LET'S TALK ABOUT CONSUMERS: COMPETITION LAW COMPENSATION FOR INDIRECT PURCHASERS' LOSSES—A UNITED KINGDOM PERSPECTIVE

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> In competition cases, pass-on arises where the direct purchaser passes on all or part of an unlawful overcharge to its own customers, the indirect purchasers. It is common ground that, under the jurisprudence of the CJEU and the common law, the cause of action for damages is then split between the direct purchaser and, to the extent that the unlawful charge has in fact been passed on, the indirect purchasers.[1]

This article will assess and reflect on the availability of competition law damages for indirect purchasers in the United Kingdom, considering the statutory and legal context, including the relevant provisions of the EU Antitrust Damages Directive as implemented in the United Kingdom. The article will also focus on aspects of the recent UK case law related to damages awards, indirect purchasers and the passing-on defense, and consumer claims generally.

There are multiple layers of complexity in an article seeking to clarify and explain those legal rules, their application, and their rationale. First, indirect purchaser litigation is merely a part of the wider context and debate on competition law private enforcement, and the specific approach adopted to the issue forms part of the broader development of the institutional and legal framework for competition law damages litigation, which are still in their relative infancy in the United Kingdom (and European Union).[2] Second, the various strands of the discussion have several levels of interconnectedness,

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[1] Sainsbury's Supermkts. Ltd. v. Mastercard Inc. [2016] CAT 11, [320].

[2] *See, e.g.*, DAVID ASHTON, COMPETITION LAW DAMAGES ACTIONS IN THE EU: LAW AND PRACTICE (2d ed. 2018).

which makes it impossible to isolate and focus on the question of indirect purchaser standing without an understanding of these links: it is difficult to disentangle competition law and private law as they coincide to determine the legal playing field for indirect purchasers; it is difficult to disentangle the treatment of indirect purchasers in the legal systems of the United Kingdom from the wider development of EU law to facilitate the private enforcement of EU competition law; it is difficult to disentangle the sub-category of indirect purchasers from that of consumers and the underlying notion that consumers are at the heart of competition law;[3] it is also difficult to disentangle indirect purchasers' right to a damages remedy from a broader understanding of how we quantify and assess loss and damages and the rationale for awarding damages. Finally, it is difficult to disentangle the position of indirect purchasers from the (non-) availability of the passing-on doctrine (in an offensive or defensive capacity) and also from the related wider objective of achieving a "global" compensation arrangement for competition law infringements.[4]

Accordingly, this article will look at competition law private enforcement for indirect purchasers from a UK perspective, focusing on the rights of consumers qua indirect purchasers.[5] Of course, unlike the position with respect to other collectivized consumer claims for mass torts where the direct victim may be a consumer (for instance, in product liability/environmental damage claims), in competition law claims with respect to cartelized products the losses are often (though not always) mediated through intermediate parties in the production or supply and distribution chain with final consumers various steps away from the infringing party. The standard requirements in damages actions to prove causation and quantification of damages can always be problematic,[6] but in competition law claims there are additional potential compli-

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[3] It should be stressed that indirect purchasers are not only consumers, and consumers are not only indirect purchasers.

[4] *See, e.g.*, Mihail Danov, *Global Competition Law Framework: A Private International Law Solution Needed*, 12 J. PRIV. INT'L L. 77 (2016); Chris Noonan, *Mediating Between Public and Private Enforcement in Multi-Jurisdiction Settings*, 37 U. QUEENSL. L.J. 25 (2018).

[5] In this article, we are unable to focus on the separate, crucial issue of litigation funding for a successful private enforcement regime, although third-party funding has been utilized and considered in the two key cases under the Consumer Rights Act 2015, discussed below.

[6] This is so despite the European Commission's publication of both an official Commission Communication as well as a "Practical Guide" on quantifying harm in antitrust damages. *See Communication from the Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty*, 2013 O.J. (C 167) 19; Eur. Comm'n, *Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of The Treaty on the Functioning of the European Union*, SWD(2013) 205 (Nov. 6, 2013) (*Commission Staff Working Document*), ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf; *see also* Niamh Dunne, *The Role of Private Enforcement within EU Competition Law*, 16 CAMBRIDGE Y.B. EUR. LEGAL STUD. 143, 165 (2014); *Communication from the Commission, Guidelines for National Courts on How to Estimate the Share of Overcharge Which Was Passed on to the Indirect Purchaser*, 2019 O.J. (C 267) [hereinafter

cations: how the calculation of losses suffered by parties at different levels of the supply chain should take into account whether and to what extent overcharges have been passed on by suppliers.[7] Accordingly, the flip side of the right of indirect purchasers to sue is the availability of a passing-on defense to defendant companies in damages claims brought by persons who claim to have suffered losses due to the infringement of competition law. Such a defense would operate on the basis that the alleged amount for which the claimant was overcharged was actually passed-on to the claimant's customers. In effect, the defendant may assert that the claimant did not actually suffer a loss.[8] As shall be discussed, the availability and scope of the two related mechanisms in any legal system depends to a great extent on the value attached to the respective goals of deterrence and compensation. As shall be stressed in particular in Part IV *infra*, divergences in approach in this area may reflect the comparative prioritization in the U.S. enforcement system of deterrence whereas the EU/UK legal systems value and emphasize compensation as driving private enforcement policy and practice.[9] Nonetheless, it should be stressed that any debate focusing on achieving effective consumer redress should recognize that a viable, workable collective redress mechanism is vital in ensuring that rules facilitating indirect purchaser rights benefit consumers in practice.[10]

This article is set out in the following four parts. Part I looks at the institutions, rules, and processes—i.e., the private enforcement architecture for indirect purchaser claims generally and consumer claims specifically at both the EU and UK levels. Part II considers the case law developments in the UK courts, exploring the issues of damages, standing, and collectivized consumer competition law claims. Part III reflects on the contrasting rationale and aims of private enforcement generally and the rules on indirect purchaser standing specifically in the United States and the European Union (and United Kingdom), considering the primacy of the respective arguments based on deter-

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Commission Overcharge Guidelines], eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0809(01).

[7] *See, e.g.*, Carlo Petrucci, *The Issues of The Passing-On Defence and Indirect Purchasers' Standing in European Competition Law*, 29 EUR. COMPETITION L. REV. 33 (2008); *see infra* Part I.A.2.

[8] *See* Samet Caliskan, *Private Enforcement of UK Competition Law: Enhanced Deterrence for Whom?*, 13 GLOBAL COMPETITION LITIG. REV. 20 (2020); IOANNIS LIANOS ET AL., DAMAGES CLAIMS FOR THE INFRINGEMENT OF EU COMPETITION LAW (2015) (particularly ch. 6).

[9] Particularly in light of the majority and dissenting opinions in the Supreme Court in *Apple v. Pepper*, 139 S. Ct. 1514 (2019), the landscape in the United States is more complicated and may be evolving. *See* Andrew Gavil, *Consumer Welfare Without Consumers?* Illinois Brick *after* Apple v. Pepper, 7 J. ANTITRUST ENFORCEMENT 447 (2019); *see also* Herbert Hovenkamp, Apple v. Pepper*: Rationalizing Antitrust's Indirect Purchaser Rule*, 120 COLUM. L. REV. F. 14 (2020).

[10] *See, e.g.*, Mastercard v. Merricks [2020] UKSC 51, [¶ 1] (Lord Briggs) (appeal taken from CAT); *id.* ¶¶ 84–85 (Lords Sales and Leggatt) (discussed further *infra*).

rence and compensation. Part IV concludes by comparing and contrasting the approaches to indirect purchaser claims in the United Kingdom and the United States and the impact on access to justice for consumers as indirect purchasers.

I. THE LEGISLATIVE AND INSTITUTIONAL CONTEXT FOR INDIRECT PURCHASER CLAIMS UNDER EU AND UK LAW

In this Part I shall trace the evolution and development of the principles, rules, and mechanisms designed to facilitate private enforcement, and on indirect purchasers and the passing-on defense in particular, at the EU and UK levels. Of course, the UK withdrawal from the European Union complicates matters, but the position in the United Kingdom will continue to be a mixture of UK and EU-developed rules for the foreseeable future.[11]

This Part will proceed as follows. The first section will discuss EU developments in private enforcement generally and in relation to indirect purchasers and consumers specifically. EU law has been driven by the concept of direct effect, and this has been buttressed by the effectiveness doctrine.[12] There has been a slow evolution from a reflexive approach based on respect for national procedural autonomy, to direct determination of certain key aspects of the right to damages under EU law,[13] primarily through the Antitrust Damages Directive, which also makes express provision with respect to indirect purchasers.[14] One of the key constraints on consumer-led damages litigation is the absence of any European Union-wide specific provision for collective actions in relation to competition law infringements.[15] This reflects a degree of ambivalence at the EU level to make private enforcement effective, despite legislative initiatives, evidenced by the weak Recommendation on consumer redress and opt-out mechanisms and the rhetoric on avoiding the "toxic cocktail" of U.S. private competition enforcement.[16] I will consider the

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[11] *See infra* Part I.A.2.b.

[12] *See* discussion *infra* Part I.A.1.

[13] *Id*; *see, e.g.*, Marcos Araujo Boyd, *Should Children Pay for Their Parent's Sins? The Sumal Preliminary Reference*, 12 J. EUR. COMPETITION L. 25 (2020).

[14] *See* discussion *infra* Part I.A.2.a.

[15] *Cf.* Csongor István Nagy, *The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation*, 2020 J. DISPUTE RESOL. 413. The recently adopted Directive on representative actions for the collective interests of consumers requires EU Member States to introduce such representative actions, but its scope is limited by Article 2(1) (and Annex II) and does not extend to competition law infringements. *See* Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020: On Representative Actions for the Prosecution of the Collective Interests of Consumers and Repealing Directive 2009/22/EC, 2020 O.J. (L 409) 1.

[16] *Commission Green Paper on Consumer Collective Redress* 4, MEMO/08/741 (2008), ec.europa.eu/commission/presscorner/detail/en/memo_08_741 ("US style class action is not en-

impact of these developments, including implementation of the Damages Directive, together with an analysis of the implications arising from the United Kingdom's withdrawal from the European Union.

The second section will look specifically at the UK legal and institutional developments arising from three key pieces of legislation: the Competition Act 1998, the Enterprise Act 2002, and the Consumer Rights Act 2015. The United Kingdom has witnessed considerable change and ongoing developments regarding private enforcement and consumer rights in particular.[17]

A. EU LAW DEVELOPMENTS

There have been a number of important developments over the last 25 years or more to encourage private enforcement of competition law, such as the European Commission Notice on Co-operation with the National Courts in 1993,[18] the Court of Justice of the European Union's (CJEU) *Crehan*[19] and *Manfredi* rulings[20] and the adoption of the Antitrust Damages Directive in 2014.[21] The Commission's focus in this area has been on damages actions,[22] as exemplified by another important development, the publication of the Commission's Passing-On Guidelines.[23]

1. *The CJEU: Direct Effect and Effectiveness*

The CJEU has played a fundamental role in shaping the development of private competition litigation across the European Union in a range of prelim-

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visaged. EU legal systems are very different from the US legal system which is the result of 'toxic cocktail'—a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures) . . . . This combination of elements—'toxic cocktail'—should not be introduced in Europe."); *see Communication from the Commission*, *Towards a European Horizontal Framework for Collective Redress* ¶ 2.2, COM(2013) 401 final (June 11, 2013) ("Class actions in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation." *Id.* ¶ 2.2.2) (internal quotation marks omitted).

[17] *See* Barry Rodger, *Private Enforcement in the UK: Effective Redress for Consumers?*, *in* THE UK COMPETITION REGIME: A TWENTY-YEAR RETROSPECTIVE ch. 12 (Barry Rodger, Peter Whelan & Angus MacCulloch eds., 2021); Competition Act 1998 (UK), www.legislation.gov.uk/ukpga/1998/41/data.pdf; Enterprise Act 2002 (UK), www.legislation.gov.uk/ukpga/2002/40/data.pdf; Consumer Rights Act 2015, www.legislation.gov.uk/ukpga/2015/15/enacted/data.pdf.

[18] 1993 O.J. (C 39) (EC).

[19] Case C-453/99, Courage v. Crehan, 2001 E.C.R. I-06297.

[20] Case C-295/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-06619.

[21] *Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Mechanisms*, 2013 O.J. (L 201).

[22] *See* VELJKO M. MILUTINOVIC, THE 'RIGHT TO DAMAGES' UNDER EU COMPETITION LAW: FROM *Courage v. Crehan* to the White Paper and Beyond (2010); COMPETITION LAW, COMPARATIVE PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS ACROSS THE EU (Barry J. Rodger ed., 2014).

[23] *See Commission Overcharge Guidelines*, *supra* note 6, at 4–43.

inary rulings on rights and remedies generally under EU law,[24] and specifically in relation to EU competition law.[25] Under the doctrine of direct effect, an EU law can produce rights and obligations for individuals that national courts are required to enforce.[26] The EU Treaty requires Member States to provide remedies that will ensure effective legal protection under EU law.[27] These obligations are applied subject to the principle of equivalence.[28] National courts retain procedural autonomy[29] but this has been curtailed by EU law through the principles of effectiveness and equivalence and fundamental rights (especially effective judicial protection).[30] The effectiveness principle[31] was re-emphasised in *Kone AG v. OBB-Infrastruktur AG.*[32]

The shift to recognition of the constituent elements of a damages claim as arising directly from EU law in the recent case law[33] was advanced by aspects

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[24] *See* ARTICLE 234 AND COMPETITION LAW: AN ANALYSIS (Barry J. Rodger ed., 2008).

[25] *See, e.g.*, ALAN DASHWOOD ET AL., WYATT AND DASHWOOD'S EUROPEAN UNION LAW (6th ed. 2011) (particularly chs. 7 through 9).

[26] Case C-26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1. *See* THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 1–31 (Miguel Poares Maduro & Loïc Azoulai eds., 2010); *see generally* DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW ch. 7 (4th ed. 2019); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS ch. 8 (7th ed. 2020).

[27] Article 19(1) TEU, added by the Lisbon Treaty, requires Member States to provide remedies sufficient to ensure effective legal protection for EU law. Article 47 of the EU Charter also guarantees effective remedies where rights and freedoms have been violated. The foundational ruling is Case C-6/90, Francovich v. Italy, ECLI:EU:C:1991:428 (Nov. 19, 1991). There are limitations on the *Francovich* ruling. *See* Reinhard Slepcevic, *The Judicial Enforcement of EU Law Through National Courts: Possibilities and Limits*, 16 J. EUR. PUB. POL'Y 378 (2009).

[28] On equivalence, see Case C-33/76, Rewe-Zentralfinanz eG & Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, ECLI:EU:C:1976:188 (Dec. 16, 1976). *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 225–64 (5th ed. 2011).

[29] *See* Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen GmbH,* 1983 E.C.R. 4173, ¶ 12. More recently, see Niamh Dunne, *Antitrust and the Making of European Tort Law*, 36 OXFORD J. LEGAL STUD. 366 (2016); ALBERT SANCHEZ-GRAELLS & OKEOGHENE ODUDU, RESEARCH HANDBOOK ON EU TORT LAW 154–83 (Paula Giliker ed., 2017).

[30] Anthony Arnull, *The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*, 36 EUR. L. REV. 51 (2011) (providing an analysis of the interplay of the principles of procedural autonomy, judicial effectiveness and equivalence of remedies). *See*, *e.g.*, Gráinne de Búrca*, National Procedure Rules and Remedies: The Changing Approach of the Court of Justice, in* REMEDIES FOR BREACH OF EC LAW 37, 37 (Julian Lonbay & Andrea Biondi eds., 1997); Walter van Gerven*, Of Rights, Remedies and Procedures*, 37 COMMON MKT. L. REV. 501 (2000); Walter van Gerven, *Harmonization of Private Law: Do We Need It?*, 41 COMMON MKT. L. REV. 505 (2004).

[31] *See* discussion *infra* Part I.A.1.

[32] Case C-557/12, Kone AG v. ÖBB-Infrastruktur AG, ECLI:EU:C:2014:1317 (June 5, 2014). *See also* Case C-435/18, Otis Gesellschaft m.b.H. v. Land Oberösterreich, ECLI:EU:C:2019:1069 (Dec. 12, 2019).

[33] *See*, *e.g.*, Case C-724/17, Vantaan Kaupunka v. Skanska Indus. Sols. Oy, ECLI:EU:C:2019:204 (Mar. 14, 2019).

of the Directive. The European Court's role and influence in relation to remedies for infringement of EU law was exemplified by its rulings in the *Crehan* and *Manfredi* cases in the English and Italian courts. The principle of the effectiveness of EU law rights also underpins the Antitrust Damages Directive.[34] Nonetheless, those rulings did not provide a clear and unequivocal EU rule on indirect purchaser standing for Member State laws to adopt, but simply prevented Member State rules that would definitively prevent indirect purchaser standing.[35] The absence of clarity and detail provided by the CJEU, which is an inevitable outcome in preliminary rulings, makes the Antitrust Damages Directive 2014 particularly significant in this context.

2. *The Antitrust Damages Directive 2014*[36]

a. Compensation, the Presumption of Harm, Quantification of Damages, Passing on Defense, and Indirect Purchasers

The Antitrust Damages Directive contains various provisions in relation to the extent of liability, passing-on,[37] indirect purchasers, and quantification of harm that seek to ensure the general effectiveness of the EU right to full compensation. The Directive followed in the wake of the Commission's earlier Green and White Papers,[38] which had oscillated between deterrence and compensation as the key rationale for facilitating private enforcement of competition law at the EU level.[39] The Directive's emphasis, per Article 3, on the right to full compensation, based on the principles of equivalence and effectiveness,[40] and its prohibition of over-compensation, including by means of punitive and similar types of multiple or exemplary damages, was not a novelty for the large majority of Member States.[41]

Article 17 of the Directive establishes a rebuttable presumption that a cartel infringement causes harm and that the purpose of damages is "full compensa-

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[34] *See* Dunne, *supra* note 6, at 157, 181–82.

[35] *See* Firat Cengiz, *Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation*, 59 INT'L & COMPARATIVE L.Q. 39, 51–52 (2010).

[36] Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringement of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1 (EC) [hereinafter Antitrust Damages Directive].

[37] *See* Foad Hoseinian, *Passing-on Damages and Community Antitrust Policy—An Economic Background*, 28 WORLD COMPETITION L. & ECON. REV. 3 (2005); Petrucci, *supra* note 7.

[38] *See infra* note 55.

[39] *See infra* Part III.

[40] *See* Antitrust Damages Directive, *supra* note 36, art. 4.

[41] *See* THE EU ANTITRUST DAMAGES DIRECTIVE, TRANSPOSITION IN THE MEMBER STATES (Barry Rodger, Miguel Sousa Ferro & Francisco Marcos eds., 2018); *EU Law and Interest on Damages for Infringements of Competition Law: A Comparative Report* (Giorgio Monti ed., Eur. Univ. Inst. L., Working Paper No. 2016/11, 2016), cadmus.eui.eu/handle/1814/40464.

tion" and no more, regardless of whether they are direct or indirect purchasers—"any natural or legal person who has suffered harm caused by an infringement of competition law."[42] It confirms "the flip side of the coin" that there is a defense in Article 13 relating to passing-on by claimants with the burden of proof on the defendant and sets out in Article 14 a legal presumption of pass-on for indirect purchasers subject to certain conditions.

The key provisions are as follows[43]:

> Article 13 requires that Member States
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> ensure that the defendant in an action for damages can invoke as a defense against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden on proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.
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> Article 14 provides:
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> 1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.
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> 2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:
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> (a) the defendant has committed an infringement of competition law;
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> (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
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> (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them . . . .

The key aspect is the reversal of the burden of proof by creating a rebuttable presumption of harm and a rebuttable presumption of pass-on where indi-

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[42] *See* Antitrust Damages Directive, *supra* note 36, art. 12.

[43] *See supra* note 1, ¶ 481 (noting, "The fact that the Damages Directive spends two full Articles dealing with the burden of proof and the need to avoid over- or under-compensation between rival claimant levels or groups and potential defendants is a clear demonstration of the difficulties inherent in the pass-on defence.").

rect purchasers use pass-on to mount a claim for damages.[44] The passing-on of the overcharge can operate as a defense invoked by the infringing party (Article 13) or offensively, raised by indirect purchasers (Article 14).[45] To strengthen the standing of indirect purchasers and to facilitate their claims, a rebuttable presumption of passing-on comes into play if the indirect purchaser satisfies the three cumulative requirements as set out in Article 14(2).

This presumption will not preclude claims by direct victims, and their share of damages with indirect victims will depend on the degree of passing on of the overcharge, which each of them will have to quantify. The Commission was required under Article 16 to issue guidelines on how to estimate the overcharge passed on to indirect purchasers.[46] This is partly a reflection of the reality that identifying the fact and extent of pass-on often presents challenges in long-running secretive cartels.[47] The Directive facilitates indirect purchaser (consumer) claims. Moreover, in light of the complexity of providing accurate assessments of quantification including pass on, the Directive explicitly provides that national courts must "have the power to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."[48]

Nonetheless, as James Langenfeld et al. note, allowing both direct and indirect purchaser claims increases the possibility of separate damages claims by claimants at different levels of the same supply chain and the consequent problematic issue of apportionment of the overcharge borne by those claimants, to avoid the risk of under- or over-compensation. The set of Directive rules aimed at facilitating compensation claims by indirect victims is complemented by a rule to prevent multiple or absence of liability of infringers due to potential claims by different injured parties.[49] Article 15(1) provides that in order to avoid either "multiple liability" or "an absence of liability of the

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[44] *See* Cento Veljanovski, *The Law and Economics of Pass-on in Price Fixing Cases*, 38 EUR. COMPETITION L. REV. 209 (2017).

[45] Note that "where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected" (Recital 40). In other words, the passing-on defense in cartel cases does not prevent an intermediary claimant from claiming for compensation based on lower sales revenues because fewer products are sold to the next level of the production and distribution chain as a result of the higher prices including the pass-on element. *See supra* note 9.

[46] *See Communication from the Commission, Guidelines for National Courts on How to Estimate the Share of Overcharge Which Was Passed on to the Indirect Purchaser* (C/2019/4899), 2019 O.J. (C 267) 4.

[47] *See* James Langenfeld, Mark Sansom & Michael Quayle, *Prevention or Cure? Damages in Private Antitrust Claims in the US and the EU*, 13 GLOBAL COMPETITION LITIG. REV. 1, 1–8 (2020).

[48] *See* Antitrust Damages Directive, *supra* note 36, art. 17(1).

[49] *See id.* art. 15.

infringer," national courts are able to take account of "actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain," and any judgments arising from them.[50]

Nonetheless, while the Directive clearly intended that Member States would introduce procedural rules to prevent over- or under-compensation, particularly in case of actions for damages issued by claimants from different levels of the supply chain, no Member State actually introduced new specific rules. Absent some kind of European Union-wide mechanism for centralization of claims, there is still a lacunae in terms of fair apportionment and avoiding under or over-compensation.[51] Moreover, the wider European debate on passing-on of cartel overcharges does not directly address Herbert Hovenkamp's argument that "pass-on" has been misunderstood. Consequent to an antitrust infringement courts should assess claims more accurately based on the harm experienced at each level of the distribution chain, where for instance direct purchasers are more likely to suffer lost profits than a direct overcharge loss.[52]

There is a clear divergence, at least following the introduction of the Directive and its support for indirect purchaser claims, between the EU approach and the U.S. federal law position enshrined in *Illinois Brick*,[53] although there is at least partial convergence with *Hanover Shoe*[54] in relation to the explicit recognition of defensive passing-on. Nonetheless, more generally a key failing is the Directive's silence about aggregation or collectivization of multiple small claims by numerous claimants—the typical end-user consumer scenario—as the primary means of making such claims viable.[55] For end-user con-

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[50] The Antitrust Damages Directive directs that "National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level." *Id*. ¶ 44.

[51] *See supra* note 4.

[52] *See supra* note 9. However, in comparison with *Apple v. Pepper*, and the analysis by Hovenkamp and Gavil, it should be stressed that the legislative and academic debates, and the EU/UK case law in relation to both direct purchasers and passing-on, have focused on and involved only cartel infringements as opposed to any form of exclusionary abusive conduct.

[53] *See supra* note 35; Jason Maclean, *Going Down the* Illinois Brick *Road (if the* Hanover Shoe *Fits)? Economic Complexity and Judicial Competence in the Context of Canadian Competition Law's Possible Futures (Part One)*, 6 GLOBAL COMPETITION LITIG. REV. 85 (2013); *see also* Niamh Dunne, *Courage and Compromise: The Directive on Antitrust Damages*, 40 EUR. L. REV. 581 (2015).

[54] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

[55] The Commission's earlier Green and White Papers on Damages Actions for Breach of the EC Antitrust Rules in 2005 and 2008 respectively had already outlined the impediments across the EU to successful private actions under EU law, including the absence of an effective group mechanism. Eur. Comm'n, *Green Paper—Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 [hereinafter *EC Green Paper*], eur-lex.europa.eu/legal-content/EN/TXT/

sumers, the value of indirect purchaser rights where damages are likely to be individually small is limited in the absence of an effective collective redress mechanism to aggregate claims and make collective legal action feasible and effective.[56]

Earlier in the Directive consultation process, it was expected that harmonized rules on collective action would be a pivotal aspect of the final legislative package. However, this did not materialize, given the likelihood that the EU parliament would oppose any opt-out collective provision on the basis of the unfair association with abusive litigation strategies and aggressive lawyering. The Commission sought instead to develop a "horizontal" approach to harmonization of collective address mechanisms at Member State level. Thus, alongside the Proposed Directive, the Commission adopted a Recommendation on common principles for collective redress in June 2013 applicable across a swathe of different subject-areas, including competition law damages actions.[57] This is "soft law," and recommended opt-in mechanisms only, but it is nonetheless notable that there has been widespread development of collective actions across the European Union in subsequent years, notably in the United Kingdom as discussed further below.[58]

b. United Kingdom Implementation of the Directive

In the United Kingdom, the Damages Directive Statutory Instrument—The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and other Enactments (Amendment)) Regulations 2017 (The Regulations)—implemented the Directive.[59] Article 22(1) of the Directive states that Member States shall ensure the national measures adopted under Article 21 to comply with the substantive provisions of the Directive "do not apply retroactively" and Article 22(2) provides that they "shall not apply to actions for damages for which a national court was seized prior to 26 December 2014." Effectively, for the substantive provisions of the Directive, there will be a considerable lag before the implementing measures are effective and have any impact on competition damages actions before the UK (or other EU) courts.[60]

HTML/?uri=CELEX:52005DC0672&from=EN; Eur. Comm'n, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final [hereinafter *EC White Paper*], ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

[56] *See supra* note 10 and discussion further *infra.*

[57] *See supra* note 21.

[58] *See*, *e.g.*, *supra* note 15.

[59] *See Hansard* HL Deb. vol. 77, 2 Mar. 2017; Barry Rodger, *United Kingdom*, *in* THE EU ANTITRUST DAMAGES DIRECTIVE, TRANSPOSITION IN THE MEMBER STATES (Barry Rodger, Miguel Sousa Ferro & Francisco Marcos eds., 2018).

[60] *See* Rodger, *supra* note 59; *see also* Philipp Kirst, *The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition In-*

It was deemed unnecessary to explicitly implement Article 13 of the Directive on the existence of the passing-on defense or Article 12(1) on the ability of indirect purchasers to bring a claim. The reasoning was that both aspects had already been confirmed by the Competition Appeal Tribunal (CAT) in *Sainsbury's*, discussed further below.[61] However, Articles 13–14 of the Directive on the burden of proof for indirect purchaser claims and passing-on were implemented.[62] As with other Member States, no specific provision was introduced to implement Article 15 to allow courts to take account of actions for damages brought by claimants at other levels of the supply chain in relation to actions in other Member States.[63] The Regulations make specific provision to implement the rebuttable presumption that cartels cause harm in Article 17(2) in paragraph 13 of the Regulations, although the presumption is limited to the existence rather than the extent of damage. This will have limited impact given that the key issue in any dispute will be the level of overcharge, on which there is likely to be conflicting expert evidence.[64] However, it was decided not to implement Article 17(1) in relation to empowering courts to estimate the amount of harm (nor Article 12(5) in relation to the estimation of the share of any overcharge that was passed on), on the basis that this was already common practice in UK courts. In relation to quantification of harm and Article 16, it was also decided that no implementing measures would be required here and that courts would follow normal processes and principles on the quantification of damages,[65] and case-law practice in this area is indeed slowly increasing, as discussed below.

c. United Kingdom Withdrawal from the European Union

For now the post-Brexit position is that in general the body of EU law applicable in the United Kingdom up to Brexit is carried over as retained EU law.[66] UK Ministers were controversially granted powers to amend domestic

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fringements in Europe, 16 EUR. COMPETITION J. 97 (2020) (for discussion of the temporal implications across the other EU Member State courts).

[61] *See infra* Part II.A.1 and II.A.2.

[62] The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 schedule1 ¶¶ 9–11 [hereinafter The Regulations], www.legislation.gov.uk/uksi/2017/385/contents/made.

[63] *See supra* note 41.

[64] *See* Kim Deitzel, Stephen Wisking & Molly Herron, *Nothing to See Here? The United Kingdom's Implementation of the EU Damages Directive*, 10 GLOBAL COMPETITION LITIG. REV. 169, 173 (2017).

[65] These decisions were not primarily adopted because of any specific policy of promoting, or limiting, the scope for private enforcement but more on the basis that in a common law-based system, these were matters of detail that would continue to be worked out on a practical way by the courts in case law.

[66] The European Union (Withdrawal) Act 2018 (UK) repealed the European Communities Act 1972 (UK), the foundational statute for EU law in the United Kingdom. The 2018 Act (see §§ 1–4) retained the *acquis communautaire*, i.e., the body of all legislation, legal acts, and court

legislation, including retained EU law, to address any deficiencies arising from Brexit.[67] Case law of the CJEU from after the Brexit transition period is not binding on the UK courts but they can have regard to it. Case law of the CJEU prior to United Kingdom's withdrawal from the European Union can be binding as to the meaning or effect of any retained EU law or principles, though not on the Supreme Court or the Scottish High Court of Justiciary when sitting as a court of appeal.[68] It is unlikely that any revisions will be made to the specific and limited provisions on burden of proof in Articles 13–14 as implemented by the Regulations, but, given the brevity of and patchwork implementation of the Directive rules, their application will continue to be refined in the developing court jurisprudence in the English (and other UK) courts, as discussed below.

B. UK LAW DEVELOPMENTS

1. *UK Statutory Context*

The Competition Act 1998 marked the start of a 20-year period of transformation of competition law and policy in the United Kingdom[69] to a more legalistic, prohibition-based set of provisions with clear sanctions and remedies.[70] It was clearly intended that the prohibitions introduced therein should be enforceable by means of private law actions through normal court processes.[71] The Enterprise Act 2002 sought to facilitate private actions by introducing section 47A of the 1998 Act,[72] which provided for the CAT,[73] which could award damages and other monetary awards where there was a finding by the relevant authorities of an infringement of the UK or EU

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decisions of EU law including almost all UK laws that resulted from EU membership and its obligations.

[67] *See* European Union (Withdrawal Agreement) Act 2020, § 3 amend. to § 8 of the 2018 Act.

[68] European Union (Withdrawal) Act 2018, § 6. There is currently consultation regarding retained EU law, the lower courts, and existing CJEU rulings.

[69] *See* STEPHEN WILKS, IN THE PUBLIC INTEREST: COMPETITION POLICY AND THE MONOPOLIES AND MERGERS COMMISSION (1999); THE UK COMPETITION ACT: A NEW ERA FOR UK COMPETITION LAW (Barry Rodger & Angus MacCulloch eds., 2000); TEN YEARS OF UK COMPETITION LAW REFORM (Barry Rodger ed., 2010); THE UK COMPETITION REGIME, AND THE UK COMPETITION REGIME: A TWENTY-YEAR RETROSPECTIVE (Barry Rodger, Peter Whelan & Angus MacCulloch eds., 2021); *supra* note 17.

[70] Prior to the 1998 Competition Act introduction of the chs. I and II prohibitions, no anticompetitive behavior was prohibited, illegal, and sanctioned in the United Kingdom. It should also be stressed that the introduction of the CAT has helped in developing a legal competition culture since 1998.

[71] *See* Barry J. Rodger, *UK Competition Law and Private Litigation*, *in* TEN YEARS OF UK COMPETITION LAW REFORM, *supra* note 69, ch. 3; *see also* Claritas (UK) Ltd. v. Post Office [2001] UKCLR 2.

[72] As introduced by § 18 of the Enterprise Act 2002, *supra* note 17.

[73] For a fuller discussion of the CAT, see David Bailey, *Early Case-Law of the Competition Appeal Tribunal*, *in* TEN YEARS OF UK COMPETITION LAW REFORM, *supra* note 69, ch. 2.

prohibitions.[74] Section 19 of the 2002 Act added Section 47B to the 1998 Act, allowing damages claims to be brought before the CAT by a specified body on behalf of two or more consumers with claims in respect of the same infringement[75]—a form of "consumer representative action."

The Consumer Rights Act 2015 subsequently made various amendments to the Competition Act regime as of October 1, 2015,[76] to enhance the role of the CAT as the specialist forum for competition law disputes in the United Kingdom, and introduced an opt-out collective redress mechanism in relation to competition law infringements.[77] The primary Government rationale for reforms in relation to collective redress was to remove obstacles to consumers' obtaining compensation: "In the Government's view, there are particular public policy reasons for taking action to reduce the barriers that businesses and consumers face in pursuing private actions in respect of infringements of competition law."[78] However, the UK Parliamentary debates concerning the central aspects of an effective opt-out procedure were clearly impacted by concerns about the consequences of potentially introducing an American style litigation process and culture. This tension was exemplified by the introductory remarks by the Secretary of State for Business, Vince Cable, at 2nd Reading of the Bill in the House of Commons on 28 January 2014. He noted the limitations in existing provision as follows: "In 10 years, there has only been one collective action case in this country, and only one 10th of 1% of the consumers who were eligible signed up for it."[79] Nonetheless, he stressed: "We have tried to strike a careful balance. We do not want an American-style system of prodigious and constant litigation, which would be costly and benefit only lawyers. . . ."[80]

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[74] *See* Mark Furse, *Follow-On Actions in the UK; Litigating Section 47A of the Competition Act 1998*, 9 EUR. COMPETITION J. 79 (2013).

[75] *See also* Enterprise Act 2002, *supra* note 17, subsecs. 47B(1) and (4).

[76] In force as of October 1, 2015, the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015, SI 2015/1630.

[77] *See* Arianna Andreangeli, *The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal Between Present Challenges and an Uncertain Future*, 3 J. ANTITRUST ENFORCEMENT 1 (2015); Aidan Robertson, *UK Competition Litigation: From Cinderella to Goldilocks?*, 9 COMPETITION L.J. 275 (2010); *see also* Barry J. Rodger, *The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?*, 3 J. ANTITRUST ENFORCEMENT 258 (2015).

[78] *See* UNITED KINGDOM, DEP'T FOR BUS., INNOVATION & SKILLS, PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM—GOVERNMENT RESPONSE ¶ 3.11 (2013), assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf. *Id.* ¶¶ 3.6, 3.11 (although deterrence was also implicitly mentioned as a factor), 3.11–3.14; *see also id.* ¶¶ 5.11–5.23 (focus on ensuring redress for consumers); Mastercard v. Merricks [2020] UKSC 51, ¶¶ 1–2, 20 (Lord Briggs).

[79] *Hansard* HC Deb. vol. 574 col. 775, 28 Jan. 2014.

[80] *Id.* col. 776; *see also* Mastercard v. Merricks [2020] UKSC 51, [¶ 1] (Lord Briggs) (appeal taken from CAT); *id.* [¶ 85] (Lords Sales and Leggatt (dissenting) and discussed further *infra*).

2. *Specific Statutory Rules on Standing?*

Absent the implementation of the Directive provisions, and until its rules in this context are applicable, there is no specific and express legislative provision on indirect purchaser claims or rules on passing-on in the United Kingdom. Under the domestic legal systems in the United Kingdom there is no *lex specialis* for competition litigation in relation to the types of damages recoverable or the methods by which proof of such damages is made. The underlying basis for a competition law damages claim, as with other types of tort or delict claim, is compensation for loss suffered.[81] Under neither principal UK legal system is there a specific and separate requirement of "antitrust" standing. The main difficulty is establishing that a statutory duty is owed by the defendant/defender to the particular claimant, and this effectively operates in the same way as a rule of standing.[82] It must be shown that the claimant/pursuer is one of the class of persons who are intended to benefit from the provision. Much depends on the purpose attributed to the statutory provision by the court.[83] Alleged anticompetitive activity could result in a great many individuals suffering some loss because of the actions of the defendant. Essentially, on a case-by-case basis courts will determine which parties are entitled to seek compensation arising from an infringement,[84] and in claims based on infringements of the EU law prohibitions, articles 101 and 102, they are guided by ECJ jurisprudence on the application of the effectiveness doctrine. For instance, the Court of Appeal in *Crehan* considered that the Court of Justice ruling effectively meant that the particular claimant in that case was entitled to seek damages for his loss.[85]

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[81] *See* Sebastian Peyer, *Compensation and the Damages Directive*, 12 EUR. COMPETITION J. 87, 87–112 (2016); *see also* SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW (7th ed. 2013).

[82] *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[83] For the application of the rules on statutory liability in a competition law context in the United Kingdom, see Mid Kent Holdings PLC v. Gen. Utils. PLC [1996] 3 All E.R. 132. The major problem lies in the fact that breaches of the competition rules can have large-scale effects on a whole market. *See* Mark Hoskins, *Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules*, 6 EUR. COMPETITION L. REV. 257 (1992); Ultramares Corp. v. Touche, 255 N.Y. 170 (1931).

[84] For instance, see Safeway Stores Ltd. v. Twigger [2010] EWCA (Civ.) 1472 (Eng.), where the Court of Appeal rejected a claim for damages by a claimant against an employee who they claimed was personally responsible for a competition law infringement committed by the claimant. *See also* Jetivia SA v. Bilta (UK) Ltd. (in liquidation) [2015] UKSC 23; [2015] 2 WLR 1168; Aidan Robertson, *Pulling the Twigger* [sic]*: Directors and Employees Back in the Firing Line for Damages After* Jetivia *in the Supreme Court?*, 35 EUR. COMPETITION L. REV. 325, 325–26 (2015).

[85] Crehan v. Inntrepreneur Publ'g Co. (CPC) [2004] EWCA (Civ) 637 (Eng.); [2004] ECC 28.

3. *Damages—Compensation Only?*

In the past, the UK courts have rejected the view that damages are awarded only for the purpose of compensation.[86] Although the *Manfredi*[87] ruling indicated that national legal systems could provide for exemplary damages in relation to competition law infringements, the Court of Appeal in *Devenish*[88] emphasized that the English courts should adopt a strictly compensatory approach and that there would be little scope for restitutionary, exemplary, or other forms of multiple damages awards. Nonetheless, the CAT subsequently made a small award of exemplary damages in *2 Travel Group PLC (in Liquidation) v. Cardiff City Transport Services Ltd.*[89] However, subsection 47C(1) of the Competition Act, introduced by the Consumer Rights Act 2015, prescribed the award of exemplary damages by the Tribunal in collective proceedings.[90] Moreover, Article 3 of the Directive prohibits over-compensation generally.[91] As discussed above, the UK Regulations apply to all competition law damages actions involving either EU or domestic infringements and accordingly paragraph 36 thereof provides that a court or the Tribunal may not award exemplary damages in competition proceedings. Therefore there is no longer any scope for exemplary damages in any context before the UK courts. This differs markedly from U.S. law, which has permitted private plaintiffs to recover treble damages awards of three times their actual loss or damage incurred.

4. *Collective Redress Mechanism*

It is generally recognized that effective justice requires appropriate collective redress mechanisms to ensure that ultimate consumers can seek compensation for overcharges as a result of competition law infringements. Nonetheless, the academic empirical literature has highlighted major gaps in redress for consumers specifically in relation to competition law infringements.[92]

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[86] JAMES EDELMAN, *Gain-Based Damages—Contract, Tort, Equity and Intellectual Property* (2002). *See* Att'y Gen. v. Blake [2001] 1 A.C. 268, 285 (Lord Nicholls of Birkenhead). *Cf.* Livingstone v. Rawyards Coal Co. [1879–80] L.R. 5 App. Cas. 25, 39 (Lord Blackburn).

[87] Devenish Nutrition Ltd. v. Sanofi-Aventis SA [2008] EWCA (Civ) 1086 (Eng.); *see* Arundel MacDougall & Alexandra Verzariu, *Vitamins Litigation: Unavailability of Exemplary Damages, Restitutionary Damages and Account of Profits in Competition Law Claims*, 29 EUR. COMPETITION L. REV. 181, 181–84 (2008).

[88] *See* 2 Travel Grp. PLC (in liquidation) v. Cardiff City Transp. Servs. [2012] CAT 19.

[89] *Id.*; *see* Cento Veljanovski, *CAT Awards Triple Damages, Well Not Really*—Cardiff Bus*, and the Dislocation Between Liability and Damages for Exclusionary Abuse*, 33 EUR. COMPETITION L. REV. 47, 47–49 (2012).

[90] *See* discussion *infra*.

[91] *See also* Antitrust Damages Directive, *supra* note 36, art. 3.

[92] RACHAEL MULHERON, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED. A Research Paper for submission to the Civil Justice Council of England and

In the United Kingdom, Section 47B of the Competition Act allowed follow-on damages claims to be brought before the CAT by a specified body on behalf of two or more consumers with claims with respect to the same infringement[93]—a form of "consumer representative action." Prior to its reform in 2015, there was only one Section 47B claim: *Consumers' Association v. JJB Sports plc*[94] in relation to *Football Shirts*.[95] Ultimately, this action, with only 144 consumers becoming party to it, was settled and withdrawn on the basis of compensation up to a maximum of £20 per individual consumer.[96]

The clear limitations of the specialist representative action, notably the low participation rates in opt-in schemes due to a lack of incentives,[97] were widely acknowledged. Subsequently, reforms were made by the Consumer Rights Act 2015, which came into effect on October 1, 2015.[98] The new, revised Section 47B of the Competition Act 1998 provides for both opt-out and opt-in collective proceedings before the CAT. The UK Parliamentary debates were influenced by concerns about the consequences of potentially introducing an American-style class action litigation process and culture.[99] Accordingly, it was stressed during the passage of the bill that "safeguards" would be built into the UK collective action model.[100] These safeguards are effectively: a

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Wales (2008). *See* RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE (2004); Rachael Mulheron, *Recent Milestones in Class Actions Reform in England: A Critique and a Proposal*, 127 L.Q. REV. 288, 288 (2011); Rachael Mulheron, *Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Actions Law-Makers*, 50 CAN. BUS. L.J. 376 (2011); *see also* MARIA IOANNIDOU, CONSUMER INVOLVEMENT IN PRIVATE EU COMPETITION LAW ENFORCEMENT (2015).

[93] *See also* Competition Act 2002 (UK), subsecs. 47B(1) & (4).

[94] Order, Consumers' Ass'n v. JJB Sports PLC, Case 1078/7/9/07 (CAT Jan. 14, 2008), www.catribunal.org.uk/sites/default/files/Order_1078_Consumers_0050209.pdf.

[95] As *Replica Football Kit* had become known in the CAT follow-on case. *See* Barry Rodger, *United Kingdom*, *in* LANDMARK CASES IN COMPETITION LAW: AROUND THE WORLD IN FOURTEEN STORIES ch. 13 (Barry Rodger ed., 2012).

[96] If receipts had been retained. *See* Helen Pidd, *Football Fans in Line for Refunds as Which? Settles Replica Shirt Case* (Jan. 10, 2008), www.theguardian.com/business/2008/jan/10/jjbsports.retail.

[97] *See* Morten Hviid & John Peysner, *Comparing Economic Incentives Across EU Member States*, *in* COMPETITION LAW, COMPARATIVE PRIVATE ENFORCEMENT AND COLLECTIVE REDRESS ACROSS THE EU ch. 6 (Barry Rodger ed., 2014).

[98] *See* DEP'T BUSINESS, INNOVATION AND SKILLS (UK), PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM (2012), www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform; The Competition Appeal Tribunal Rules 2015, SI 2015/1648 (Eng.). However, per Rule 119 of the revised CAT rules, see Gibson v. Pride Mobility Prods. Ltd., [2017] CAT 9. *See generally* Barry J. Rodger, *The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?*, 3 J. ANTITRUST ENFORCEMENT 258 (2015).

[99] As discussed above, Parliamentary concerns focused on "ambulance-chasing" lawyers and (unsubstantiated) concerns regarding potential blackmail litigation.

[100] *See* Baroness Hayter of Kentish Town, Grand Committee, (HL), vol. 756 col. 579, 3 Nov. 2014; Christopher Hodges & Rebecca Money-Kyrle, *Safeguards in Collective Actions*, 19 MAASTRICHT J. INT'L & COMPARATIVE L. 477 (2012).

requirement for the CAT to certify that a representative is suitable to bring proceedings;[101] a ban on exemplary damages awards; and, the prohibition of damages-based agreements[102]—the terminology that had been adopted in England and Wales for what are more commonly known as contingency fees.[103] The amended Section 47B provides for the CAT to make a Collective Proceedings Order (CPO)[104] in relation to a claim only on the basis that there is an authorized representative;[105] the claims raise the same, similar, or related issues of fact or law; and, are suitable for collective proceedings.[106] A CPO must include:[107] (a) authorization of the person who brought the proceedings to act as the representative in those proceedings; (b) description of a class of persons whose claims are eligible for inclusion in the proceedings; and (c) specification of the proceedings as opt-in collective proceedings[108] or opt-out collective proceedings.[109] Part V of the Competition Appeal Tribunal Rules 2015 puts flesh on the bones of the statutory system: the relevant certification process provision is set out in Rules 77–79.[110]

Despite the existence of the new opt-out collective redress scheme,[111] the difficulties in obtaining successful collective redress for consumers has been exemplified by the first two cases under the new regime, which will be discussed further below.[112] After early case law setbacks in *Gibson* and *Merricks*, there are a number of ongoing CPO application proceedings before the CAT, notably in relation to numerous follow-on claims against Mastercard and Visa and in relation to the trucks cartel.[113] The downside is that they generally reflect, as is historically the case in private competition litigation in the United Kingdom, the predominance of business claimants, and not ultimate consum-

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[101] *See* Baroness Neville-Rolfe, Grand Committee, (HL), vol. 756 cols. 570–81, 3 Nov. 2014.

[102] The Damages-Based Agreements Regulations 2013, SI 2013/609 (Eng). *See* Review of Civil Litigation Costs: Final Report (Dec. 2009), www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[103] More accurately, a provision that declares them to be unenforceable.

[104] As required under subsec. 47B(4) of the 1998 Competition Act. *See* subsecs. 47B(5)(a) and (6) in particular.

[105] *Id.* subsec. 47B(5)(a).

[106] *Id.* subsec. 47B(6).

[107] *Id.* subsec. 47B(7).

[108] *Id.* subsec. 47B(10).

[109] *Id.* subsec. 47B(11).

[110] *See* Michael O'Higgins v. Barclays Bank PLC & Others [2020] CAT 9.

[111] It was anticipated that the provision for approval of a voluntary redress scheme under Section 49C of the 1998 Act (as introduced by the Consumer Rights Act 2015) may have been a viable route for redress for indirect purchasers/consumers but it has not, as yet, been utilized.

[112] Gibson v. Pride Mobility Prods. [2017] CAT 9. *See* discussion re: *Mastercard v. Merricks*, *infra* Part II.A.2.

[113] *See generally* www.catribunal.org.uk/cases.

ers, although the ongoing claim by train commuters in *Justin Gutmann v. First MTR South Western Trains Limited and Another*[114] is notable.[115]

II. PRIVATE ENFORCEMENT, INDIRECT PURCHASERS, AND CONSUMER REDRESS IN PRACTICE

In this Part I will look at the private enforcement case law in the UK courts.[116] There has indeed been remarkably little case law on either indirect purchaser standing or passing-on until at least very recently, although discussion of quantification and assessment of damages more generally will enhance understanding of the approach adopted here.

There were a raft of early damages claims before the CAT following the introduction of the 2002 Act, many in the wake of Commission cartel infringement decisions, notably the Vitamins cartel decision.[117] Most of the rulings concerned resolution of limitation period issues,[118] and various cases involved indirect purchasers albeit all being business intermediaries.[119] The question of standing of indirect purchasers or determination of specific rules for determining passing-on were not considered at any stage in these early cases before the CAT.[120] In light of the ECJ preliminary ruling in *Crehan*, it was simply assumed that "anyone" could sue should they prove the pre-requisites of an infringement, loss (and the inherent difficulties in quantification of damages), and causation.

More recently, effectively since the Consumer Rights Act 2015, there have been two essential and interlinked issues which have been reflected in the case law: first, how we determine appropriate models and practice in awarding

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[114] Case 1304/7/7/19 (CAT Feb. 27, 2019).

[115] *See also* Case 1339/7/7/20, Mark McLaren Class Representative Ltd. v. MOL (Europe Africa) Ltd. & Others (CAT Feb. 20, 2020).

[116] *See* Barry Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004—Part I,* 27 EUR. COMPETITION L. REV. 241 (2006); Barry Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004—Part II*, 27 EUR. COMPETITION L. REV. 279 (2006); Barry Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004—Part III*, 27 EUR. COMPETITION L. REV. 341 (2006); Barry Rodger, *Competition Law Private Enforcement in the UK Courts: A Study of All Cases 2009–2012*, 6 GLOBAL COMPETITION LITIG. REV. 55–67 (2013); Barry Rodger, *Competition Law Private Enforcement in the UK Courts: Case-Law Developments—2016*, 10 GLOBAL COMPETITION LITIG. REV. 128 (2017).

[117] Commission Decision of 21 Nov. 2001 Relating to a Proceeding Pursuant to Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement, 2003 O.J. (L 006) 1.

[118] *See supra* note 116 (collecting articles); *see also* Barry Rodger, *Implementation of the Antitrust Damages Directive in the UK: Limited Reform of the Limitation Rules?*, 38 EUR. COMPETITION L. REV. 219 (2017).

[119] *See* Order, Case 1098/5/7/08, BCL Old Co Ltd v. BASF AG (CAT May 16, 2008). This can probably be explained, at least in part, by the inadequacy of the opt-out representative scheme for consumer redress originally introduced by the Enterprise Act 2002, *supra* note 17.

[120] Or the High court, see, for example, Devenish Nutrition Ltd. v. Sanofi-Aventis SA (France) [2007] EWHC 2394 (Ch).

compensation generally and specifically in relation to indirect purchasers, where passing-on may be an issue; and second, how we achieve a suitable model of collectivization of claims for end indirect purchasers: "consumers." The latter aspect may be potentially in conflict with the former, where the collectivization model to achieve consumer redress is driven by effectiveness concerns rather than the principle of compensation,[121] which would appear to underpin the availability of indirect purchaser claims.

A. Competition Damages Awards in the United Kingdom

As with other types of tort or delict claims, compensation for loss suffered is the primary function of an award of damages with respect to a competition law infringement.[122] Where claims based on EU competition law are concerned, this was confirmed by the ECJ jurisprudence in *Crehan* and *Manfredi* and reaffirmed by Article 3 of the Damages Directive, which highlights the right to full compensation based on the principles of equivalence and effectiveness.[123] The Court of Appeal in *Devenish*[124] had indicated that the English courts should adopt a strictly compensatory approach and that there would be little scope for restitutionary, exemplary, or other forms of multiple damages awards.[125] However, although neither of the first two successful CAT damages awards, in *2 Travel Group PLC (in Liquidation) v. Cardiff City Transport Services Ltd*[126] and *Albion Water v. Dwr Cymru Cyfyngedig*,[127] involved indirect purchasers or passing-on defenses, it is notable that exemplary damages of £60k were awarded, in exceptional circumstances, in the former.[128] Nonetheless, as discussed above, a combination of Section 47C(1) of the Competition Act and the Directive implementing Regulations has removed the potential for such awards in any context before the UK courts. However, the confirmation by the UK Supreme Court (and earlier the Court of Appeal) in *Mastercard v. Merricks*[129] of the availability under the new collective proceedings mechanism of aggregated damages absent any relationship to actual

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[121] *See also* Mastercard Inc. v. Merricks [2020] UKSC 51, [¶ 58] (Lord Briggs noting under the collective redress scheme that "the compensatory principle is expressly, and radically, modified.").

[122] *See* Sebastian Peyer, *Compensation and the Damages Directive*, 12 EUR. COMPETITION J. 87 (2016).

[123] *See* Antitrust Damages Directive, *supra* note 36, art. 4.

[124] *See* 2 Travel Grp. PLC (in liquidation) v. Cardiff City Transp. Servs. [2012] CAT 19.

[125] JAMES EDELMAN, *Gain-Based Damages, Contract, Tort, Equity and Intellectual Property* (2002). *See* Att'y Gen. v. Blake [2001] 1 A.C. 268, [285] (Lord Nicholls).

[126] [2012] CAT 19.

[127] [2013] CAT 6. Both cases focused on the application of the causation rules.

[128] *Id.*; *see* Veljanovski, *supra* note 89, at 47–49.

[129] Mastercard Inc. v. Merricks [2020] UKSC 51 (Lord Briggs delivering the majority judgment); *see also* Merricks v. Mastercard Inc. [2019] EWCA (Civ) 674.

losses incurred by individual consumers, appears to be inconsistent with the predominant compensation principle.

Finally, in 2018, we witnessed the first judgment by a UK court[130] awarding damages in relation to a cartel under Article 101 TFEU.[131] The claimant had sustained losses as a result of the operation of a global power cables cartel. In relation to quantification, the court stressed that it would take a pragmatic approach,[132] and that inability to prove the exact sum of loss would not preclude recovery, on the basis that assessment of damages in all areas of civil liability involved some form of estimation and the adoption of assumptions. Accordingly, a broad-brush approach by the court would be appropriate, albeit the final sum awarded would need to be grounded in evidence.[133] The overcharge was assessed as the difference between the price actually agreed and the price the claimant would have agreed absent the cartel. The court undertook a broad-brush analysis of the overcharge, and damages of circa £13 million plus interest[134] were awarded, although this was later reduced on appeal to under £12 million.[135]

Generally, the courts continue to grapple with how to accurately identify losses. The dicta of Popplewell, J, in *Asda*,[136] accurately depicts the assessment to be undertaken here:

> The fact that it is not possible for a claimant to prove the exact sum of its loss is not a bar to recovery. In this case, the assessment of damages will involve an element of estimation and assumption. Restoration by way of compensatory damages is often accomplished by "sound imagination" and a "broad axe" . . . . The Court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of its rights.[137]

The need for passing-on rules was recognized in *Devenish*,[138] where there was also prescient submission by counsel that if the pursuit of collective enforcement actions is too difficult, especially in the English legal system with its high costs and risks, private enforcement will not happen. Indeed, this reflects the limited historical experience of collective consumer redress in the United Kingdom, at least until the Consumer Rights Act 2015. Despite the

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[130] BritNed Dev. Ltd. v. ABB AB & ABB Ltd. [2018] EWHC (Ch) 2616.

[131] *See* Crehan v. Inntrepreneur Publ'g Co. CPC [2004] EWCA (Civ) 637.

[132] Applying the ruling in Asda Stores Ltd. v. Mastercard Inc. [2017] EWHC (Comm) 93.

[133] *Asda Stores* [2017] EWCA (Civ), [¶¶ 10–12, 24–25].

[134] The claim for compound interest was held to be unarguable.

[135] BritNed Dev. Ltd. v. ABB AB & ABB Ltd. [2019] EWCA (Civ) 1840. This was considerably lower than the sum claimed for.

[136] *Asda Stores* [2017] EWHC (Comm) 93.

[137] *Id*. ¶ 306; *see also* Mastercard Inc. v. Merricks [2020] UKSC 51, [¶¶ 47–51] (Lord Briggs).

[138] Devenish Nutrition Ltd. v. Sanofi-Aventis SA (France) [2008] EWCA (Civ) 1086.

claimants' arguments based on the deterrence objective,[139] the court stressed that account of profits and restitutionary remedies generally would only be available where damages were not an adequate remedy.[140] However, although the claimants developed this argument on the basis that the cartels were secretive, in fact there was evidence that Devenish had passed on 100 percent of the overcharge to indirect purchasers. Accordingly, it was considered unfair to give Devenish a restitutionary award to enable it to avoid the consequences of its having passed on the overcharge. The difficulties in making such a claim by a direct purchaser who had passed on overcharges were observed starkly: "If the passing-on defense is available, then the profits to be accounted for would be adjusted accordingly (see above). If the passing-on defense is not available, but the subsequent purchasers have separate claims, issues of multiple liability arise in any event."[141] Devenish's economic expert was able to calculate the amount of the overcharge using methodology typical in antitrust cases but did not take into account any pass-on. It was concluded that if Devenish had suffered a loss, it was recoverable in damages, and if not, this did not mean damages are an inadequate remedy. An account of profits would have given Devenish an unjustified windfall: "the law . . . is not in the business of transferring monetary gains from one undeserving recipient to another . . . ."[142]

The most important case to date in the United Kingdom in this context, *Sainsbury's Supermarkets Ltd v. Mastercard Inc.*,[143] involved a damages claim with respect to Mastercard's UK Multilateral Interchange Fee (MIF), which inflated banks' charges to merchants for card acceptance. The Tribunal held that there was an infringement of Article 101 TFEU[144] and that Sainsbury's was entitled to recover nearly £70 million in damages. The CAT considered in detail the complex issue of quantification of damages, in only the third ruling in which it awarded and assessed final damages. The general principles informing the calculation of the overcharge damages award[145] are compensation/reparation, the balance of probabilities and "where there is an element of estimation and assumption—as frequently there will be—restoration by way of compensation is often accomplished by 'sound imagination' and a 'broad axe.'[146] The CAT also reflected on the passing-on defense and

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[139] *Id.* ¶ 102.

[140] *Id.* ¶ 104.

[141] *Id.* ¶ 131.

[142] *Id.* ¶ 147 (Per Longmore LJJ).

[143] Case 1241/5/7/15 (T), Sainsbury's Supermkts. Ltd. v. Mastercard Inc. [2016] CAT 11.

[144] *See id.* ¶ 21 (where the CAT explains that this is not a follow-on action as the earlier Commission decision related to a different infringement in relation to the EEA MIF).

[145] *Id.* ¶ 423.

[146] *Id.*; *see also* Mastercard v. Merricks [2020] UKSC 51, [¶¶ 47–51] (Lord Briggs).

underlying compensation principle,[147] particularly where indirect purchasers were involved, albeit the Directive was not involved.[148] Its determination is particularly significant in the absence of any prior UK case law determination on these issues and given they were also ultimately aired in this case on appeal before the Supreme Court, as discussed below.

1. *The Passing-On Defense and Indirect Purchasers: The* Sainsbury's v. Mastercard *Case in Greater Focus*[149]

The CAT confirmed for the first time the recognition of overcharge claims by indirect purchasers and the existence of a passing-on defense for defendants.[150] The CAT stressed that:

> the pass-on "defense" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. [Otherwise] we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.[151]

The CAT observed that the pass-on defense had been recognized by the CJEU in *Crehan*,[152] but (at least prior to the Directive) was a matter for determination by national law subject to the EU principles of effectiveness and equivalence.[153] However, given that no English courts had dealt with the issue in any substantive or definitive way, the scope and nature of the defense remained uncertain.[154] The CAT recognized Sainsbury's standing to bring a claim as an indirect purchaser. It was not disputed that any alleged overcharge had been 100 percent passed on by banks (the direct purchasers) to Sainsbury's (the indirect purchaser). The central issue was whether Sainsbury's had subsequently passed on any overcharge to its own customers. The CAT observed that "English law recognizes overcharge claims by indirect purchasers."[155] It also explicitly rejected the *Hanover Shoe* approach as "not the position under English law."[156] Consequently, in light of the position that an indirect purchaser was able to claim damages, the passing-on defense must be

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[147] *Sainsbury's Supermarkets* [2016] CAT 11, [¶¶ 479 et seq., in particular ¶ 480].

[148] The Directive was inapplicable *ratione temporis*, although referred to at ¶¶ 480–81 of the CAT judgment.

[149] *See* Veljanovski, *supra* note 44.

[150] *Sainsbury's Supermarkets* [2016] CAT 11, [¶ 484].

[151] *Id.*

[152] *Id.* ¶ 479.

[153] *Id.* ¶ 480.

[154] *Id.* ¶ 483.

[155] *Id.* ¶ 484.

[156] *Id.* ¶ 482; *see also* Emerald Supplies Ltd. v. British Airways PLC [2009] EWHC 741 (Ch), [¶ 37].

available in order to ensure that the claimant was not overcompensated. It stated that it "is in reality not a defense at all: it simply reflects the need to ensure that a claimant is sufficiently compensated, and not over-compensated, by a defendant."[157] Finally, it distinguished legal and economic passing-on as follows:

> [A]lthough an economist may define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defense is only concerned with identifiable increases in prices by a firm to its customers. A mere assertion that all costs are passed on by a profitable firm was insufficient and a defendant must prove that: (i) the cartel overcharge increased the prices charged by the claimant to its customers; (ii) the claimant's price increase was "causally connected" to the cartel overcharge; and (iii) an identified category of indirect customers absorbed the price overcharge.[158]

The Court of Appeal affirmed the CAT's approach but noted obiter dicta that the CAT's third condition was not required. The Supreme Court, supported the approach of the Court of Appeal, emphasized the compensatory principle, but stressed that in applying the broad axe in determining the level of mitigation of loss, the evidentiary burden did not require a greater degree of precision on the part of the defendants (than the claimants) in quantifying the precise level of pass-on which had been made by the claimants.[159]

As discussed below, Mastercard is also subject to a collective proceedings claim by consumers (in *Merricks*), some of whom are purchasers from Sainsbury's, claiming they were harmed indirectly by the unlawful MIF.[160] It is interesting to note that the CAT in *Sainsbury's* appeared wary of the vagaries of collective actions and, recognizing the difficulty of recovery in actions such as *Merricks*, it adopted statements similar to a U.S.-type approach based on deterrence which would favor direct purchasers:

> There is danger in *presuming* pass-on of costs to indirect purchasers because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end result is that the defendant retains the overcharge. This risk of under-compensation, we consider, to be as great as the risk of overcompensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effective-

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[157] *See* Bill Batchelor, Kaweh Resasade & Jonathon Egerton-Peters, *Complexities in Antitrust Litigation UK Update*, 13 GLOBAL COMPETITION LITIG. REV. 29 (2020).

[158] *Sainsbury's Supermarkets* [2016] CAT 11, [¶ 484].

[159] Sainsbury's Supermkts. Ltd. v. Visa Eur. Servs. LLC [2020] UKSC 24, [¶¶ 225–226].

[160] None of the rulings in *Merricks*, including by the Supreme Court, have required at the CPO stage to deal with the passing-on issue, which is a central plank of the consumer claim there. Interestingly, Lord Briggs notes that Mastercard does not accept the passing-on to consumers took place in this case, while simultaneously relying on it in other, pending litigation involving "merchants." Mastercard v. Merricks [2020] UKSC 51, [¶ 15].

> ness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult."[161]

2. *Indirect Purchasers and Collective Redress*

The question of the appropriate treatment of direct and indirect purchasers and the consequent role of the passing-on defense was the backdrop to an important dispute over the pre-Consumer Rights Act 2015 mechanism for aggregating group claims as representative actions before the English courts in *Emerald*, decided by the Court of Appeal in 2010.[162] There were 565 Claimants located in numerous territories across the world. They all sued BA in respect of losses they allegedly incurred as a result of a worldwide cartel in transporting cargo by air, raising the prices of air cargo services. The Claimants were a wide range of enterprises ranging from Chinese fruit and vegetable packers to East African flower growers and had identified 31 airlines that allegedly took part in the global cartel. The Claims related to alleged overcharges on air routes worldwide.

The proceedings[163] considered all aspects of the procedural requirements of representative actions in general but these particular proceedings were ultimately unsuccessful as falling outside the scope of CPR 19.6 rule on representative actions. A particular difficulty was that the members did not have the same interest in recovering damages for breach of competition law if a defense was available in answer to the claims of some of them, but not to other claims. As was stressed:

> The potential conflicts arising from the defenses that could be raised by BA to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defense to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defense to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented.[164]

Accordingly, the interplay of these issues precluded the existence of a sufficient commonality of interest for the rule on representative actions to come into play.

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[161] Sainsbury's Supermkts. Ltd. v. Mastercard Inc. [2016] CAT 11, [¶ 484].

[162] Emerald Supplies Ltd. v. British Airways PLC [2010] EWCA (Civ) 1284.

[163] Emerald Supplies Ltd. v. British Airways PLC [2014] EWHC 3514 (Ch); Emerald Supplies Ltd. v. British Airways PLC [2017] EWHC 2420 (Ch).

[164] *Emerald Supplies Ltd.* [2010] EWCA (Civ) 1284, [¶ 69].

Despite the subsequent introduction of the new opt-out collective redress scheme by the Consumer Rights Act 2015,[165] the difficulties in obtaining successful collective redress for consumers has been further exemplified by the first two cases under the new regime. In *Gibson v. Pride Mobility Products*,[166] the application for a CPO was adjourned for the applicant to return with an amended claim form. The fundamental difficulties here lay in the related issues of the limited scope of the infringement decision, the requisite boundaries of a follow-on action,[167] and the consequent impact of the decision on the various sub-classes of claimant. In order to grant a CPO the CAT, *inter alia*, required the applicant to propose revised sub-classes and a methodology that focused on the effects of the agreements which were the subject of the infringement decision.[168] The claim was subsequently withdrawn and the applicant held liable for the defendants' costs of the proceedings.[169]

In *Merricks v. Mastercard*,[170] a follow-on suit by consumers based on Mastercard's setting of the multilateral interchange fee, the claims were held by the Tribunal not to be certifiable under Rule 79 of the Tribunal Rules as eligible for inclusion in collective proceedings. Merricks sought to bring proceedings on behalf of a class defined as individuals who, between May 22, 1992 and June 21, 2008, had purchased goods and/or services from businesses selling in the United Kingdom that had accepted Mastercard cards, provided those individuals were (a) resident in the United Kingdom at the time and (b) aged 16 years or over. The claim was for an aggregate sum of circa £14 billion including interest and the class was considered to be around 46.2 million people. As Lord Briggs noted in the Supreme Court: "The proceedings involve a disparity in size between collective and individual recovery on a scale which is, in the current experience of the UK courts and tribunals, completely unique."[171]

The case failed on the suitability test on the basis that the applicant had failed to put forward: (1) a sustainable methodology to be applied in practice to calculate a sum which reflected the aggregate of the individual claims; and (2) a reasonable and practicable means for establishing the individual loss to be used a basis for distribution.[172]

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[165] *See supra* Part I.B.4.

[166] [2017] CAT 9.

[167] Because of transitional provisions, the Applicant was required to bring this action as a follow-on action.

[168] *Gibson* [2017] CAT 9, [¶¶ 112–118].

[169] Order, Case 1257/7/7/16, Gibson v. Pride Mobility Prods. Ltd. (CAT May 25, 2017), www.catribunal.org.uk/sites/default/files/1257_Dorothy_Gibson_Order_250517.pdf.

[170] [2017] CAT 16.

[171] Mastercard v. Merricks [2020] UKSC 51, [¶ 17].

[172] Sebastian Peyer, *Has the CAT's MasterCard Decision Killed off Opt-out Class Actions by Indirect Puchasers?*, COMPETITION LAW AND POLICY BLOG (Aug. 10, 2017), competition

On appeal, the Court of Appeal rejected the CAT's reasoning and adopted a more purposive approach to certification proceedings, recalibrating the process in the balance of potential collective redress applicants. In considering the nature of the aggregated damages, the Court of Appeal noted the Canadian approach[173] at the certification stage did not involve a detailed analysis of expert opinion, and the threshold for certification is not an onerous one. It considered that the applicants had provided a methodology for calculation of the aggregate damages and there was data likely to be available to operate it, and at this stage they need only show prospect of success before completion of disclosure and filing of evidence, not that the claims were certain to succeed. The CAT had set too high a hurdle for certification and there was "no requirement . . . to approach the assessment of an aggregate award through the medium of a calculation of individual loss."[174] In relation to the economic model for pass-on, the CAT had rejected the proposed methodology because it was uncertain what data would be available to apply the methodology.[175] The Court of Appeal held that the CAT had applied too high a standard, finding that at certification, claims need not demonstrate more than a "real prospect of success"[176] at trial. This test was met because the methodology presented was capable of assessing the level of pass-on to the class and data was (likely) to be available at trial.[177] The Court of Appeal's observation at paragraph 47 is notable:

> To require each individual claimant to establish loss in relation to his or her own spending and therefore to base eligibility under Rule 79 on a comparison of each individual claim would, as I have said, run counter to the provisions of s.47(C)(2) and require an analysis of the pass-on to individual consumers at a detailed individual level which is unnecessary when what is claimed is an aggregate award. Pass-on to consumers generally satisfies the test of commonality of issue necessary for certification.[178]

The second main issue concerned the proposed mechanism for distribution of the aggregate damages award. The Court of Appeal stressed that Section 47B did not require aggregate awards to be distributed on a compensatory

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policy.wordpress.com/2017/08/10/has-the-cats-mastercard-decision-killed-off-opt-out-class-actions-by-indirect-purchasers/#more-1175.

[173] Merricks v. Mastercard Inc. [2019] EWCA (Civ) 674 [¶ 40]. *See also* Mastercard v. Merricks [2020] UKSC 51, [¶ 19] (Lord Briggs) (noting the considerable Canadian jurisprudence in relation to their similarly-worded statutory scheme); *id.* [¶¶ 36–42] (Lord Briggs).

[174] Merricks v. Mastercard Inc. [2019] EWCA (Civ) 674, [¶ 46].

[175] *Id.* ¶ 78; *see also* [2020] UKSC 51, [¶¶ 31–32] (Lord Briggs); *id.* [¶ 125] (Lords Sales and Leggatt on the methodology issues and the CAT's finding here).

[176] Hipwell v. Szurek [2018] EWCA (Civ) 674, [¶ 46].

[177] *Id.*

[178] *Id.* ¶ 47.

basis as envisaged by the CAT.[179] The Court emphasized that the power to make an aggregate award would be largely negated if "calculation of individual loss was a pre-requisite for any authorized method of distribution and therefore for certification."[180] It was stressed that the provisions for distribution of an aggregate award under the opt-out Collective Proceedings Order mechanism are open-ended and "[t]he vindication of the rights of individual claimants is achieved by the aggregate award itself."[181] The ruling emphasizes the need for the practical effectiveness of the collective redress scheme itself, and that the mechanisms created for CPO applications should be workable and not create insurmountable barriers to collective redress by consumers. The UK Supreme Court heard the appeal in May 2020, and the CAT suspended consideration of CPOs pending the Supreme Court's ruling.[182]

The Supreme Court delivered its ruling in December 2020, and a favorable majority judgment, delivered by Lord Briggs,[183] upheld the Court of Appeal and returned the case to the CAT to reconsider the CPO application in light of its findings that it had erred in law. Lord Briggs, in line broadly with the Court of Appeal's approach,[184] emphasized context and purpose: "Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose."[185] The most serious of the errors of law by the CAT identified by Lord Briggs concerned the methodology and evidence to calculate damages at trial. It is worth citing an extensive passage from the judgment here at paragraphs 72–74 of his judgment:

> 72. [T]he CAT's assessment fell well short of suggesting that Mr Merricks would be unable at trial to deploy data sufficient to have a reasonable prospect of showing that the represented class had suffered any significant loss.
>
> 73. The fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or tribunal refusing a

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[179] *Id.* ¶¶ 56–62; *see also* Mastercard v. Merricks [2020] UKSC 51, [¶¶ 33–34] on the CAT's finding here.

[180] Hipwell v. Szurek [2018] EWCA (Civ) 674, [¶ 57].

[181] *Id.*

[182] Michael D. Hausfeld et al., *Can U.S. Class Action Law Serve as Guidelines for the UK Indirect Purchaser* Mastercard *Case?* HAUSFELD COMPETITION BULL. (Aug. 18, 2020), www.hausfeld.com/en-gb/what-we-think/competition-bulletin/can-u-s-class-action-law-serve-as-guidelines-for-the-uk-indirect-purchaser-mastercard-case/.

[183] *See Merricks* [2020] UKSC 51, [¶ 82] (Lord Briggs).

[184] *Id.* ¶ 64.

[185] *Id.* ¶ 45.

> trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. In the context of suitability for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on, and insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large.
>
> 74. The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily basis. The likely cost and burden of disclosure may well require skilled case management. But neither justifies the denial of practicable access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive. The present case may well present difficulties of those kinds on a grand scale, but they are difficulties which the CAT is probably uniquely qualified to surmount. It may be that gaps in the data will in some instances be able to be bridged by techniques of extrapolation or interpolation, and that some gaps will be unbridgeable, so that nothing is recovered in relation to particular market sectors or for parts of the Infringement Period. Nonetheless it is a task which the CAT owes a duty to the represented class to carry out, as best it can with the evidence that eventually proves to be available.

Interestingly, the minority judgment (by Lords Sales and Leggatt), concurred with Lord Briggs (and the earlier Court of Appeal ruling) on the issue of distribution of aggregate damages.[186] Again, the CAT had erred in law in deeming the compensatory principle to be essential for determining the outcome of that process. As Lord Briggs notes, "section 47C of the Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case, and that nothing in the Act or the Rules puts it back again, for the purposes of distribution."[187]

It is hoped that the favorable ruling by the Supreme Court in *Merricks* on the broad axe approach required for quantification of pass-on and ultimate losses for certification of CPO applications, in line with the Court of Appeal's approach, and the rejection of the compensation aligned damages distribution model required at first instance by the CAT, may help to incentivize future consumer-based claims.

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[186] *Id.* ¶¶ 148–150 (Lords Sales and Leggatt).

[187] *Id.* ¶ 76.

III. COMPARISON OF RATIONALES FOR DIFFERENTIAL APPROACHES TO INDIRECT PURCHASERS IN THE UNITED STATES AND EUROPEAN UNION

It is important at this stage to reflect on the underlying debate and rationales for the development of private enforcement generally and the rules on indirect purchasers and the passing-on defense specifically. The development of a framework for competition law private enforcement reflects the tensions and balance between three potentially conflicting considerations[188]: (1) the *fairness* consideration requiring that every individual,[189] including the final consumer, is granted access to redress in the form of compensation; (2) the *effectiveness* consideration, which requires that deterrence of anticompetitive behavior is recognized as one of the ultimate goals of antitrust damages actions and the private enforcement regime; and (3) the *efficiency* consideration, requiring a balanced approach to the level and burden of economic and factual analysis imposed on the judiciary in the determination of antitrust damages actions.

Historically, the U.S. debate on indirect purchasers appears to have been primarily driven by deterrence arguments, and the effectiveness and efficiency of the judicial system in dealing with antitrust damages actions.[190] William Landes and Richard Posner stressed that if final consumers are those who are actually injured, their purchases may be small and their incentives and resources to sue for damages are limited compared to direct purchasers, and would not advance the deterrence objective.[191]

Alongside the deterrence argument the efficiency rationale has been a factor in the rejection of the passing-on defense in *Hanover Shoe*, with a real concern for the practical difficulties in using economic models to analyze business decisions in the "real economic world."[192] The rationale for the U.S. restrictions on indirect purchaser claims are partly based on a combination of the analytical and evidentiary complexity for courts required to assess such claims, together with what would appear to be mutually inconsistent concerns

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[188] *See* Cengiz, *supra* note 35.

[189] *See* Crehan v. Inntrepreneur Publ'g Co. (CPC) [2004] EWCA (Civ) 637 (Eng.).

[190] William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979); Gregory J. Werden & Marius Schwartz, Illinois Brick *and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629 (1984). *Cf.* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1980).

[191] Landes & Posner, *supra* note 190. *See also* Andrea Hamilton & David Henry, *Bricks, Beer and Shoes: Indirect Purchaser Standing in the European Union and the United States*, 5 GLOBAL COMPETITION LITIG. REV. 111 (2012).

[192] *See* Maclean, *supra* note 53; *see also* Jasminka Kalajdzic, *Consumer (In)Justice: Reflections on Canadian Consumer Class Actions*, 50 CANADIAN BUS. L.J. 356 (2010).

regarding liability to over-compensate by defendants faced with claims at multiple levels of the distribution chain, and arguments over the practical feasibility of ensuring redress and compensation of the usually very small amounts that indirect purchasers are overcharged.[193] The combination of *Hanover Shoe* and *Illinois Brick* sacrificed compensation as the primary goal in favor of deterrence and administrability at the federal level. However, the U.S. system of private enforcement is further complicated by the adoption of statutory rules by many states authorizing suit by indirect purchasers, in response to the criticisms of the federal rules as being "anti-consumer" in nature.

In the European Union and United Kingdom, there has been a tension between effectiveness/efficiency and the compensation principle in the development of a set of rules to deal with indirect purchasers, both in terms of legislative developments and incremental case law analysis. The predominance of the compensation principle has been exemplified by the adoption of the Damages Directive, but it is important to understand how we got there. The issues of the passing-on defense and indirect purchasers' standing were considered in the early Green Paper on damages actions for breach of the EC antitrust rules,[194] which put forward four options concerning the legal treatment of the passing-on defense and indirect purchasers' standing. The first option, to allow the passing-on defense and ensure standing of indirect purchasers,[195] was ultimately adopted in the Directive. Nonetheless, the tenor of the Green Paper was a compromise between compensation and deterrence as the ultimate goal of private enforcement, with damages actions being viewed as a way to supplement public enforcement action by the Commission. The tone had changed by the time the White Paper was published, as it stressed at the outset that "full compensation" of all victims of infringements of EU competition law will be the "first and foremost guiding principle" of private enforcement in Europe.[196] In order to achieve the goal of full compensation, the Commission proposed recognition of both indirect purchaser standing and a passing-on defense through legislative action at the EU level, finally achieved by the Directive.

There is a significant divergence between the rationales and practice in European Union and the United States on the objectives of private enforcement and how this plays out in relation to the specific rules on indirect purchasers. *Courage* and *Manfredi* confirmed that the doctrine of direct effect requires

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[193] Note the use of *cy près* distributions as a part of class action settlements. *Cf.* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003).

[194] *EC Green Paper*, *supra* note 55.

[195] *See* Petrucci, *supra* note 7.

[196] *EC White Paper*, *supra* note 55.

that it should be "open to *any individual* to claim damages for the loss caused to him by a contract or by conduct liable to restrict or distort competition." Accordingly, the complete exclusion of redress for indirect purchasers, justified by efficiency and effectiveness considerations, would be in direct conflict with those key principles and the underlying rationale of "full compensation" of all victims of infringements of EU competition law. The aim of the rules in the United Kingdom and European Union contexts was put eloquently by the CAT in *Sainsbury's* as follows:

> (2) The real thrust of the defense is, at least in this case, to do with compensation:
> (i) It is to prevent the over-compensation of a claimant; and
> (ii) It is to ensure that the defendant does not pay damages for the same wrong twice over.
>
> (3) These two points are linked. Where a claimant has (for example, by reason of a breach of Article 101 TFEU) overpaid for a good or service, that claimant (a "direct" purchaser) would be over-compensated where the overpayment has been passed-on to a party "downstream" of the claimant (an "indirect" purchaser). EU law recognizes that a claim for damages for breach of competition law may be brought not only by those who have directly suffered harm as a result of anti-competitive conduct, but also those who have been indirectly affected by the same conduct. Where there can be both direct and indirect purchasers—or multiple classes of indirect purchasers—it is important to ensure both that these classes are properly compensated *and* that the defendant pays only compensatory and not what are in effect multiple damages.[197]

Accordingly, while apparently clear that competition law damages in the United Kingdom are aimed at compensation rather than deterrence, the majority Supreme Court ruling in *Merricks* has clarified that at least in the context of the 2015 Acts collective redress mechanism, the compensation principle applies in a modified form.[198]

IV. CONCLUSION

The analysis of the EU and UK legislative and case law background has allowed us to see the trajectory followed by competition law private enforcement in the United Kingdom, in that competition litigation culture has developed following the establishment of institutions, rules, processes, and mechanisms at both the EU and UK levels.[199] It appears that the developing

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[197] *See* Sainsbury's v. Mastercard [2016] CAT 11, [¶ 480].

[198] *See also* Mastercard v. Merricks [2020] UKSC 51, [¶ 58] (Lord Briggs).

[199] *See* Rodger, *supra* note 22; *see also* Barry Rodger, *Institutions and Mechanisms to Facilitate Private Enforcement Across the EU: Specialist Courts and Follow-On Actions*, 2014 CONCORRENZA E MERCATO 139 (2014).

culture and jurisprudence in the United Kingdom has similarities with the U.S. system, although at a much earlier developmental stage. There are a range of mechanisms that facilitate private antitrust lawsuits in the United States, *inter alia*, the availability of treble damages, an opt-out class action mechanism, discovery, and contingency fees,[200] and essentially, the U.S. legal system has, for a considerable period, been viewed as promoting access to the courts for consumers.[201]

Nonetheless, there has been academic skepticism of the extent to which private antitrust enforcement continues to be encouraged and facilitated in the United States. Jason Rathod and Sandeep Vaheesan concluded that private enforcement had been undermined by the business victim mythology which had shaped attitudes of *inter alia* judges to limit the scope of private enforcement rights, and they advocated strongly against the importation into Europe of an "anti-private enforcement" message based on "empirically unsupported narrative of 'excessive litigation' in the United States."[202] The irony appears to be that although in the United States there is greater focus in the antitrust enforcement narrative on consumers, and class actions, the indirect purchaser rule at the federal level militates against indirect purchaser claims, which are most likely to be raised by end consumers, and class certification has become more problematic in recent years. Indeed the position in the European Union would appear to be in stark contrast, with ECJ jurisprudence buttressed by specific Directive provisions confirming indirect purchaser standing (and the flip side passing-on defense) alongside reluctance at the EU level to develop an effective collective redress aggregation model, despite the institution of effective opt-out redress models across a number of individual Member States, notably the United Kingdom.[203]

Accordingly, on the one hand in the United States, *Illinois Brick* blocked indirect purchasers seeking damages from federal courts, but the Federal Rules of Civil Procedure provided robust class action mechanisms (albeit until more recently when the standards have become demanding). On the other, a more robust right of action for indirect purchasing consumers has been devel-

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[200] *See* INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

[201] *See* Arianna Andreangeli, *Collective Redress in EU Competition Law: An Open Question with Many Possible Solutions*, 35 WORLD COMPETITION 529 (2012); COMPETITION LAW, *supra* note 22, ch. 7, *A View from Across the Atlantic: Recent Developments in the Case Law of the US Federal Courts on Class Certification in Antitrust Cases*; Arianna Andreangeli, *Private Enforcement of Antitrust Regulating Corporate Behaviour Through Collective Claims in the EU and US* (2014).

[202] *See* Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 UNH L. REV. 303 (2015).

[203] *See supra* note 15.

oped in the European Union, but an adequate mechanism for consumer redress across the European Union is absent. Therefore, both systems have been limited in ensuring consumer redress justice, albeit for different historic reasons. The United Kingdom may be in an ideal position to provide the beneficial aspects of both jurisdictions from a consumer's perspective.

Competition law and policy in the United Kingdom has undergone a radical transformation in the last 20 years.[204] The Competition Act 1998 marked the start of the transformation[205] to a more legalistic, prohibition-based set of provisions while seeking to facilitate private enforcement. There has been an increase in practitioners involved in competition law, greater awareness of competition law rights and remedies, and more case law, although settlements continue to obscure much of this practice.

Over the last 20 years the courts in the United Kingdom have become increasingly attractive as a forum for international private litigation involving infringements of domestic and EU competition law rules. This is partly as a result of the introduction of a range of legal, procedural, and institutional mechanisms, including the specialist CAT. The CJEU has incrementally ensured that national legal systems, including the United Kingdom, ensure the protection of EU law-derived rights, in this context in relation to any loss or damage arising from any EU competition law infringements, and the specific protection of indirect purchaser rights has been enshrined in the EU Antitrust Damages Directive.

Although the United Kingdom has now withdrawn from the European Union, the Directive's provisions will be maintained (at least in the short term) as retained EU law. In any event, it is clear from the *Sainsbury's v. Mastercard* case[206] that the UK courts, irrespective of EU law requirements, will continue to recognize indirect purchaser rights to sue, and apply an appropriate passing-on rule. There are three main ongoing difficulties and concerns. The first concerns multi-level, multi-state claims arising from the same infringement and how these can be coordinated in any effective way to avoid excessive levels of over-compensation by defenders. This issue may be even more problematic in the United Kingdom, which will no longer be a party to the Brussels I Regulation regime[207] and its (limited) *lis pendens* provisions for minimizing the risk of irreconcilable judgments from multiple courts. The second is a generic concern regarding quantification generally, and although the broad-axe principle is helpful and welcomed, estimating quantification of

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[204] *See* THE UK COMPETITION ACT, *supra* note 69; TEN YEARS OF UK COMPETITION LAW REFORM (2010), *supra* note 69.

[205] *See* WILKS, *supra* note 69.

[206] *See* Sainsbury's Supermkts. Ltd. v. Mastercard Inc. [2016] CAT 11.

[207] Regulation No. 1215/2012 of the Eur. Parliament & of the Council, 2012 O.J. (L 351) 1.

pass-on in complicated markets involving numerous consumers over a long period is likely to remain very problematic. This also ties in with a third concern regarding how the underlying compensation model can really equate with such complicated long-term end-product consumer markets.

Both of these latter issues indeed lie at the heart of the *Merricks* case and the enhancement of access to justice for consumers in the United Kingdom. Although applications for CPOs have been raised by business parties (notably in *Trucks* and *Visa/Mastercard*),[208] there is also evidence of increasing resort to the collective redress mechanism in final consumer based claims in *Gibson/Merricks* and *Gutmann/Maclaren.*[209] The majority Supreme Court ruling in *Merricks*, with its purposive emphasis on the vindication of consumer rights, and in particular its broad-brush approach to the level of detail required on the quantification of passing-on at the certification stage for consumer claimants, is a helpful step on the way to providing an effective consumer redress scheme for competition law infringements. The existence of indirect purchaser rights and passing-on rules, combined with a developed, workable, and viable collective redress mechanism may allow the United Kingdom to ensure justice and redress for consumers harmed by competition law infringements.

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[208] *See also* 1329/7/7/19, Michael O'Higgins FX Class Representative Ltd. v. Barclays Bank PLC and Others (CAT July 29, 2019).

[209] Case 1305/7/7/19, Justin Gutmann v. London & S.E. Railway Ltd. (CAT Feb. 27, 2019); Case 1339/7/7/20, Mark McLaren Class Representative Ltd. v. MOL (Europe Africa) Ltd. (CAT Feb. 20, 2020).