Maley ‘The Language of Law’ in J Gibbons (ed), Language and the Law (Routledge, 2013) 11, 13-14; NB no attempt is made here to differentiate between structuralist and post-structuralist (Foucauldian) perspectives on discourse analysis. It is submitted
reasoning is important because it has implications for the argumentative structure of law.\textsuperscript{70} The approach to legal reasoning adopted by courts will set precedent for the justification of future legal arguments, giving that form of reasoning authority and causing it to be replicated by litigants, particularly in lower courts.\textsuperscript{71} In this regard, the discourse of law is directly linked to the way courts frame and justify their reasoning. Therefore, the choice of approach when constructing and explaining the courts conception of the consumer will contribute to this discourse.

An abstract assumptive approach may limit the extent to which legal discourse reflects current understandings of the need for consumer protection by preventing it from being informed by relevant behavioural issues. For example, if the legal system relies on a conception of the consumer who easily understands information, then a court will not have the opportunity to consider issues surrounding the failure of disclosure as a tool of consumer protection.\textsuperscript{72} Litigants will be much less likely to produce the evidence relating to such issues and cases will not make it to court for assessment. A court could update an abstract conception of the consumer \textit{ad hoc} whenever a noteworthy development is identified. However, the information needed to trigger this might be lacking if legal discourse does not reflect that need. Equally, consumer cases are relatively rare, especially at appeal level, which means that a particular conception could dominate the field for some time before the opportunity for change arises. In addition, the more engrained a particular conception within prevailing legal discourse, the more difficult it would be for courts to depart from it to meet the needs of a particular case.\textsuperscript{73}

A behaviourally informed approach would translate new understandings regarding consumer protection issues associated with behavioural analysis into legal reasoning. This would provide more scope for an expansive legal discourse surrounding such issues. The law would

\textsuperscript{70} D Leczykiewicz 'Regulatory Cost, the Consumer, and the EU Constitutional Framework' in Leczykiewicz and Weatherill (n3) 257, 268; I Ramsay 'Consumer Law and Structures of Thought: A Comment' (1993) 16 JCP 79
\textsuperscript{72} see for example, O Ben-Shahar and C Schneider 'The Failure of Mandated Disclosure' (2011) 159 U.Pa.L.Rev 647; G Howells 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) J.Law & Soc 349
\textsuperscript{73} Hathaway (n71), 605
then be able to develop its response to behavioural insights, and communicate that to relevant audiences.\textsuperscript{74} Specifically, it would allow for the legal system to communicate with regulators on issues such as behavioural market failure, which it is submitted, is essential if the law is to keep up with developments in the theory and practice of the broader consumer protection regime. Regardless of the normative influences guiding the law’s development, and indeed the legal outcomes produced as a result, it seems sensible for the legal system to allow itself to perceive all relevant facts and to hear the case for legal intervention. It is submitted that this requires a behaviourally informed approach when constructing the legal conception of the consumer.

An important point that follows from this analysis, is that it may be difficult to change legal discourse once it has become entrenched.\textsuperscript{75} For the most part, the legal tests considered above have not been subject to extensive judicial interpretation and application at the higher levels of appeal. There is then scope for precedent to be set which could settle the courts approach towards the more behaviourally informed end of the spectrum. This may become increasingly difficult however for cases concerning unfair terms, given the fairly restrictive approach adopted by the Supreme Court in \textit{Abbey} and \textit{ParkingEye}.\textsuperscript{76} Both the ECJ and Supreme Court have an important role in this regard and the longer-term implications of the different approaches adopted as part of their decision-making processes must be considered.\textsuperscript{77}

**The conception of the consumer between courts and regulators**

In Part 2 it was suggested that regulators must recognise the nuances of consumer behaviour and the potential for behavioural market failure in order to satisfy their role as guardians of effective competition.\textsuperscript{78} A behaviourally informed approach to the identification and investigation of market problems, as well as the choice of response to such problems, influences regulators’ understanding of consumer interests for the purpose of legal analysis.

This is important because a significant aspect of the consumer protection regime is dependent on regulators who are expected to use their powers to enforce consumer protection legislation. This means that regulators enforce consumer protection rules on a day

\textsuperscript{74} Ramsay 1993 (n70) 88
\textsuperscript{75} Hathaway (n71), 605
\textsuperscript{76} ParkingEye (n56); Abbey (n32); see Part 3, 84-89, 93-101
\textsuperscript{77} see Willett 2012 (n4) 436
\textsuperscript{78} Part 2, 50-54
to day basis, often without recourse to the courts. It follows that a behaviourally informed conception of the consumer is likely to play an important role in a significant proportion of consumer protection enforcement activity.

The issue that arises here is that the approach of regulators is not always mirrored by the courts. With regard to the assessment of unfair terms in particular, the approach of the Supreme Court has been to largely reject a conception of the consumer based on behavioural economics type reasoning.\textsuperscript{79} Equally, although the average consumer conception can be varied when assessing commercial practices, the analysis conducted above suggested that this is often done based on the judge’s own understanding and experience of consumer interests, without recourse to empirical evidence such as consumer surveys.\textsuperscript{80} The potential problem with courts and regulators relying on different conceptions of the consumer, is that they will therefore reach different understandings of consumer interests, which may in turn affect their interpretation and application of the law. The tension between regulators’ behaviourally informed understanding of the consumer, and the varying, but often abstract understanding of the courts, can be seen in many of the cases discussed in Part 3 above, and may have implications for the consumer protection regime more broadly.

One issue that arises is the lack of clarity regarding how the conception of the consumer should be constructed as part of legal discourse. Regulators are required to interpret and apply fairness tests, as well as a wide range of other legal rules.\textsuperscript{81} Therefore, regulators must grapple with phrases such as ‘average consumer’ and ‘hypothetical reasonable consumer’, to determine how those legal personalities would behave. Since such conceptions are not necessarily intended to be realistic, nor based on empirical evidence of actual consumer behaviour, and since they are relatively vague, variable, and to a large extent dependent on an individual judge’s perception, it may be difficult for a regulator to predict and mirror a court’s approach. An added complication here is regulators’ understanding and experience of actual consumer interests gleaned from their observation and investigation of relevant markets.\textsuperscript{82} Regulators are not well placed to ignore actual consumer behaviour to allow for consideration of an abstract and fictional understanding instead. This is particularly true given

\textsuperscript{79} ParkingEye (n56); see Part 3, 93-101

\textsuperscript{80} Case C 210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt Amt für Lebensmittelüberwachung [1998] ECR I 04657 (Gut Springenheide); Interflora Inc and another v Marks & Spencer plc (No 5) [2014] EWCA Civ 1403 [115] (Kitchin LJ); see Part 3

\textsuperscript{81} see for example Enterprise Act 2002 Part 8 (EA 2002)

\textsuperscript{82} see Part 2
that regulators are often seeking to improve how markets actually work for consumers. The more removed the legal assessment of fairness from this tangible goal, the less useful such legal rules will be. Where there is scope then, it might be expected that regulators will interpret and apply the law in a manner that best serves their needs, which could be based on a behaviourally informed understanding of consumers. This may explain why the CMA refer to behavioural economics in their guidance on the unfair terms test, despite some courts seemingly rejecting such influences.83

If regulators fail to predict courts’ understanding of consumers, there is a risk of inconsistent interpretation and application of consumer protection measures between those two institutions. Regulators may pursue the enforcement of legislative provisions in one way, based on their understanding of consumer interests, and courts may apply the same legislation differently because their understanding of consumers differs. Where these inconsistencies are not resolved, the market may receive mixed signals regarding acceptable conduct. This may be problematic for suppliers attempting to understand their consumer protection responsibilities, since a term or practice which would seem to be fair if an abstract understanding of the consumer is adopted, may be found to be unfair once actual consumer behaviour is understood.84 Equally, a dissonance between the approach of courts and regulators may cause confusion for consumers who may be left unclear regarding the level of protection that they can expect. Again, the CMA’s reference to behavioural economics as part of their guidance on the unfair terms test, which is available to consumers and businesses alike, may be an example of this.85

In addition to the problem of consistency, differences in understanding of the conception of the consumer may also have wider implications for the enforcement of certain consumer protection measures. The importance of the relationship between courts and regulators in shaping the landscape of consumer protection enforcement should not be underestimated.86

For a number of well documented reasons, the traditional private law system is an

84 This may be particularly true where behavioural market failure occurs.
85 CMA 2015 (n83)
86 see for example S Bright ‘Winning the battle against unfair contract terms’ (2000) 20 LS 331
inadequate device for the policing of consumer-trader interactions. This has given rise to the regulator as protector of collective consumer interests and enforcer of consumer protection rules. If regulators charged with improving market outcomes for consumers believe that courts will not accept their understanding of a market problem, because of judicial reliance on a fictional conception of the consumer, then regulators may adapt their enforcement strategies to avoid litigation. This could have implications for the regulatory regime as a whole. For example, the powers that regulators have to enforce fairness tests may become underused if regulators do not think courts will understand the behavioural issues which they believe cause unfairness. Regulators would still need to police the market however, so they may seek to adapt their regulatory strategies, perhaps focusing on soft measures to encourage rather than force compliance, in line with regulators’ understanding of consumer behaviour. Without recourse to the courts, such measures might be relatively weak since refusal to cooperate on the part of traders could go unpunished, leading enforcement efforts to focus on traders most likely to comply.

This issue can be illustrated by consideration of recent changes to the Enterprise Act 2002, which give regulators more flexibility to accept undertakings from traders under the Part 8 enforcement regime. These enhanced consumer measures (ECMs), should allow regulators to work with traders to ensure better outcomes for consumers following an identified breach of consumer protection rules. They include providing for consumer redress, improving compliance with the law, and improving consumer information. Importantly, regulators must only seek measures which are just, reasonable and proportionate. In its guidance on these new regulatory powers, the Department for Business Innovation and Skills has explained that what is just, reasonable and proportionate will depend on the circumstances. It explains that a regulator will have to, “weigh up the different aspects of the particular case and put in place measures to address the trader’s behaviour and the impact that it has had on consumers”. The guidance goes on to explain, that in light of the obligations contained in

88 R Baldwin, M Cave and M Lodge, Understanding Regulation: Theory, Strategy, and Practice (2nd, OUP, 2012), 109-111, 238-243
89 EA 2002 as amended by Consumer Rights Act 2015 s79 and sch7
90 ibid, s219B
91 Department for Business Innovation and Skills, Enhanced Consumer Measures: Guidance for Enforcers of Consumer Law (May 2015) BIS/15/292, 28
92 ibid
the Regulators’ Code, enforcers should have the knowledge and skills needed to support those they regulate. This includes being able to choose “proportionate and effective approaches”.93 The relevant provision in the Regulators' Code requires regulatory activities to be based on risk which necessitates the adoption of an evidence-based approach focused on allocating resources to interventions that are most likely to be effective.94

In light of this, one might conclude that regulators have little choice but to adopt a behaviourally informed approach to ensure that their proposed ECMs are evidence based and designed to be as effective as possible. This will feed into their assessment of what is just, reasonable, and proportionate. However, the ultimate power which underlies Part 8 is resort to an enforcement order issued by a court. The problem with this is that reliance on different conceptions of the consumer may cause courts and regulators to reach different conclusions regarding whether the relevant rules have been breached, and whether the ECM proposed is just, reasonable and proportionate.

The issue here is not that regulators should be able to interpret and apply legislation however they see-fit, but rather that differences in the understanding of consumer interests, which may arise due to differences in approach, can have important practical consequences for the consumer protection regime as a whole. Where regulators adopt a behaviourally informed conception of the consumer, and courts adopt an abstract assumptive conception, the two pillars of consumer protection enforcement are essentially talking different languages when it comes to the assessment of consumer interests. The result of this may be a regulatory system unable to respond to issues of behavioural market failure as robustly as desired. As Ogus notes:

> Particular institutions may be designated as regulators because their expertise and independence from political influence maximize the prospects of their fulfilling public interest goals. Those prospects are reduced if their judgments may be overridden by other bodies which do not combine the same degree of expertise and political independence.95

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93 ibid
94 Department for Business Innovation and Skills (Better Regulatory Delivery Office), Regulators’ Code (2014) BRDO/14/705 [3]
95 A Ogus, Regulation: Legal Form and Economic Theory (Hart, 2004) 117
In this context, the point can be rephrased; regulators must use their expertise to assess and understand consumer behaviour and its effect on the market to allow them to satisfy their public interest goals. If courts override their behaviourally informed approach, this may hinder their success.

This final point is important. Consumer protection is premised on the understanding that interactions between consumers and suppliers can have detrimental effects and that these effects should be avoided in certain circumstances. The reason why regulators have needed to recognise and respond to the findings of behavioural economics is because those findings relate directly to understanding the need for consumer protection initiatives.96 As a result, the debate surrounding consumer protection has become heavily infused with behavioural economics type thinking.97 To the extent that courts do not engage with this behaviourally informed discourse, they will be unable to contribute to it. This means that issues such as behavioural market failure will be largely absent from the legal system’s understanding of fairness in the context of consumer protection.98 In turn, the courts may fail to contribute to the development of norms and principles that need to be settled as a result of new understandings which emerge in the form of analysis of behavioural evidence. For example, courts may have little to say on when it is wrong for a supplier to manipulate framing effects or status-quo bias. The issue is not that the law cannot resolve particular disputes since the abstract consumer could be applied and a decision reached. It is rather that courts will not have the necessary theoretical framework and associated dialogue to be able to reach and justify a decision which satisfies the demands of the current debate.99 In contrast, regulators are well placed to produce the information and analysis needed to interpret and re-interpret the legal rules to ensure that they remain effective.100

It is submitted that this point in particular strengthens arguments for the adoption of a behaviourally informed approach when seeking to translate the interests of actual consumers into the legal system. Regardless of the normative persuasions guiding court decisions, there

96 see for example, Erta, Hunt, Iscenko, and Bramley (n23) 26
97 ibid; X Troussard and R van Bavel ‘How Can Behavioural Insights Be Used to Improve EU Policy?’ (2018) Intereconomics 53(1) 8; OECD (n5) 42
98 At least in the absence of specific legislation.
99 see generally Ramsay 1993 (n70)
is a need for the legal system to keep in touch with the wider understanding of consumer protection theory and practice; and in particular the thinking and practice of regulatory bodies. This may render legal reasoning more difficult by introducing a degree of complexity into fairness decisions, however, it is submitted that such complexity offers the opportunity for the legal system to play a central role in shaping the understanding of consumer protection more broadly.

**Behavioural evidence and complexity: time and cost in the context of litigation**

The preceding analysis has suggested that there are (theoretical) advantages to reliance on a behaviourally informed conception of the consumer when conducting legal reasoning associated with fairness assessment. However, it must also be noted that there may be time and cost implications of such an approach which must be balanced against those benefits in the context of litigation. These implications stem mainly from two overlapping features of a behaviourally informed approach; the need for evidence regarding actual consumer behaviour and the inevitable complexity that accompanies the interpretation of it.

**The need for evidence**

One of the attractions of an abstract assumptive approach is that it does not require empirical evidence to produce an understanding of consumer behaviour. Instead, a working model can be based on assumptions allowing for a simplified version of the consumer to be used for the purpose of analysis. The limitations of such an approach have been set out above, but in practical terms the attraction of relying on a simplified account are clear; time and money can be saved by avoiding the need to gather and analyse empirical evidence regarding actual consumer traits. This allows judges to reach conclusions regarding consumer behaviour without reliance on expert witnesses and without having to reconcile conflicting empirical accounts. Instead, judges can use their judgment to fabricate a useful legal tool to replace the complex reality of actual consumer behaviour.

In contrast, a behaviourally informed approach is intended to produce a conception which reflects actual consumers. As discussed in Part 1, behavioural economics’ claim to accuracy is derived from its empirical roots, binding it to the empirical imperative. Courts seeking to

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101 Beale (n4) 119; Mak (n2) 385-386
102 see Part 1
103 see for example Gut Springerheide (n80)
104 Part 1, 42-45; Tor 2013 (n53) 272
adopt a behaviourally informed approach would need to be confident that they have the evidence necessary to enable them to reach a sound understanding of consumer behaviour. This raises two specific difficulties in the litigation context. The first is how a decision is to be reached when there is no evidence available. The second is the source of the relevant evidence and its interpretation.

**i. The behaviourally informed approach in the absence of relevant evidence**

It must be recognised that relevant behavioural evidence might be lacking at the time a court is required to reach a decision regarding fairness. Abstract assumptions may then be needed to allow for a decision to be made. This is true for individual assessments, in that courts may lack information needed to fully understand and assess an individual consumer’s behaviour, and for collective assessments, whereby courts may need to judge fairness without any empirical evidence at all. In this regard, abstract assumptions may be particularly important given the need to satisfy legal tests based on some notion of ‘the consumer’.\(^{105}\)

In light of this, a ‘pure’ behaviourally informed approach, requiring all decisions to be based on robust evidence, would not be a realistic prospect in day-to-day adjudication. This does not mean that courts should therefore ignore all behavioural evidence. Rather, where evidence is available courts should engage with it. Where evidence is lacking however, a default position based on abstract assumptions may need to be employed. This would allow legal decisions to be reached in the absence of behavioural evidence when necessary, whilst allowing for the conception of the consumer to become more nuanced where relevant behavioural evidence is available. The adoption of a behaviourally informed approach more broadly, could nonetheless improve this inevitably assumptive aspect of fairness assessments by providing courts with experience of behavioural findings on which they could later draw. When reference is then made to judicial ‘common sense and experience of the world’, this would be more likely to include a reasonable appreciation of typical behavioural patterns. Therefore, whilst the need for some reliance on assumptions regarding consumer behaviour cannot be eliminated, a more behaviourally informed approach could increase the sophistication of those assumptions where courts have experience of significant behavioural findings in other (relevant) contexts.\(^{106}\)

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\(^{105}\) This seems to be an important consideration in cases relating to the average consumer in particular, see; Gut Springenheide (n80); Interflora (No 50) (n80)

\(^{106}\) Sibony (n60) 939-940
In addition, as courts signal their acceptance of behavioural evidence as part of their justification of legal outcomes, litigants will begin to produce the evidence needed to inform assessments. This will reduce the instances in which a court is required to assess fairness in the absence of relevant factual information regarding consumer behaviour. In light of this, it is important that the guidance and rules developed to allow for this evidence to be admitted are effective at ensuring that a more behaviourally informed approach goes hand-in-hand with a sensible and proportionate evolution in adjudicative practices. The precise nature and formulation of such rules is a topic that must be left for further research but would need to be considered if the adoption of a behaviourally informed approach is to be made to work effectively. One obvious risk of encouraging the generation of more empirical information is a corresponding increase in costs of litigation. This risk cannot be eliminated; however, it could be managed through the development of appropriate rules and procedures.107

**ii. Gathering and interpreting evidence**

Given that a behaviourally informed approach requires relevant evidence, that evidence must be sourced and translated into the process of legal reasoning. Gathering and interpreting useful evidence may be both time consuming and costly, especially where conflicting results and analysis exist. Equally, reaching a robust and scientifically justifiable conclusion in light of conflicting evidence may be difficult in many cases. One immediate consequence of this is the need for judges to have the skills necessary to allow them to engage with behavioural evidence and analysis when deciding cases. This may require judicial training on issues such as behavioural methodologies and the main themes of behavioural findings.108 There would be an inevitable cost associated with this. In addition, the pursuit of accuracy in behavioural terms may result in courts relying heavily on expert witnesses and empirical evidence produced by the parties to litigation. In an adversarial system, it must be asked whether the incentives at play would impact upon the quality of this evidence and the arguments made, especially in a field such as behavioural economics where the results of studies are highly context specific. The ability of the judicial process to deal with such evidential issues would need to be explored through focused empirical study.

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108 Sibony (n60) 940
At this point it should be recognised that whereas an abstract assumptive approach can be controlled by courts, a behaviourally informed approach would be likely to increase court reliance on experts; particularly regulators who have the skills and resources, as well as the mandate and incentive, to engage in detailed empirical investigation of consumer behaviour and its consequences.\(^{109}\) Indeed, most of the context specific behavioural evidence needed to understand consumer behaviour is produced by regulators themselves meaning that a court seeking to construct a behaviourally informed conception of the consumer may have no choice but to rely upon it.\(^{110}\) This could cause courts’ understanding of consumer behaviour to become more accurate.\(^{111}\) It would also bridge the gap between regulators’ and courts’ understandings of the consumer for the purpose of applying judicial sanction to achieve regulatory goals.\(^{112}\) This may be particularly important with regards to tackling behavioural market failure, where an understanding of consumer behaviour is required to appreciate the nature of the problems to be addressed.\(^{113}\)

However, the potential downside to this increased role of regulators would be a possible lack of legal accountability if courts do not fully scrutinise the evidence and arguments put forward when justifying regulatory decisions.\(^{114}\) Whether such an issue would occur in reality would depend largely on the rigour of the legal system, and in particular the attitudes and skills of the judiciary, as well as the opportunity for those affected to challenge the behavioural evidence relied on. Such challenges would probably require reliance on expert witnesses to counter the behavioural evidence put forward, which may increase litigation costs. However, if regulators are performing their functions effectively, these increased costs should be proportionate to the risks and benefits associated with such action and therefore justified by the need to enforce consumer protection laws.\(^{115}\)

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109 see for example EA 2002 Part 4
112 see for example EA 2002 Part 8 s215(5)
113 see Part 2, 51-54
114 Ogus (n95) 115-117
115 see for example, Legislative and Regulatory Reform Act 2006 Part 2; CMA, *Consumer Protection: Enforcement Guidance* (2016) CMAS58, 10-14; BIS, *Regulators’ Code* (n94)
Complexity

In addition to problems of gathering and interpreting evidence, a behavioural approach could also be more complex than the abstract assumptive approach. The difficulty here is that behavioural science suggests that behaviour is complex and context dependent, which means that the legal conception should reflect that.¹¹⁶ The process of identifying detriment, assessing levels of responsibility, and applying normative rules may then take longer and inflict greater costs.

In addition, it must be recognised that not all consumers are the same.¹¹⁷ If the legal conception is to reflect actual consumers this factor would need to be taken into account as part of the process of determining ‘typical’ consumer behaviour.¹¹⁸ Duivenvoorde suggests that this may be problematic in the sense that behavioural evidence casts doubt on the very notion of typical behaviour because, in reality, behaviour depends to a large extent on the individual in the situation in which they find themselves.¹¹⁹ Whilst it is clear that a behaviourally informed approach would require recognition of behavioural heterogeneity and would therefore introduce a degree of complexity into the process of legal reasoning, it is submitted that the effect of this should not be exaggerated. Referring to typical behaviour is not a reference to a mathematical formula or some innate truth. It is rather a shorthand way of expressing judgment based on factual information regarding the type of behaviour that is expected to occur frequently under normal circumstances. The adoption of a behaviourally informed approach does not prevent such a judgment from being made. Rather, it requires that such judgments be informed by, and justified in light of, factual information derived from the actual study of behaviour, as opposed to assumptions made despite that factual information. Therefore, courts may still refer to typical behaviour, but this should be a reference to a factual assessment based on evidence and not a mask for implicit assumptions informed by normative influences. Where a normative standard of consumer behaviour is to be adopted and applied, this should be made clear as part of the overall assessment.

¹¹⁶ see Part 1, 28-45
¹¹⁷ see Part 1, 40-41; see for example J Cacioppo, R Petty, J Feinstein and W Blair ‘Dispositional Differences in Cognitive Motivation: The Life and Times of Individuals Varying in Need for Cognition’ (1996) 119(2) Psychological Bulletin 197
¹¹⁸ Tor 2013 (n53) 16-18
¹¹⁹ Duivenvoorde (n63) 198-199
Should the courts adopt a more behaviourally informed approach? A summary

Given the tension between behaviourally informed and abstract assumptive approaches, set against a backdrop of a consumer protection field based increasingly on behavioural insights, it is pertinent to ask whether courts should seek to adopt a more behaviourally informed conception of the consumer for the purpose of assessing fairness. This is a difficult question to answer categorically since it will depend on the particular nuances of a given area of law, which includes issues of policy and legal norms, but also practical issues such as legal costs, legal resources, and efficacy of litigation. As Schuck notes, the question is whether all things considered, the benefits of a given level of complexity are worth its costs.120

Given the constraints of this work, it has not been possible to deal with all of the issues relevant to this broad question in sufficient detail to offer a firm conclusion for every case. However, the analysis of cases across different areas of consumer protection law demonstrates why this issue is important. The approaches adopted when seeking to translate understandings of consumer behaviour into processes of legal reasoning affects judicial application of fairness tests. This in turn affects legal outcomes and therefore the level and nature of consumer protection afforded under the law. The significance of a more behaviourally informed approach under each test was considered in addition to a theoretical consideration of the issue more broadly. A number of important points have emerged from this analysis.

The first is that a behaviourally informed approach would provide scope for each of the fairness tests considered to afford a high(er) level of consumer protection. Where courts fail to reflect important behavioural nuances as part of their interpretation and application of the fairness tests, this risks lowering the level of protection afforded to consumer interests. This was apparent across the range of cases considered in relation to each of the fairness tests. In collective fairness assessments this can be seen in potentially unrealistic understandings of typical consumer behaviour, whether that be through reference to the hypothetical reasonable or average consumer conceptions. In concrete assessment cases, this issue arises with regards to the understanding and judgment of an individual consumer’s behaviour, which requires some underlying perception of normal behaviour against which the individual’s conduct can be compared. This affects the identification of detriment as well as

120 P Schuck 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42(1) Duke LJ 1, 8
the assessment of consumer and supplier responsibility for it. In contrast, consideration of behavioural evidence provides more scope for courts to consider some of the important realities of actual consumer behaviour which can render them vulnerable to detriment in ways that might not otherwise be recognised. The analysis of behavioural market failures is pertinent in this regard, and should be dealt with by fairness tests designed to foster effective competition. The adoption of a behaviourally informed approach might be necessary if such issues are to be tackled by courts satisfactorily. In light of this, to the extent that fairness tests are intended to produce a high level of consumer protection, arguments can be made in favour of a more behaviourally informed approach.

A second point which emerges from both the case analysis set out in Part 3 and the theoretical analysis set out in Part 4, is the relationship that exists between courts and regulators. The rise of behavioural economics has already had a significant impact on understandings of consumer protection. Regulators have necessarily been quick to respond to such changes and as a result the field as a whole has progressed in a behaviourally informed direction. It is submitted that this shift is likely to continue as regulators develop practices designed to investigate behavioural realities in pursuit of furthering the effective competition goal. The shift is important for judicial application of fairness tests and a failure to respond might be problematic. What courts decide to do as new cases arise under each of the tests, and the corresponding implications of those choices on the ability of regulators to utilise their enforcement powers to satisfy policy goals, will determine the landscape of consumer protection going forward. The less able courts are to play a role in determining societal responses to new understandings of consumer detriment, the less likely it is that they will be relied on to police fairness in these contexts. Increased reliance on non-judicial regulatory schemes, such as the FCA’s treating customers fairly rules and various alternative dispute resolution schemes (the Financial Service Ombudsman for example), may then become the dominant forum for establishing the appropriate balance of supplier-consumer interests. To the extent that it is thought desirable for courts to retain a significant role in determining such issues, it might be argued that they should adopt a more behaviourally informed approach.

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121 see for example OECD (n5); Ramsay 2012 (n5) 41
122 see for example Atamer (n122); M Faure and H Luth ‘Behavioural Economics in Unfair Contract Terms’ (2011) 34(3) JCP 337
informed approach to ensure that they are able to meet the demands of current debates in a relevant and informed manner.  

This feeds into a third point. Fairness tests are designed to strike a balance between competing interests and competing normative influences. Assessments of fairness can be seen as important forums for normative debate which influence and are influenced by issues of legal policy. However, the narrower the scope for legal discourse associated with consumer protection concerns, the less relevant these normative debates will be beyond the confines of the legal system itself. In contrast, the adoption of a behaviourally informed approach would allow for a more expansive legal discourse which recognises and responds to important issues surrounding consumer protection law and policy. A perceived need to limit this discourse to protect the interests of suppliers may be misguided in this respect, since adoption of a more behaviourally informed approach would not necessarily limit courts’ ability to respond to such concerns. Rather, it would provide a better factual foundation upon which normative issues could be expressed in a more transparent fashion. The promotion of normative ethics which protect supplier interests at the expense of consumers would then need to be justified in light of behavioural reality and not despite that reality. The theoretical analysis set out in Part 4 demonstrated why this issue is important in terms of the transparency and external validity of judicial reasoning associated with fairness assessment. It is submitted therefore, that whilst a behaviourally informed approach would inevitably increase the complexity of fairness assessments, it could allow for a more satisfactory form of legal reasoning which would in turn produce clearer guidance regarding how and why fairness standards will/should produce certain legal outcomes when applied in consumer protection cases. This would allow for a clearer picture regarding how the actual conflicts that exist between consumer and supplier interests, as a result of terms, practices, or more broadly credit relationships, should be dealt with as a matter of fairness/legal policy.

As noted above, the structure of a given fairness test will be important in this regard since it may confine courts consideration of normative issues as part of the overall assessment.  

This may be seen as problematic if it is thought desirable for courts to be able to develop clearer guidance on policy concerns associated with fairness. Despite this, the analysis set out in Part 3 demonstrates that there is, under each of the tests considered, some scope for

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124 see Ramsay 1993 (n70)
125 see Part 4, 193-194
courts to engage with behavioural concerns either as part of the assessment of supplier responsibility directly, or when determining why a particular conception of the consumer should be adopted for an assessment, in light of relevant behavioural evidence.

Taken together, these issues begin to form a strong argument in favour of a behaviourally informed approach. However, this is inevitably tempered by the imperfect reality of litigation and the constraints apparent when dealing with societal conflict through adjudication. Some of these constraints have been considered at a general level above in terms of the time, cost, and complexity associated with a more realistic understanding of consumer behaviour. Further research should be carried out to examine these constraints in the context of each fairness test specifically, and from an operational perspective in light of the complexities of day-to-day litigation, to allow for an assessment of the extent to which the advantages of a more behaviourally informed approach could be realised. This will probably depend on the procedural frameworks existing alongside each fairness test and may be complicated by influences of European law. It may be noted in this regard, that it is not necessarily the case that courts have adopted a clear abstract assumptive approach which must be overturned before reliance on behavioural evidence could be allowed. Rather, the analysis suggested a degree of uncertainty of approach with some indication of judicial concern for behavioural issues and therefore relevant behavioural evidence. The issue then is one of how the law is to develop and whether the judiciary may be persuaded to embrace developments in behavioural science when given the opportunity to do so.

In light of this, it must be concluded that the adoption of a more behaviourally informed approach must be seriously considered as a potentially desirable trait of judicial practice within the context of fairness assessment associated with consumer protection law and policy. Further research may however be required to develop a clear model for how this should be achieved in practice, given the potential time and cost implications which arise in the context of litigation.

126 see also; C Jolls, C Sunstein, and R Thaler ‘A Behavioral Approach to Law and Economics’ (1998) 50 Stan.L.Rev 1471; C Sunstein, C Jolls and R Thaler ‘Theories and Tropes: A Reply to Posner and Kelman’ (1998) 50 Stan.L.Rev 1593; Incardona and Poncibo (n48); Trzaskowski (n51); Sibony (n60)

127 see for example, Y Atamer ‘Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Rights Answer: Insights from Behavioural Law and Economics’ (2017) 80(4) MLR 624, 641-642
Areas for further research

It is submitted that the analytical framework setting out the different approaches to conception of the consumer as either more behaviourally informed or more abstract assumptive, illustrates an important aspect of legal reasoning which has significant implications for judicial application of consumer law provisions. It has been suggested that a behaviourally informed approach has certain advantages over an abstract approach in this regard. However, it has not been possible to fully assess the extent to which adjudicative practices would need to change at an operational level to allow for such an approach to be implemented further. Therefore, one area for further research flowing from this study is the practical implications of adopting a more empirically informed approach to adjudication in the context of consumer protection cases. This should look at both the rules needed to accommodate such an approach and the potential time and cost implications for litigation.

In addition, the case analysis set out in Part 3 focused for the most part of high profile appeal cases to allow for consideration of different legal tests. This has been an ambitious project and it has been difficult to consolidate it within the thesis format. It is submitted therefore, that this project could be taken further by considering more cases, specifically at County Court level, to provide a more detailed picture of day-to-day judicial practice and the extent to which this fits the pattern of analysis set out above. One question that may be particularly interesting in this regard, is the extent to which the approaches associated with precedent set down by the higher courts is reflected in the legal reasoning of trial judges.

Finally, an important theme running throughout this work is the relationship between courts and regulators in the field of consumer protection. Those institutions form two pillars of the consumer protection landscape and both play a vital role in securing and maintaining the circumstances within which effective competition can be fostered. The emergence of behavioural economics as a strong force within discourse surrounding consumer protection has highlighted a significant divergence between the understanding of consumer traits and interests reflected in regulatory forums and in legal decisions. The implications of this have been considered in this thesis, however, it is submitted that this issue requires more research to examine it further. The analysis set out above demonstrates why this issue is important and how, to some extent, a more behaviourally informed approach in law might benefit the working relationship that exists between the two institutions. Further research should consider this relationship in more detail and should examine the effect that it has more
broadly on consumer protection beyond the fairness tests considered above. The behaviourally informed/abstract assumptive framework can be used as a platform from which to begin this further research by, for example, assessing other areas of overlap between regulatory and judicial jurisdiction which bring divergent understandings of consumer interests into conflict.
Conclusion
The way courts construct their conception(s) of the consumer is important. The process of selecting influences that inform the courts understanding of consumer traits will shape legal reasoning designed to protect consumer interests. In this regard, the conception serves a crucial function by acting as a representative of actual consumers, and therefore, it has the potential to affect outcomes produced under consumer protection law. The recent rise of behavioural economics as a force within consumer protection discourse has produced a new source of potential influences that might be translated into the legal system through its understanding of consumers.\textsuperscript{128} However, recognition of the reality of human decision-making behaviour often conflicts with notions of rationality and responsibility central to much of English private law.\textsuperscript{129}

The study of the three fairness tests has examined the extent to which behavioural influences have been translated into processes of legal reasoning.\textsuperscript{130} The behaviourally informed/abstract assumptive framework was developed to assist in this endeavour by providing a structure for analysis across the different tests. The study has revealed that the courts’ conception of the consumer, as reflected in their decisions in individual cases, varies within tests and between tests. A central finding therefore is that a tension can be observed between conceptions of the consumer based on abstract assumption and conceptions which are behaviourally informed. This makes it difficult to provide a single description of the judicial approach to constructing the conception of the consumer because there are a range of approaches that may be adopted falling somewhere on a spectrum between being purely behaviourally informed and purely abstract assumptive. The case analysis conducted did not identify clear guiding principles that might explain where on the spectrum of approaches a given assessment will, or should, fall which gives rise to a degree of uncertainty of approach.

In contrast to the examination of judicial practice, it has been shown that regulators necessarily rely on a behaviourally informed approach to regulation which contributes to their understanding of consumer interests.\textsuperscript{131} Consideration of regulatory practice reveals how and why behavioural economics is so important to the consumer protection

\textsuperscript{128} see Part 1
\textsuperscript{129} Adams and Brownsword (n4)
\textsuperscript{130} see Part 3
\textsuperscript{131} see Part 2
To the extent that effective competition is to be fostered, understanding the realities of consumer-supplier interaction is essential if problems such as behavioural market failure are to be addressed. Against this backdrop, critical analysis of each fairness test suggested that there is an important role for behavioural influences in the judicial interpretation and application of fairness regimes.

Building on this analysis, Part 4 has examined the importance of different conceptions of the consumer for fairness assessment at a more general and theoretical level. It was suggested that reliance on a more behaviourally informed approach provides certain advantages over reliance on abstract assumptions and that therefore, such an approach seems to offer a more satisfactory form of legal reasoning. An important point made in this regard, is that reliance on a fictional image of the consumer is not a necessary precursor to reflecting different legal ethics under the fairness tests. Rather, normative concerns could, and it is submitted should, be considered more openly by focusing analysis on supplier responsibility in light of evidence of actual consumer behaviour.

In addition, the analysis revealed a number of issues associated with legal reasoning based on different conceptions of the consumer. This includes the effect that different judicial approaches have on the scope of legal protection afforded under fairness tests. It was suggested that a behaviourally informed approach would allow courts to perceive more forms of consumer detriment and therefore increase the scope for protective legal outcomes. In addition, it was argued that legal discourse surrounding consumer protection issues might be stifled by the adoption of too abstract an understanding of consumer traits and interests. This is because it would prevent important issues relevant to consumer protection from being translated into the process of legal reasoning, to the extent that those issues derive from complex behavioural nuances. Related to this is the issue of the relationship the exists between courts and regulators. It is important that those institutions are able to work together effectively to ensure that consumer policy goals are realised. Judicial recognition of the reality of consumer behaviour may be important in this regard because it is through such recognition that regulatory discourse will be accommodated within legal discourse. It is

\[132\] Ramsay 2012 (n5) 41
submitted that a more behaviourally informed approach would then make it easier for courts to keep pace with developments in the theory and practice of consumer protection.

Taken together, it is submitted that the analysis set out above produces a strong argument for the adoption of a more behaviourally informed approach to the construction of the conception of the consumer within the context of fairness assessment. It must be noted however that such an approach would inevitably increase the level of complexity associated with the assessment of consumer interests when compared with a more abstract assumptive approach. This will have time and cost implications for litigants and courts. Therefore, further research is needed to examine the extent to which it would be feasible from an operational perspective, for courts to adopt an approach based on consideration of empirical behavioural evidence. It is submitted that ultimately a balance must be struck between the incurrence of costs associated with consumer protection policy goals and the simplification of conflict to save resources. Determining the precise balance that should be struck in this regard must be left as an issue for future work. However, the analysis set out above should be taken into account as part of any such assessment.
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