CPI's North America Column Presents:

In Defense of Class Actions: A Response to Makan Delrahim's Commentary on the UK *Mastercard* Case

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CPI COMPETITION POLICY INTERNATIONAL

June 2020

I. Introduction

Few would argue with the proposition that, in the antitrust context, indirect purchaser class actions raise more difficult questions of commonality, impact, and manageability than direct purchaser class actions even though there may have been harm sustained at both levels. As a result, indirect purchaser class actions in the United States often are not certified for class treatment under Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") or comparable class action rules in state courts.

This does not mean, however, that indirect purchaser class actions can or should never be certified. Nor should they be summarily dismissed without first carefully analyzing the nature of the underlying violation, the number of levels in the distribution chain involved, the size and composition of the purported class, the particular features of the industry and products involved, and the economic models proffered by plaintiffs' economic experts in support of class treatment. Some cases will satisfy the requirements for class certification, and others may not, but in all cases, the decision on whether to certify a class should be made on the basis of the record developed in that case, not on the basis of preconceptions of whether some class actions are legally inappropriate.

II. The Division Article

In a recent article, Makan Delrahim, the Assistant Attorney General in Charge of the Antitrust Division of the U.S. Department of Justice (the "Division"), provided a commentary on the decision of the English Court of Appeal in the *Mastercard* case, which is now on appeal before the UK Supreme Court.[2] While the ostensible focus of the Division's article is on a comparison between the treatment in the U.S. and UK of class certification issues in indirect purchaser cases, particularly as related to the UK *Mastercard* case, most of the article focuses on class actions generally.

Although we agree with the general overview of Rule 23 provided by the Division, we disagree with a number of specific assessments in the article, starting with the Division's comment that the U.S. experience demonstrates that courts should be wary of class actions because they create a risk of "in terrorem" settlements, meaning that once a class is certified, defendants are under enormous pressure to settle potentially meritless claims in order to avoid the risk of an unwarranted, exorbitant judgment if they should go to trial and lose.[3] This comment disregards the facts that unlike the U.S., there is no treble damage risk in the UK, and the UK has a "loser pays" rule. Additionally, in the UK, but not in the U.S., a defendant can seek contribution from co-defendants in the event of an adverse judgment. Moreover, many of the class actions brought in the U.S. and UK are follow-on actions, where the defendants have already pled guilty or otherwise have been found guilty of the underlying offense giving rise to the private suit. Such follow-on class actions in particular cannot be automatically dismissed as meritless.

More specifically, we question the relevance of the Division's comments addressed to the narrow questions before the Court of Appeal in the *Mastercard* case, because unlike Rule 23, there is no requirement that common issues predominate in collective proceedings in the UK, and because unlike Rule 23 practice, where motions for class certification are not generally decided until after there has been discovery on class issues, including damage methodology, the collective proceedings order at issue in *Mastercard* was decided before the class representative took any discovery whatever. In fact, the U.S. approach to discovery prior to certification has been specifically disavowed in the UK.[4]

Significantly, the view advanced by the Division's discussion of potential difficulties in calculating individual damages after an aggregate award has been made[5] ignores the requirement of Section 47C(2) of the Competition Act of 1998 to the contrary: "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."[6]

While the views of the Division can be instructive on particular aspects of U.S. antitrust law, and unquestionably would be entitled to a measure of deference if presented to a U.S. court in an appropriate submission, it is not clear how the Division's views on the proper application of Rule 23 would be of assistance to the UK Supreme Court in deciding the *Mastercard* appeal. Certification in a collective proceeding in the UK is entirely different from certification in the U.S. The questions before the UK Supreme Court are questions of procedure under UK law, and UK procedure does not distinguish between direct and indirect actions. The UK court is not being asked to apply U.S. law, and from a comity perspective, even if U.S. law were implicated, a forum generally is entitled to apply its own procedural rules—in this instance the collective action regime established under the UK Consumer Rights Act of 2015—without regard to the law of any other jurisdiction, particularly in the UK, unless it chooses, in its discretion, to do otherwise.

Convergence, if that is the goal of the views expressed in the Division article, makes little sense with respect to procedural rules precisely because they are procedural, reflecting the cultural and legal traditions of a particular jurisdiction, which normally is respected by other jurisdictions. While it is true, as the Division article says, that the UK Supreme Court's *Mastercard* decision "may . . . have important effects on U.S. companies like Mastercard and their opportunities to compete globally,"[7] limiting remedies, including collective redress, for harms caused by the anticompetitive behavior of any company, American or not, cannot in any view be in the interests of the wider global economy, nor the societies in which such companies operate.

The UK Supreme Court might give little, if any, weight to the views expressed in the Division's article for yet another reason. The Division does not bring class actions in the U.S. courts. Class actions are not part of its enforcement tool kit, and institutionally it has no particular experience or expertise in class action litigation. U.S. government enforcement actions, whether brought to enforce Section 1 or 2 of the Sherman Act, are not brought as class actions. In fact, most of the Division's enforcement resources are devoted to criminal enforcement and merger actions under

Section 7 of the Clayton Act. And when the Division expresses its views in private antitrust cases in the U.S. Supreme Court, it generally does so by joining in amicus briefs filed by the Solicitor General when the views of the government are requested by the Court.

The views expressed in the Division article on the utility of the class action remedy in antitrust cases are troublesome for another reason as well. None of the billions of dollars collected by the Division each year in antitrust fines goes to victims in the criminal antitrust cases brought by the Division. For most victims, class actions are the only realistic remedy for obtaining justified monetary compensation for their losses. In that regard, the Division does not generally seek restitution or any other form of collective redress for victims of antitrust violations, even when defendants have pled guilty in criminal antitrust cases and when restitution can be required under the relevant federal restitution statutes and sentencing guidelines.[8] As the Division's Antitrust Manual for its attorneys makes clear, private antitrust damages are the preferred method of providing monetary damages to victims of antitrust violations:

> Restitution has not been ordered (directly or as a condition of probation) in many cases brought by the Division as the result of several factors: in many of our criminal matters, civil cases have already been filed on behalf of the victims at the time of sentencing, which potentially provide for a recovery of a multiple of actual damages (plus costs and attorneys' fees); the complexity of antitrust cases; the resulting difficulty of determining damages; and the per se nature of antitrust criminal violations, which relieves the prosecution from having to introduce evidence of harm resulting from the violation to secure a conviction.[9]

In 2007 the Antitrust Modernization Commission, a bipartisan group of antitrust experts variously appointed by the President, the House and the Senate—and which included Mr. Delrahim as a Commissioner—issued its final report, in which it concluded that current private antitrust enforcement, including class actions, effectively furthered five important antitrust enforcement goals–deterrence, punishment, disgorgement of gains, compensation to victims, and incentives for private attorneys general.[10] Indeed, according to the U.S. Supreme Court, the statutory right to bring such suits expresses Congress' s "belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." [11]

As to damage awards, in the United States, antitrust damages need not be proved with mathematical precision in cases brought by individual plaintiffs in their own name. The courts extend individual plaintiffs latitude in proving such damages, recognizing that it would be inequitable to allow a wrongdoer to defeat recovery by insisting on an impossibly high burden of proving the amount of damages. "The vagaries of the marketplace," as the U.S. Supreme Court has observed, "usually deny us sure knowledge of what a plaintiff's situation would have been in the absence of the defendant's violation."[12] Accordingly, U.S. courts have not established impossibly high or unduly complex damage standards in individual cases. A different rule should not apply in class actions if a procedural framework exists for proving damages on a basis that

closely, although imperfectly, approximates the loss that any individual class member may suffer. The Division provides no convincing justification for requiring any greater burden of proof on a class and its members.

The issues raised on the *Mastercard* appeal are governed entirely by UK law and involve the interpretation of provisions of a collective proceeding under the Competition Act and Competition Appeal Rules of 2015 that markedly differs from Rule 23 in numerous material respects. The UK statute has entirely different standards for certification, including different rules on: the showing required of the plaintiffs' experts at the certification stage of a proceeding; determining aggregate damages in the first instance; then addressing the distribution of aggregate damage awards to individually injured members; and finally, allocating any portion of a class recovery that may remain after all identifiable injured class members have been compensated.

One of the principal differences between the UK collective proceedings rules and Federal Rule 23 in the U.S. is that there is no requirement of preponderance of common questions in a UK collective proceeding. All that is required is that there be some common issues among the class members.[13] Despite this fundamental difference, the Division article repeatedly refers to U.S. cases that rely on the predominance of common questions requirement of Rule 23.[14] If anything seems clear, it is that Parliament has decided that predominance of common questions has no place in UK collective proceedings analyses.

III. Class Actions and Effective Civil Redress

Regardless of jurisdiction, all class action regimes seek to balance two at times seemingly contradictory interests—the interest in providing effective redress for parties injured by antitrust violations whose claims might be too small to proceed individually (the compensatory or restitutionary interest), and the interest in protecting the legitimate interests, due process and otherwise, of defendants whose conduct gave rise to these claims. Different jurisdictions will balance these competing interests differently. Some will conclude, as the UK Parliament has apparently decided, that a top-down approach of deciding aggregate damages first, and then later considering the distribution of damages on an individual basis, is preferable to the bottom-up approach now followed by some U.S. courts, requiring formulaic proof of individual loss with mathematical exactitude.

The UK appears to have decided for public policy reasons that, if given the choice between denying any recovery to claimants with potentially small value claims because of possible imprecision in the calculation of some claimants' individual damages, and allowing such claims to proceed beyond the certification stage, the better approach is to accept a modicum of imprecision and allow the collective action to proceed, rather than to refuse to certify the action and therefore rule out recovery altogether. Such an approach, after all, would, under appropriate rules, recover the overall damage to the market, provide compensation to actually injured

victims, and by providing for the distribution of unclaimed damages, deprive wrongdoers of their ill-gotten gains from the marketwide harm they have caused. This is particularly so in follow-on cases where there has been a guilty plea or fine or both, and liability is clear. This, of course, reinforces the deterrent effect of the sanction imposed by the government competition authority with respect to the same misconduct. From an apparent public policy point of view, there is much to commend the UK approach.

Class actions have existed in the United States for more than 100 years,[15] and have been recognized as serving a number of important societal functions, as well as contributing to the efficient operation of the judiciary. From a societal point of view, class actions permit the aggregation of claims which, often because of their comparatively small size, would not be brought as individual claims for economic reasons—the inability to find capable counsel to take on the case, or the inability to afford experts needed to provide expert testimony to support the claims. Thus, from the perspective of compensatory justice, class actions often provide the only mechanism by which large numbers of purchasers suffering similar damages from a common wrong can realize any sort of recovery. From the point of view of the courts, class actions provide a mechanism for bundling such claims of many in a single action, thus assuring that the courts are not overwhelmed by an avalanche of virtually identical claims, all of which might have to be needlessly adjudicated separately.

Class actions thus preserve scarce judicial resources by offering the prospect of efficient litigation, as well as the potentially early and dispositive end to litigation because of the binding effect of any judgment or settlement on all class members, including absent class members, after a class has been certified. Indeed, from the perspective of a defendant seeking "global peace" with its customers, the class action mechanism can be a more attractive alternative than the prospect of litigating individually with all who are able to bring suits separately.

This is particularly sensible in the case of a follow-on action such as *Mastercard*, where guilt has already been established in an action by an antitrust enforcement authority, and the defendant should not be able to fully relitigate the legality of its conduct. In such a case, the issue of illegality is established not by plaintiffs' counsel in a private suit, but by independent enforcement authority prosecutors who have no economic interest in the outcome of their investigation. In most investigations that result in guilty pleas, certainly in the United States, the enforcement agencies may lack the investigative resources to ascertain or quantify the amount of overcharge or the degree of consumer harm resulting from the violation found. They typically recognize that defendants should be required to make restitution, and that the preferred restitutionary mechanism is a class action brought under Rule 23. Indeed, under the antitrust laws of the majority of U.S. states, the concept of restitution applies to both direct and indirect purchasers, generally limited only by the pragmatic considerations identified by the U.S. Supreme Court in the *Associated General Contractors* case.[16] Indeed, in EU competition decisions, consumers are

advised to consider seeking restitution in matters where enforcement agencies have found violations.

IV. UK Collective Proceedings

Opt-out collective proceedings in the UK under the Competition Act of 1998 (as amended by the Consumer Rights Act of 2015) proceed on an opt-out basis for UK residents, but non-UK-domiciled class members may opt-in to the proceedings. Such claims are heard before the Competition Appeal Tribunal (the "CAT"), a specialist tribunal composed of judges and so-called Ordinary Members who are expert in economics, law, business, accountancy and other related fields.

In collective proceedings in the UK, as previously noted, the equivalent of class certification takes place early by way of an application for a collective proceeding order ("CPO"), at which point the CAT may grant a CPO only if it would be just and reasonable for the applicant to be authorized as the class representative and the claims which the applicant seeks to combine are eligible for inclusion in collective proceedings.[17] The eligibility requirement is satisfied if the CAT finds that the individual claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.[18] In assessing suitability, the CAT can take into account all matters it thinks fit, including whether the claims are suitable for an aggregate award of damages.[19]

The question as to the factors relevant to an assessment of suitability for an aggregate award were the subject matter of the Tribunal's refusal to certify the *Mastercard* case in 2017 and the Court of Appeal's subsequent remand of the case back to the CAT for a second hearing.

To date only two certification hearings have taken place before the CAT and both were refused. Further applications for CPOs have been made but none have yet been heard as the Tribunal chose to pause all certification hearings pending the Supreme Court's ruling in the *Mastercard* Case.

V. The *Mastercard* Case

The *Mastercard* case is an opt-out collective proceeding brought before the CAT in 2016 seeking approximately £14 billion (roughly $18 billion) on behalf of a class of 46 million UK consumers. It is a follow-on claim based on a 2007 decision of the European Commission finding that Mastercard's multilateral interchange fees ("MIFs") applicable to cross-border payment card transactions violated Article 101 of the Treaty for the Functioning of the European Union by restricting competition between acquiring banks and raising the price of card acceptance charged to retailers. Mastercard appealed the EU Commission decision to the General Court and ultimately to the European Court of Justice, and was unsuccessful in both appeals.

At the time that the collective action was commenced, Mastercard had also been sued in the UK courts in individual actions by some of its largest retail merchants using the reasoning in the Commission Decision to claim for UK interchange fee damages. Mastercard notably lost the first trial resulting in a £68.6 million judgment to Sainsbury's, the UK supermarket chain. This was upheld in the Court of Appeal, and the case is now on appeal to the UK Supreme Court.

The collective proceeding brought against Mastercard is thus a follow-on action, where Mastercard's liability for market-wide price fixing had been established by way of an infringement decision, and could not be relitigated again. The proposed class representative argues that the merchants passed on Mastercard's overcharge to their customers in the form of higher retail prices.

In July 2017, the CAT refused to grant a CPO to Walter Merricks, the proposed class representative and former financial ombudsman with a long career of public service,[20] for two principal reasons: first, the CAT found that at the hearing Mr. Merricks had not pointed to sufficient data to facilitate the use of the methodology proposed by his experts to determine how the overcharges may have been passed on to consumers;[21] and, second, the CAT ruled that Mr. Merricks had not put forward any plausible means of calculating the losses sustained by class members on an individual basis so as to allow for the distribution of an aggregate award of damages.[22]

However, the Court of Appeal overturned the CAT's ruling and remanded the case back to the CAT for a second certification hearing. The Court of Appeal held, *inter alia*, that the CAT had applied too strict a test at the CPO stage, and that the class representative only had to demonstrate that the claims have a "real prospect of success."[23] In essence, the Court of Appeal held that the CAT had erroneously required too much of the proposed class representative at the certification stage.[24]

With regard to the calculation and distribution of an aggregate award of damages, the Court of Appeal held that there was no requirement under Section 47C(2) of the UK Competition Act

> to approach the assessment of an aggregate award through the medium of a calculation of individual loss and the appellant's experts have not attempted to do so. In that they have the support of the Canadian authorities which in cases like *Microsoft* have approved a top-down method of calculation on the basis that the level of pass-on to the class as a whole will be a common issue for all individual claimants.[25]

Insofar as the distribution of an aggregate award is concerned, the Court of Appeal saw no reason to depart from the approach employed for the purposes of calculating the award. In the Court's view, a loss-based method of distribution is not mandated by the rules. The Court also held that distribution is not a matter for certification but rather determination following trial.[26]

Mastercard's appeal of the Court of Appeal's ruling was heard by the Supreme Court in May of this year, and the Supreme Court's ruling will set the standard as to the test to be applied by the CAT at the certification stage in the *Mastercard* case and in the further collective cases which will proceed to certification hearings. If the *Mastercard* case is remanded to the CAT, then it may be certified and permitted to continue to trial. Alternatively, the CAT could refuse to certify the action for a second time, or may certify only part of the proposed class. If the claim is permitted to continue to trial, it can be expected that factual discovery will be taken from Mastercard and third parties, including retailers, in order to develop data relevant to damages.

Courts should be cognizant of the difficulties that claimants in competition cases face in attempting to determine what a price would have been in a hypothetical world "but for" a competition infringement. As the European Commission noted in its damages guidance document to national courts: "Quantification of harm in competition cases has always, by its very nature, been characterized by considerable limits to the degree of certainty and precision that can be expected. Sometimes only approximate estimates are possible."[27]

If a CPO is granted, Mastercard will then have had a full and fair opportunity to present evidence of its own, cross-examine plaintiffs' experts, and dispute the aggregate amount claimed on behalf of the class. But once questions of overcharge and pass-on are determined, and the value of an aggregate award of damages determined by the CAT, it seems both reasonable and appropriate for the CAT at that point to determine to whom and in what amounts damages should be allocated and distributed to individual class members.[28]

VI. Conclusion

In providing its views of U.S. class action law, the Division's commentary exalts damage analysis above the importance of recovery for misconduct, and allows economic opinions to control class certification determinations that are fundamentally legal in nature. The Division's approach fails to acknowledge any of the interests served by meaningful collective redress in competition cases.

Price fixing involves serious harm to the market. It is not directed at any specific victim, but rather to the price setting function of the market as a whole. While the unlawful conduct may cause different magnitudes of injury throughout the chain of distribution, those differences do not alter the fact of the aggregate impact on the market. Indeed, the 2014 European Commission's Damages Directive

provides that courts should adopt a rebuttable presumption of injurious impact on the market following a Commission determination of unlawful price fixing.[29]

The *Mastercard* case presents the UK Supreme Court with the opportunity, early in the life of the UK's young collective proceedings regime, to ensure that the test for proposed class actions is

set at an appropriate level. That level ought to be one which takes into account the complexities of calculating loss in competition law claims and the unequal position of class representative and defendant from an evidentiary point of view. It ought also be one that does not prove unduly burdensome for would-be representatives such that valid claims fail, rights to compensation are not vindicated, and the proceeds of anticompetitive conduct remain with the wrongdoer.

It is certainly within the province of the UK courts to choose an approach that fulfills the purpose of the enabling act—ensuring that there is an effective means of consumer access to compensation, collectively and individually, for violations of the UK competition laws.

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[2] *See* M. Delrahim, *Merricks v. Mastercard: "Passing On" the U.S. Experience,* Competition Policy Int'l, May 2020 (the "Division article"). *See generally Merricks v. Mastercard Incorporated and others,* [2019] EWCA Civ 674 (the "Judgment").

[3] Division article, p. 3.

[4] See *Gibson v. Pride Mobility Products Limited* [2017] CAT 9, dated 31 March 2017, at Paras 102-04.

[5] Division article, pp. 10, 12.

[6] As introduced by the Consumer Rights Act of 2015.

[7] Division article, p. 2.

[8] For a discussion of the potentially applicable statutes, *see* U.S. Department of Justice Antitrust Division Manual (5th ed. 2012) ("Division Manual"), pp. 88-89. Restitution is an express condition of amnesty under the Division's corporate leniency program. Model Corporate Conditional Leniency Letter (Sept. 12, 2016), para. 2(g), available at https://www.justice.gov/atr/file/891286/download.

[9] Division Manual, p. IV-89.

[10] Antitrust Modernization Commission, *Report and Recommendations* 243-77 (Apr. 2, 2007).

[11] Minnesota *Min. & Mfg. Co. v. New Jersey Wood Finishing Co*., 381 U.S.311, 318 (1965); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws).

[12] *J. Truett Payne Co. v. Chrysler Motors Corp*., 451 U.S. 557, 562 (1981).

[13] The Competition Appeal Tribunal Guide specifies at 6.37: "Where only certain issues in the claims constitute common issues, there is no requirement that those must predominate over the remaining individual issues in order for it to be suitable for the part of the claims covering the common issues to be brought in collective proceedings."

[14] Division article, pp. 6-7, 9, 12.

[15] *See* Calabresi & Schwartz, *The Costs of Class Actions: Allocation and Collective Redress in the U.S.. Experience,* Eur J Law Econ (2011) 32(2): 169-183. Rule 23 goes back to the original Federal Rules in 1938, and the modern Rule was adopted in 1966.

[16] *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519 (1983).

[17] Section 47B(5) of the Competition Act 1998.

[18] Section 47B(6) of the Competition Act 1998.

[19] Rule 79(2)(f) of the Competition Appeal Tribunal Rules 2015.

[20] *Walter Hugh Merricks v. Mastercard Inc. and others* [2017] CAT 16, dated 21 July 2017.

[21] *Id. at Paras. 75-78.*

[22] *Id.* at Paras. 87-89.

[23] *Merricks v. Mastercard Inc. and others* [2019] EWCA Civ 674, at Para. 44.

[24] *Id.*

[25] *Merricks v. Mastercard Inc. and others* [2019] EWCA Civ 674, at Para.46.

[26] *Id.* at Para. 62.

[27] European Commission, Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU 2013/C 167/07, at Para. 9.

[28] *See Tysons Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036 (2016), in which the U.S. Supreme Court adopted that approach to Rule 23: first determining aggregate damages, then eliminating uninjured class members, and only then compensating those class members who have shown actual damages.

[29] Directive 2014/104 of 26 Nov. 2014, at Para. 47.