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Differing Proof Requirements for Global Class Actions: Using Economic Analysis to Guide Future Policymakers

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THE FUTURE OF ANTITRUST undoubtedly includes an element of private enforcement and recovery. In private enforcement actions asserting antitrust claims on behalf of individuals or firms, the alleged harm may be spread across a large number of purchasers or sellers, making individual actions impractical and requiring recovery through collective actions.

In the United States, private enforcement through collective actions is not new: it has been a critical part of antitrust enforcement for decades.[1] Rule 23 of the Federal Rules of Civil Procedure sets forth the standards for obtaining class certification and is augmented by a long history of court precedent that sets a very high bar for proof at the class certification stage. Outside the United States, in contrast, private actions are still developing, but decisions in Canada and the United Kingdom suggest a lower bar for class certification. Many jurisdictions around the world are just starting to allow collective actions in competition cases.

In deciding on the appropriate standard of proof at the class certification stage, policymakers in emerging jurisdictions may use economic analysis to help make difficult choices. In this article, after surveying the various key standards, we identify different ways in which departures from an optimal standard for judging class actions could, under certain assumptions, harm certain parties or lead to losses in efficiency.

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Differing Views on Standards for Establishing Similarity

Most class certification decisions turn on the question of whether the claims of individual class members share sufficiently common questions of law or fact that they should be treated collectively rather than individually. In this article, we describe an optimal standard for the level of proof required to establish whether claims are sufficiently similar to be treated collectively as a class action, maximizing the economic benefits and minimizing the economic costs that class actions entail. In the interests of crafting a broader analysis that can apply globally without the confusion of U.S.-specific jargon, we call the same analysis the "Similarity" standard here.

The United States Requires a Rigorous Analysis of Common Impact at the Class Certification Stage. In the United States, courts place a heavy burden on plaintiffs to prove that class certification is appropriate. Plaintiffs must, in the first instance, show that: "the class is so numerous that joinder of all members is impractical" (the "numerosity" requirement); "there are questions of law or fact common to the class" (the "commonality" requirement); "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (the "typicality" requirement); and "the representative parties will fairly and adequately protect the interests of the class" (the "adequacy" requirement).[2]

In addition to these requirements, a U.S. plaintiff must also meet one of the requirements of Rule 23(b), which is where the fight over class certification usually occurs. In cases where damages are sought, as is common in antitrust class actions, Rule 23(b)(3) governs class certification. Rule 23(b)(3) requires a showing that "questions of law or fact common to class members predominate over any questions affecting only individual members" (the "predominance" requirement) and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (the "superiority" requirement).[3]

Under U.S. procedural rules, plaintiffs must prove with evidence that they meet each requirement, and that proof

is subject to "rigorous analysis" at the certification stage, particularly as to predominance.[4] To meet this burden of proof, plaintiffs must demonstrate that common evidence will establish that all (or nearly all) class members suffered damage from the alleged conspiracy.[5] This stringent standard often requires U.S. courts to decide a "battle of the experts" *before* they certify the class[6] and may "entail some overlap with the merits of the plaintiff's underlying claim."[7]

Countries Outside the U.S. Typically Apply a Less Stringent Standard. Historically, class actions have been much less prevalent outside of the United States. As class action is a relatively new legal vehicle in other jurisdictions, new decisions and legislation continue to modify the bounds of such actions. Even those countries with relatively well-defined class certification regimes—such as Canada and the United Kingdom—have only a fraction of the number of class actions as the United States has.[8] And both Canada and the United Kingdom employ a standard for evaluating evidence at the class certification stage that is less stringent than the U.S.-style rigorous analysis. Other countries approach collective actions more generally without a formal certification stage, particularly in continental Europe.

Canada Requires a Showing that is "Sufficiently Credible or Plausible to Establish Some Basis in Fact." Canada has one of the longest-standing class action regimes outside of the United States.[9] Canadian courts require significantly less evidence than in the United States and do not weigh the merits of the expert opinions at the class certification stage. To demonstrate common impact among class members, a Canadian plaintiff must present an expert methodology that is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement."[10] In a leading case on class certification, *Pioneer Corp. v. Godfrey*,[11] the Supreme Court of Canada held that it was not necessary at the class certification stage to have a methodology that could show that each class member suffered a loss. The *Godfrey* decision underscored Canada's view that factual disputes over whether common proof predominates over individualized proof to establish injury need not be determined at the class certification stage.[12]

The United Kingdom Considers Whether a Proceeding is "Suitable" for Collective Action. The United Kingdom first allowed antitrust collective actions in 2015, with the passage of the Consumer Rights Act 2015. Under this new class action regime, a class representative can commence proceedings for breaches of competition law on behalf of a defined class of claimants. A class action claim may only proceed, however, if the Competition Appeal Tribunal (CAT) issues a collective proceedings order which requires, among other things, that the Tribunal is satisfied that the individual claims of the class members raise "the same, similar, or related issues of law."[13] But the U.K. has no analogue to the U.S. predominance requirement. The U.K. requires only the presence of common issues for which collective proceedings provide "an appropriate means for the fair and efficient resolution."[14]

The main case establishing the standards in the United Kingdom is the U.K. Supreme Court's decision in *Merricks v. Mastercard*.[15] The *Merricks* case involved a proposed collective proceeding on behalf of a class of some 46.2 million people claiming losses over a 16-year period. At the class certification stage, the CAT relied on Canadian jurisprudence for guidance.[16] It accepted that the proposed expert methodology was sound in theory, but refused to issue a collective proceeding order because it was not persuaded that there was sufficient data available to adequately apply that methodology to determine the level of pass-on, and thus the amount of aggregate damages.[17]

The English Court of Appeal set aside the order refusing certification and held, consistent with Canadian jurisprudence, that a proposed class representative need only show "a real prospect of success" for each of the certification requirements.[18] It criticized the CAT for effectively conducting a mini-trial that required Mr. Merricks to establish more than a "real prospect of success"[19] and stated that the court is not required to resolve at the certification stage conflicting issues of fact and evidence that can only be properly resolved at trial when pleadings, and fact and expert discovery are complete.[20]

The Supreme Court broadly upheld the decision of the Court of Appeal and remanded the case back to the CAT to be evaluated applying a different and, in certain respects, lower threshold test. In particular, the Supreme Court held that the CAT erred when it held that difficulties in quantifying damages (because of the likely non-availability of data) were sufficient to require class certification to be denied.[21] The Supreme Court held that, at the class certification stage, the CAT should ask whether the claim is relatively more suited for treatment as a class action or as an individual action.[22] Hence, difficulties quantifying loss that would equally arise in individual proceedings do not, by themselves, provide a basis for refusing certification.

Economic Analysis: A Framework for Considering Optimal Similarity Standards for Class Certification

The different treatment of class actions around the world raises difficult choices for policymakers seeking to craft their own legal regimes. Economic analysis may help policymakers more systematically consider the tradeoffs inherent in designing such a regime, such as setting too low or too high a bar to show that prerequisites for class certification have been met, or imposing that bar at relatively earlier or later stages of the case.

While antitrust policies across jurisdictions differ in their goals and objectives, the discussion that follows is focused on maximizing economic efficiency. It assumes that the goal of an optimal antitrust class action regime will be to minimize the sum of: (1) deadweight loss resulting from anti-competitive behavior; and (2) the costs of dealing with class actions. However, the framework is general enough (and the mathematical notation is simple enough) to accommodate differing objectives. In some parts of the discussion that follow, we introduce some simple formal mathematical notation to

give the framework some flexibility. However, by using formulas we do not intend to suggest that there exists a single, one-size-fits-all answer to this Issue.

For purposes of our analysis, we assume that the hypothetical policymakers are trying to identify the proper level of proof to assess whether members of a potential class have sufficiently similar characteristics, claims and evidence to proceed as one group. The policymaker is trying to decide where to set this Similarity standard.

While there are potentially multiple dimensions to Similarity standards, for the sake of the mathematical framework, we simplify it to a single dimension *S*. We call the lowest imaginable standard, perhaps equivalent to not having a Similarity hurdle to clear at all, s_0. We also posit a "maximum" Similarity standard, which can be thought of as a hurdle that no class action could conceivably clear, $s_{max} > s_0$.[23] Between these two extremes lie all potential values of *s*, with lower values corresponding to less strict standards, and the strictness of the standards increasing as *s* approaches s_{max}. We also assume that there is an optimal value, s^*, which corresponds to the optimal standard, in the sense that economic efficiency is maximized, after taking into account considerations related to litigation costs and deterrence.[24]

Policymakers will likely also give some weight to equity considerations, as the relative increase or decrease in litigation awards and settlements for certain values of *s* could benefit certain parties up and down the supply chain at the expense of others. Economists generally consider these to be transfers, without direct implications for economic efficiency. Still, as a non-economic point, policymakers will value fairness and equity, so any complete theory should take account of these factors as well. Economic transfers may also be relevant to the extent that they alter incentives, and thus behavior, and potentially efficiency.

Our discussion of the costs associated with differing standards will begin with the most direct effects and then consider how the behavior of the relevant entities would differ at different levels of *s*. We thus need to begin by specifying different outcomes, in terms of what happens to various claims when they are or are not certified.

Consider a putative class action (i.e., a lawsuit that has been brought on behalf of a class of plaintiffs but has not yet been certified by the court) and assume that a sufficiently large subset of the claims in the class are different enough that the putative class would not be certified under a higher standard s^H, but that the putative class would be certified under a lower standard s^L. In the case where the class is certified, we assume that discovery proceeds and that the parties eventually settle.[25]

We turn next to the case where the standard is higher and class certification is denied. Class actions typically arise when economies of scale make it efficient to aggregate common claims. Accordingly, the ultimate outcome when a putative class action is not certified depends in large part on the number of putative plaintiffs, the Similarity of their claims, and the magnitude of individual damages. One potential outcome of non-certification is that some narrower alternative to the original putative class forms, where the narrower class has a stronger Similarity profile than the original class, still satisfies numerosity standards, and is still collectively large enough to justify litigation.[26]

Plaintiffs that were part of the original class but are not part of a narrower class will generally fall into one of two groups: (1) those whose claims are too small to justify individual actions; or (2) those who, either in isolation or in conjunction with other similarly situated plaintiffs, are large enough that they can be brought as individual or joint actions involving a smaller number of plaintiffs. The denial of class certification on Similarity grounds need not end the claims but may result in a reorganization of the claims. For the former group, it may result in a narrower action, whereas for the latter, it may result in multiple or individual actions.

On the other hand, denial of class certification will often cause the putative class action to simply end, without any reorganization. While it is possible that individual purchasers might continue after a denial of class certification—as was seen in the *Rail Freight* case when a substantial number of large purchasers brought individual actions[27]—the denial of class certification often dooms the case.[28] This occurs when the costs of litigating the smaller, individual claims become prohibitive in light of the expected recovery, so that the plaintiffs and their attorneys are forced to abandon the case altogether. If the underlying claims are meritorious, then causing the entire litigation to end because of defects at the certification level is another social cost that would undermine the compensatory and deterrence goals of private antitrust litigation.

Wherever the standard is set, the relevant parties—potential plaintiffs, potential defendants, and the attorneys who represent them—will adjust their behavior. These changes in behavior have implications for the efficiency of various levels of the Similarity standard, which we turn to now.

Finding the Optimal Standard. It is possible to set too high or too low a bar for class certification, thereby creating a Similarity burden that is not socially optimal. In general, as the Similarity standards bar increases, the probability that a given case will successfully clear the class certification hurdle should decrease. If the bar is too high, then potentially meritorious class actions will not be brought, or they will be brought in a fashion that does not define the class to capture injured parties, or they will be brought and fail at class certification. If the bar is too low, this invites additional, potentially less meritorious class actions to be brought, or class actions where the class is defined improperly to include uninjured parties. To see why, consider the case of a potential class action for which, under the optimal standard s^*, the costs associated with bringing a class action just exceed the benefits (in terms of the expected settlement or reward). A tightening of *s* means that for a given level of cost and effort, the potential for either a settlement or a reward has decreased, creating barriers to bringing meritorious claims. A relaxation of *s* means that for a given level of cost and

effort, the potential for either a settlement or a reward has increased, inducing "entry."

Costs Associated with Setting Strict Similarity Standards. There are potential costs associated with setting an overly strict Similarity standard. Using our previous notation, these are situations where $s > s^*$.

Many Harmed Parties May Lack Recourse. A potential direct consequence of an increased incidence (or even risk) of "false negatives" is that fewer putative class actions will be filed in the first place. Since a denial of class certification often ends a case altogether, increasing the likelihood of denial will discourage many plaintiffs from bringing class actions, even when the underlying merits of a case are sound. If even a fraction of the marginal putative class actions—those that would have been brought and cleared the class certification stage under a less strict standard, but that would either not be brought, or would fail under the stricter standard—are meritorious, but involve claims that are not sufficiently large to bring individually, or cannot otherwise be efficiently litigated, the ramifications are potentially significant. Specifically, harmed parties would lack recourse and some legitimate claims that do not on their own warrant the expense of litigation could lose their only viable avenue for compensation. The net result is a potential transfer from those who were harmed to those who committed the antitrust violation.

Loss of Deterrence Due to False Negatives. The discussion above illustrates how a higher standard for Similarity could reduce the likelihood that firms committing antitrust violations face some monetary punishment. As firms incorporate this information into their decision-making, it is likely that some decrease in deterrence would follow. Undetected and unpunished violations of antitrust law can yield significant economic gain to firms. On the other hand, the risks associated with violations of the antitrust laws can act as a significant deterrent. Ultimately, the deterrent effect depends on whether the magnitude of expected punishment (in the form of fines and penalties, damages awards, or settlement payments) is large enough to offset the increased profits from collusion.

The higher incidence of false negatives would cause firms to lower their expectations of the monetary punishment associated with a collusive act. This may be particularly true for firms with sufficiently distinct customer bases, where the Similarity hurdle is likely to have the largest impact. In some situations, this could tip the balance so that the decreased expectation of a monetary penalty/punishment would mean that collusion is worth the risk, which could result in more price fixing at lower cost to the colluding firms, a social negative.[29]

Possible Reduction in Class Action-Related Economies of Scale with Respect to Litigation Costs. All things being equal, as the Similarity standard increases, class actions that successfully clear that hurdle will become more homogeneous and the opportunity for inclusion of potential plaintiffs who were legitimately harmed (but in ways that are marginally different from other class members) decreases. Thus, in the course of applying a more rigorous analysis of common impact, there is an increased possibility of "false negatives." In other words, a more stringent standard increases the risk that plaintiffs who were in fact harmed and for whom the relevant factual and legal questions predominate over individualized questions are, at the class certification stage, found to be sufficiently different to warrant their exclusion or to warrant a denial of class certification.

In such circumstances, where the putative class action fails to clear the Similarity hurdle, one of two things can happen. First, if plaintiffs' individual or collective claims are large enough to justify stand-alone litigation, potential class members who were found to differ from the rest of the class may file parallel litigation. Similarly, as plaintiffs' attorneys react to a higher standard, potential plaintiffs who, under the more stringent standard might jeopardize the chances of success at the class certification stage, may be excluded from the class through a narrowing of the class definition, again potentially resulting in an increased number of parallel actions. This potential increase in parallel actions would have the effect of undoing some of the inherent efficiency in class action regimes. Cases with common issues of law and fact would be duplicated, increasing discovery and other litigation costs relative to those that would prevail under the optimal Similarity standard.

Costs Associated with Setting Similarity Standards Too Low. On the other hand, there are costs associated with setting a Similarity hurdle too low.

Settlements and Damages Awards Get Paid Inefficiently. Lower standards can lead to parties who were not actually harmed getting rewarded, or to parties obtaining less compensation than they should. This can happen through at least two channels.

As previously discussed, the vast majority of certified class actions are resolved through settlement, which is the presumptive outcome of class actions that clear class certification. If some of the class actions achieving class certification are overly broad (in that some members of the class were not harmed) yet eventually settle, plaintiffs who were not actually harmed may receive a settlement award, and defendants who did not actually harm those plaintiffs may pay those settlement awards. While these harms could be ameliorated through settlement agreement provisions or claims administration procedures that screen out uninjured members, as the class gets larger and more complex, these procedures may become difficult to administer.

The corollary to the above point is that payments to plaintiffs who were included in an overly broad (but ultimately meritorious) class, but who were not actually harmed, may result in under-payment to those who actually were harmed. For instance, if a class action contains one million individuals and a settlement agreement provides $100 million to be equally divided among the class, then each individual would receive $100. But if 20 percent of the class was not actually harmed, then the harmed class members receive less

than they otherwise would. Excluding the unharmed members but keeping the payment the same would lead to the same $100 million being provided to 800,000 individuals, or $125 each. To the extent that a lower standard leads to a broadening of putative classes, the prevalence of this unintended outcome is likely to increase.

Further, a payment to settle a less meritorious class action that under a strict Similarity standard would not have been certified raises its own equity and fairness concerns for later-settling plaintiffs. To the extent that defendants are forced to deplete their resources settling claims in class cases that would not have been certified under an optimal Similarity standard, they will have fewer total resources to settle different, possibly more meritorious claims in the future.

Higher Costs Associated with Discovery and Litigation of Cases That Lack Merit. A higher number of cases clearing class certification would, all else being equal, also increase the costs spent by firms on discovery and litigation in class action matters. The expenditure of some of these sums may be worthwhile if an otherwise meritorious case would only receive class certification under the looser standard. If, however, as discussed above, more classes lacking merit get certified, then litigants will also expend resources on discovery and litigation of frivolous cases that do not right wrongs or deter future wrongs, and may result in inequitable transfers of wealth.

An Increase in "False Positives" Could Undermine the Deterrence Effects Associated with Antitrust Laws. A simple model can help illustrate the concept. Assume that there are two possible actions for the firm to take—it can either collude or not collude. Assume that the operating profits (ignoring any risks of detection or punishment) from collusion π_c are greater than those from not colluding π_n. Assume further that there is some positive probability of the collusive acts being detected and leading to some large costs in the future. Let $E(p_c)$ denote the present value of its expected punishment from collusion, taking into account the uncertainty of detection and punishment. In this simplified world, the firm will choose not to collude as long as $\pi_n \geq \pi_c - E(p_c)$ (eq. 1) i.e., the profits from not colluding exceed the profits from collusion, once the expected punishment is taken into account.

Now, suppose that relaxing the Similarity standards makes it more likely that frivolous cases will be brought and will clear the class certification hurdle. The firm, wanting to avoid the risk associated with a trial, will settle. Under these assumptions, it now faces some risk, and therefore an expectation of some positive monetary cost or "punishment," which we will denote $E(p_n)$, even when it chooses not to collude. Under this new scenario, the firm's indifference equation becomes $\pi_n - E(p_n) \geq \pi_c - E(p_c)$ (eq. 2) i.e., the firm's profits from not colluding are also offset by an expected "punishment."

While $E(p_n)$ will likely be significantly smaller than $E(p_c)$, it nevertheless may be sufficient to tip the balance in some cases. That is, some firms for whom equation (1) holds may find that equation (2) does not hold, meaning that they would not collude under the optimal standard but would under the lower standard. Accordingly, it is plausible that an increase in frivolous lawsuits actually weakens the deterrence effect.

An Increased Risk of Lower Merit Claims May Chill Procompetitive Activities. The basic model presented above is an over-simplification: in reality, firms' management of antitrust related risks cannot be distilled down to binary decisions. The example above does illustrate, however, that firms will need to be concerned, under some circumstances, not only with whether their activity is actually illegal, but also with the perception that their activity runs afoul of antitrust rules. In an environment where the probability of claims with little merit achieving class certification could be higher, this may be particularly true, as the risks relating to perceived violations are likely higher as well. Claims in which questions related to damages are "sufficiently credible or plausible" to clear class certification, but where those claims are found to be meritless can nevertheless impose costs on firms.

Accordingly, when the bar for class certification is lowered, firms may be less willing to engage in procompetitive or efficiency-enhancing activities that are harmless, if that harmlessness is not sufficiently evident for a court to throw out the case on motions to dismiss or motions for summary judgment.

For instance, suppose that oil and gas companies are accused of colluding to raise prices, after several firms imposed price increases, all of which went into effect simultaneously after an industry-wide trade association meeting. While there is no direct evidence of collusion, the facts are sufficiently circumstantial to allow the plaintiffs to prevail in early motion practice (for example, defeating a motion to dismiss). Let us also assume that the class was certified under a lower certification standard, but has clear Similarity problems that would have precluded certification under a higher standard (for example, it includes both entities whose purchase prices were locked into long-term contracts, and so were not affected by the increase, and those who buy on the spot market, who would be affected).

If we assume that the lack of evidence of collusion suggests parallel pricing rather than illegal price-fixing, the defendants would have a good chance of prevailing on the merits if they went to trial. Nonetheless, a sufficiently risk-averse firm would likely prefer to settle the case to avoid the uncertain outcome of a trial and potentially massive liability to the class. Thus, the expected litigation-related costs associated with benign activities, like attending a trade association event or independently matching competitors' prices have increased, in part due to the lower hurdle for class certification.

A Summary of the Tradeoffs. The process of litigating class actions acts as a tax that imposes costs on society. The justification for this tax is that the threat of litigation and possibly damages awards incentivizes firms to comply with the antitrust laws. Generally speaking, these tax-like costs

are closely related to the level of rigor required to meet the Similarity standard. This defines the central trade-off in setting Similarity standards: a higher standard for obtaining class certification generally results in fewer class actions (or successful class actions) and therefore lowers the "class action tax" but likely weakens the deterrent effect, imposing another set of costs on society.

The table below reorganizes and summarizes the key effects discussed above. Determining the relative importance of these costs is the policymakers' task. However, the framework presented here should help clarify tradeoffs as antitrust authorities approach this complex, multi-layered problem.

Type of Effect	Negative Effects of Setting the Similarity Standards Too High	Negative Effects of Setting the Similarity Standards Too Low
Distributional Effects	Many harmed parties lack recourse, either because classes aren't certified or because fewer cases will be brought if class certification is less likely	Unharmed parties wrongly receive remuneration Potential for less compensation to truly harmed parties
Litigation Costs	Splintering of classes leads to duplication of litigation costs	Increased number of collective actions results in higher costs
Marketplace Effects	The higher threshold leads to more "false negatives" or fewer class actions being brought, with the potential to significanlty weaken deterrence	Increase in "false positives" has the potential to undermine deterrence Higher risk of frivolous claims may chill some procompetitive activities

Conclusion

In the United States, private cases offer the prospect of treble damages and joint and several liability. A false positive in a U.S. case—which becomes more likely if the Similarity standard is not strict—can thus have very significant effects, such as forcing defendants into unwarranted settlements through the threat of massive damages liability.[30] These conditions may also explain why United States policymakers are more comfortable with demanding a higher standard to litigate class actions. Because the monetary rewards of successfully prosecuting an antitrust class action are very high, private actors will have every incentive to bring claims, so the law can demand more of them without the risk of over-deterring private enforcement. The U.S. system also features robust pretrial discovery and information exchange, making the additional rigor more practical.

While the stakes in the United Kingdom and Canada are also high, rather than treble damages both jurisdictions only impose single damages, and the U.K. allows claims for contribution from other defendants, lowering the stakes for antitrust cases as compared to the United States. Both also impose a "loser-pays" rule in most jurisdictions, where the losing party in litigation pays the others' legal costs. This is in sharp contrast to the "American Rule," where each party pays its own fees regardless of success on the merits. The loser-pays rule will tend to both disincentivize plaintiffs from filing frivolous claims to begin with, and incentivize defendants with valid defenses to litigate through trial. Therefore, these jurisdictions already have their own methods of filtering out frivolous claims, and may not need heightened scrutiny at the class certification stage to accomplish the same goal.

In the U.K., antitrust class actions are also heard by the specialist CAT, which may offer more predictability for litigants than a non-specialist jury, alleviating additional litigation risks for defendants proceeding to trial against a certified class and again limiting the downside risk of a false positive. It is notable that in the *Godfrey* case, though the Supreme Court of Canada permitted class certification without proof of injury to all class members, it also explained that the trial judge would need to conduct a careful analysis of the class members after trial, to exclude any uninjured class members from a damages award.[31] False positives may therefore be more acceptable at the class certification stage, in exchange for higher levels of review later.

Proceedings in Canada and the United Kingdom lack discovery practices as broad as those found in the United States. Setting too high a Similarity burden might be unworkable without establishing more expansive discovery rules. These differences may therefore influence these regimes to adopt a more permissive certification standard.

Most jurisdictions have damages regimes and disclosure rules that are even less expansive than Canada and the United Kingdom. The choices that other regimes make about how to balance the Similarity standard will set the level of difficulty required to obtain a private recovery and, in turn, will help to define the future of private antitrust enforcement in these jurisdictions. ■

[1] *See, e.g.*, FED. R. CIV. P. 23 advisory committee notes to 1966 amendments (describing amendments creating modern U.S. class action regime); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014) (discussing history of 20th century U.S. class action law).

[2] FED. R. CIV. P. 23(a).

[3] FED. R. CIV. P. 23(b)(3).

[4] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

[5] *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 791 (9th Cir. 2021) (noting that "[p]laintiffs must establish, predominantly with generalized evidence, that all (or nearly all) members

of the class suffered damage as a result of Defendants' alleged anti-competitive conduct") (internal quotation marks and citations omitted); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) ("Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."); *see also* In re Asacol Antitrust Litig., 907 F.3d 42, 53–54 (1st Cir. 2018) (holding, in a case where there are "apparently thousands [of class members] who in fact suffered no injury . . . [t]he need to identify those individuals will predominate"). While employed at Allen & Overy, Messrs. Roberti and Moen represented defendants in *Olean v. Bumble Bee*, *supra*. Mr. Moen's current law firm, O'Melveny & Myers, represented a different defendant in the same case before Mr. Moen was employed there. Dr. Powers' employer, The Brattle Group, provided expert testimony on class certification to the End Purchaser Plaintiff class in the same case. The views expressed herein are the authors' own and do not necessarily reflect those of any client.

[6] *See Olean*, 993 F.3d at 793 (vacating "the district court's certification of a class for the failure to resolve 'critical factual disputes' in a 'battle of the experts' regarding commonality" and for failure "to resolve the factual disputes as to how many uninjured class members are included in Plaintiffs' proposed class—an essential component of predominance") (quoting Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)); *see also Wal-Mart*, 564 U.S. at 363 ("[Rule 23](b)(3) requires the judge to make findings about predominance and superiority *before* allowing the class.") (emphasis added).

[7] *Wal-Mart*, 564 U.S. at 351; *see also* Comcast Corp. v. Behrend, 569 U.S. 27, 35 (2013). The analysis typically involves three aspects: (1) "the court must 'find[]' that the requirements of Rule 23 are met"; (2) "the court must resolve all factual or legal disputes relevant to class certification," including as to experts; and (3) "the court must consider 'all relevant evidence and arguments,' including 'expert testimony.'" *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 191(3d Cir. 2020) (citations omitted). Other federal courts across the country have reached numerous decisions to the same effect. *See, e.g.*, West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002) ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."); *In re* High-Tech Emp. Antitrust Litig., 289 F.R.D. 555, 567 (N.D. Cal. 2013) ("[C]onducting a thorough review of Plaintiffs' theory and methodology is consistent with the requirement that the Court conduct a 'rigorous analysis' to ensure that the predominance requirement is met." (citation omitted)); Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, No. 04-5898, 2010 WL 3855552, at *6 (E.D. Pa. Sept. 30, 2010) ("Expert opinions do not escape the 'rigorous analysis' requirement of Rule 23.").

[8] For example, while class actions are permitted in Singapore as a matter of law, only two class actions were filed between 2000 and 2019. Daniel Chia & Jeanette Wong, *Class Actions: Singapore*, Thomson Reuters Practical Law (2019). Other countries, such as Germany, Ireland, South Korea, and Turkey, do not allow class actions at all, although a recent EU Directive will require Member States to begin adopting them. *See* Directive (EU) 2020/182 of the European Parliament and of the Council of 25 November 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020 O.J. (L 409), 2 ¶ 7 ("This Directive therefore aims to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States.").

[9] Canada's competition class action jurisprudence has developed primarily from an important trilogy of Supreme Court cases issued in 2013. *See* ProSys Consultants Ltd. v. Microsoft Corp., [2013] 3 S.C.R. 477; Infineon Tech. AG v. Option Consommateurs, [2013] 3 S.C.R. 600; SunRype Prods. Ltd. v. Archer Daniels Midland Co., [2013] 3 S.C.R. 545.

[10] *ProSys*, [2013] 3 S.C.R. at 481 ("[T]he methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class").

[11] [2019] S.C.C. 42 (Can.).

[12] This position was reinforced in *Mancinelli v. Royal Bank of Canada*, [2020] O.N.S.C. 1646 (Can. Ont. Sup. Ct. J.), a recent Ontario Superior Court of Justice decision involving price fixing of foreign exchange products where the Court was reluctant to delve into the factual disputes in the case.

[13] Competition Act 1998, (1998) § 47B Current Law c. 41; The Competition Act Tribunal Rules 2015, SI 2015/1648 Part 5, Rules 73, 79.

[14] The Competition Act Tribunal Rules, *supra* note 13, Rule 79((2)(a).

[15] [2019] E.W.C.A. (Civ.) 674.

[16] *See* Merricks v. Mastercard Inc., [2017] CAT 16, ¶¶ 58–59.

[17] *See id.* ¶¶ 75–78, 87–89. The Tribunal also took issue with lack of relationship between the proposed method of distribution and the actual loss of each class member, which it believed conflicted with compensatory damages principles. *See id.* ¶¶ 79–84.

[18] *Merricks*, [2019] E.W.C.A. (Civ) 674, ¶¶ 39–55.

[19] *See id.* ¶¶ 52–53.

[20] *See id.* ¶¶ 50–51.

[21] *See* Mastercard, Inc. v. Merrick, [2020] U.K.S.C. 51, ¶¶ 45–54.

[22] *Id.* ¶¶ 56–57, 67–71, 78–79.

[23] It may be helpful to think of *s* as the share of class members that must be shown to be injured for the class action to be certified.

[24] We recognize that the parties' approaches to litigation and the outcomes associated with different levels of the commonality standards set within a jurisdiction will depend in large part on whether the discovery requirements at the class certification stage are commensurate with those standards. Ensuring alignment of discovery requirements and the standards (including, but not limited to, commonality) is of course also a very important question for antitrust policy. It is, however, beyond the scope of this article.

[25] In the United States, almost every successful antitrust damages action settles. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997 (2015). While acknowledging the lack of systematic data, the authors estimate that "at most perhaps only 1% of filed cartel damages cases have been litigated to a verdict that stands up on appeal." *Id.* at 2001–02.

[26] For instance, in *In re Intuniv Antitrust Litigation*, a district court originally refused to certify an indirect purchaser class alleging anticompetitive "pay-for-delay" agreements in the pharmaceutical industry. Memorandum and Order, *In re* Intuniv Antitrust Litig., 1:16-cv-12396-ADB, 2019 WL 3947262, at *7–*8 (D. Mass. Aug. 21, 2019). Nonetheless, the indirect purchasers recently moved for approval of a small classwide settlement against one group of defendants, based on a more limited settlement class. In particular, the new class definition limits the class members by state and explicitly carves out seven different types of purchasers who are excluded from the class. Motion for Preliminary Approval of Settlement, *In re* Intuniv Antitrust Litig., 1:16-cv-12396-ADB (D. Mass. May 24, 2021). ECF-2, ¶1.

[27] Several individual actions were filed in the *Rail Freight* litigation following the D.C. Circuit's class certification opinion, including Kellogg Co. v. BNSF Ry. Co., 1:19-cv-02969-BAH (D.D.C. Oct. 2, 2019); N. Indiana Pub. Serv. Co. v. Union Pac. R. Co., 1:19-cv-02927-BAH (D.D.C. Sept. 30, 2019); and Century Aluminum Co. v. BNSF Ry. Co., 1:20-cv-01114-BAH (D.D.C. Apr. 29, 2020).

[28] *See, e.g.*, Order Denying Renewed Motion for Class Certification, *In re* Asacol Antitrust Litig., 1:15-cv-12730-DJC, ECF No. 772 (relying on First Circuit vacatur of earlier class certification order).

[29] A study of the effects of the introduction of the 1993 U.S. Department of Justice's leniency program finds that cartel discoveries by the DOJ fell by 40% following an initial spike. This is consistent with a strong deterrence effect leading to lower rates of cartel formation, as the expected penalties from collusion were higher after 1993 (here, primarily due to an increased risk of cartel discovery). *See* Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 Am. Econ. Rev. 750 (2009).

[30] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

[31] *Godfrey*, [2019] S.C.C. 42 (Can.), ¶¶ 117–120.