In a class of their own?

Reflections on UK competition collective proceedings

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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 (e.g., 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!.....

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