Antitrust Impact in Class/Collective Actions


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Introduction

In regimes that allow it, litigation alleging a violation of competition law can be pursued as a collective or class action. Typically, an early stage in such litigation is determining whether action will be permitted to be brought as a class action on behalf of a specified class of claimants. For example, to proceed in the U.S. and Canada, plaintiffs must seek a motion for class certification. In the U.K., claimants must seek a collective proceedings order. Though these three regimes differ in how they consider the question of class certification or collective proceeding, one focal area of inquiry is the commonality of antitrust injury or harm among putative class members. This is often referred to as "common impact". A framing of this in the U.S. context is found in *In re Linerboard Antitrust Litigation*, where the decision states that plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class".[1] The language from *Linerboard* can further be found in important recent class certification decisions in both Canada and the U.K.[2]

Economic analysis is generally central to assessing the common impact question. This chapter offers an overview of how this analysis appears to be perceived in the class action regimes in the U.S., Canada, and the U.K. There are key differences, and similarities, in these regimes, which have important implications for what economic analyses may be seen as dispositive.

The common impact question is made complex because putative classes are often defined to encompass class members who are differentially situated. For example, in a price-fixing case, the individual class members (perhaps end consumers) may purchase different, heterogeneous products at different times, from different retailers in different locations, and through different channels. Thus, it is not a given that any particular alleged anticompetitive conduct affected each class member in a common way. Economists draw on competition economics and evidence on the determinants of firms' prices to evaluate whether any common-to-the-class analysis, or methodology, can establish whether the alleged conduct caused harm to class members.

Antitrust Impact Across Class Certification Regimes

2.1 U.S.

In the U.S., a central question in class certification is whether all, or virtually all, putative class members were impacted by the conduct at issue.[3] This interpretation of the common impact question asks whether common evidence, or a common methodology, can be utilised to establish antitrust harm flowing from the alleged conduct, for (virtually) each and every putative class member.[4] A closely related question is whether the putative class contains uninjured class members. Uninjured class members are by definition not harmed by any alleged conduct, thus their presence implies that common impact cannot be established.[5]

There is robust literature debating whether, and in what circumstances, various empirical economic modelling strategies suffice to meet this common impact burden.[6] This debate follows the U.S. trend of increasingly "rigorous analysis" being applied by economists who are addressing class certification questions.[7] This analysis seeks to determine antitrust impact by rigorously analysing, for example, how transaction prices for individual class-member purchasers are determined, and then determining how that price-setting process would be affected by the alleged conduct. In the U.S., data are generally produced via discovery at the class certification phase. Defendants' transaction data are generally available, as well as data from third parties. Transactions made by putative class members can be analysed empirically. Thus, arguments made by economists and accepted by U.S. courts are heavily weighted towards empirical analysis.

It is instructive to consider, in this context, the applicability of one of the most common tools used by economists: the regression. A regression is a statistical tool that allows one to measure the relationship between variables.[8] A common use in this setting would be to attempt to measure any relationship between the alleged anticompetitive conduct and price. A key feature of regression analysis, when done properly, is that it also allows for the effect of one factor, such as the conduct, to be identified while controlling for other factors that might also influence price.[9] The challenge in using regression analysis to address the common impact question is that a regression measures an average effect. For example, a regression could be constructed to measure the average effect of the alleged conduct on all class members' transaction prices. However, establishing an average effect across all class members does not, by itself, necessarily establish that every class member is harmed.[10] The average could potentially mask that some class members were, in fact, uninjured.

The argument that establishing an average effect does not establish common impact has been successful in helping defeat class certification in the U.S.[11] In some cases, a regression model to establish common impact may prove to be unreliable through direct demonstration. In the *Rail Freight Fuel Surcharge* case in the U.S., it was shown empirically that the regression model by the plaintiffs' economics expert showed "false positives", i.e. the regression model found that individuals suffered damage when they did not.[12] Other evidence had established that certain class members were uninjured. The fact that the model found them to be injured demonstrated the infirmity of the model.[13]

Further economic analysis of the conduct, and the process of price determination, may establish whether circumstances are such that any measured average effect would in fact impact each class member. For example, if each class member were similarly situated, and the alleged conduct directly applied to how prices were determined for each, then an inference that the average effect was felt by all may be appropriate.

However, if class members are differently situated then establishing common impact on all or virtually all class members may require further analysis into the likely competitive effect of the alleged conduct on price determination.[14] One approach often pursued by economics experts retained by plaintiffs is to analyse whether prices paid by putative class members, though diverse, are all part of a "price structure".[15] The argument is that such a structure implies that all prices move together. If, for example, the nature of the alleged conduct were an agreement to directly fix only certain product prices amongst a diverse set of products at issue, then a price structure in the industry would imply that if one price was shown to be affected by the alleged conduct, then all were. This would imply that the determination of impact is common, because once impact is established for one it is established for all. For example, in *In re: High Tech Employees Antitrust Litigation*, the plaintiffs alleged that seven high-tech companies conspired to restrict employee mobility and suppress employee wages.[16] The court accepted the plaintiffs' economics expert's empirical analyses showing that "there is a wage structure in place under which an impact on some employees would have resulted in an impact to all or nearly all employees".[17]

In contrast, when differently situated class members require individualised analyses or individualised theories of competitive harm to establish impact, then even with a regression analysis perhaps showing an average effect across all class members, or across groups of class members, the establishment of impact becomes not-common. Thus, under the "all, or virtually all" standard, this lack of common impact may defeat class certification.

2.2 Canada

The importance of, and appropriate standards for, assessing common or class-wide antitrust impact for class certification has been acknowledged and considered by the Canadian courts in a number of decisions. The role of economic evidence and methodologies has been central. For example, in the *Microsoft* case, the British Columbia Supreme Court noted that "[t]he most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis".[18] The court further noted that "[i]t is not necessary at the certification stage that the methodology establish the actual loss to the class", but the expert "methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class".[19]

However, an "all, or virtually all" standard like that applied in the U.S. appears to have been rejected by the Supreme Court of Canada in the recent *Godfrey* decision. The *Godfrey* case involved a putative class of direct, indirect, and umbrella purchasers. The court noted that "it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary … to identify those class members who suffered no loss so as to distinguish them from those who did".[20] Instead, "a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level"[21] or reached "one or more claimants at the purchaser level".[22] For indirect purchasers, "this would involve demonstrating that the direct purchasers passed on the overcharge".[23] Thus, this appears to be a "one or more" standard rather than an "all, or virtually all" standard.

In Canada, data are not generally produced via discovery at the class certification phase. Thus, there is more limited ability for economists to perform empirical analysis, such as regression analysis using transactions data. Economic analysis considered by courts is therefore more theoretical, or based on market analysis and public data. For example, in *Godfrey*, in order to meet plaintiffs' burden, plaintiffs' economics expert relied upon an analysis that economic factors were present that made the industry at issue "vulnerable to collusive conduct", and that "the presence of [these] factors, and the laws of supply and demand", implied that "'any conspiratorial overcharge would have been absorbed in part and passed-through in part at each level of the distribution chain, thus impacting all members of the proposed class'."[24]

A regression analysis was proposed (though not performed) by plaintiffs' expert in *Godfrey* as a methodology for calculating aggregate damages, rather than for establishing common impact.[25] A measurement of an average price effect (overcharge) from the alleged conduct, together with a measurement of the overall volume of commerce, might provide a sufficient calculation of aggregate damages to the overall class. The determination of such an aggregate damages amount must not be confused with a determination of common impact under the U.S. "all, or virtually all" standard. The *Godfrey* decision acknowledges that while an aggregate damages methodology may be sufficient for the purposes of class certification, "to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have".[26]

The continued importance of the economic analysis of impact to class certification, even in light of the apparent "one or more" standard of *Godfrey*, is made clear in the recent *Mancinelli* decision.[27] The proposed class definition in *Mancinelli,* where plaintiffs alleged collusive manipulation of foreign exchange markets, included "(a) Direct Purchaser from Defendant Class Members; (b) Direct Purchaser from non-Defendant Class Members; and (c) Investor Class Members".[28] Class members were further differentiated within groups, such as class members who transacted via electronic platforms, and those who transacted by "voice".[29] In assessing the common impact of the alleged infringement, the judge found that "given the episodic nature of the price-fixing perpetrated by the Defendant banks, … Direct Purchaser from non-Defendant banks are … remote to the wrongdoing" and "[i]nvestor Class Members' claims are even more remote and conceptually different than the claims of the Direct Purchaser Class Members".[30] The judge also excluded "from the Direct Purchaser Class, persons who dealt with the Defendant banks on electronic platforms. There are no allegations of misconduct in the Second Amended Statement of Claim that refer to trading in FX Instruments on electronic platforms".[31] Ultimately, the judge found the members of these groups to be differentially situated, and the economics of the market showed that there was no common methodology that would establish impact class-wide.[32]

The *Mancinelli* decision demonstrates that even under the *Godfrey* "one or more" standard, there still needs to be a common methodology that can establish impact on all categories, or groups, of class member. Economic analysis of the market, price determination, and the competitive effects of the alleged conduct are critical to establishing, or not, whether a common methodology for measuring harm is possible. The *Mancinelli* decision highlights that in order to obtain class certification there needs

to be a common theory of competitive harm that can establish impact on class members who are situated differently. A class that includes class members who are too "remote", with different theories of competitive harm required for differently situated groups of class members, will not likely be amenable to certification.

2.3 U.K.

In assessing common impact, the U.K. collective action regime is currently considering issues that fall squarely within those addressed in the U.S. and Canadian jurisdictions. The assessment of common impact for obtaining a collective proceedings order ("CPO") has generated debate in the recent *Merricks* case, which is the biggest collective action matter in the U.K. to date.[33]

In the U.K., the Consumer Rights Act of 2015 introduced an opt-out collective action regime under English law.[34] Similar to the U.S. and Canada, as a first step in a collective action, the claimants seek to obtain a CPO from the Competition Appeal Tribunal ("CAT"), which is analogous to class certification.[35] Like Canada, there is no meaningful discovery prior to the CPO application in the U.K. As a result, expert economists do not have the benefit of rich datasets to assess issues such as common impact at the CPO stage.

In its CPO decision in *Merricks*, the CAT found that the estimated direct overcharge was a common issue, but that the impact of the estimated overcharge depended on how much of the overcharge was passed through to consumer class members, and on individual class member's expenditure.[36] The CAT characterised the problem by noting that the claimants' economics experts' proposed aggregate damages methodology (to estimate aggregate damages by multiplying the volume of commerce by estimated direct overcharge and the weighted average pass-through) results in a "fundamental problem" regarding impact.[37] This is because it is not based on "loss suffered by each member (or most members) of the class", but instead "circumvents the problem of an issue which is not common by seeking to go directly to determination of a total sum for all claims. Such an approach can only be permissible, in [the CAT's] view, if there is then a reasonable and practicable means of getting back to the calculation of individual compensation".[38] The CAT appears to acknowledge that a methodology that calculates aggregate damages using averages does not demonstrate impact for "each member (or most members) of the class".[39] The statement "each member (or most members)" is not unlike the U.S.' "all, or virtually all". In this sense, the standard for a CPO, as interpreted by the CAT in *Merricks*, appears more stringent than the Canadian *Godfrey* decision and the "one or more" standard.

Ultimately, the CAT did not grant the CPO, in part because the aggregate damages methodology offered by the claimants' economics experts was incapable of demonstrating loss to class members as a common issue, and did not go far enough in demonstrating "a reasonable and practicable means of getting back to the calculation of individual compensation".[40] According to the CAT, the *Merricks* decision, which was made before the *Godfrey* decision, was consistent with the requirements at the class certification stage laid out by the Canadian courts in *Microsoft*, i.e. the "methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class".[41]

The CAT's decision in *Merricks* was appealed and set aside by the Court of Appeals. The Court of Appeals found the CAT's focus on individual loss to be contrary to the rules governing the making of a CPO. The Court of Appeals characterised the issue in the following terms: "there is some controversy as to whether [it] is sufficient to make the global loss suffered by consumers a common issue absent being able to show that each member of the class was in some way adversely affected in their own purchases during the infringement period."[42] The Court of Appeals found the standard to be that "the CAT is not required under Rule 79(2)(f) for certification purposes to consider more than whether the claims are suitable for an aggregate award of damages which, by definition, does not include the assessment of individual loss". The Court of Appeals appears to apply an "in aggregate" standard for common impact at the CPO stage by finding that an acceptable aggregate damages methodology satisfies any need to establish "common impact". Put differently, the determination of common impact, as interpreted in the U.S. and in Canada to be about impact on individual class members, is unnecessary for a CPO, except to the extent that establishing impact on individual class members is relevant to establishing whether a proposed aggregate damages methodology is sound, and has a "a real prospect of success".[43]

The *Merricks* case has been appealed to the U.K. Supreme Court. The Supreme Court decision will presumably add some clarity regarding the U.K.'s common impact standard as applied to making a CPO. This will further add clarity to the relevant economic arguments that will be necessary for assessing whether any alleged anticompetitive conduct has had a common, class-wide effect.

Conclusion

This chapter speaks to the different, and evolving, standards regarding common impact in class certification or collective proceedings in the U.S., Canada and the U.K. What it means to demonstrate common impact appears to vary by jurisdiction. However, regardless of the particular standard, careful economic analysis is critical to determining whether putative class members were injured by any alleged anticompetitive conduct and whether this injury can be established or measured using a common methodology. Jurisdictions also differ in their discovery rules; thus, varying how much data may be available to economists at class certification also varies. Dispositive economic arguments and analysis may therefore be data-intensive, where possible, as in the U.S.; when not, as in Canada and the U.K., the arguments and analysis will be anchored by competition economics relying more on conceptual analyses of the alleged conduct, public information, and market indicia "grounded in the facts of the particular case in question".[44]

Note

The opinions expressed are those of the authors, who are responsible for the content, and do not necessarily reflect the views of Cornerstone Research.

Endnotes

1. In re Linerboard Antitrust Litig., 305 F.3d 145 (3rd Cir. 2002), at p. 155.
2. Pioneer Corp. v. Godfrey, [2019] SCC 42 (Can.) ("Godfrey"), ¶ 106; Walter Merricks CBE v. Mastercard Inc. & Others, [2019] EWCA Civ 674 (Eng.) ("Merricks CoA"), ¶ 43.
3. "All parties concede that to show impact, the model must serve to establish that 'all or virtually all' of the class members paid an overcharge on at least one transaction." In re Air Cargo Shipping Services Antitrust Litigation, No. 06-MD-1175, 2014 WL 788299 (E.D.N.Y. Oct. 15, 2014), at *p. 90.
4. The 2019 Court of Appeals decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation* clarified the "all, or virtually all" threshold. The economic model proposed by the plaintiff expert found that "12.7 percent—suffered 'only negative overcharges' and thus no injury from any conspiracy". According to the Court of Appeals, such a model "does not prove classwide injury" because it "leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent". In re Rail Freight Fuel Surcharge Antitrust Litigation, MDL No. 1869, 725 F.3d 244 (D.C. Cir. 2013), at p. 8.
5. A "class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant". Kohen v. Pacific Inv. Mgmt. Co. & PIMCO Funds, 571 F.3d 672 (7th Cir., 2009).
6. *See, e.g.*, P. Johnson, "The Economics of Common Impact in Antitrust Class Certification", *Antitrust Law Journal* 77, no. 2 (2011), pp. 533–567; M. Burtis and D. Neher, "Correlation and Regression Analysis in Antitrust Class Certification", *Antitrust Law Journal* 77, no. 2 (2011), pp. 495–532.
7. This increase in rigour has been the subject of a great deal of commentary and analysis by different attorneys and economists. For example, Johnson and Leonard (J. Johnson and G. Leonard, "Rigorous Analysis of Class Certification Comes of Age", *Antitrust Law Journal* 77, no. 2 (2011), pp. 569–586) write that "[a] series of influential decisions have rejected a longstanding presumption of injury in antitrust price-fixing cases and courts now regularly conduct a 'rigorous' analysis of evidence at the class certification stage". Further discussion is found in a 2016 symposium in *Antitrust* magazine (an overview is provided in G. Wrobel, "Perspectives on the Golden Anniversary of Modern Rule 23: Key Issues for Class Certification in Antitrust Cases", *Antitrust*, 30, no. 2 (Summer 2016)).
8. D. Rubinfeld, "Reference Guide on Multiple Regression", in *Reference Manual on Scientific Evidence: Third Edition*, ed. National Research Council (Washington, DC: The National Academies Press), 2011, pp. 305–357, at p. 305.
9. D. Rubinfeld, "Reference Guide on Multiple Regression", in *Reference Manual on Scientific Evidence: Third Edition*, ed. National Research Council (Washington, DC: The National Academies Press), 2011, pp. 305–357, at p. 313.
10. See, for example, M. Burtis and D. Neher, "Correlation and Regression Analysis in Antitrust Class Certification", *Antitrust Law Journal* 77, no. 2 (2011), pp. 498–499.
11. For example, in *In re Plastics Additives*, the plaintiff expert proposed "market-wide regressions … to determine whether the alleged conspiracy raised prices, and his results therefore were [average] single, industry-wide estimates of increased price". On the basis of the regression model and other evidence, the court concluded that the plaintiffs did not provide "proof of impact common to the class member". In re Plastics Additives, No. 03-2038, at 12.
12. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the U.S. Court of Appeals vacated a district court decision to certify the class in part because of the plaintiffs' "damages model's propensity toward false positives". In re Rail Freight Fuel Surcharge Antitrust Litig., MDL No. 1869, 725 F.3d 244 (D.C. Cir. 2013), at p. 254.
13. In re Rail Freight Fuel Surcharge Antitrust Litigation, MDL No. 1869, 725 F.3d 244 (D.C. Cir. 2013), at p. 4.
14. A differently situated class member may potentially be accounted for by using sub-classes, with a regression specification accounting for differences across sub-classes. However, even within this framework, the regression model will yield average estimates within a sub-class.
15. M. Burtis and D. Neher, "Correlation and Regression Analysis in Antitrust Class Certification", *Antitrust Law Journal* 77, no. 2 (2011), pp. 495–532, at p. 503.
16. Order Granting Plaintiffs' Supplemental Motion for Class Certification, In re High Tech Employees Antitrust Litig., 985 F. Supp. 2d 1167 (N.D. Cal., 2013).
17. Order Granting Plaintiffs' Supplemental Motion for Class Certification, In re High Tech Emps. Antitrust Litig., 985 F. Supp. 2d 1167 (N.D. Cal., 2013), at p. 1219.
18. Pro Sys Consultants Ltd., et al., v. Microsoft Corp. and Microsoft Canada Co./Microsoft Canada CIE, [2013] 3 SCR 477 (Can.) ("Microsoft"), ¶ 116.
19. Microsoft, ¶¶ 115, 118.
20. Godfrey, ¶ 102.
21. Godfrey, ¶ 102.
22. Godfrey.
23. Godfrey.
24. Godfrey, ¶ 96. Note that the plaintiffs' economics expert appeared to opine that his proposed methodology would meet an "all, or virtually all" standard, even though the court ruled that a weaker standard was applicable.
25. Godfrey, ¶ 97.
26. Godfrey, ¶ 118.
27. Mancinelli v. Royal Bank of Canada, 2020 ONSC 1646 (Can) ("Mancinelli").
28. Mancinelli, ¶ 197.
29. Mancinelli, ¶ 211. "Voice" refers to foreign exchange transactions involving direct contact between bank staff and their customers.
30. Mancinelli, ¶¶ 202, 203, 206.
31. Mancinelli, ¶ 211.
32. Mancinelli, ¶¶ 192–211.
33. Walter Hugh Merricks CBE v. Mastercard Inc. & Others [2017] CAT 16 (Eng.) ("Merricks CAT"); "England and Wales", *The Class Actions Law Review,* ed. 4 (2020).
34. Consumer Rights Act 2015, Schedule 8, Part 1.
35. Consumer Rights Act 2015, Schedule 8, Part 1.
36. Merricks CAT, ¶¶ 60–66.
37. Merricks CAT, ¶ 87.
38. Merricks CAT, ¶¶ 79, 87.
39. Merricks CAT, ¶ 87.
40. Merricks CAT, ¶ 79.
41. Merricks CAT, ¶ 58.
42. Merricks CoA, ¶ 45.
43. Merricks CoA, ¶ 54.
44. Microsoft, ¶ 118.

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