

# In a class of their own?

*Reflections on UK competition collective  
proceedings*

Vincent Smith

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# What is a class action?

## *The taxonomy issue*

- a claim
- a bundle of claims (joinder)
- a claim where non-claimants have a similar interest (test case)
- a claim by a group (eg unincorporated association)
- a representative claim on behalf of identified persons
- a representative claim which can be joined at any stage by persons meeting the description
- a representative action whose outcome binds all persons meeting the description unless they object

# No 'US-style' class actions here!.....

	USA (FRCP23)	UK (CRA sch 8)	Fr (loi Hamon)
Minimum number	'so numerous, joinder is impractical' – but one representative	two or more claims	'des consommateurs' more than one
Link between them	questions of law or fact common to class + common issues predominate	same, similar <u>or</u> <u>related</u> claims of fact or law	similaire ou identique
Representative	fairly and adequately protect interests of class	if just and reasonable – not necessarily a class member	authorised consumer bodies only
Certification?	<ul style="list-style-type: none"> <li>○ define class</li> <li>○ identify class claims/<u>defences</u></li> <li>○ appoint class counsel</li> </ul>	<ul style="list-style-type: none"> <li>○ define class</li> <li>○ authorise representative</li> <li>○ opt-in or opt-out</li> </ul>	None. When giving judgment on liability, court must define "class"
Making a claim	Approved notice on how to claim given to class members not opting out	Damages paid to representative or other fit person.....	Judge sets value of individual claims: consumers have 2-6 months to claim

# English exceptionalism?

- Collective proceedings only for breaches of EU and UK competition law
  - what about 'hybrid' claims – LIBOR?
  - what about class defences – eg 'Eurodefence' in mass copyright cases?
- Only in specialist Competition Appeal Tribunal
- Opt-out only applies to UK domiciliaries
  - compare scope of Dutch collective settlement: anyone within class in EU (*Converium*)
  - compatibility with CJEU case law?

# Class ADR

- UK settlement: no need for proceedings to be commenced
  - joint application by representative and settlor(s)
- What ADR methods could this apply to?
  - agreement reached through negotiation or mediation
  - contractual arbitration: is the award a 'settlement'?
- Settlements may only be endorsed "opt-out" if "just and reasonable" to do so
- How will CAT decide on "just and reasonable"
  - publicity to class members?
  - publicity to third parties (eg competitors)?
    - the anti-competitive settlement problem (cf: generic drug 'reverse payments')

# Class complexity

- A lot will depend on the CAT Rules
  - who gets what notice; and
  - who has standing to intervene/object
- Pass through issues will need careful handling
  - subclasses for indirect purchasers
  - what if not all classes in chain before the CAT at the same time?
  - timing: award of aggregated damages first – then mediation between the sub-classes?
- Role of representative/distribution trustee
  - tedious but vital part of process

..... uncertainty = expense: will these get funded?

**Torrent or trickle?**