At A Glance
# Antitrust Class Actions in the EU and UK

## Overview

Antitrust class actions are initiated by groups of consumers or qualified entities. They typically follow on from infringement decisions by competition authorities, though standalone actions have also been observed. As various countries in the European Union and the UK pass class action legislation, the first antitrust class actions are landing in court.

A recent judgment by the UK's Supreme Court in *Merricks v Mastercard* clarified the framework for bringing antitrust class actions in that country. In that dispute, the UK's Competition Appeals Tribunal (CAT) set a high standard for the claimants, arguing that Walter Hugh Merricks' proposed damage quantification methodology was unsuitable not only for the allocation of damages across class members but also for the determination of damages in the aggregate. The decision was later repealed by the Court of Appeal and, in December 2020, the Supreme Court sided with the Court of Appeal, concluding that damages did not need to be calculated on an individual basis and that limited data availability should not stand in the way of class certification.

This decision has paved the way for more actions to seek class certification in the UK and has the potential to embolden class actions in the European Union as well, where a Directive on representative actions has been recently approved. Actions have been emerging in member states ranging from Italy and the Netherlands to France and Spain, and may cover not only more traditional antitrust ground but also issues including privacy and data breach. Although national legal frameworks are still emerging and vary considerably from country to country, economic analysis is likely to play a crucial role in many of them. Indeed, as the experience of *Merricks v Mastercard* and of antitrust class actions in Canada and the US suggest, economic analysis is often required in both the substantive and the certification phases of antitrust class action proceedings.

## Economic Analysis in Antitrust Class Actions

While the specific legal test may vary across jurisdictions, class actions for compensation generally raise the following distinct but related economic questions:

- **Commonality**: Uniformity of the infringement's impact across class members.

- **Damage**: Existence and magnitude of the damage at the aggregate or individual level.

A key requirement of class actions is that the collected claims raise "common issues", meaning that (almost) all proposed class members were impacted by the infringement and that the resulting harm can be quantified for all members using the same data and methodology. Whether commonality is satisfied depends on the interplay of (i) the characteristics of the underlying competition case, including the theory of harm; (ii) the composition of the proposed class; and (iii) the available data and empirical methodology. Once commonality is established, damages can be calculated as the difference between economic outcomes in the presence and in the

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absence of the antitrust infringement. In a cartel case, for example, the relevant economic outcome would be the price paid by the claimants, and the difference between the actual and the counterfactual price is referred to as the overcharge.

International experience shows that different types of economic analysis can be deployed to address commonality and damage, and some examples of such analysis are described below. NERA experts have vast experience in the implementation of these and other types of economic analysis that are relevant in antitrust class actions.

### Testing for Price Correlation and Cointegration

One way to test for commonality is to determine whether prices paid by class members follow a similar pattern over time. This can be done by applying statistical techniques known as correlation or cointegration analysis.

### Counterfactual Analysis

Regression analysis is frequently used in antitrust economics to estimate counterfactual prices and, as a result, the overcharge. For example, a regression analysis of prices can identify the impact of a cartel by comparing prices in the cartel period with prices in another period, accounting for other price determinants.

### Sub-regression Analysis

The same type of regression analysis described above can also be used to answer questions of commonality. If all members of the class were commonly impacted by a cartel, the researcher would expect to find similar results irrespective of whether the regression is estimated on a sub-group of the proposed class or another. Sub-regression analysis is a regression analysis that splits the class into different sub-groups, re-estimates the regression specification for each sub-group, and checks for differences in the estimated results.

### Faulty-Prediction Analysis

When econometric models are used to establish commonality, the validity of such models could be tested by assessing their propensity to make faulty predictions. A prediction would be faulty if, for example, it found an overcharge in places where, according to the proposed theory of harm, there should be none—for example when the price for certain customers was set in a contract that pre-dated the onset of a cartel.

### Demonstrating Class Member-Specific Pricing

Another way to test for commonality is to assess whether prices paid by different class members depend on class member-specific characteristics such as a member's geographic location or bargaining power. If this is the case, class members may be heterogeneously affected by a cartel, making it less likely to establish commonality. While such analysis can be purely based on qualitative characteristics, for example by comparing prices paid by different consumers on the basis of their location, it is also possible to use regression analysis to econometrically test for the importance of class member-specific characteristics on prices.

## NERA's Experience and Expertise

NERA has been involved in many of the most high-profile class actions globally. Leveraging NERA's experience in class actions in the US and Canada, as well as its in-depth expertise in industries ranging from energy and finance to life sciences and transport, NERA's competition experts in the European Union and the UK are best placed to accompany clients involved in class action litigation.

NERA has one of the top antitrust and competition practices in the world, with over 130 dedicated competition experts within a wider team of regulatory, finance, and sector specialists. NERA's experts work on some of the highest-profile global deals. As the oldest microeconomics consultancy in the world, NERA is celebrating its 60th anniversary in 2021.

## About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. With its main office in New York City, NERA serves clients from major cities across North America, Europe, and Asia Pacific.

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