
Economic evidence in competition law collective actions

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The economics of collective actions

Harm from a competition law infringement may be spread across multiple small claimants (typically consumers)



Class definition and representative



Class certification



Litigation (liability and quantum)



Damages award and distribution

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Perceived benefits of opt-out collective actions

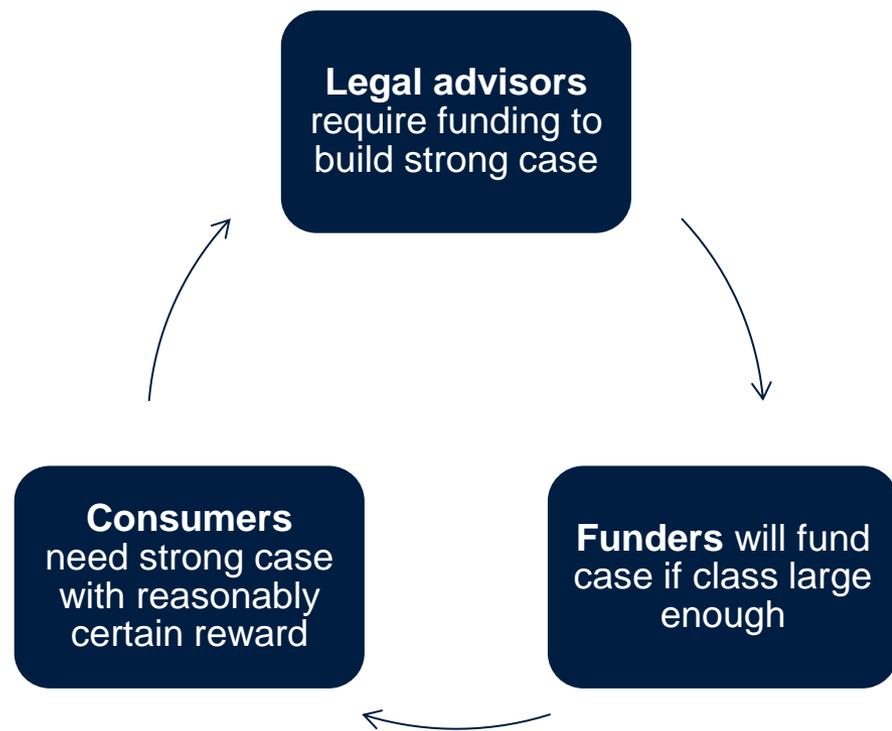
Economies of scale

- common issues of fact and law can be determined together
- opt-out actions removes substantial cost and time involved in 'book building'

Consumer redress

- **fairness:** compensation to consumers who would otherwise have redress
- **deterrence:** to infringements of competition law (particularly consumer facing)

Opt-out solves coordination problem

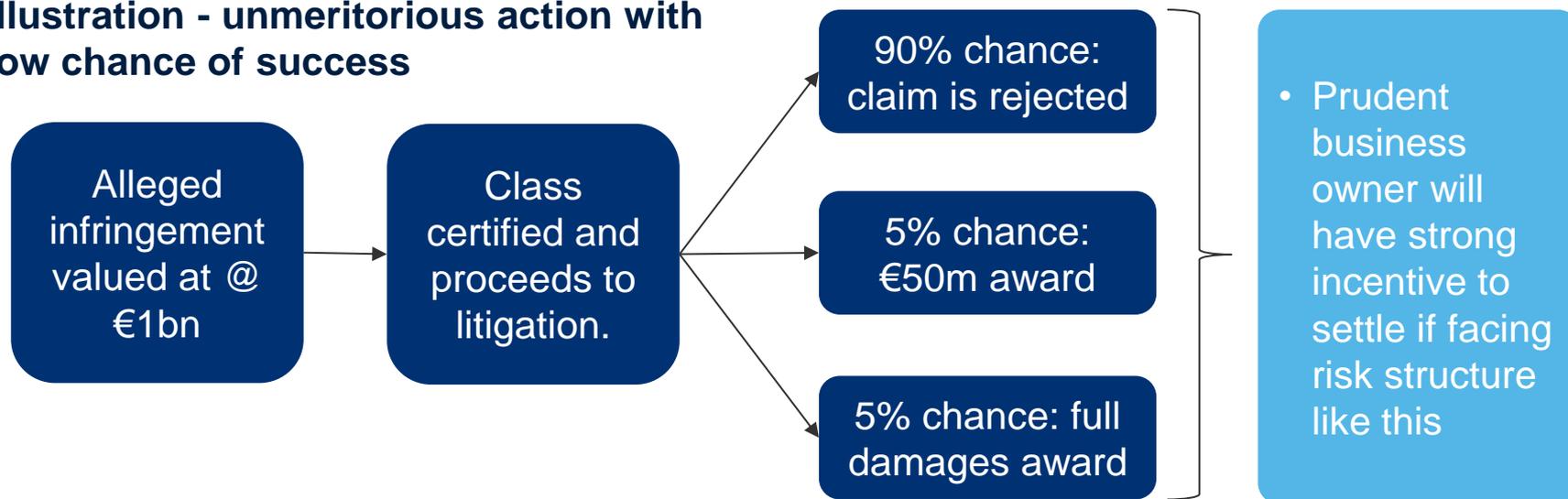


Example: Which? vs JJB Sports Football Shirts (2009) in UK¹
UFC Que Choisir 'Cartelmobile' (2006) in France²

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Perceived costs of opt-out collective actions: suggestion that unmeritorious claims get settled

Illustration - unmeritorious action with low chance of success



Why a particular issue for consumer claims?

- **Scale:** can be order of magnitude greater than to an individual business
- **Uncertainty:** may be limited data/factual information at consumer level
- **‘Disciplining mechanisms’:** of B2B claims do not apply to C2B claims in the same way

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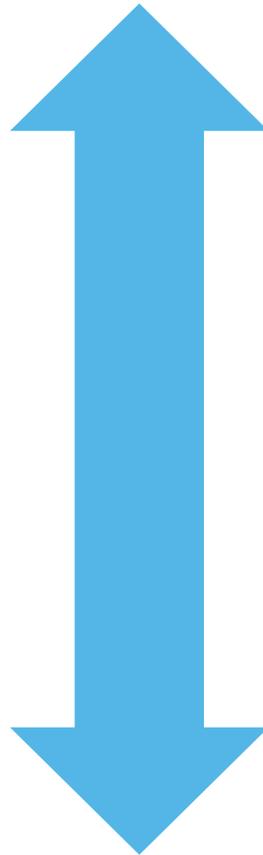
Getting evidence requirements right

Set the bar high?

- e.g. US: common issues must be shown to 'predominate'
- rigorous analysis earlier
- can filter speculative claims

Set the bar low?

- e.g. Australia: no initial certification process¹
- reduces cost and increases speed (no disclosure)
- increases accessibility



Or something in between?²

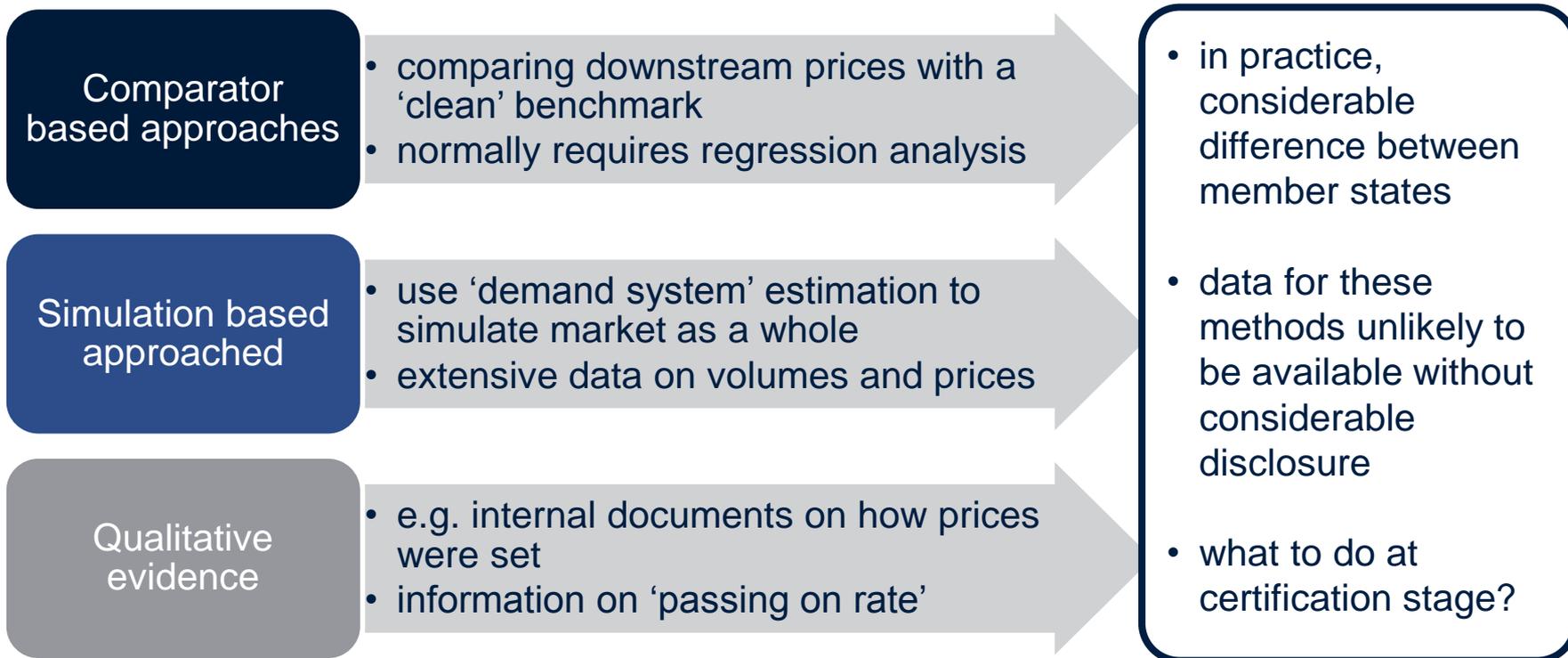
Pro-sys test (Canada): The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred).

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Example issue: pass-on (1/2)

Consider an indirect consumer class action – how to estimate up-stream pass-on rate?

The Commission Guidelines give some possible methods, e.g.



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Example issue: pass-on (2/2)

Legal solutions

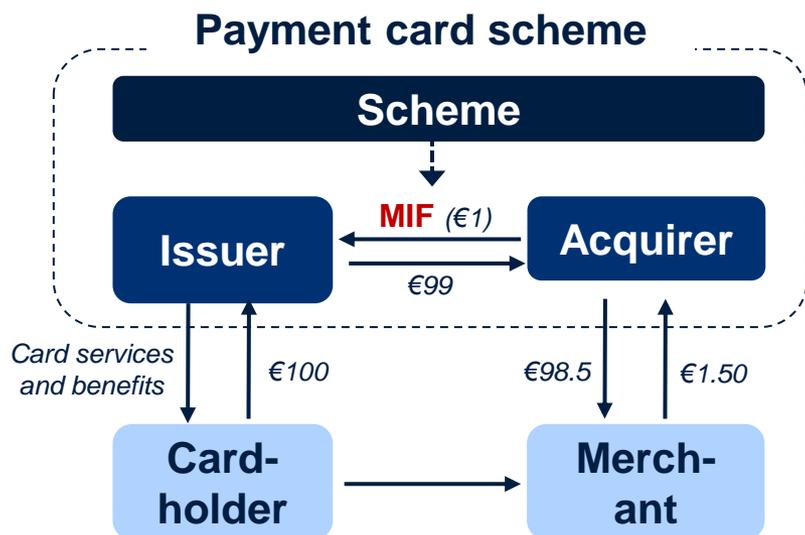
- Article 14 of damages directive – a passing on proven if
 - there was an infringement
 - overcharge for the direct purchasers
 - claimant purchased the goods or services containing affected product
- sufficient at certification stage?
- risk of overcompensation if also claims from direct purchasers:
 - procedural solutions: hearing cases in same value chain together
 - ‘piggyback; on upstream claims

Economic solutions

- Use a quantification method that does not rely on extensive disclosure
- Option 1: Economic theory
 - well established methods available for estimating pass-on which can be calibrated to match facts of the case
 - E.g. Cheminova (2015) – 50% pass-on derived from upstream supplier’s monopoly position
- Option 2: public data analysis
 - general relationship between cost and prices can sometime be estimated on sector level

Case study: Merricks vs Mastercard in UK CAT

European Commission decision



- **2007:** EC finds that Mastercard's MIF for cross-border transactions (intra EEA MIF) restricts competition
- **2014:** The EU Court of Justice (CJEU) also upholds the EC's Decision

The Claim

- Walter Merricks brings a claim against Mastercard on behalf of all consumers in the UK
- argues that the inter-EEA MIF set a floor to the domestic MIF
- (one of the) largest damages claims ever in the UK: £14bn across 46 million individuals
- rejected by UK CAT on two grounds:
 - **no viable method for establishing aggregate pass-on (our focus)**
 - no way of distributing that award in line with compensatory principle

Case study: Merricks vs Mastercard in UK CAT

Case outcome on pass-on

The claimant position

- Claimant expert (Dr. Veljanovski) proposed a top-down method for establishing aggregate damages across the entire UK economy

The UK CAT's finding¹

- Applicant's economists initial proposal did not allow for **different level of pass-on to consumers** across sectors, types of retailers and time
- the CAT was not satisfied that the Applicant had demonstrated the data for such an exercise existed

The UK Court of Appeal's finding²

- “[Merricks] had to satisfy the CAT that the expert methodology was capable of assessing the level of pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology. But it was not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value.”

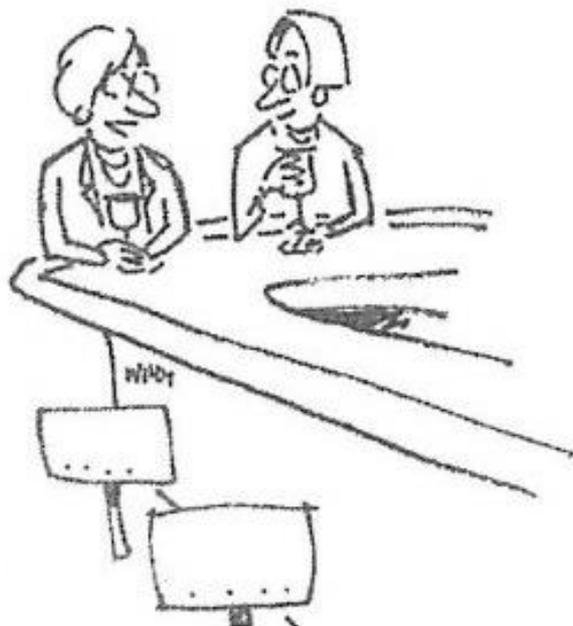
Case study: Merricks vs Mastercard in UK CAT

Potential implication for difference in expert roles – the 5S

	Litigation	Certification
Scope of expert role	need to implement robust quantification methodology	need to show such a methodology exists (or is likely to exist)
Source	claimant documents and data (or potentially, disclosure from defendants)	public sources, prior judgements, authority decisions, economic theory
Scale of loss	individual claimant – should not over or under compensate the claimant	aggregate across class – may over or under compensate individual consumers
Specificity	method will be specific to claimant and may reflect claimants' particular procurement policies or decision making processes	method needs to reflect a theory of harm that is common to the class i.e. class members should fit in common methodological framework
Standard of proof	usually that actual loss occurred on 'balance of probabilities'	'realistic prospect' of loss being established

Where next?

Concluding thoughts



“For that satisfying sense of inclusion, you can’t beat a class action suit.”

- increasing demands for improved access to consumer redress across EU¹; collective litigation likely to be part of landscape
- evidential requirement for economic evidence will generally be, as a matter of necessity, lower for certification than litigation
 - appeal court finding in Merricks was in line with Canadian case law² since Pro-sys
- indirect claims in all EU jurisdictions likely to be promoted by Article 14 of Damages Directive
- fundamental trade-off between rigour at certification stage and access to redress through litigation

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