

In a class of their own?

*Reflections on UK competition collective
proceedings*

Vincent Smith

Anti-trust enforcement symposium

28 June 2014

Pembroke College, Oxford

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"> ○ define class ○ identify class claims/<u>defences</u> ○ appoint class counsel 	<ul style="list-style-type: none"> ○ define class ○ authorise representative ○ opt-in or opt-out 	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?