COMPETITION APPEAL TRIBUNAL BLOCKS CLASS ACTION AGAINST MASTERCARD

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By: John D. Magnin

In one of the first decisions of its kind, the Competition Appeal Tribunal ("CAT") has blocked a group of claimants from pursuing a £14 billion "collective action" against MasterCard, in a significant blow to the feasibility of similar class action lawsuits in the U.K. In *Walter Hugh Merricks CBE v MasterCard Incorporated and Others [2017] CAT* 16, the CAT refused to grant a Collective Proceedings Order ("CPO") on the grounds that the assessment of damages would be too imprecise and would not result in the claimants being restored to the position in which they would have been, but for MasterCard's alleged breaches of U.K. and EU competition law.

The claimants were seeking to recover damages resulting from MasterCard's setting of the multilateral interchange fee ("MIF"), which applied between banks in the UK. The issue was the degree to which (if at all) merchants "passed through" increases in the MIF to the retail prices that they charged to end consumers. The claimants' experts filed a preliminary report on the level of damages, but indicated that more investigation and research would be required, including into evidence filed in previous damages claims against MasterCard; third party studies; and supply and demand conditions. MasterCard's representatives contended that there were no practicable means of arriving at a realistic estimate of the total overcharge arising from such pass-through, and ultimately borne by consumers.

In several jurisdictions, "indirect purchaser claims," i.e. cases brought by downstream purchasers who did not buy from the party accused of competition law violation, meet significant obstacles. In the United States, for example, they cannot be pursued under Federal antitrust law, although many states have legislated specifically to enable such claims under state law.

In the UK, the new section 47A to the Competition Act 1998, inserted by the Consumer Rights Act 2015, entitles a person to make a claim in the CAT for loss or damage in respect of an infringement of Article 101 of the Treaty on the Functioning of the European Union. The new section 47B extends that right to "collective proceedings," subject to certain conditions, namely: (i) the CAT must authorise the person bringing the proceedings to act as the class representative; and (ii) the CAT must certify the claims as eligible for inclusion in such proceedings.

On this occasion, the CAT found that, although it was not conducting a mini-trial, it was required to scrutinise the application for a CPO with particular care, to ensure that only appropriate collective actions, which can be "burdensome and expensive" for defendants, were allowed to proceed.

The CAT adopted the approach of the Canadian Supreme court in a 2013 class action case, in requiring the claimants to adopt a "sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages", and a "reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution."

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Not least because of the variety of different markets and periods involved, the CAT found that the Claimants would have significant difficulty in arriving at a weighted average for the pass-through with any meaningful accuracy, and expressed particular concern about the method of distribution of the damages, should the claims succeed. Various methods of distribution to eligible members of the class had been considered, including with reference to income brackets, or levels of disposable income, as a proxy for relative levels of consumer spend. The CAT concluded that there was insufficient data for the proposed methodology to be applied on a sufficiently sound basis, and, therefore, this application for over 46 million claims to be pursued by collective proceedings could not result in damages being distributed in accordance with the governing principles of competition law.

Separately and obiter, the CAT considered whether it was able to authorise the person bringing the proceedings, Mr Merricks, a solicitor, to act as the class representative. It determined that it was able to do so, subject to an amendment to the claimants' litigation funding agreement. It rejected MasterCard's contention that the £10 million limit in the funding agreement for adverse costs was inadequate.

The CAT based its decision on deficiencies with the formulation of the CPO application, and did not find that the claimants had no cause of action. The claimants are considering appealing the decision. For those reasons, the CAT has not closed the door to similar proceedings in the future that may meet its CPO criteria. However, the case illustrates some of the strategic and evidential difficulties potentially faced by wide classes of consumer claimants in competition litigation.

KEY CONTACTS



JOHN D. MAGNIN
PARTNER

LONDON
+44.20.7360.8168
JOHN.MAGNIN@KLGATES.COM

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