Testing the Boundaries of Competition Law: The Expansion of the UK Collective Proceedings Regime

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ABSTRACT

The Consumer Rights Act 2015 has been in force for a decade, leading to numerous applications for collective proceedings orders in the Competition Appeal Tribunal (CAT) following the UK Supreme Court's landmark ruling in Merricks v. Mastercard. Consequently, the CAT has become one of the UK's busiest courts. Despite its infancy, the regime has quickly become a popular avenue for class actions, with claims spanning various industries and theories of harm. Yet, certain core aspects of the regime have surfaced only recently or remain unresolved. This article reflects on the development of the regime and considers whether it strikes the right balance between compensating consumers and ensuring that unmeritorious claims are identified at an early stage.

Keywords: antitrust, certification, class actions, collective proceedings, Competition Appeal Tribunal, damages, group litigation, Merricks v. Mastercard, opt-out, UK

1.Introduction

As the UK's competition collective action regime completes its tenth year, the regime is starting to mature. It has now seen the first decision on the merits as well as multiple settlements, and more cases are reaching trial. At the same time, new claims continue to be filed covering broad theories of harm and spanning various industries. A number of these claims are based on novel theories of harm, which test the boundaries of traditional competition law. This article reflects on the development of the regime and considers whether it strikes the right balance between compensating consumers and ensuring that unmeritorious claims are identified at an early stage.

2.WHERE ARE WE?

The Consumer Rights Act 2015 has now been in force for ten years. A string of collective proceedings applications have been filed in the Competition Appeal Tribunal ('CAT') following the UK Supreme Court's seminal ruling in Merricks v. Mastercard, which set a 'low threshold' to certification. Not surprisingly, the CAT has quickly grown into one of the busiest courts in the UK. Two new claims have been filed so far in 2025 and eleven were filed in 2024, to add to the twenty-three pending cases. Overall, as of writing this article, approximately twelve claims await certification, and twenty have been certified to proceed to a trial on the merits.

Even as the regime completes its tenth year, it is striking that certain core aspects are yet to be resolved. Only last year was the first judgment on the merits handed down. More recent still is the CAT's first refusal to certify a claim for collective proceedings on the grounds of the suitability of the proposed class representative. Fresh procedural complexities continue to arise. As the former President of the CAT said in 2023:

As recent appellate decisions have shown, the collective proceedings regime in this country is still in its infancy, and fragile … For the CAT's part, we recognise that collective actions give rise to procedural challenges that are orders of magnitude harder than those which arise in 'ordinary' bilateral litigation.

Infancy notwithstanding, the collective proceedings regime has quickly become a popular avenue to bring class actions in the UK. Merricks was soon followed by a series of claims involving widely different forms of alleged illegal conduct. Justin Le Patourel v. BT, the second claim to receive certification, was a 'pure' excessive pricing case alleging that BT had charged prices above competitive levels. Boundary Fares, certified shortly thereafter, involved alleged conduct which, taken as a whole, gave rise to circumstances, which in effect compelled double payment of the price for transportation services. As the CAT noted, the alleged abuse was based on 'an objective outcome (lack of customer awareness)'. These early certifications have encouraged class representatives to pursue claims spanning various industries and case theories. Many claims are of a substantial value.

3.WHAT ARE THE KEY TRENDS?

The claims filed include follow-on actions based on well-known infringement decisions (e.g., the Trucks cartel and the Power Cables cartel). However, the vast majority (c. 80%) are standalone claims in which the class representative must prove an infringement of competition law before establishing causation and loss on behalf of the class. The preponderance of standalone claims reflects the growing creativity of class representatives. In recent years, class representatives have sought to argue that claims involving data privacy, consumer rights and even environmental law are rooted in an abuse of dominant position; therefore, they fall within the collective proceedings regime. Some examples of the more innovative claims include the alleged abuse of dominance and distortion of competition caused by unfair distribution of royalties to songwriters ; and the alleged misreporting of discharges of wastewater from sewerage networks by certain sewerage companies, enabling them to avoid financial penalties and charge water consumers higher prices.

Some of the theories of harm include excessive pricing or unfair terms that have no analogue in US antitrust laws. Absent exclusionary conduct, US antitrust cases generally conclude high prices should be resolved through market entry and competition. Potentially limiting claimants' appetite for excessive pricing claims, the CAT in Le Patourel set a relatively high bar for securing damages. Applying the two limbed United Brands test, the CAT found BT's charges for leased lines met the first limb (excessive price compared to costs), being more than a reasonable margin (set at 13.5% by the CAT), but failed on the second limb of 'unfairness'. The CAT took into account intangible factors and value adds, including customer satisfaction and BT's brand reputation, to rule that the excess was not unfair: BT's prices bore a reasonable relation to the economic value of the services. Introducing qualitative considerations of this kind raises the bar for claims by making excessive pricing a far more fact intensive inquiry.

There is also growing creativity to assemble claims with the broadest class base. This is understandable – a larger class size will increase the quantum of aggregate damages claimed. However, this trend gives rise to a complex cross over to consumer, environmental or privacy protection regulation. Proving loss accruing to the class may also raise evidential complexities as class representatives will be required to show flow through of a measurable quantum, potentially through a complex supply chain.

The majority of the claims are opt-out, rather than opt-in, where class members must affirmatively choose not to participate. This trend is likely to continue following the Court of Appeal's ruling in Evans reversing the majority decision of the CAT to limit that claim to opt-in proceedings. The Court of Appeal concluded that a claim's strength should not be treated as a sliding scale, with the weaker claims more appropriate for opt-in proceedings and vice versa. Therefore, there was no reason why the claims against the banks should not proceed on an opt-out basis and the CAT should not have declined to certify the proceedings on the basis that they were proposed on an opt-out basis rather than on an opt-in basis. The Court of Appeal's decision arguably widens the door for prospective claimants to bring opt-out actions, even where the affected parties are businesses.

On the procedural side, a notable trend observed under the former President of the CAT is its pro-active case management, an area where the CAT enjoys significant discretion. In many cases, the

CAT's approach to case management has been guided by the expert evidence adduced in the proceedings, and experts have played an important role through to trial. The importance of expert evidence to the claims is indicated by the fact that in Le Patourel, nearly half of the seven-week trial was devoted to considering expert evidence. The content of the evidence also touched on complex issues of behavioural economics and actuarial practises. It will be interesting to see how the CAT's approach to expert evidence evolves in 2025.

In contrast to the US, the UK competition regime permits claims for damages by both direct and indirect purchasers. This may lead to parallel or overlapping claims. If not managed together, these claims may result in conflicting judgments, such as one court finding that direct purchasers did not pass on overcharge to indirect purchasers, while another court concludes otherwise. Conflicting judgments could lead to claimants being compensated more or less than the damages they are entitled to. The Court of Appeal has tried to limit these inconsistencies by holding that such cases should be heard 'by the same tribunal [i.e., the CAT] and at the same time'. Accordingly, several High Court cases have recently been transferred to the CAT. While the potential for conflicting judgments has been reduced, the CAT's ever-increasing caseload has necessitated new case management tools to make proceedings practicable and efficient. It has also meant that the CAT is required to consider complex issues regarding whether the victim of a competition law infringement has passed on all or part of its loss to another party. An ostensibly simple rule on damage limitation is now of existential importance for some of the biggest cases before the CAT, and to future indirect claims (which depend on pass-on to have occurred).

4. HOW ARE CLAIMS STRETCHING THE BOUNDARIES OF COMPETITION LAW?

The UK collective proceedings regime is restricted to claims arising from a breach of competition law. Such breach may be an infringement of the Chapter I prohibition (anti-competitive agreements) or the Chapter II prohibition (abuse of dominant position). Claims in respect of other areas of law, such as consumer law or environmental claims, may not be pursued as collective proceedings absent an allegation of a breach of the Chapter I and Chapter II prohibitions. However, recent cases reflect a growing trend of claims being advanced often with links to competition law, which on the face of the claims appear rather tenuous. These cases no doubt seek to benefit from the opt-out regime. In doing so, they stretch the boundaries of commonly held conceptions of competition law.

The creativity of the claims against the sewerage companies and the Performing Rights Society is referred above. Another case worth mentioning is the standalone iPhone Throttling Claim. The class representative in that claim has alleged that Apple pushed on iPhone users' iOS updates, which contained a 'throttling' function. These updates purportedly caused significant reductions in the performance of iPhones. It is also alleged that Apple failed to communicate transparently about unexpected shutdowns and subsequent throttling. Apple's alleged lack of transparency is 'central' to the class representative's claim. In short, the class representative contends that Apple's initial failure to respond transparently and explain the battery issues to iPhone users when it became aware of those issues constitutes an abuse of its dominant position. According to the class representative, Apple continued charging prices that did not reflect the diminished value of the iPhones affected by throttling. These prices are said to be unfair as they did not reflect the true value of the handsets.

Another case involving a novel infringement allegation is the claim against Meta where the class representative has alleged a breach of Meta's dominant position 'in an unfamiliar and novel context, namely data or information abuse on or involving Facebook'. Central to the class representative's case is the contention that in exchange for Facebook's social network services, users provide their data. In other words, user data is the 'price' agreed between Facebook users and Meta. That premise underpins the two abuses alleged by the class representative: (1) Meta allegedly abused its dominant position by collecting user data pursuant to a 'take-itor-leave it' offer in relation to social network services on Facebook; and (2) the 'price' charged by Meta for providing such services was allegedly unfair.

Indeed, the CAT has explicitly recognized some of the consumer-like claims that are brought before it. For example, the CAT commented in Gormsen v. Meta that it must 'be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders'.

HOW DID WE GET HERE?

The current state of the UK collective proceedings regime is perhaps best understood by considering its position in the broader class/mass claims landscape in the UK. Even before the Consumer Rights Act 2015 came into force, group claims could be brought in England and Wales through group litigation orders ('GLOs') under Civil Procedure Rule ('CPR') 19.21, or representative actions under CPR 19.8. The former type of claims can be brought on an opt-in basis only. Unless a large class opts in (which has been rare), mass claims seeking a GLO may not be commercially viable. As regards representative actions under CPR 19.8, while such claims can be brought on an opt-out basis, their availability was restricted by the UK Supreme Court's decision in Lloyd v. Google. The Supreme Court held that opt-out representative actions may not proceed unless the plaintiff proves material damage and shows that each class member is seeking the same compensation. In these circumstances, collective proceedings under the Competition Act 1998 provide the most viable means to bring an opt-out class action. Not surprisingly, collective proceedings have gained momentum following the Supreme Court's landmark judgments in Merricks and Lloyd v. Google.

DOES THE UK REGIME STRIKE THE RIGHT BALANCE?

The introduction of the collective actions regime in the UK was designed to improve access to justice for citizens while, at the same time, ensuring that frivolous claims are identified at an early stage. While it may still be early to assess whether the UK collective proceedings regime strikes the right balance, an initial insight into how the regime is working was provided in early 2025 when the parties in Merricks entered settlement. The initial claim was for an estimated value of GBP fourteen billion, but the settlement is for GBP 200 million, part of which will be distributed to eligible consumers who come forward and part of which will go to the funder. This settlement amount would provide just over GBP two per class member if all members come forward to claim compensation. The amount would be awarded after ten years of litigation, involving much of the CAT's time as well as appeals to the Court of Appeal and the Supreme Court, and following an infringement decision, which was issued in December 2007.

The claim against Mastercard was a traditional 'follow-on' case, triggered by an infringement decision issued by the European Commission. It remains to be seen whether some of the more novel, standalone theories of harm will raise challenges in calculating the compensation due to the class. Some of the claims filed at the CAT are targeting relatively low returns; for example, Thames Water customers were estimated to receive approximately GBP thirteen each in the water companies claim (which the CAT has refused to certify on the basis of a statutory exclusion rather than for failing to qualify as a competition law action) and iPhone holders are said to be entitled to GBP thirty-two only in the action concerning the throttling mobile phone batteries. While these individual amounts may appear insignificant, class representatives are alleging high aggregate damages on behalf of large classes, potentially driven by litigation funders who are targeting high returns. There is therefore a risk that these claims, if successful on the merits, deliver substantial returns to funders but not to the claiming class members.

This is an aspect of the class action ecosystem that has been observed in jurisdictions with more established regimes such as the US For example, following a viral 2013 Facebook post showing a Subway 'Footlong' sandwich measured to just eleven inches, plaintiffs' lawyers sued the second largest food chain in the world under consumer protection laws. Plaintiffs were able to extract a settlement that included USD 525,500 for class counsel, while the ten class representatives were to receive just USD 500 each. Although the district court approved the settlement, Judge Sykes for the Seventh Circuit delivered a passionate rebuke on appeal, writing, 'a class action that seeks only worthless benefits for the class and yields only fees for class counsel is no better than a racket and should be dismissed out of hand'. Accordingly, the Seventh Circuit reversed the settlement, and plaintiffs' counsel subsequently abandoned their claim.

WHAT DO OTHER JURISDICTIONS SHOW US?

Class actions are growing in volume and complexity across the globe. Across Europe, national class action regimes have developed in response to the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers that was passed in 2020. It requires EU Member States to have in place at least one procedural mechanism for consumers to seek collective redress when they claim to have been harmed by a business through breaches of certain European consumer laws.

Some countries, such as the US, Canada and Australia, have well-established class action regimes with certain safeguards designed to limit the extent of unmeritorious private antitrust litigation. While these guardrails are far from perfect, they provide lessons about features that might curb the excesses of a collective proceedings regime.

One key procedural guardrail in the US is the opportunity to dispatch with litigation early on via a motion to dismiss. Federal Rule of Civil Procedure 12(b) allows defendants to move to dismiss an action on the grounds that the complaint does not state a claim for relief.

Another important limitation on private US antitrust litigation is the Illinois Brick bar on indirect purchaser actions. As articulated by the Supreme Court in 1977 in Illinois Brick Co. v. Illinois, federal antitrust actions for monetary damages may only be brought by those who purchased directly from the alleged antitrust violators, although indirect purchasers may still bring actions at state-level, as certain state legislatures have passed laws that repeal the Illinois Brick bar.

Another guardrail that exists in the US system is the threshold requirement that plaintiffs demonstrate antitrust standing, which requires both that the plaintiffs suffered an injury of the type that antitrust laws are intended to prevent ('antitrust injury'), and that the plaintiffs are appropriate parties to bring the lawsuit (or 'efficient enforcers'). The 'antitrust injury' requirement bars recovery if the plaintiffs' injury is not based on harm to competition arising from defendants' unlawful acts. For example, in the seminal case of Brunswick Corp. v. Pueblo Bowl-O-Mat, the Supreme Court held that a bowling-alley operator could not bring an antitrust claim against a bowling-equipment manufacturer for purchasing bowling alleys on the brink of bankruptcy. These purchases actually increased the amount of competition among bowling alleys, even if they damaged plaintiff's profits, and as such, the Court ruled that the antitrust laws would not allow such a claim. The doctrine of antitrust injury serves an important role in limiting lawsuits to those that vindicate the purposes of the antitrust laws.

The requirements that plaintiffs must satisfy to certify a class under Federal Rule of Civil Procedure twenty-three provide another key guardrail in the US class action system. After showing that they have satisfied all of the pleading requirements to state an antitrust claim, plaintiffs must succeed at class certification to proceed as a class action. Rule 23(a) requires plaintiffs moving for class certification to establish: (1) the class is sufficiently numerous ('numerosity'); (2) the presence of common questions of law or fact ('commonality'); (3) the named plaintiffs' claims are typical of those of the class ('typicality'); and (4) the named plaintiffs will adequately represent the class ('adequacy of representation'). Under Rule 23(b)(3), the most common vehicle for certification used in antitrust class actions, plaintiffs must also show that common questions of law or fact predominate over any individual issues ('predominance'), and that a class action is a superior method of adjudication ('superiority').

Under binding precedent from the Supreme Court, plaintiffs bear an affirmative burden of proof on each of the Rule 23 elements, which requires withstanding a 'rigorous analysis' of plaintiffs' proffered evidence. In Comcast Corp. v. Behrend, the Supreme Court further clarified the high bar facing antitrust class plaintiffs, which requires that plaintiffs seeking class certification must present a model of damages that maps their damages to each theory of liability in the litigation. Comcast involved a challenge to Comcast's business practises in the Philadelphia area, in which plaintiffs presented four different theories of how Comcast's behaviour increased prices, but did not isolate the damages from each theory in their damages expert report. The Supreme Court reversed class certification because 'a model purporting to serve as evidence of damages in [a] class action [based on a specific theory of injury] must measure only those damages attributable to that theory'. Under the ruling in Comcast, class plaintiffs in US antitrust litigation face a steep burden to present carefully tailored expert models in support of their theories of antitrust liability.

Class certification often offers defendants a last chance to dispatch with an antitrust class action before facing an expensive and risky trial, and defendants often reach settlement agreements if they do not prevail at the class certification stage.

In addition to these procedural guardrails, the substantive legal tests in the UK are, in many cases, more favourable to claimants. For example, a number of the collective claims brought at the CAT allege excessive pricing, a form of abuse of dominance which is not prohibited under the US Sherman Act. In other cases, the substantive test in the UK is easier to prove than the US equivalent. For example, resale price maintenance is a 'hardcore' restriction in the UK whereas the US courts are required to fully analyse and balance the pro- and anti-competitive effects of resale price conduct before concluding whether it is illegal (the so-called rule of reason approach), which is a higher bar.

8.WHAT'S NEXT?

The year 2025 will continue to be interesting for collective proceedings. Several certified cases will proceed to trial, and a number of recently filed certification applications will be heard. The CAT's certification decisions and substantive judgments will continue to shape the boundaries of acceptable theories of harm.

Another important issue in several cases will be that of causation, i.e., whether and how the alleged infringement resulted in loss to consumers. Addressing these issues may require substantial documentary and witness evidence as well as expert economic evidence.

At the same time, collective settlements and distributions have exposed tensions between class members, class representatives and litigation funders. The funder in Merricks has forcefully opposed the GBP 200 million settlement for being too low and has put forward alternative proposals for distribution. The Merricks settlement proceedings demonstrate that differing expectations between a funder and a class representative regarding the likely aggregate damages award can impact settlement negotiations and the CAT's collective settlement approval order, raising novel issues concerning distribution of settlement amounts and appropriate returns to litigation funders.

Given these developments, it is widely anticipated that the UK collective proceedings regime will continue to evolve rapidly and in intriguing ways.

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