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An Examination of Global Class Action Regimes After Godfrey

On September 20, 2019, the Supreme Court of Canada ("SCC") issued a landmark antitrust class action decision in *Pioneer Corp. v Godfrey* which clarified several procedural questions relating to class actions. Notably, the *Godfrey* decision addressed the following three important points:

- Loss as a common issue. For a class action to succeed, there must be a showing that the class members were injured, but the level or even fact of injury can vary. *Godfrey* considered the burden to make this showing.
- Application of the limitation period. The statute of limitations puts a time limit on when claims can be brought, but there is often a dispute about when the clock started ticking.
- Umbrella purchaser claims. Umbrella damages are claims

for purchases from non-cartelists whose prices may have been inflated because of the impact of the cartel on the overall market.

This article examines the difference and commonality in approach currently taken by the courts in Canada, the U.S. and the UK on each of these issues.

More generally, the *Godfrey* decision is important not just for Canada but potentially for the development of private antitrust damages actions globally. In the EU, private damages regimes developed somewhat slowly,[1] but the volume of cases has been growing rapidly over the past few years and this trend is expected to continue. In particular, while collective action regimes at EU Member State level, if they exist, are mostly still in their infancy, there are now a few notable exceptions. The UK has the most mature collective action regime in the EU: forms of representative, group, and multi-party litigation procedures have long been integral to the legal system, and a collective action regime for damages claims for breaches of antitrust law was introduced in 2015. We believe that other non-EU countries may well follow the lead of the EU in developing their private antitrust damages systems, as they have done in developing their antitrust regimes.

In turn, the EU Member States (and, in particular, the UK) have looked to Canada for precedent on how to develop their private damages systems. Indeed, in *Dorothy Gibson v Pride Mobility Products Ltd,* the UK Competition Appeal Tribunal ("CAT") considered that "*appropriate guidance*" regarding the certification of claims could be derived from the position in Canada and, more importantly, that the SCC's approach in *Pro-Sys Consultants Ltd v Microsoft Corp.* to expert evidence on the overcharge should similarly apply under the UK regime when determining whether to certify a class action. In doing so, the CAT expressly dismissed the relevance of U.S. authorities.[2]. Similarly, in *Merricks v Mastercard Incorporated* the UK Court of Appeal evaluated the Canadian jurisprudence on certification and accepted that, albeit not binding on the CAT or the Court of Appeal itself, this jurisprudence perhaps provided the "*most useful and proximate model for the UK regime"* and the CAT was right to treat it as informing its approach.[3].Given the UK courts' degree of deference to Canadian jurisprudence, the *Godfrey* precedent is of interest to European companies also.

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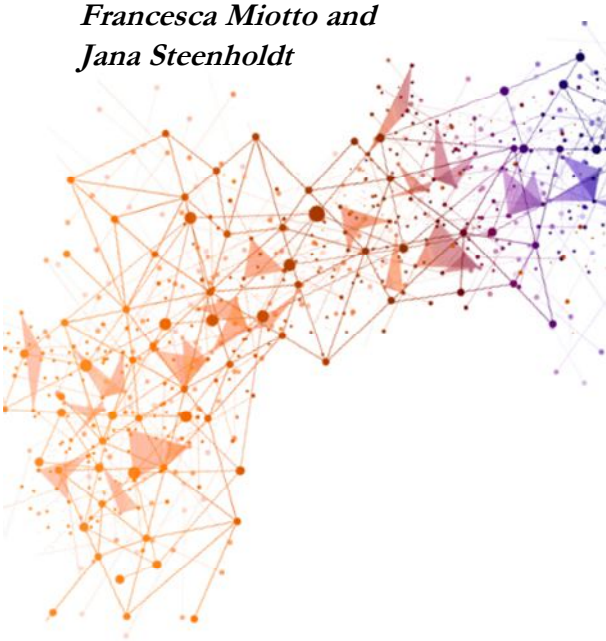

1 Private enforcement of European Union (EU) competition law has been very significantly boosted by the Damages Directive (Directive 2014/104/EU of November 26, 2014), which has now been implemented in all EU Member States. However, due in part to concerns about the potential for U.S.-style class actions, a consensus was not reached on this subject, and provision for collective redress was not included within the Damages Directive. Whilst the European Commission has issued a non-binding Recommendation on collective redress mechanisms for breaches of citizens' rights granted under EU law, the availability of collective redress mechanisms in the EU is still limited.

2 *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, paras. 102 105

3 *Merricks v Mastercard Incorporated & Anor* [2019] EWCA Civ 674, paras. 38 55

	Canada	United States	United Kingdom
What is required to prove commonality of injury at certification?	*For certification, loss-related questions need only be sufficiently credible or plausible but actual suffered loss must be proved at trial to recover damages.* The SCC stated that "a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level."[4] This means that the methodology need not prove every class member suffered a loss or be able to distinguish those who did. This is a low bar.	*A rigorous analysis showing that all class members have suffered the same injury with a common contention is required.*[5] The hot issue in this area in the U.S. is how many uninjured class members are too many for class certification. No bright line rule exists for how many uninjured class members are too many, but these recent cases show a growing trend in some circuits to rigorously analyze the *de minimis* standard.[6]	*On this issue, the UK position reflects the Canadian approach.* Commonality of injury was a central issue in *Merricks v. Mastercard*, in which the Court of Appeal recently confirmed that pass-on to consumers will generally satisfy the test of commonality of issue necessary for certification.[7] In particular, the Court of Appeal noted that the CAT should only have evaluated whether the expert methodology was capable of assessing the level of pass-on to the class and whether there was, or was likely to be, data available to operate the methodology. In doing so, the Court of Appeal endorsed the view that the proposed expert methodology must be simply a suitable and effective means of calculating loss to the class as a whole.[8] This is in line with the CAT's view that the Canadian approach to expert evidence[9] should be applied similarly in the UK.

4 *Pioneer Corp. v. Godfrey, 2019 SCC 42.*

5 Wal-Mart Stores, Inc. v Dukes, 131 S. Ct. 2541, 2549 (2011). See also Behrend v. Comcast Corp., 264 F.R.D. 150, 165-81 (E.D. Pa. 2010) (applying the predominance criteria and pointing to the disjunction between plaintiff's theory of injury and basis for claiming damages).

6 See In re Asacol Antitrust Litig.,907 F.3d 42 (1st Cir. 2018) (rejecting the notion that uninjured class members could be removed in the post-judgment claims administrative process, instead holding that certifying a class with uninjured persons would deny defendants' rights to challenge whether a plaintiff has suffered an antitrust injury. The court did not go as far as to require every class member to demonstrate standing, but rather only the presence of a de minimis number (here 10% was not considered de minimis); In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013) (holding that the class included too many uninjured members (12.7%) and meant that plaintiffs had failed to satisfy Rule 23's predominance requirement).

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8 The Court of Appeal thus overturned the CAT's refusal to issue a collective proceedings order, because, the latter held, it was not possible to determine the exact degree of the interchange fee passed on to consumers across all retailers. In particular, the amounts passed on to individual consumers would vary to a great extent and, hence, this would not be a common issue to all members of the class. The Court of Appeal decision has been appealed to the UK Supreme Court, and the appeal is listed to be heard in May 2020.

9 Where it is sufficient that the calculation of global loss is methodologically sound and not – using the language in *Pro-Sys Consultants Ltd v Microsoft Corp.* – "purely theoretical or hypothetical". The Court of Appeal thus endorsed the view also expressed in Canadian jurisprudence, most notably *Pro-Sys Consultants Ltd v Microsoft Corp.*

	Canada	United States	United Kingdom
Are limitation periods subject to discovery?	*Statutory limitation periods do not start to run until the violation is discovered.* Section 36 of the Competition Act imposes a two-year limitation period for private actions that runs from the day on which the conduct was engaged in or the day on which criminal proceedings were disposed of, whichever is later. However, in *Godfrey*, the SCC held that the limitation period "begins to run only when the material facts on which [the] claim is based were discovered… or ought to have been discovered". This means, at least in theory, that a conspiracy could be actionable many years – even decades – after it is terminated if it remains undiscovered.	*There is inconsistent application within the U.S. but class periods are typically expanded during the discovery period without much scrutiny, generally by arguing fraudulent concealment and continuing violation.* An antitrust action must be commenced "within four years after the cause of action accrued" (15 U.S.C. § 15b). However, there are some exceptions to this rule, such as the continuing violation doctrine. The entire limitation period is expanded by continuing violations whereby the plaintiff suffered injury from a new and independent overt act within the statutory period. Each new purchase of a price-fixed product is deemed to extend the limitations period. However, if a party withdraws from an agreement and it is not discovered, the statute of limitations will run. Note that some states may adopt a more liberal standard.	*As in Canada, the limitation period is subject to discovery (see below). In the UK, it is also suspended during the competition authority's investigation (until one year after the decision of the competition authority).* The limitation period is six years from the later of (a) the date on which the infringement of competition law ceases, or (b) the first date on which the claimant knew, or could reasonably be expected to have known, of (i) the infringer's behavior, (ii) the fact that this behavior constitutes an infringement of competition law, (iii) that he/she has suffered loss or damage arising from that infringement, and (iv) the identity of the infringer. However, for collective action proceedings concerning claims that arose before October 1, 2015, and that follow on from a decision of the European Commission or the Office of Fair Trading, the relevant limitation period is two years from the date on which the relevant decision becomes final.
Are umbrella damages available?	*Umbrella purchaser claims may be difficult to prove, but are allowed to proceed to trial.* In *Godfrey*, the SCC held that it was not "plain and obvious" that umbrella purchaser claims could not succeed. The burden of proof at trial remains unchanged and the SCC acknowledged that umbrella purchaser claims may be complex or difficult to prove.	*In general, umbrella damages are not allowed in the U.S. But there is some precedent allowing them.* Typically, the umbrella damages rule precludes plaintiffs from seeking damages for transactions with parties who were not included in the alleged antitrust conspiracy. However, an influential appellate court (Third Circuit, covering mid-Atlantic states) recently permitted plaintiffs to pursue antitrust damages for products supplied by non-conspiring parties.[10]	*English courts generally allow for the collection of umbrella damages.* Umbrella damages may be pleaded in collective proceedings. The plaintiff must demonstrate causation and quantify losses, but this can be accomplished with expert testimony.

[10] Requiring the expert methodology only to be "sufficiently credible or plausible" to establish some basis in fact for the commonality requirement.

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John is the partner in charge of Allen & Overy's Washington, D.C. Antitrust practice and a member of the firm's Investigations and Litigation practice. John focuses his practice on civil antitrust litigation and investigations. He provides strategic guidance to clients on all issues that relate to antitrust, and represents companies in court and before the agencies in their most important matters.

John is an alumnus of the FTC which, along with the experience developed in private practice, gives him insight into the workings of the FTC and the U.S. Department of Justice's (DOJ) Antitrust Division. He represents clients in all aspects of government investigations and private antitrust litigation, and has guided clients through complex merger and civil investigations involving a wide range of complex issues. John also has handled high-profile trials and litigation in both private practice and during his tenure with the FTC, and represents clients in high stakes class action litigation. John has particular experience in defending civil cartel cases.

Both Chambers USA and Legal 500 have recognized John as a leading antitrust lawyer for many years. Chambers reports that John provides "strategic mind and his practical, pragmatic advice" and is "fantastic at navigating tricky antitrust matters,". John is a leader in the American Bar Association Antitrust Law Section, and hosts the Section's weekly podcast on antitrust, consumer protection and privacy law and serves on two non-profit boards supporting children with special needs. He joined Allen & Overy in 2014.

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Francesca is Counsel in the antitrust team in Brussels and is a member of the firm's life sciences group. Francesca has 13 years' experience in providing strategic counsel on all aspects of EU competition law in a diverse range of sectors. She has particular experience in advising on complex multi-jurisdictional merger reviews and on some of the most complex investigations by the European Commission (EC) in recent years, including on abuse of dominance issues and cartel settlement procedures. In recent years, Francesca has developed a depth of experience in advising on private enforcement across the EU and beyond.

Francesca has also represented clients in appeal proceedings before the European courts in several high-profile cases.

Recent EU cases include advising major global banks in confidential and parallel antitrust investigations by various competition authorities, including the EC, and acting for Scania in the EC's trucks cartel investigation and related private damages claims, as well as in appeal proceedings before the General Court of the EU.

Francesca regularly publishes and speaks on competition law, private enforcement and life sciences topics. She is qualified in the UK and Belgium and has spent time working in both the London and Brussels antitrust teams, as well as in our Paris office. Francesca is noted is Who's Who Legal as a Future Leader, winning praise from peers as an '*impressive follow-on damages expert' who provides 'strong insights into the Commission's thinking and likely reactions'* (WWL, 2019).

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Jana is an associate in the Investigations and Litigation practice group in the firm's Washington, D.C. office. Her practice includes supporting clients, namely large global financial services firms, in the conduct of multijurisdictional internal investigations, advocating for them in contentious regulatory proceedings, and advising them on regulatory and compliance matters. She also has experience on congressional inquiry matters. Prior to joining Allen & Overy, Jana worked for the U.S. Senate Committee on Banking, Housing, and Urban Affairs.