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## Class actions – an English perspective

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- Considerations from an in-house perspective
  - Issues with collective redress
  - Bringing a claim in England – what's the attractiveness
  - The Competition Appeal Tribunal and the High Court
  - Which class actions have been brought in England
  - The use of economists in English courts
  - Can you be prepared for a class action
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- In-house counsels are more and more confronted with competition damages (plaintiffs or defendants)
  - Need to distinguish between redress for business and redress for consumers
    - Business less interested in compensation - injunction
    - Consumers want redress (but what about SMEs?)
  - Business view of class actions
    - Class actions can cost substantial sums, take time, lead to US style issues and uncertainties
    - Disruption and increased costs for customers
    - Multi-jurisdictional litigation can lead to inconsistency
    - Business often want finality (although some seek delay)
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- *Courage and Crehan* acknowledges right to compensation
  - but issues
    - Ignorance of the claim
    - Low amount of money involved
    - The length of time between purchasing the goods and joining a claim is very long and
      - Consumers may not even remember that they purchased the goods/ services
      - They may no longer have the goods or a receipt to show proof of purchase
    - Worries about liable for legal costs and that the case will go on for years
    - They do not know at the outset how much they will be able to recover
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# England becoming a claimants' forum of choice

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- Speed, use of English, case management
  - Competent judges
    - CAT and High Court – 19 judges all trained in competition law
  - Disclosure
    - Exchange of list of documents on which parties wish to rely
    - Document that adversely affect their own case
    - Documents that support another party's case
    - It includes confidential documents – confidentiality rings
    - CAT requests disclosure of the confidential version of the infringement decision
  - Only exception
    - Legally privileged documents
  - Costs : Loser pays
  - Duty to assist the Court
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- Defendant in EU member state should be sued in the courts of that member state
  
  - Two exceptions
    - Defendant domiciled in a Member State can be sued in the courts of the place where the damage occurred
    - Where jurisdiction of the English court has been established over one defendant, additional defendants domiciled in other member states can also be sued in England in the same action, provided that the claims are ‘so closely connected that it is expedient to hear and determine them together to avoid the risks of irreconcilable judgments resulting from separate proceedings’
  
  - The Italian torpedo
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- The Competition Appeal Tribunal
    - Specialised court but competent only for follow-on (by individuals and specified consumer groups on behalf of named individual with their consent)
  - High Court : stand-alone actions
  - Types of damages
    - Compensatory damages (yes)
    - Exemplary damages or profits earned (not at the moment, Devenish)
    - Passing on issue
  - Costs and interest
  - 8 competition infringements in High Court and 7 in CAT
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- Group Litigation Orders
- Representative actions (*but Emerald later*)
- Specified bodies on behalf of named consumers for follow on to the CAT



# Class Actions – CAT - JJB Sport & Which?

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- Which? Is the only consumer body which can bring class action (opt-in)
  - JJB sport (RPM) : fined in 2003, appeals and Which only in 2007
  - 20% of the legal department and significant costs
  - Intensive media campaign – including front of the Sun
  - Only 500 named individuals
  - Proof of purchase – “How I am supposed to remember what I bought 6 years before?”
  - Low value of payout £20 gave little incentive
  - Settlement in January 2008
  - “would we do it again? Never say never but its not looking likely” (Deborah Prince, head of legal)
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- Representative action = when more than one person has the same interest in a claim, the claim can be commenced by one or more as representatives of any person who share that interest
  - Two flower importers against BA (air freight services cartel) as representatives of all direct and indirect purchasers – opt out
  - Failed for two reasons:
    - the class should be clearly identifiable at the beginning of the action. As here the class was defined by reference to the alleged anticompetitive conduct, its scope could not be determined unless and until each claimant actually proved their allegation at trials.
    - The loss would depend on where in the chain of distribution they came and who had absorbed or passed on the alleged illegal overcharge. This gave rise to a conflict of interest between the claims of different members who could not be said to have the same interest.
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- **For direct purchasers in cartels**
    - Calculation of damages and but-for approach for cartels
    - Hypothetical competitive price
    - But if passed on
  
  - **For indirect purchasers**
    - He paid the price charged by supplier which may or may not include the whole or part of that overcharge
  
  - **Even more complicated for abuses**
    - reduction of sales and margins (causing loss of profit)
    - impairment of ability to compete (as a consequence of reduced investments, an inferior reputation with customers potentially causing further loss of profit)
    - There might be no 'before' period and the effects may persist long after the infringement period
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- Parties are entitled to appoint an expert
  - Widely used in English courts
  - Economic experts used in competition cases
  - Joint statement – areas of agreement and disagreement
  
  - Evidence to determine both valuation of the claim and causation
  - Calculation of the overcharge (including the pass on upstream and downstream)
  - Evidence of economic expert admitted but little weight was placed on it as there was direct evidence of fact indicating what rationally the claimant could have done absent the abuse
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- Greater awareness
  - In-house counsels ready to deal with it from both sides
  - Difficult to prepare as dependent on country where the action is brought and on which court is competent
  - Highly complex and a strain on relations with customers
  - Sometimes better to settle (PPI)
  - Due to the complexity, experts needed
    - Competition lawyers, litigation experts, economist, Press Office
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- Overview of the English system
- The role of the economists
- The in-house perspective