

## **What does the Mastercard decision mean for the UK's collective action regime and why should finance directors care?**

In December, the Supreme Court delivered its long-awaited decision on *Merricks v Mastercard*, with it representing an important milestone in the regulation of businesses in the UK, according to Phillip Evans and David Lawne of Hausfeld.

### **What is the collective action regime?**

In 2015, the UK introduced a collective action regime to address practical problems in the regulatory and civil litigation landscape for anti-competitive conduct. While regulatory authorities have long had the power to fine businesses for misconduct, the prospect of fines has not always been enough to deter wrongdoing and, importantly, fines do not compensate the victims.

Under EU and UK law, those affected by anti-competitive conduct have been entitled to recover compensation for any losses suffered for several decades. But whilst harm to markets can be very significant, the losses may be spread across very large classes of those affected. Pursuing individual claims can be impractical because the recoverable losses are often not sufficient to warrant the time and cost of pursuing litigation.

The UK's collective action regime allows a person to pursue collective proceedings as 'class representative' on behalf of classes of those affected by market misconduct. Such claims may seek aggregate damages, thereby overcoming some of the practical difficulties of seeking compensation. This brings the UK in line with long established regimes in other jurisdictions such as Canada, Australia and the USA.

However, while the statutory footing was sound, delivering an effective regime proved more difficult – so much so that, in the five years since the regime was introduced, no collective actions have been certified.

### **Why is *Merricks* significant?**

Although the collective regime has not yet taken off, that looks set to change following the Supreme Court's judgment in *Merricks*. In a resounding endorsement for the regime, and an acknowledgment of what it was designed to do, the Supreme Court created a framework for collective actions that will help speed up and embed the regime. It confirmed that the threshold for certification of a claim – the first step to getting the litigation started – is lower than the hurdle which the Competition Appeal Tribunal (the specialist court in which such claims are heard) had initially applied.

This is good news for potential class members of other proposed collective actions which had been waiting for the Supreme Court's verdict in *Merricks* and can now proceed. One such claim relates to the foreign exchange market.

In *Phillip Evans v Barclays Bank plc & Ors* (filed by the authors of this article), Mr Evans has applied to pursue collective proceedings against six major banks in respect of their participation in foreign exchange spot trading cartels via online chatrooms. That action will be considered for certification in July 2021.

## **What does this mean for finance directors?**

For finance directors, the Supreme Court's decision is a mixed blessing. On the one hand, finance directors may need to be aware of their businesses' potential exposure to large scale damages actions for breaches of competition law now that the collective action regime is under way.

However, while the Supreme Court's decision has helped to remove a number of practical barriers to seeking effective compensation, businesses ought not to be concerned that this will lead to an increase in unmeritorious claims.

Defendant businesses can still apply to strike out claims or seek summary judgment as they can in civil claims. And collective actions still need, of course, to be provable at trial.

On the other hand, businesses are often victims of market misconduct and may therefore stand to benefit from collective actions where they are included within a class for which damages are sought. The regime is therefore an opportunity for businesses to recover compensation without needing to dedicate significant time and resource towards pursuing individual claims.

While businesses may not need to take an active role in such proceedings, finance directors should nevertheless be aware of these collective claims and monitor their progress so that their businesses do not miss out on an opportunity to recover compensation. They should also ensure they preserve any transaction records that might be relevant to the claims.

Either way, financial directors ought to take note of the potential changes that the collective action regime brings to the litigation landscape. It will serve as an important deterrent to wrongdoers and promote fairer and more efficient markets.

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