Repackaging class actions

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Abstract

The absence of a generic opt-out class action regime under English law has created a significant access to justice gap, preventing many individuals from seeking redress for mass harm. At present, opt-out class actions exist only in the context of competition law. This means that, even if an alleged harm best aligns with another area of law, a litigant must repackage their claim as a breach of competition law to access the benefits of the class action framework. Drawing on the *Gutmann* Boundary Fares case, this article argues that repackaging reinforces the case for expanding class actions beyond competition law.

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Introduction

Millions have suffered harm. Yet, the losses of each individual are so small that it is not feasible for any of them to bring a claim to court. How can the law address this problem? The most powerful tool at its disposal is the opt-out class action. A representative files a claim on behalf of the entire class, with every member included unless they choose to withdraw. Few, if any, do. Once judgment is handed down against the defendant, the claimants can collect their compensation, subject to deductions to pay lawyers and litigation funders. The result is access to justice, an improvement in the administration of justice, and the deterrence of wrongdoing.

In England and Wales, the significance of this issue has been acknowledged, but class actions remain restricted to competition law. This makes English law an outlier among common law jurisdictions with generic regimes, including the US, Canada and Australia. This article argues for reform. It analyses a phenomenon that has received little attention. Regardless of whether the mass harm they have suffered is rooted in another area of law, litigants are forced to repackage their claims as breaches of competition law to benefit from the class action regime. This is illustrated by the ongoing case of *Justin Gutmann v London & South Eastern Railway Limited and Others* – a competition law class action that, at its core, is premised on a breach of consumer law.[1] This article considers (i) the development of class actions; (ii) the need to repackage claims to access class actions; and (iii) the case for class actions beyond competition law.

[1] [2022] EWCA Civ 1077, [2022] E.C.C. 26; [2021] CAT 31.

I. The development of class actions

a. The justifications of class actions

The first and most important justification of class action procedures, and collective redress more broadly, is securing access to justice. Class actions address the problem that arises where large numbers of people have been harmed by another's conduct, but their individual loss is so small that an individual action is economically unviable.[2] They are crucial in this situation because a rational litigant will only commence a claim where the expected benefit of the claim exceeds its expected costs.[3] In other words, only a lunatic or fanatic would sue for £30. It follows that the realistic alternative to class actions is not millions of individual claims, but zero.[4]

The importance of securing access to justice through class actions is closely linked to upholding the rule of law. If the courts are not easily accessible where mass harm has been suffered, the law prohibiting the commission of that harm risks turning into a dead letter. This undermines its ability to guide conduct. To ensure public confidence in the law, people and businesses should be able to conduct their lives with the knowledge that, even if their individual loss is small in the context of a mass harm, their legal rights are enforceable.[5] Beyond 'providing the substantive law with teeth', additional aspects of access to justice include placing the parties on an equal footing, especially where defendants enjoy significant economic power, as well as ensuring the timeliness of litigation.[6]

A second core justification of class actions is improving the administration of justice. They enable the courts to address mass harm in an efficient, proportionate and predictable manner.[7] By avoiding unnecessary duplication, class actions create economies of scale for claimants and obtain finality for defendants. Further, consolidating multiple proceedings into a single class

[2] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.43.
[3] Bruce Wardhaugh, "Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law" (2014) 34 Legal Studies 1, 4.
[4] An adaptation of Posner J, *Carnegie v Household International Inc* 376 F 3d 656 (7th Cir 2004) 661, cited in *Merricks v Mastercard* [2020] UKSC 51, [2021] 3 All E.R. 285 at [84] (Lord Sales and Lord Leggatt).
[5] See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 1st edn (OUP 1979), p.217; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] A.C. 869 at [66]-[72] (Lord Reed).
[6] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004), pp.53-55.
[7] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.47; *Merricks v Mastercard* at [37] (Lord Briggs).

action reduces the risk of inconsistent judgments and mitigates detriment to those who are not parties to the first case deciding common issues.[8]

Third, class actions may be justified as a means of deterring wrongdoers from committing mass harm.[9] Actual and potential wrongdoers are more likely to modify their behaviour if a viable route for redress exists that is likely to be pursued. This is based on the assumption that legal compliance depends, at least in part, on the likelihood of enforcement.[10]

b. The pre-existing forms of collective redress

The most prominent forms of collective redress that were available prior to the introduction of opt-out competition law class actions suffer from a range of limitations, rendering them suboptimal for addressing mass harm. First, representative actions have long existed under English law as a mechanism for collective redress, allowing one or more persons to represent others who share the 'same interest' in a claim.[11] The strict interpretation of 'same interest', often requiring interests to be virtually identical, heavily confines the situations in which proceedings may be brought.[12]

Although the Supreme Court endorsed a bifurcated representative action model in *Lloyd v Google* to address this constraint – allowing common issues to be decided collectively before individual compensation claims are assessed[13] – the same decision illustrates that any prospect of representative actions becoming widely available is more illusory than real. The claim was for a 'loss of control' of personal data under the Data Protection Act 1998. The bifurcated model was of little use, since the court held that section 13 of the Act could not be reasonably interpreted as conferring such a right to compensation in the absence of material damage or

[8] Andrew Higgins and Adrian Zuckerman, "Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress" (6 November 2013) Oxford Legal Studies Research Paper No.93/2013, 2 <https://ssrn.com/abstract=2350141> [Accessed 1 January 2025]; Andrew Higgins, "The Rule of Law Case Against Inconsistency and in Favour of Mandatory Legal Process" (2019) 39(4) O.J.L.S. 725, 736.
[9] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), p.6; *Merricks v Mastercard* at [2], [37] (Lord Briggs).
[10] Andrew Higgins and Adrian Zuckerman, "Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress" (6 November 2013) Oxford Legal Studies Research Paper No.93/2013, 2 <https://ssrn.com/abstract=2350141> [Accessed 1 January 2025].
[11] CPR 19.8(1).
[12] See e.g. *Emerald Supplies Ltd and another v British Airways plc* [2010] EWCA Civ 1284, [2011] Ch 345 at [62]-[65] (Mummery LJ); *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1389, [2022] 2 All E.R. 1056 at [51] (Coulson LJ).
[13] [2021] UKSC 50, [2022] A.C. 1217 at [81]-[84] (Lord Leggatt).

distress.[14] Moreover, the claimants could not have sought compensatory damages for distress under the Act or for the misuse of private information, due to the need for individual assessments that would fall foul of the 'same interest' requirement.[15] In any case, it is not clear how the bifurcated model would be economically viable. It offers no financial return for funders or class members at the common stage.[16] Therefore, the decision does not change how the representative action procedure remains ill-suited for addressing the vast majority of mass harm, due to its narrowness.[17]

Second, a Group Litigation Order ('GLO') allows for the case management of separate claims which raise common issues of fact or law.[18] Although the GLO regime constitutes a helpful tool for coordinating large numbers of individual claims under a managerial framework, it falls short of providing an effective mechanism to address mass harm.[19] Litigants must opt in by commencing separate proceedings. The expected costs of bringing a claim may exceed its benefits, particularly given the administrative burden of determining whether a claim is viable for inclusion on the group register.[20] Further financial risk is generated by the default costs liability structure, according to which group litigants are severally liable for an equal proportion of the common costs.[21] Third, other existing mechanisms for collective redress include test cases, joining multiple claims and consolidating pre-existing proceedings.[22] These suffer from similar disadvantages, such as the need to opt in, as well as their inadequacy in efficiently handling claims involving very large numbers of parties.[23]

A final pre-existing form of collective redress was the 'follow-on' consumer mechanism in the competition law context. It provided that a 'specified body' could bring consumer claims in the Competition Appeal Tribunal ('CAT') in respect of proven anti-competitive conduct.[24] The procedure was constrained by a range of limitations, the most significant of which was that

[14] *Lloyd v Google* at [159].
[15] *Lloyd v Google* at [5].
[16] *Lloyd v Google* at [85]; Rachael Mulheron, "Further impetus for a statutory class action, post-Lloyd v Google" (2023) 42(1) C.J.Q. 10, 17-19.
[17] See e.g. *Prismall v Google UK Ltd* [2024] EWCA Civ 1516 at [62]; *Wirral Council v Indivior plc* [2025] EWCA Civ 40 at [133] (Flaux C).
[18] CPR 19.21.
[19] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.24; Andrew Higgins, "Driving with the handbrake on: Competition Class Actions under the Consumer Rights Act 2015" (2016) 79(3) M.L.R. 442, 446-447.
[20] *Lloyd v Google* at [25].
[21] CPR 46.6(3).
[22] CPR 3.1(2)(h), 7.3, 19.1.
[23] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.73.
[24] Enterprise Act 2002 s.19, inserting Competition Act 1998 s.47B.

claimants had to opt in to the class. Other restrictions included the need for a pre-established infringement of competition law; the requirement that claims be brought by a specified body approved through secondary legislation; and the stipulation that the mechanism applied exclusively to consumers.[25] These limitations meant that, during its twelve years of existence, only one action was brought by the sole licensed body, namely the Consumer Association's (commonly known as Which?) case concerning the price-fixing of replica football shirts. Despite a potential class size in excess of one million, only 130 individuals opted in. This underlines the difficulties involved in raising awareness of class membership opportunities, as well as motivating members to actively participate.[26] The procedure failed to secure redress for consumers for breaches of competition law, with consumer groups refusing to take new cases under an opt-in system.[27]

c. The introduction of opt-out competition law class actions

The Civil Justice Council's 2008 report on improving access to justice through collective actions is a useful starting point for outlining the history of opt-out class actions under English law. Highlighting the deficiencies of the pre-existing forms of collective redress, the report argued that across a range of sectors – including financial services, consumer, competition and employment law – there was an unmet need for an opt-out regime. It endorsed a generic, statutory regime covering all scenarios giving rise to collective actions, akin to models in jurisdictions such as the US, Canada and Australia.[28]

Despite the Civil Justice Council's compelling case for reform, the Government firmly rejected their recommendations in a 2009 response.[29] The response criticised the Council for assuming that the operation of collective actions abroad constitutes evidence of unmet need in England and Wales. Instead, the Government argued that the broader economic, social and legal context should be considered.[30] Emphasising that collective litigation should be a last resort, it proposed

[25] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.77; Adrian Zuckerman, *Civil Procedure: Principles of Practice*, 4th ed (Sweet & Maxwell 2021), pp.753-754.
[26] *Lloyd v Google* at [26]-[27].
[27] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), para.5.13.
[28] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), pp.88-89.
[29] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions*' (2009).
[30] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions*' (2009), para.8.

that enhancing the powers of regulatory agencies may be a proportionate alternative.[31] The response concluded that opt-out class actions should only be introduced on a sector-by-sector basis, for two reasons. First, the potential structural differences between sectors, for example the nature of regulatory frameworks, which require tailored approaches. Second, the Government argued that a meaningful global impact assessment would not be possible to conduct and, even if it was, it could overlook critical sector-specific factors. One of these is the risk of 'blackmail suits' – frivolous claims leveraged to pressure settlements.[32]

The sector-by-sector approach initially materialised in the form of the Financial Services Bill 2009, cll.18-25 of which proposed a class action regime for financial services claims that could proceed on either an opt-in or opt-out basis. Despite passing through the House of Commons and two readings in the House of Lords, the procedure was dropped in the build-up to the 2010 general election, in an attempt to prioritise other elements of the Bill which proved unsuccessful.[33] The regime was not reintroduced following the change in government.

Progress was eventually made in the competition law sector. An opt-out regime was introduced by section 81 and schedule 8 of the Consumer Rights Act 2015, amending the Competition Act 1998 ('CA 1998') in line with recommendations from a 2013 government consultation.[34] The main features of the competition law class action may be summarised as follows. Opt-out proceedings may be brought on behalf of UK-domiciled class members.[35] The CAT must be satisfied that two criteria are met to certify an application for a collective proceedings order ('CPO').[36] First, it must be just and reasonable for the person seeking to act as representative to be authorised to do so. Second, the claims must be eligible for inclusion in collective proceedings. For the claims to be eligible, they must raise 'the same, similar or related issues of fact or law' and be suitable to be brought in collective proceedings.[37] The suitability test should be applied relative to individual proceedings instead of in the abstract, and forensic difficulties in quantifying damages should not lead to a denial of certification without more.[38]

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[31] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions*' (2009), paras 10-11.
[32] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions*' (2009), paras 12-13.
[33] Hansard HC Deb 8 April 2010, vol.508, col.1242.
[34] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), para.5.14.
[35] CA 1998 s.47B(11).
[36] *Merricks v Mastercard* at [5] (Lord Briggs); CA 1998 ss.47B(5), (8)(b); Competition Appeal Tribunal Rules 2015 ('CAT Rules 2015') r.78.
[37] CA 1998 s.47B(6); CAT Rules 2015 r.79.
[38] *Merricks v Mastercard* at [70]-[72] (Lord Briggs).

Aside from opt-out proceedings, a key feature of the regime is the CAT's power to award aggregate damages. This is a single sum for the entire class, eliminating the need to assess the damages recoverable by individual class members.[39] Aggregate damages facilitate access to justice in mass harm cases, since individual assessments would frequently render claims uneconomical and impractical. The CAT is nevertheless not permitted to award exemplary damages in collective proceedings, and damages-based agreements are unenforceable.[40] Proposed settlements must be approved as fair and reasonable.[41] Finally, the regime preserves the principle of two-way cost shifting. Costs may be awarded to or against the class representative but generally may not be awarded to or against class members, providing insulation from financial risk.[42]

To date, competition law remains the only sector for which an opt-out class action regime has been enacted. Attempts at further expansion have fallen upon deaf ears. For instance, in a 2021 consultation response, the Government rejected calls for an opt-out data protection law class action by children's rights organisations and privacy groups.[43] The response insisted that improvements to existing opt-in mechanisms and continued regulatory activity by the Information Commissioner's Office offer sufficiently robust protection for children and other vulnerable groups. It also echoed concerns raised by businesses that new legislation could increase litigation costs and insurance premiums.[44] Additionally, the Government pointed to the then-anticipated ruling in *Lloyd v Google* as evidence of the potential for representative actions to succeed under the existing civil procedure rules.[45] This expectation was defeated by the eventual failure of the claimant's 'unusual and innovative' use of the representative action in that case.[46] Subsequently, demands by members of the House of Lords to include an opt-out class action regime for consumers in the Digital Markets, Competition and Consumers Act 2024 were left unanswered.[47]

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[39] CA 1998 s.47C(2).
[40] CA 1998 ss.47C(1), (8); c.f. Digital Markets, Competition and Consumers Act 2024 ('DMCCA 2024') s.126.
[41] CA 1998 s.49A(5).
[42] CAT Rules 2015 r.79.
[43] UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021).
[44] UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021), paras 6.9-6.16.
[45] UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021), para.6.17.
[46] *Lloyd v Google* at [4]-[5].
[47] Hansard HL Deb 5 December 2023, vol.834, cols 1417-1418.

Taken together, successive governments have repeatedly resisted expanding the scope of opt-out class actions, preferring regulatory and other alternatives. In the latest step, a consultation has been launched to review whether the collective actions regime is functioning as intended, focussing on whether the access to justice it provides for consumers imposes a disproportionate burden on businesses.[48] While the Government acknowledges that the ability to bring private actions is an important legal right, it has emphasised that this should not be the primary means of securing redress for consumers for harm caused by anti-competitive conduct, as opposed to tools such as alternative dispute resolution and voluntary redress schemes. This suggests that, instead of considering how to expand opt-out collective proceedings, the Government is now questioning their value.

[48] UK Government, *Opt-out collective actions regime review: call for evidence* (2025).

II. Repackaging claims to access class actions

a. The universal application of the justifications of class actions

Competition law claims are the paradigmatic example of a situation where securing access to justice using class actions is crucial. Breaches of competition law, such as price-fixing, frequently involve very large numbers of people suffering small individual losses. Thus, it is not economical for any one person to bring a claim.[49] This is well illustrated by the facts of *Merricks v Mastercard*. Walter Merricks CBE applied to the CAT to bring an opt-out class action following the European Commission's 2014 decision that Mastercard's multilateral interchange fees for cross-border transactions were set at an unlawfully high level over a sixteen-year period, the costs of which were passed on to consumers. The size of the claim was breathtaking. Aggregate damages of approximately £10 billion were initially pursued on behalf of over 45 million people, prior to a settlement of £200 million in early 2025.[50] Opt-out class actions are indispensable to render claims on this scale viable.

Yet, the importance of facilitating access to justice where mass harm has been suffered, as well as improving the administration of justice and deterring wrongdoing, is not confined to competition law. The justifications of class actions apply universally to situations in which mass harm is alleged, but individual losses are small. Consider consumer law. Consumers face challenges in seeking redress where businesses use unfair standard terms, as identified by the Civil Justice Council's 2008 report.[51] Contrastingly, in jurisdictions where it is possible to bring a consumer protection class action, claimants take the opportunity. In Canada, for example, nearly 33% of all class actions filed in 2024 were consumer protection claims.[52] A significant amount of other non-competition claims were also brought, such as securities and data privacy class

[49] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), p.6; cited in *Gibson v Pride Mobility Products* [2017] CAT 9, [2017] 4 C.M.L.R. 33 at [22]; *Merricks v Mastercard* at [85] (Lord Sales and Lord Leggatt).
[50] [2025] CAT 28.
[51] Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), p.89.
[52] Torys LLP, "Class actions in Canada: a review of 2024" (20 March 2025) <https://www.torys.com/our-latest-thinking/publications/2025/03/actions-collectives-au-canada> [Accessed 3 May 2025].

actions.[53] Restricting the availability of opt-out class actions to select areas of law, and especially a single sector, is not logically sound.

As shown above, the Government has countered this argument by asserting that conclusions cannot reliably be drawn from the prevalence of opt-out class actions in other jurisdictions, and that the empirical evidence of domestic need for such actions in other sectors is insufficiently strong, particularly in light of existing regulatory measures.[54] This reasoning is circular. It is difficult, if not impossible to precisely gauge the level of unmet need for a procedural avenue that does not yet exist. By dismissing international evidence and relying on the absence of domestic data, the Government has created a paradox: the lack of widespread opt-out class action procedures ensures that the conditions necessary to demonstrate their utility will never emerge.

There is, however, an underexplored way in which the access to justice gap becomes visible. Claims originally rooted in other areas of law must be repackaged as alleged breaches of competition law to access the advantages offered by opt-out class actions. While this may render claims viable, it forces claimants to surpass barriers specific to competition law that they would not otherwise face. Potentially meritorious claims that cannot meet these hurdles through repackaging are left in the shadows. Crucially, even successfully repackaged claims are bogged down by arbitrary requirements and inefficiencies. Repackaging claims distorts the purpose of competition law, which is designed to address genuinely anti-competitive conduct, not serve as a catch-all mechanism. It also undermines the goal of the original area of law, since its relevant standards are not applied. All of this would be avoided under a generic opt-out class action regime.

[53] The types of class actions filed are also diverse in other jurisdictions. For Australian statistics, see Vince Morabito, "An Empirical Study of Australia's Class Action Regimes: The First Twenty Five Years of Class Actions in Australia" (24 July 2017), 11 <https://ssrn.com/abstract=3005901> [Accessed 1 January 2025]; Jonathan Beach, "Some current issues in securities class actions" (2017) 36(2) C.J.Q. 146.
[54] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions*' (2009), para.8; UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021), paras 6.9-6.16.

b. The *Gutmann* Boundary Fares case

i. Facts and procedural history

Justin Gutmann v London & South Eastern Railway Limited and Others is a useful case study to explore the phenomenon of repackaging and its implications.[55] It concerns the allegation that train operating companies ('TOCs') operating the South-Eastern and South-Western rail franchises unlawfully abused their dominant positions by failing to make 'Boundary Fares' sufficiently available for purchase by consumers holding valid 'Travelcards' issued by Transport for London ('TfL').[56]

Travelcards are zonal tickets that permit unlimited travel on London's public transport network, including National Rail services, within specified time periods and for various zonal combinations. Although nine zones exist, zones 1-6 constitute 99% of all valid Travelcards issued by TfL. A Boundary Fare is a supplementary ticket that covers the portion of a journey extending beyond the outer boundary of a Travelcard's validity. For instance, a consumer holding a Travelcard between zones 1-6 travels beyond zone 6 to destination X. The Travelcard covers the journey within zones 1-6, with the Boundary Fare covering the segment from the outer boundary of zone 6 to X. The crux of the claim is that TOCs failed to make Boundary Fares sufficiently available. This led to double-charging for the part of the journeys within zones 1-6, which should have already been covered by the Travelcard. The class size is approximately three million consumers, with individual losses ranging between £33 and £55, and the total claim amounting to an estimated £93 million.

The claim is being brought as an opt-out class action under section 47B(11) of CA 1998. The relevant provision of competition law is the Chapter II Prohibition of the Act. This prohibits the abuse of a dominant position if such conduct affects trade within the UK, with its wording closely mirroring Article 102 of the Treaty on the Functioning of the European Union.[57] Conduct which is identified as an abuse in particular includes directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.[58] The *Gutmann* case hinges on proving that the TOCs' failure to provide accessible Boundary Fares constitutes an abuse under this provision. The claim is supported by significant evidence. First, data shows that only 1-2% of eligible

[55] [2022] EWCA 1077, [2022] ECC 26; [2021] CAT 31.
[56] *Gutmann* [2022] EWCA 1077 at [4]-[9] (Green LJ).
[57] CA 1998 s.18(1).
[58] CA 1998 s.18(2)(a).

journeys were charged at the Boundary Fare rate over several years.[59] Second, a 'mystery shopper' survey commissioned by a consumer research consultancy revealed systemic failures in making Boundary Fares available. With over 400 enquiries made, it found that:

- At ticket counters, over 80% of enquiries resulted in staff quoting full fares without asking about Travelcard ownership.
- Even when a Travelcard or Boundary Fare was mentioned, station clerks failed to incorporate the Travelcard into the quoted fare in up to one-third of cases.
- Boundary Fares were difficult or impossible to locate at ticket vending machines and entirely unavailable through online platforms or apps.
- There was a near-total absence of consumer-facing information regarding Boundary Fares, compounding these issues.[60]

The CAT certified the case for collective proceedings in October 2021. It ruled the claims suitable for an opt-out collective action, citing the commonality of issues among the class members and the appropriateness of the class representative.[61] An appeal of the CPO was refused in July 2022.[62] The Court of Appeal upheld the CAT's findings and rejected contentions that aspects of the claim, such as the exclusion of Boundary Fares from Advance Fares, were unarguable. Following this, a collective settlement was approved by the CAT for the second defendant (Stagecoach South Western Trains Limited) in July 2024, one of the first orders of its kind.[63] The trial of the issues arising in the proceedings has been split, with issues relating to the alleged abuse of dominance being determined first, followed by causation and the quantification of damages second, and market definition and dominance third. The first trial concluded in July 2024, with judgment yet to be handed down at the time of writing.

ii. A repackaged consumer law claim

At the heart of *Gutmann* is the allegation that, by failing to make Boundary Fares sufficiently available, TOCs double-charged consumers. Yet, once the application of the Chapter II prohibition is stripped away, it is difficult to see how this is most obviously a wrong rooted in competition law. Common sense dictates that double-charging consumers through an omission

[59] *Gutmann* [2022] EWCA 1077 at [17].
[60] *Gutmann* [2022] EWCA 1077 at [16], [18].
[61] *Gutmann* [2021] CAT 31 at [85].
[62] *Gutmann* [2022] EWCA 1077 at [115].
[63] *Justin Gutmann v First MTR South Western Ltd* [2024] CAT 32.

of information is likely a breach of consumer law. But lawyers are tasked with securing the best results for their clients. They must select the most feasible procedural avenue for claims. In *Gutmann*, this meant repackaging the mass consumer harm that was originally suffered as an abuse of a dominant position. It followed that the claimants gained access to the multitude of advantages offered by the competition law class action regime, such as opt-out proceedings and aggregate damages.

This raises the question – what was the original legal wrong suffered in *Gutmann*? The most likely answer lies in the Consumer Protection from Unfair Trading Regulations 2008 ('CPUTR 2008'), which implemented the EU Unfair Commercial Practices Directive.[64] These Regulations prohibit 'unfair commercial practices'.[65] A 'commercial practice' includes any act, omission, course of conduct, representation or commercial communication by a trader directly connected with the promotion, sale or supply of a product to consumers.[66] On the facts of *Gutmann*, the relevant commercial practice is the TOCs' general failure to make Boundary Fares sufficiently available. This practice arguably constitutes a misleading omission under Regulation 6, a form of 'unfair' commercial practice.[67]

One situation in which a commercial practice is a 'misleading omission' is where it omits 'material information' in its factual context, causing or likely causing the 'average consumer' to take a transactional decision they would not have taken otherwise.[68] 'Material information' is defined as the information an average consumer needs, according to the context, to take an informed transactional decision.[69] In this case, the material information is the availability of Boundary Fares. There is a strong case that the TOCs misleadingly omitted this information, illustrated by the very small percentage of eligible journeys that were charged at the Boundary Fare rate, as well as the findings of the mystery shopper survey. Applying the objective standard imposed by the Regulations, the lack of purchase options and information regarding Boundary Fares would have likely misled a reasonably well informed, observant and circumspect train

[64] Dir.2005/29/EC. For harm suffered after 6 April 2025, the DMCCA 2024 replaces CPUTR 2008. Both regimes would be engaged by the ongoing claim in *Gutmann*, which includes all Boundary Fares purchased between 1 October 2015 and the date of final judgment or settlement. Nevertheless, the content of the law remains substantially similar for the purpose of this reconstruction, including the absence of consumer rights to redress for omissions (ss.225, 227, 230, 232). To avoid duplication, this analysis is based on the provisions of CPUTR 2008, but a reconstruction under the new regime would be equally viable.
[65] Reg.3(1), (4).
[66] Reg.2(1).
[67] Reg.3(4)(b).
[68] Reg.6(1).
[69] Reg.6(3)(a).

customer.[70] It would have caused them to take a transactional decision they would not have taken otherwise – paying twice for the portion of their journey covered by their Travelcard.

Finally, when considering whether a commercial practice is a misleading omission, the courts must account for all the features and circumstances of the commercial practice, and the limitations of the medium used to communicate it.[71] The mystery shopper survey highlighted that ticket clerks often failed to provide information about Boundary Fares, even when prompted, and that there was a near-total absence of consumer-facing information regarding them. Moreover, Boundary Fares were difficult or impossible to locate at ticket machines and completely unavailable online – highly capable media to communicate their availability. This leaves little room for the TOCs to argue that their practice complied with the Regulations.

There is a complication. Unlike 'misleading actions' under Regulation 5 and 'aggressive' commercial practices under Regulation 7, misleading omissions do not constitute a 'prohibited practice'. Consequently, a breach of Regulation 6 does not provide consumers with a right to redress.[72] By contrast, it is more challenging to argue that the failure by TOCs to make Boundary Fares sufficiently available is a misleading action. Although a misleading action includes situations where the overall presentation of a commercial practice deceives a consumer,[73] the allegations in *Gutmann* depend on omissions logic, in terms of the failure to disclose material information.

The disparity between misleading actions and omissions was imposed for policy reasons. The Directive left it to Member States to decide whether to provide individuals with private law rights to seek redress for economic loss caused by unfair commercial practices.[74] When the Regulations were amended in 2014 to introduce private remedies for misleading actions and aggressive practices, misleading omissions were excluded.[75] The rationale was that allowing individual claims for omissions would open the door to frivolous litigation, especially due to the broad and uncertain scope of a misleading omission. It was stressed that legal rights should only be extended if there is a clear need.[76] This conclusion was reached despite the benefits of

[70] Reg.2(2)-(4).
[71] Reg.6(2)(a)-(b).
[72] Reg.27B(1); c.f Reg 10.
[73] Reg.5(2)(a).
[74] Explanatory Memorandum to the Consumer Protection from Unfair Trading Regulations 2008, para.105.
[75] Consumer Protection (Amendment) Regulations 2014 reg.3.
[76] Explanatory Memorandum to CPUTR 2008, paras 107-108, 112-114; Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012), paras 4.45-4.52; UK Government, *Response to the recommendations of the Law Commission and Scottish Law Commission*

such rights, including enhanced consumer protection, the deterrence of unfair practices, and consistency across the Regulations.[77]

The gap in consumer remedies is not fatal to the reconstruction of *Gutmann* for two reasons. First, under a generic class action regime, remedies would need to be restructured to accommodate mass harm. Aggregate damages would replace specific consumer remedies, such as the right to unwind the transaction or claim a discount.[78] This remedial adjustment would apply to misleading actions and omissions alike, creating opportunities for compromise. For example, aggregate damages could be made available in class actions for omissions, while preserving the current limitations for individual proceedings. Second, the fear of frivolous claims is not insurmountable. Class actions are subject to certification processes that ensure only well-substantiated claims proceed, and there are also the possibilities of strike-out or summary judgment.[79] Moreover, aggregate damages mitigate uncertainty and expense by removing the need for individual assessments. Given the lack of a viable procedural avenue, the law was not drafted with a case like *Gutmann* in mind, where a misleading omission by a trader leads to a clearly identifiable mass harm suffered by consumers. This demonstrates how far the adverse consequences of the refusal to enact a generic class action regime extend.

iii. The issues associated with repackaging

The hidden access to justice gap

Instances of repackaging, such as *Gutmann*, reveal the access to justice gap created by restricting class actions to the context of competition law. They are the only direct means through which this gap may surface. What is impossible to quantify, however, is the number of cases of mass harm that have been left unaddressed because they cannot be repackaged as breaches of competition law.

Gutmann is not an isolated example of repackaging. It is challenging to fully reconstruct alternative causes of action, since many cases in this rapidly evolving area are in their early stages. Nevertheless, three other examples support the breadth of the access to justice gap. First, in *David Courtney Boyle v Govia Thameslink Railway Limited and Others,* the alleged abuse of a dominant position concerns TOCs issuing branded fares permitting travel on a single

on misleading and aggressive commercial practices and to the BIS consultation on implementing the Consumer Rights Directive (2009).

[77] Explanatory Memorandum to CPUTR 2008, paras 109-111; Law Com No 332, paras 4.53-4.56.

[78] CPUTR 2008 regs.27E, 27I.

[79] CAT Rules 2015 rr.41, 43; *Merricks v Mastercard* at [59] (Lord Briggs).

branded service at a lower price than fares permitting travel on multiple, differently branded, services.[80] At its core, the claim that TOCs misrepresent their entitlement to issue brand-restricted fares may constitute a misleading action prohibited by Regulation 5 of CPUTR 2008.[81]

Second, the claim in *Professor Carolyn Roberts v Severn Trent Water Limited and Others* involves allegations that water and sewerage undertakers, subject to regulation by the Water Services Regulation Authority (Ofwat), underreported the number of pollution incidents in their local areas.[82] This allowed the undertakers to charge consumers higher prices than they would have been able to had the reports been accurate. Although this has been framed as an abuse of a dominant position, the underlying wrong consists of breaches of environmental statutory duties. This includes the duty to provide an effective sewage system imposed by section 94(1) of the Water Industries Act 1991.

Third, *Doug Taylor Class Representative Limited v MotoNovo Finance Limited and Others* relates to discretionary commission arrangements that allegedly led to second-hand car dealers brokering finance agreements at significantly higher interest rates.[83] These well-publicised arrangements, previously outlawed by the Financial Conduct Authority ('FCA'), raise issues at the intersection of financial services and consumer law. The claim was brought as a breach of the Chapter I prohibition under section 2(1) of CA 1998, but the wrong is the presence of unfair relationships between creditors and debtors, contrary to section 140A of the Consumer Credit Act 1974.

Accordingly, *Gutmann* is emblematic of a wider phenomenon whereby a claim must be repackaged as a breach of competition law for access to justice, regardless of whether the alleged harm best aligns with another area of law. This is a structural failure in procedural design. The misalignment between the procedural avenue and the substance of claims caused by repackaging weakens the coherence of the law. Class action procedures should facilitate claims being pursued within the proper legal framework, rather than forcing their substance to be repackaged to effectively secure redress. This undermines legal consistency and hinders the effective enforcement of rights.

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[80] [2022] CAT 35.
[81] And for harm suffered after 6 April 2025, DMCCA 2024 s.226.
[82] [2025] CAT 17. Certification was refused on the basis that private law remedies are not available for infringements of the statutory scheme, in accordance with Water Industries Act 1991 s.18(8). Permission to appeal has been granted on this point.
[83] CAT 1598/7/7/23, ongoing.

The unnecessary hurdles imposed by competition law

Where mass harm is successfully repackaged, as in *Gutmann*, claimants face unnecessary hurdles stemming from the distinct requirements of competition law. The most significant additional barrier in *Gutmann* is the need to prove that the TOCs held a dominant market position. Why must consumers who were double-charged due to a misleading omission also establish that the defendants dominated the market in which they operated?

When considering the CPO application, the CAT conducted a detailed analysis of market definition and dominance, relying on the evidence of an experienced competition economist.[84] Defining the relevant product market required an extensive analysis of fare substitutability. The expert drew on industry studies, the 2018 rail merger guidance from the Competition and Markets Authority ('CMA'), and prior CMA railway merger decisions. This generates complexity and inefficiency, diverting focus from the true wrong – the misleading omission that caused consumer harm. In fact, one of the TOCs argued that dominance is not a common issue because the market definition varies between (a) business passengers and commuters compared to leisure passengers, (b) passengers travelling at different times, and (c) passengers departing from different parts of London.[85] While this contention did not succeed, it exemplifies the risk that repackaging may fail due to extra requirements.

Another obstacle is that abuse of dominance is inextricably tied to the special responsibility of dominant companies to avoid exploitative abuse. This allowed the TOCs to argue that competition law is not a general consumer protection regime, and that this special responsibility does not equate to a fiduciary duty to protect consumers.[86] The CAT did reject this submission due to the breadth of the concept of abuse, particularly given the reference to 'unfair' prices in section 18(2)(a) of CA 1998.[87] Yet, there is no reason why the consumers affected in *Gutmann* should bear the burden of proving that their harm was connected to the special responsibility of dominant TOCs.

If repackaged claims fail because of additional requirements imposed by competition law, this threatens to damage public confidence in opt-out collective proceedings as a viable route for consumer redress. This is especially pertinent given how the Government has chosen to review the efficacy of the regime, and its legitimacy is being questioned through political campaigning

[84] *Gutmann* [2021] CAT 31 at [122]-[125].
[85] *Gutmann* [2021] CAT 31 at [122].
[86] *Gutmann* [2021] CAT 31 at [54].
[87] *Gutmann* [2021] CAT 31 at [55]-[65].

and lobbying by groups such as Fair Civil Justice, affiliated with the American and British Chambers of Commerce. The failure of repackaged claims may also deter litigation funders from funding ongoing or future cases, since they decide whether to maintain the availability of funding according to the likelihood of success at trial or a successful settlement.

The distortion of doctrine

A final problem with repackaging is that it distorts the purposes of both competition law and the original area of law. With respect to *Gutmann*, competition law does aim to foster effective competition for the benefit of consumers.[88] However, it is questionable to apply competition law norms where anti-competitive conduct is not the central wrong. Although concepts such as abuse of dominance are flexible,[89] applying them to cases like *Gutmann*, *David Boyle* and *Carolyn Roberts* for the sake of procedural convenience risks stretching competition law beyond its intended scope. This blurs its distinction from consumer law at the expense of doctrinal stability. It also undermines the role of the original area of law. In *Gutmann*, the consumer law standards imposed by Parliament were bypassed entirely. Rather than assessing whether an average consumer would have been misled by the TOCs' omissions regarding Boundary Fares – an inquiry key to consumer protection – the court instead concentrated on whether TOCs occupied a dominant position within the relevant market.

[88] See e.g. Enterprise and Regulatory Reform Act 2013 s.25(3).
[89] *National Grid plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114, [2010] U.K.C.L.R. 386 at [54] (Richards LJ).

III. Class actions beyond competition law

a. The arguments against expanding class actions

Class actions serve a universal purpose, making it difficult to rationalise restricting their availability to competition law. This restriction forces claims to be repackaged to fit within the competition law framework, introducing artificial barriers, inefficiencies and distortions. Accordingly, there is a powerful case for expanding class actions beyond competition law. However, any proposal for reform must address the arguments against broader class action regimes. A decade after the introduction of opt-out competition class actions, it is clear that these counterarguments fail to justify the limited availability of class action procedures, especially given the emergence of repackaging.

i. Fears of American excesses

Frivolous and vexatious litigation

A persistent fear in debates surrounding class actions reform is that expanding their availability could import the most infamous features of the American regime, set out in Rule 23 of the Federal Rules of Civil Procedure. First, it has been repeatedly argued by the Government that making class actions more widely available may lead to a surge in unmeritorious claims and an increase in 'blackmail suits', designed to extract settlements.[90] Even if claims are not vexatious, it may be argued that the aggregation of claims places defendants intense pressure to settle irrespective of the merits, due to the financial and reputational risks associated with litigation. One empirical study found some evidence of a disparity between the strength of US securities class action claims on the merits and settlement values achieved.[91]

The possibility of unmeritorious claims does not justify restricting the scope of opt-out class actions. Rather, it militates in favour of strong procedural safeguards. In fact, when the Government decided to introduce opt-out competition law class actions, it did so on the basis

[90] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (2009), para.13; UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), para.5.33; see also *Merricks v Mastercard* [2020] UKSC at [86] (Lord Sales and Lord Leggatt).
[91] Susan Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis" (2008) 27 C.J.Q. 208, 212-213; Janet Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43 Stanford Law Review 497.

that such controls would be present.[92] Moreover, an increase in the number of claims being brought is not inherently harmful. It is the natural consequence of closing the access to justice gap. The viability of many claims would no longer depend on whether they can be repackaged as breaches of competition law. One recent Government consultation acknowledged that opt-out proceedings could be carefully designed to prevent unmeritorious claims. It nonetheless stressed business concerns regarding increased litigation costs and insurance premiums during periods of economic uncertainty.[93] These concerns are contradicted by the Government's own prior impact assessment, which found that the litigation costs for defendants were outweighed by the boost from deterrence and cartel prevention, even before factoring in the additional benefit of consumer redress running into millions of pounds.[94] In any case, businesses which do not commit mass harm have nothing much to fear.

The fear of blackmail suits is equally misplaced. The institutional factors which make this possible under the American system are not present in this jurisdiction. These include the lack of recoverable costs, the unpredictability of jury trials, and the practice of settlement-only certification.[95] Empirically, there is no evidence from the last decade that the CAT has been inundated with frivolous or vexatious claims. Likewise, this is not reflected by the experiences of jurisdictions with generic opt-out regimes, such as Canada and Australia.[96]

Entrepreneurial litigation

The second concern stemming from the American regime is that expanding class actions would enable lawyers and litigation funders to exploit the system, securing excessive fees at the

[92] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), paras 5.13-5.14.
[93] UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021), para.6.16.
[94] UK Government, *Private Actions in Competition Law: A consultation on options for reform - final impact assessment* (2013), para.198.
[95] See e.g. Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004), pp.74-75; Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), pp.30-32; Mulheron, "Recent Milestones in Class Actions Reform in England: A Critique and a Proposal" (2011) 127 L.Q.R. 288, 302-304; Andrew Higgins and Adrian Zuckerman, "Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress" (6 November 2013) Oxford Legal Studies Research Paper No.93/2013, 32-33; Bruce Wardhaugh, "Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law" (2014) 34 Legal Studies 1, 8-12.
[96] Rachael Mulheron, "Recent Milestones in Class Actions Reform in England: A Critique and a Proposal" (2011) 127 L.Q.R. 288, 302-304.

expense of recovery by class members.[97] Agency issues are pervasive in all lawyer-client relationships, not just when class actions are brought, since lawyers have an incentive to maximise returns from their time spent handling client matters.[98] As recognised by the CAT, while concerns about profit-driven litigation cannot be dismissed outright, this must be balanced against how commercial incentives for lawyers and funders are integral to the viability of opt-out class actions.[99] The potential for abuse and misuse is mitigated by robust controls on certification, settlement and costs.

The recent case of *Christine Riefa Class Representative Limited v Apple Inc and Others* illustrates this point.[100] The CAT refused certification because the proposed class representative failed to demonstrate sufficient independence and robustness, particularly in her understanding of litigation funding arrangements. The court reiterated that class representatives carry a heavy responsibility to ensure that the proceedings are conducted in the best interests of the class. The decision shows that the CAT is highly aware of the risks of entrepreneurial litigation where a class representative may lack independence from lawyers and funders. Therefore, the courts already possess significant tools to control lawyer-driven litigation, alleviating concerns that a generic opt-out class action regime would lead to abuse. The Civil Justice Council has also recently concluded a review into litigation funding, presenting an opportunity to bolster safeguards.[101] They recommended the introduction of a formal, 'light-touch' regulatory regime, including adequacy requirements, codification of the requirement that funders should not control litigation, and conflict of interest provisions. This would include rules specific to the consumer context, such as the introduction of a regulatory consumer duty and a requirement for funded parties to seek independent legal advice.

Disproportionate damages

A third fear drawn from the American experience is that expanding class actions could expose defendants to disproportionate awards of damages. Opponents of reform may point to how, in some American cases, billions of dollars of punitive damages have been awarded by juries,

[97] Christopher Hodges, "Collective Redress in Europe: the new model" (2010) 29(3) C.J.Q. 370, 372-373; Susan Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis" (2008) 27 C.J.Q. 208, 215; *Merricks v Mastercard* at [98] (Lord Sales and Lord Leggatt).
[98] Bruce Wardhaugh, "Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law", 6-8.
[99] *Evans v Barclays Bank plc and Others* [2023] EWCA Civ 876, [2024] 1 All E.R. (Comm) 573 at [130] (Green LJ); *Gutmann* [2024] CAT 32 at [42]-[47] (Popplewell LJ).
[100] [2025] CAT 5, [2025] Bus. L.R. 417 at [113]-[118].
[101] Civil Justice Council, *Review of Litigation Funding, Final Report* (2025).

sometimes exceeding the net worth of a defendant's entire industry.[102] This is a red herring given the absence of punitive damages in class actions in this jurisdiction, as well as the lack of juries in civil proceedings more generally.[103] Ultimately, the fears of replicating American excesses are either overstated or mitigated by existing procedural safeguards. None of them provide a compelling justification for continuing to restrict opt-out class actions to competition law.

ii. Preserving the autonomy of litigants

Another objection to expanding opt-out class actions is that they undermine the personal autonomy of litigants. The concern is that a litigant should be the 'master' of their own claim. Opt-out mechanisms create binding legal relations without explicit consent, despite how high-stakes claimants may prefer individual litigation for strategic reasons.[104] This objection is difficult to reconcile with how the existence of competition law class actions already limits litigants' autonomy. The notion that expanding class actions undermines litigants' autonomy rings especially hollow considering how the present system forces them to repackage their claims as breaches of competition law. More fundamentally, this absolute conception of autonomy is flawed. A civil justice system must, to some extent, circumscribe litigants' autonomy to regulate their activity and function effectively.[105] In relation to class actions, the alternative is denying access to justice. A more nuanced conception of autonomy recognises that constraints on freedom may be justified to promote meaningful choices.[106] Limiting individual control over every aspect of claims is desirable to make litigating mass harm economically viable.

iii. The role of regulation

A final rebuttal consistently raised by the Government against the expansion of class actions is that public regulation is sufficient to address the threat posed by mass harm.[107] This stance is

[102] Bruce Wardhaugh, "Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law", 5-6.
[103] CA 1998 s.47C(1); c.f. DMCCA 2024 s.126.
[104] Andrew Higgins and Adrian Zuckerman, "Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress" (6 November 2013) Oxford Legal Studies Research Paper No.93/2013, 21; Susan Gibbons, "Group Litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis" (2008) 27 C.J.Q. 208, 240.
[105] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015), p.144; Andrew Higgins, "The Rule of Law Case Against Inconsistency and in Favour of Mandatory Legal Process" (2019) 39(4) O.J.L.S. 725, 743-744.
[106] See e.g. Joseph Raz, *The Morality of Freedom* 1st edn (Clarendon 1986), pp.378-381.
[107] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (2009), para.12; UK Government, *Response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 Data Protection Act 2018* (2021), paras 6.10, 6.14.

internally inconsistent. Having acknowledged in the competition sphere that regulatory mechanisms alone were insufficient to obtain redress for consumers – with many cases subsequently brought under the opt-out regime – the Government cannot credibly maintain that it is adequate in other areas.[108] As argued above, it is also circular to insist that regulation is enough while preventing domestic evidence of need for class actions beyond competition law from emerging. Be that as it may, instances of repackaging reveal the persistent access to justice gap left by regulation, underlining the need for private enforcement mechanisms.

Doug Taylor is a striking example of this.[109] A consumer finance claim is being brought as a breach of competition law to obtain redress in respect of discretionary commission arrangements. These arrangements have already been outlawed by the FCA. Yet, to maximise the chances of securing compensation, a competition class action is being pursued alongside both test claims[110] and claims joined together,[111] leading to an undesirable fragmentation of collective proceedings. Aside from the challenge of delivering compensation, public enforcement faces deeper structural weaknesses. Regulatory agencies may lack the resources for extensive monitoring and are vulnerable to capture through lobbying by business groups.[112] Overall, private and public enforcement should be seen as complementary rather than mutually exclusive.[113] Class actions correct the access to justice gap that regulation and alternative tools alone cannot fill.

b. The best approach to expansion

i. Repackaging and the need for a generic regime

Since the justifications for class actions apply universally, a generic regime is preferable to incremental sector-by-sector expansion. The case for a generic regime is reinforced by repackaging, since it is an unavoidable consequence of introducing class actions on a sector-by-sector basis. Cases like *Gutmann* do not merely prove the need for a consumer law

[108] UK Government, *Private Actions in Competition Law: A consultation on options for reform - government response* (2013), para.5.12.
[109] CAT 1598/7/7/23, ongoing.
[110] *Johnson v FirstRand Bank Ltd* [2025] UKSC 33.
[111] *Stuart Angel and Ors v Black Horse Ltd* [2025] EWHC 490 (KB).
[112] See e.g. Civil Justice Council, *Improving Access to Justice through Collective Actions, Final Report to the Lord Chancellor* (2008), 62-66; Deborah Hensler, "So You Are Thinking About Adopting a Class Action Regime? Lessons from the US" C.J.Q. 42(1) 2023 3, 8.
[113] Andrew Higgins and Adrian Zuckerman, "Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress" (6 November 2013) Oxford Legal Studies Research Paper No.93/2013, 41-44.

class action, as proposed by members of the House of Lords.[114] Although gradual evolution would reduce the number of instances of repackaging, it perpetuates the core problem. Claims would still fall between the cracks if they cannot be repackaged as breaches of competition law or consumer law. Only a generic regime can truly solve the issue.

The reasons provided by the Government for a sector-by-sector approach are not convincing.[115] The first is that structural differences, such as the nature of regulation, require sector-specific approaches. As Mulheron has argued, there is no reason why these differences could not be accommodated under a generic framework according to the rules of the court. For example, if a sector has more active regulatory or ombudsman schemes, the rules could make it more difficult for a class representative to bring an action in preference to those schemes.[116]

The second argument is that a meaningful global impact assessment of generic class action regimes may not be possible. Even if it were, the Government contends, it could overlook factors specific to certain sectors, such as the alleged danger of blackmail suits. The misplaced fear of blackmail suits has already been addressed. Further, the insistence on a global impact assessment is self-contradictory. The Government emphasised that class actions should not be expanded on a generic basis without such an assessment, yet conceded that it cannot be done. This cannot justify inaction, especially since the Government subsequently undertook a similar assessment before introducing opt-out proceedings for competition law.[117] Sectoral expansion also poses new dangers, the most damaging of which is inconsistency across procedural requirements. Undue variance across matters such as preliminary merits criteria could threaten accessibility and erode legal certainty.[118] Therefore, a generic regime is the only defensible way forward.

ii. Designing a generic class action

The concluding question is how to design a generic class action. While a detailed exploration lies beyond the scope of this article, a statutory framework would be ideal, imposing minimal financial costs for the Government. It would enable comprehensive parliamentary debates

[114] Hansard HL Deb 5 December 2023, vol.834, cols 1417-1418.
[115] UK Government, *Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'* (2009), paras 12-13.
[116] Rachael Mulheron, "Recent Milestones in Class Actions Reform in England: A Critique and a Proposal" (2011) 127 L.Q.R. 288, 300-301.
[117] UK Government, *Private Actions in Competition Law: A consultation on options for reform - final impact assessment* (2013), para.194.
[118] Rachael Mulheron, "Recent Milestones in Class Actions Reform in England: A Critique and a Proposal" (2011) 127 L.Q.R. 288, 305-306.

regarding the details of the regime, such as the requirements for certification and the rules governing settlement and costs allocation. The existing opt-out competition law regime should inform the legislative process, as well as generic class action regimes in other jurisdictions, including the US, Canada and Australia. The approaches taken by the Canadian provinces are particularly instructive, having influenced the evolution of the existing law.[119] How might *Gutmann* have proceeded in its original consumer law form under such a regime, free from the problems caused by repackaging?

British Columbia offers a compelling model. Building on virtually identical frameworks enacted in the other provinces to improve access to justice,[120] class actions were introduced by the Class Proceedings Act 1996 ('CPA 1996'). The Act establishes four criteria for class action certification.[121] First, the pleadings must disclose a valid cause of action. There is an available route in consumer law, namely a deceptive act or practice contrary to section 4(1) of the Business Practices and Consumer Protection Act 2004. This includes any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer, with the Act setting out a non-exhaustive list of deceptive acts and practices.[122] With respect to *Gutmann*, the practice is the failure to make Boundary Fares sufficiently available. Although there is no direct equivalent to a misleading omission, this would not be fatal. In *Director of Trade Practices v Household Finance Corporation of Canada*, the British Columbia Supreme Court held that a practice of non-disclosure of material information may be a deceptive practice if it tends to lead and is capable of leading consumers into an error of judgment.[123] The evidence from *Gutmann* meets this requirement, in terms of the preponderance of factors that led to the double-charging of consumers.

The other certification requirements under the British Columbia framework would also be met. Second, there is an identifiable class of two or more persons, given the millions of train customers affected. Third, it is clear that the claims of the class members raise 'common issues', such that a class action would be the preferable procedure for the fair and efficient resolution of the common issues.[124] In contrast, under the competition law regime in this

[119] UK Government, *Private Actions in Competition Law: A consultation on options for reform - final impact assessment* (2013), para.194; *Merricks v Mastercard* at [37], [42] (Lord Briggs).
[120] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018), p.4.
[121] s.4(1).
[122] Business Practices and Consumer Protection Act 2004 s.4(3).
[123] [1976] 3 WWR 731 (BCSC) 737.
[124] See generally *Hollick v Toronto (City)* 2001 SCC 68, [2001] 3 SCR 158; *Pro-Sys Consultants Ltd v Microsoft Corporation* 2013 SCC 57, [2013] 3 SCR 477.

jurisdiction, claims must raise 'the same, similar, or related issues of fact or law'.[125] This standard is influenced by Quebec's statute, which is broader and more flexible than the 'common issues' test used in British Columbia and Ontario.[126] Nevertheless, it is unlikely that the stricter British Columbia test would bar certification. The double-charging caused to the consumers in *Gutmann* by the misleading omission is evidently a 'common issue'. This is illustrated by how, in *Gutmann*, the CAT drew a comparison with *Kett v Mitsubishi Materials Corp*, a consumer case brought in British Columbia concerning defective vehicle components.[127] In *Kett*, it was held that the question whether the defendants fraudulently altered quality control certifications for their products was not a common issue. The case was distinguished because it was impossible to determine whether any class member had suffered loss at all without a complex inquiry, whereas *Gutmann* involves systemic breaches amounting to common issues.[128] Lastly, since Justin Gutmann can fairly and adequately represent the interests of the class as the class representative, it seems likely that *Gutmann* would have been certified as a class action in British Columbia as a straightforward breach of consumer law.

This would provide access to aggregate damages. A key distinction is that, under the British Columbia statute, the aggregate damages provision may only be used to measure the class-wide loss, instead of proving the loss.[129] By contrast, the English regime dispenses with the need for individual assessments of loss entirely.[130] Although the British Columbia regime is more stringent, *Gutmann* is a case in which the existence of individual loss in the form of double-charging is clear and measurable, meaning that aggregate damages would be available. Therefore, it appears likely that *Gutmann* would proceed as a consumer law class action in British Columbia, avoiding the constraints imposed by competition law and the distortion of competition and consumer law doctrine. This does not mean that a generic English class action should replicate this model. However, the possibility of access to justice without repackaging demonstrates that, if a generic regime is carefully implemented, a brighter future for English law is within reach.

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[125] CA 1998 s.47B(6).
[126] *Vivendi Canada Inc v Dell'Aniello* 2014 SCC 1, [2014] 1 SCR 3; cited in *Gutmann* [2022] EWCA 1077, at [41]; [2021] CAT 31 at [108].
[127] 2020 BCSC 1879.
[128] *Gutmann* [2021] CAT 31 at [115].
[129] CPA 1996 s.29.
[130] Rachael Mulheron, "Revisiting the Class Action Certification Matrix in Merricks v Mastercard Inc" (2019) 30 King's L.J. 396, 413-414; *Merricks v Mastercard* at [97], [120] (Lord Sales and Lord Leggatt); *Gutmann* [2021] CAT 31 at [110]-[111].

Conclusion

If claimants suffer mass harm that does not fit neatly into competition law, they must choose between repackaging their claims or forfeiting access to justice, potentially for millions. Repackaging exposes the scale of the access to justice gap; creates needless hurdles for claimants due to the need to satisfy the requirements of competition law; and distorts the purpose of both competition law and the original area of law. The *Gutmann* case highlights all of these problems, but is not an isolated instance.

The arguments against expanding class actions are not persuasive. The evidence from the competition law regime over the past decade shows that the fear of American excesses is a distraction. The objection that class actions threaten the autonomy of litigants carries little purchase, especially given the current need to repackage claims. Moreover, regulatory enforcement cannot fill the access to justice void left by the absence of a generic regime. The Government's insistence that regulation is sufficient is circular, relying on the absence of a procedural avenue to argue that there is no need for one. In Canada and other jurisdictions, claims may proceed as opt-out class actions in their original form without issue. Until a generic regime is introduced, most people affected by mass harm will never secure justice.