

## Go, go, go! UK antitrust class actions given green light to proceed to trial



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The recent UK Supreme Court ruling in [Merricks v Mastercard](#) has important implications for UK collective actions for competition law infringements. The landmark judgment lowers the bar for claims to proceed to trial, a significant outcome not only for this case but also numerous other cases where collective actions had been paused pending the Supreme Court's ruling on the test for "certification". While this will be welcome news for victims of competition law infringements and their prospects of compensation, it heightens risks for companies under investigation and therefore exposed to damages actions in respect of "follow-on" claims arising from any infringement decision. This raises the stakes for companies subject to investigations and emphasises the importance of effective competition law compliance programmes.

*Merricks v Mastercard* is the first significant test of the UK's collective proceedings regime, a new regime that was introduced in 2015 to bring the prospect of true "US-style" opt-out class actions. The claim is very significant: seeking £14 billion in damages, brought on behalf of 46 million consumers who used a Mastercard between May 1992 and June 2008. The claim alleges that all UK consumers in that period paid higher prices because Mastercard's interchange fees were found by the European Commission in 2007 to be unlawfully high. In 2017, the UK's specialist competition court, the Competition Appeal Tribunal (**CAT**), refused to grant a Collective Proceedings Order (**CPO**), ruling the claim could not be certified and therefore preventing it proceeding to trial. However, in December 2020 the Supreme Court ruled the CAT had made a number of errors in refusing certification – the CAT had applied too strict a test in this regard.

Collective proceedings are one of a number of types of "group" claim in the UK. They are specific to competition law infringements and fall within the exclusive jurisdiction of the CAT. A CPO can be sought for a follow-on claim (where there is a pre-existing competition authority decision establishing an infringement), a stand-alone claim (where the claimant must prove an infringement) or both. The claim can also be either opt-out or opt-in – but it is in respect of opt-out claims where the regime is a "game-changer" because it provides a means of collective redress for businesses or consumers who may have suffered loss but for whom it would not be economically viable to initiate proceedings individually.

The key stage in collective proceedings is certification where the CAT decides whether a claim can proceed to trial. To certify a collective proceedings action, the CAT must be satisfied that: (i) the person bringing the claim on behalf of the relevant class is someone the CAT could authorise to act as the class representative; and (ii) the claim is eligible for inclusion in collective proceedings – the claims raise the same, similar or related issues of fact or law and are suitable for collective proceedings.

The key issue before the Supreme Court in *Merricks* was "suitability". At first instance, the CAT ruled the claims were not suitable for an aggregate award of damages as there was insufficient data to assess the level at which the interchange fees had been passed-on to consumers. The CAT also refused to grant a CPO because the proposed method for distributing any damages awarded did not reflect the compensatory nature of damages.

However, the Court of Appeal and then ultimately the Supreme Court overturned this decision and found the CAT had set too high a bar for certification (identifying five errors of law). Importantly, the Supreme Court found that "suitability" was just one of many factors to be considered in deciding certification (not an absolute hurdle) and "suitability" is a relative test, meaning the CAT should consider whether individual claims are a reasonable alternative to collective proceedings.

In weighing the pros and cons of certifying the action, the Supreme Court found that the CAT had failed to take into account the breadth of common issues (commonality of issues being a key criteria for certification).

On the issue of quantification of aggregate damages, the Supreme Court emphasised the “broad axe” or “broad brush” principle that is the well-established principle that English courts apply to assessing compensatory damages – i.e. a court must do its best with the available evidence to quantify damages. Difficulties in this regard or an unreasonable insistence on precision cannot defeat the justice of compensating a claimant whose rights have been infringed. Also, forensic difficulties in assessing the extent to which an overcharge has been passed-on should not prevent certification if those difficulties would not have prevented individual claims proceeding to trial.

On the issue of distribution of aggregate damages, the Supreme Court held that this did not need to reflect the compensatory principle. A key purpose of the collective regime is to allow for an assessment of damages that avoids an individual assessment of loss; imposing an absolute requirement that these same damages are then distributed on the basis of an approximation of individual loss undermines that key purpose. In many – but not all – cases, such an approach would be so difficult and disproportionate as to render the distribution mechanism unworkable.

The immediate impact of the Supreme Court’s decision in *Merricks* is that a number of other collective proceedings pending before the CAT have now been “unlocked” (including claims regarding the EU *Trucks* and *Maritime Car Carriers* decisions), enabling them to proceed to certification hearings. The decision in *Merricks* has been widely viewed as claimant-friendly and a general uptick in collective actions is now expected. The apparently low bar for certification may also prompt defendants to revise their strategy in respect of such claims by (for example) seeking to narrow the scope of the claim at the certification stage (instead of seeking outright dismissal) or pushing for designation as an opt-in claim.

The decision also has an important impact for companies that are subject to antitrust investigations and may be considering admitting infringements in return for immunity or reduced fines under leniency or settlement procedures. Crucially, although such admissions may offer protection in the context of an investigation, they will not provide similar protection from damages claims, and consumer collective proceedings therefore pose a real risk of additional – and in many cases, very substantial – financial exposure above and beyond an investigation by an authority. Increased damages exposure is thought to be the main reason why many competition authorities have already seen leniency applications decline over recent years and the decision in *Merricks* may well strengthen the resolve of businesses looking to challenge alleged infringements.



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