

Competition law pleadings

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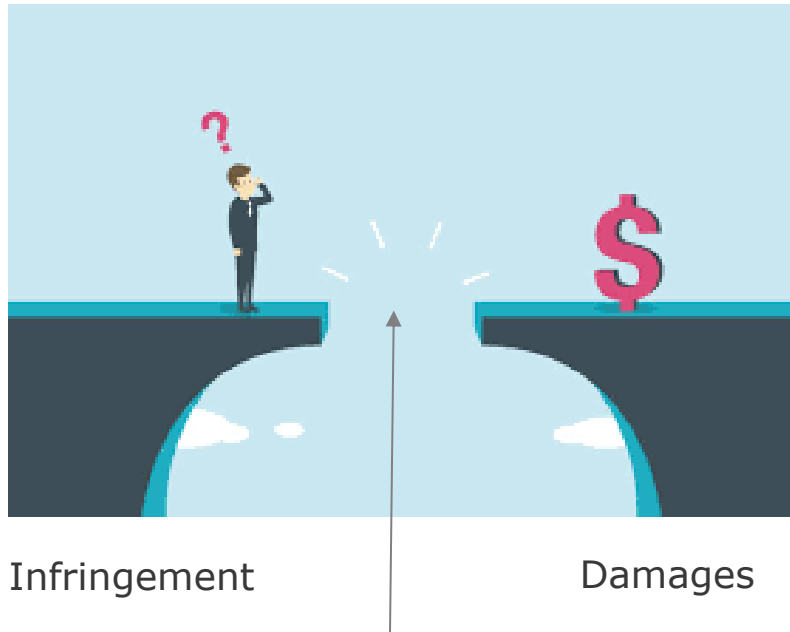
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Agenda

1. Pleadings: role
2. Economic theories of harm: causation and mitigation
3. Pleading cost mitigation defences: *Stellantis*
4. Pleading consumer harm from abuse: *Gormsen*
5. Take aways

1. The role of pleadings



The role of pleadings is to allow the parties and the Tribunal to know where they stand and to be able to prepare for trial efficiently

Pleadings: “must identify the way in which the infringement is said to have resulted in the loss or damage claimed” (CAT in *O’Higgins*)

CAT: “Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all material facts on which a party relies”

“a failure properly to assert a causal link between breach and damage will result in a claim being defective and – if that defect is not cured – liable to be struck out. That is as true of Applications for CPOs as it is in other cases”

a “blueprint to trial” to ensure effective trial of issues, which “sets a fairly low threshold and simply does not require the [rep’s] methodology to anticipate and address at the certification stage every point that might be raised in defence” (Boyle)

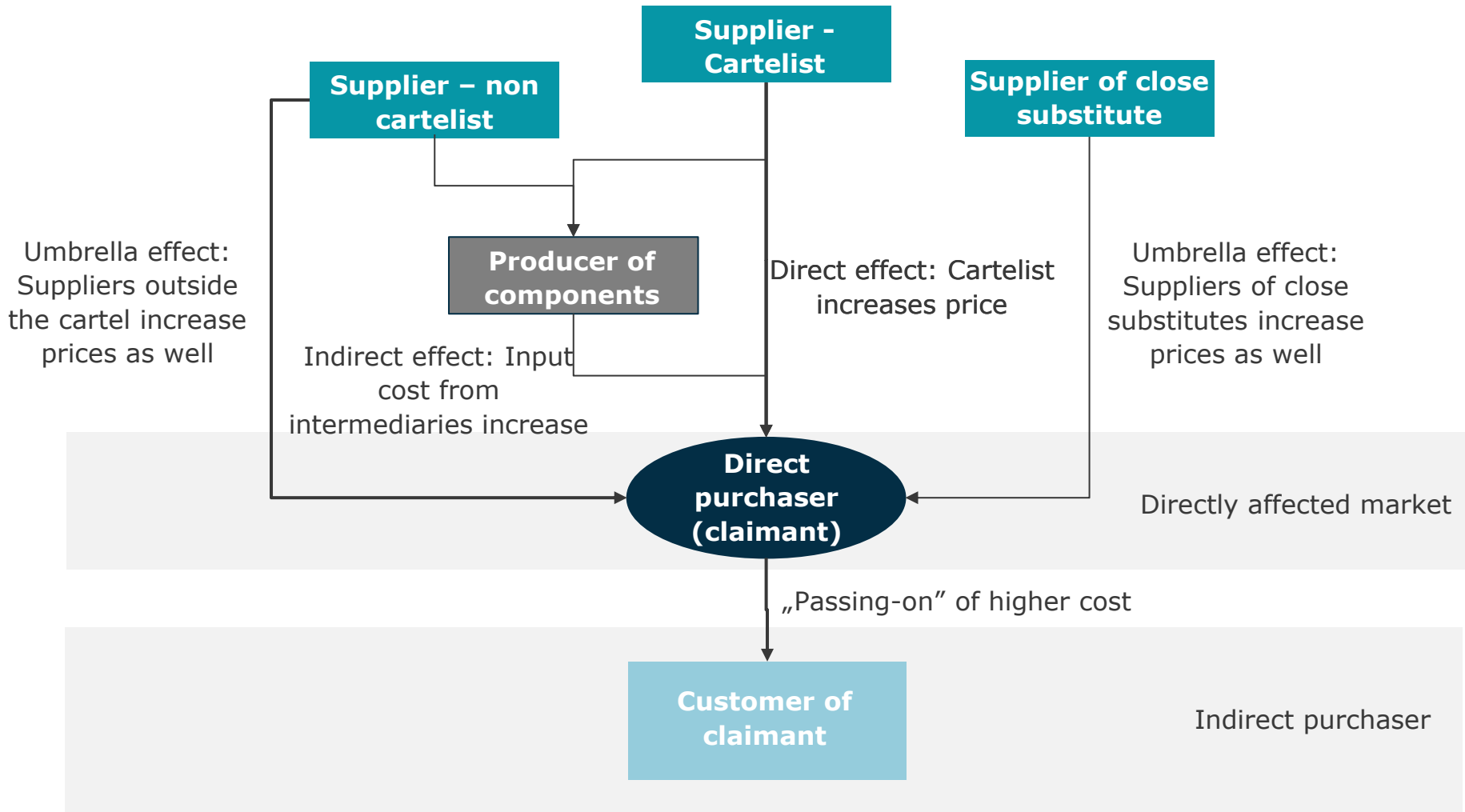
“a short articulation of the theory of harm said to arise out of the infringement, and how the expert proposes, on a class wide basis, to demonstrate in a court of law how that infringement was causative of loss, and how that loss will be quantified”

2.A. Economic theories of harm – Causation and quantification challenges

- Imagine competitors meeting in a smoke filled room...
- Cartels: anti-competitive object or per se illegal, so typically little on effects in decisions. Abuse: capability – not actual effects/damages on either rivals or customers/consumers. Settlement decisions terse
- Necessary to consider causation and any defendant mitigation arguments (pass-on, cost reduction..)
- CAT in *Boyle*: Expert economist best placed to identify “clearly and narrowly” data/information required (e.g. prices etc), not docs, but may need third party disclosure or other expert evidence
- Economists: (i) Assess/test causation/mitigation – i.e. relevant evidence required, not just theory; and (ii) quantify damages, in a transparent, evidence based way, comparing:
 - actual observed market outcomes (factual)
 - with market outcomes absent the infringement (counterfactual) (see *BritNed* and *Gormsen*)
- Rarely simple: counterfactual is a universe that never existed



2.B. Causation – how do cartels harm direct and indirect purchasers?



3. *NTN v Stellantis*: cost off-setting defences

- In *NTN v Stellantis*, CoA focus on pleading required for a cost mitigation defence
- Context: EC bearings cartel; NTN's pleaded defence - no overcharge or it was passed on to its customers or set-off against prices it paid to other suppliers. FCA applied to have off-setting defence struck out
- CoA:
 - *British Westinghouse Electric* test - sufficient nexus between claimed mitigation (the off-setting) and the overcharge
 - Burden of proof on defendant to demonstrate: (a) legal and proximate causal connection between overcharge and mitigation; (b) connection is realistic/plausible and some degree of conviction; and (c) evidence is more than merely arguable
- NTN advanced voluntary particulars that FCA had cost controls and set cost targets, and these facts were assumed to have been realistic/plausible to test NTN's arguments
- But primary case was no overcharge or passed on, and no particulars or evidence how/why FCA identify, quantify and seek to off-set by reducing costs elsewhere; or why it would be effective; or why FCA would not have secured other cost reductions in any event
- Neither defendants or claimants "have any right to go fishing in disclosure"
- Not obvious why these points do not read across to pass-on

4. Gormsen

- Context: Meta/Facebook allegedly abused a dominant position:
 - Unfair data requirement: personal data obtained exceeded that required, with data used by Facebook's advertising business and revenues not shared with users. But PCR's claim not based on loss to the class in a counterfactual (data not been unlawfully extracted), but the advertising profits gained by Meta
 - Other unfair trading conditions: users are misled, but why is this abusive (consumer protection claim) and, if based on misrepresentation, is it suitable for collective proceedings if allegations based on individual members being misled (counterfactual is either not subscribed or would have done so anyway)
 - Unfair price: in a competitive market, users would have been compensated for their personal data proportionate to its commercial value. (Why don't small non-dominant social media pay consumers for data?) Pleaded methodology needs to set how price charged for Facebook service is too high (rather than too low) including value to users
- No methodology advanced for unfair data/trading conditions (Pro Sys Test not addressed)
- Unfair price: Need to address nexus between abuse, counterfactual, and quantification methodology – not done. Even if nexus, are some excess profits due to advertising dominance? If more advertising competition, would value of extra users' data be lower?

4. Take-aways

Economics jokes

- Why were economists invented?
- Two-word summary of economics?

Causation/ Mitigation

- Pleadings need to cover causation, especially if indirect effects. Expert evidence needs to cover all impacts of the cartel and key mitigations
- Point is of general relevance - E.g. Power cables cartel: BritNed was not a typical project, so why compare average prices during and outside of cartel?

Quantification

- Remember expert's duties in the UK!
- Work should be done to the scientific experiment standard and with transparency – key question is not that opposing experts differ, the question is why?

Big picture

- Economists should work closely with lawyers from pleadings onwards
- Facts are king