

## **Schemes to benefit from UK's burgeoning collective action boost**

Historically, there has been no equivalent to US style class actions in the UK. This means that the only recourse available to those affected by anti-competitive behaviour, such as cartels, is often to go it alone in court.

This can be a powerful disincentive against pursuing claims for compensation, because the recoverable losses may not be enough to merit the time and cost of pursuing individual litigation. Customers and clients might also be reluctant to sue a counterparty that has been involved in anti-competitive conduct if they need to continue a commercial relationship.

In 2015, the UK introduced a collective action regime designed to overcome these practical difficulties. It allows a person to bring collective proceedings as a class representative on behalf of classes of those affected by market misconduct.

The claims can be brought on an opt-out basis, which means that those who fall within the class are automatically included in the claim, unless they choose to opt out. Class members are not required to play an active role and, if the claim is successful, they are entitled to a share of any damages paid out.

Another major advantage of collective actions is that they can be run on a cost and risk-free basis for class members. The costs of the claim are borne by the class representative — usually backed by a litigation funder.

While the UK's collective action regime is relatively new, it brings it in line with long-established regimes in other jurisdictions such as Canada, Australia and the US.

### **Supreme Court's judgment in *Merricks v Mastercard***

The UK's collective action regime has been slow to take off, with no claims passing the certification stage to date. However, this looks set to change following a judgment by the Supreme Court in December 2020.

The case, *Merricks v Mastercard*, is a £14bn claim against Mastercard, alleging that it caused harm to 46m UK consumers by imposing an unlawful interchange fee as part of its payment card schemes between 1992 and 2007.

After certification was initially denied on grounds that it failed to meet the legal standard for collective proceedings, the case was appealed, eventually reaching the Supreme Court.

In its judgment, the Supreme Court overturned an earlier ruling and confirmed that the threshold for certification is lower than had been initially applied.

In doing so, it gave a resounding endorsement to the collective action regime. Its judgment will set the standard for future collective actions and will help to embed the regime.

### **What does this mean for pension funds?**

Pension funds should welcome this development, many of which may have been affected by breaches of the law in financial markets and could therefore benefit from future collective actions where they are included within a class for which damages are sought.

The regime is therefore an opportunity for pension funds to recover compensation without needing to stand alone or dedicate significant time and resource towards pursuing individual claims.

One such potential claim — filed by the authors of this article — relates to anti-competitive conduct in the foreign exchange market.

In *Phillip Evans v Barclays Bank plc & Ors*, Evans has applied to pursue collective proceedings against six major banks involved in spot trading cartels on behalf of other participants in the foreign exchange market. That action will be considered for certification in July 2021.

### **What action should trustees take?**

There is no obligation on pension funds to participate in collective actions.

Nevertheless, trustees should monitor the progress of any actions where they may fall within the proposed classes and take note of any steps that class members are required or recommended to take.

This way they do not miss out on an opportunity to recover compensation — collective actions in the UK typically provide extensive information to class members via dedicated websites. It would also be prudent to preserve any transaction records that might be relevant to the claims.

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