TERRITORIALITY ISN'T OVER

By Robert O'Donoghue [1]

I. INTRODUCTION

Economist Jorge Padilla recently lamented "I have a clear view: territoriality is over…The question is not so much therefore whether territoriality is meaningful or not, but to what extent – and how – extraterritorial competition law enforcement is going to have an impact on trade liberalization and trade flows."[2]

At least in the context of private antitrust damages litigation, however, these rueful comments are premature. The United States has long grappled with these issues in a series of complex, and not always consistent, cases arising under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), going all the way to the Supreme Court in *F Hoffmann-La Roche v. Empagran* 542 U.S. 155 (2004).

Curiously, however, the territorial scope of competition law has received very limited scrutiny indeed in over 60 years of EU competition law. A small number of cases and decisions arose in the context of administrative decision-making (and appeals therefrom) at the EU level, notably *Woodpulp*,[3] *Gencor*,[4] *Intel*[5] and *Innolux*.[6] But to my knowledge at least the issue has not surfaced in the sphere of private antitrust damages actions.

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[2] Jorge Padilla, 7th International Concurrences Review conference, Paris, June 14, 2016, quoted http://globalcompetitionreview.com/news/article/41250/padilla-territoriality-over/.
[3] *Ahlström Osakeyhtiö and Others v. Commission,* Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447.
[4] Case T-102/96, *Gencor v. Commission,* EU:T:1999:65.
[5] Case T-286/09, *Intel Corporation v. Commission,* EU:T:2014:547.
[6] Case C-231/14 P *Innolux Corp. v. Commission*, EU:C:2015:451.

Until now that is. On May 23, 2016 the English High Court struck out two separate damages claims in the case of *Iiyama Benelux BV & others v. Schott AG & others* [2016] EWHC 1207 (Ch.) ("*Iiyama*")[7] purely on the basis that the claims as advanced did not fall within the territorial scope of EU competition law, and specifically Article 101 TFEU.

The damages actions arose in the context of two separate but related cartels in cathode ray tubes ("CRT") and glass used as an input in CRTs. The claimants' parent entity purchased finished products containing CRT monitors (which contained CRT glass as an input) in Asia which it then branded as Iiyama products and onward supplied to its subsidiaries in the EU. The EU subsidiaries sought damages in the English courts for the loss alleged to have been suffered by the subsidiaries in their onward sales to customers due to the cartelized components. The defendants succeeded in having these claims struck out before trial. The gravamen was that the relevant transactions, and effects on competition, all took place in Asia and did not engage EU competition law as a territorial matter. That the High Court considered the issues in this regard to be sufficiently clear to merit summary dismissal is striking.

This article teases out the salient background in the *Iiyama* case, the High Court's main findings, and where the judgment leaves us on the vexed question of territorial application of competition law. It might be thought that the issues are largely ones of posterity in the wake of the recent UK plebiscite which voted to leave the European Union. But the issues of territoriality would actually assume greater, not lesser, importance if the UK leaves the European Union since it would become all the more important to understand the demarcation between UK competition and EU competition laws, including when agreements or practices that facially have a UK dimension might remain subject to EU competition law due to their territorial effects.

II. THE BACKGROUND IN *LIYAMA*

The salient facts in *Iiyama* can be stated briskly. It concerned two separate but related cartels in CRTs and CRT glass (which is an input into CRTs). These two cartels were the subject of separate EU Commission decisions in 2012 finding infringements of EU competition law.

The CRTs (and CRT glass which they contained) were incorporated in monitors that entities like Iiyama then sold under their own brand name. CRTs are an older technology that was eventually displaced by LCD technology. Iiyama sold finished CRT monitors to end-customers. Its case was that the overcharges involved in the cartels caused it loss and damage in selling on to its customers. It commenced proceedings in the English courts to bring these claims. The plaintiff entities were Iiyama's local subsidiaries in the UK, Netherlands, France, Germany and Poland, as well as a Japanese parent company entity. The defendants were certain UK subsidiaries of the cartelist groups. These UK entities provided an "anchor" for the plaintiffs to then join in other non-UK defendant entities as necessary parties to the litigation.

[7] I did not act in the *Iiyama* case. Both I do act for various defendants in a related case involving the LCD cartel.

A critical aspect to understand for purposes of the territoriality argument is the relevant supply chain underpinning the claim. The judgment describes it as follows (para. 43):

> (i) CRT glass was made in Asia (or otherwise outside the EEA).
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> (ii) It was supplied to CRT manufacturers outside the EEA (in Asia) who turned it into tubes (CRTs).
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> (iii) The tubes were then sold to a monitor manufacturer, or in some cases to dealers who sold on to monitor manufacturers. This step was generally in Asia (but in any event outside the EEA)…
>
> (iv) The completed monitors were then sold to Liyama Corporation, a Japanese company (and therefore in Asia).
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> (v) Liyama Corporation then sold the monitors to one of the claimant companies. At this point the monitors entered the EEA.
>
> (vi) The claimants then sold the monitors within the EEA.

So, it will immediately be seen that: (a) the plaintiffs did not purchase any products directly from the defendants; (b) the relevant purchases of monitors were made in Japan by Iiyama Corporation and the competition to supply and manufacture CRTs and CRT glass took place in Asia also; and (c) the sales by Iiyama Corporation to its EU subsidiaries were intra-group transactions.

The defendants applied to strike out the claim in its entirety. The simple point they made was that, in substance, any harm to competition as alleged was suffered in Asia, and this did not engage EU competition law as a territorial matter. They argued that the plaintiffs based their claim on EU Commission decisions finding a cartel between Asian producers of CRTs/CRT glass panels that was orchestrated in Asia. During the cartel period, Iiyama Corporation (which was not itself a plaintiff) purchased finished products from original equipment manufacturers ("OEMs") who had purchased the CRTs used in such monitors from Asian distributors or other Asian sources. The defendants' case was that Asia was the point (temporal and geographical) at which any alleged overcharge of a member of the plaintiff group took place. Thereafter, the finished goods were transferred variously to Iiyama's EU subsidiaries at prices determined internally by the plaintiff group. The consequences of those internal transfers for the plaintiff group companies did not fall within the scope of what EU competition law is protecting against as a territorial matter. A claim for damages based on EU competition law was also therefore bad in law.

III. THE HIGH COURT'S FINDINGS

There were various strands to the High Court's judgment. The first concerned a specific basis for strike out of the claim in the case of the CRT glass cartel. The EU Commission decision in the case of CRT glass found an EEA-wide cartel. The CRT glass defendants argued that there was no causal link between the EU Commission decision finding of an EEA-wide glass cartel – which the plaintiffs relied on – and the cartel that, on the plaintiffs' own case, necessarily

underpinned the claim based on the purchases made by Iiyama Corporation in Asia (and then internally supplied to its EU subsidiaries).

The High Court accepted that there was a disconnect between the EEA-only glass cartel found by the EU Commission and the chain of causation pleaded by the plaintiffs based on purchases in Asia. It therefore separately struck out the claim on this basis due to lack of causation. As the High Court put it (paras. 98-99):

> The pleaded case against the Glass defendants bases itself on the CRT Glass Decision. That Decision found a European cartel, in which glass (or perhaps transformed products into which glass was incorporated) was sold into the European market by the cartelists to their European customers. It is a claim based on that infringement that the claimants seek to pursue in their Particulars of Claim.
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> However, their elaborated case goes off in a different direction. It alleges sales outside Europe to people who were not their European customers (and who were not the claimants either). That sort of claim is not within the infringement found by the Commission, and there is no pleaded suggestion as to how price fixing by a cartel in Europe in relation to European pricing and European customers (which is what the Commission found and what the pleading ostensibly relied on) would have an effect on pricing in Asia of components manufactured in Asia and which passed down a chain outside Europe before ending up in monitors bought into Europe by the claimants. The two things are fundamentally different.

This issue is not analyzed further in this article since it was a point of causation that was specific to the glass claim, and not a general point to do with territorial jurisdiction under EU competition law.

A second issue concerned an interpretative issue as to how the EU Commission's CRT decision itself dealt with the issue of territorial application of EU competition law. Because the Iiyama damages claim "followed-on" from the EU Commission decision, it was obviously important to establish if the decision itself shed light on the territorial scope, or limits, of the infringements found. Particular focus was placed on recital 1020 of the CRT Decision which stated:

> 1020. The sales of CDT colour display tubes] and CPT [colour picture tubes] directly or indirectly concerned by the infringement in the EEA (duly taking into account its enlargement in 2004) are:
>
> (a) Direct EEA Sales (that is CDT or CPT directly sold to customers in the EEA by one of the addressees of this Decision);
>
> (b) Direct EEA Sales Through Transformed Products (that is CDT or CPT incorporated intra-group into a final computer monitor or colour television and subsequently sold to customers in the EEA by one of the addressees of this Decision); and

> (c) Indirect Sales (that is the value of the CDT or CPT sold by one of the addressees of this Decision to customers outside the EEA, which would then incorporate the CDT or CPT into final computer monitor or color television products and sell them in the EEA).

The EU Commission then added:

> 1021. However, for the purpose of establishing the value of sales in this case, the relevant EEA turnover consists of those sales where the first "real" sale of CDT or CPT – as such or integrated in a final computer or color television product – was made into the EEA during the period of the infringement by one of the addressees of this Decision. This refers only to points (a) and (b) of Recital (1020). Although the value of all indirect sales made into the EEA (point (c) of Recital (1020)) could have been included in the relevant value of sales, this is not necessary in this case.

On this basis, the decision gave the impression that the scope of its findings was limited to direct sales to customers in Europe and direct sales of transformed products. It also gave the impression that these findings did not extend to so-called indirect sales, albeit the Commission considered that it could in principle decide to include the value of "Indirect Sales" when imposing a fine (in the event it decided not to do so). The High Court found that this was the correct way to read the CRT Decision, and that a follow-on claim that relied on the contrary interpretation was misconceived. But, again, this point is specific to the wording of the relevant EU Commission decision.[8]

The real interest in the judgment lies in its tackling the issue of the territorial application of EU competition law head-on; in other words ignoring the two points adverted to above, which happened to be pleading-related issues specific to the particular Iiyama claims.

On the pure territoriality point the High Court's judgment is relatively short and devastating. The court first recalled the two possible tests for territoriality under EU competition law.

It first cited the "implementation" test in *Woodpulp*. In that case the EU Court of Justice ("CJEU") held that Article 101 TFEU has two elements: (a) formation of an agreement; and (b) implementation thereof (para 16). It further held that Article 101 TFEU could apply to entities based outside the EU only if it related to direct sales of the relevant products to purchasers established in the EU and if vendors engaged in price competition in order to win orders from those customers (paras 12–13), i.e. the EU "implementation" doctrine.

The court agreed with the defendants' characterization that: (a) both the CRT and CRT glass cartels were alleged to have been outside the European Union; (b) they related to prices charged in sales outside the European Union; (c) those sales were effected outside the European Union; and (d) then at the end of the relevant supply chain the cartelized products or transformed products were sold to the claimants in the European Union. This fell short of

[8] The wording was not unique however. The Commission's decision in the LCD cartel adopts an identical approach.

"implementing" the cartel in the European Union; it was implemented (on these facts) outside the European Union. By contrast in *Woodpulp*, the target of the cartel was EU pricing, and sales were made into the European Union by the cartelists.

A hoary old issue arises under EU competition law as to whether a sort of "qualified effects" test exists as a standalone alternative to the "implementation" test. The *Gencor* case of the EU's General Court appeared to suggest this – citing a test based on an "*immediate, substantial and foreseeable effect*" in the European Union[9] – although this suggestion has not hitherto been accepted by the higher CJEU.

The English court side-stepped this issue since it was prepared to assume that the plaintiffs were right that qualified effects was a standalone alternative to implementation. But it had no hesitation in finding that this possible alternative test was not satisfied either. In particular, it found that the claims floundered on an "immediate" effect. The court held that, while immediacy is a concept which is capable of flexible application, depending on the facts, it could not be satisfied in the case of the Iiyama claims, even to a level to allow the claim to proceed to trial to test the proposition further on the facts. It found that (para. 158):

> The consequences of the non-EU cartels fixing their prices for glass and CRTs will have been felt in the market into which they were sold, which is not the EU market. Even if the effect of those sales is ultimately felt in the EU in the manner which the claimants would like to rely on, that is not an immediate effect. If a label is required, it is a 'knock-on effect,' and it is apparent from Intel that that is not sufficient.

IV. SOME REACTIONS

The first short, but important, point is that the judgment makes clear that while the territorial scope of EU competition law raises *inter alia* issues of public international law and comity, the legal issues go beyond this. In particular, it confirms that it is a question of substantive law under EU competition law as to whether, as a territorial matter, EU competition law can apply in a specific set of circumstances. In other words, the issue is that the plaintiff must show that EU competition law is engaged. The issue is not one (simply) to do with a court exercising discretion over proceedings before it for reasons of public international law or comity. It is a requirement of substantive law that the court has jurisdiction to do so as a territorial matter.

Second, the *Iiyama* judgment does not take any position on whether EU competition law should, formally, accept a second standalone test for territoriality based on a form of qualified effects test. As noted, the court was prepared to accept, for purposes of its analysis,

[9] *Gencor* arose under the EU Merger Regulation so strictly speaking it was not dealing with the territorial scope of EU competition law more generally. As the court noted in *Iiyama* the test in *Gencor* was arguably not posed as a test for the scope of Article 101 TFEU but as a justification for imposing jurisdiction (*in casu* under the EU Merger Regulation) on non-EU entities as a matter of international law (para. 127). But the subsequent *Intel* judgment of the General Court (*Intel v Commission*, Case T-286/09) seems to accept that qualified effects in the sense posited in *Gencor* is an alternative test to implementation. In June 2016 the CJEU heard the appeal against this judgment, including on the territoriality point. A ruling is not expected for several months.

that there was (or may be) a second test to this effect but concluded that the claims failed on this front also.

Interestingly, in reaching this conclusion, the court concluded that *Intel* case – which remains pending before the CJEU – did not assist the plaintiffs on territorial jurisdiction. In that case Intel was found to have made payments to computer OEMs in exchange for them slowing down deployment of or not fully exploiting products with non-Intel chips in them. The OEM contract in question was made in China, with the chips sold to Lenovo in China and put into PCs/laptops there that were later sold worldwide. The court in *Iiyama* distinguished this case on the basis that in *Intel*:

> the anti-competitive practices were designed to produce an effect in the EEA (and elsewhere), because it was intended that Intel's customers (the computer manufacturers) would deliberately not sell products there. Those customers were complicit in the behaviour, and their complicity had, and was intended to have, an effect in the EEA. It was therefore entirely accurate to describe the behaviour as being 'implemented' in the EEA, which was what the Commission and [General Court] found. Sales made by Intel were part of the background, but were irrelevant to that analysis. What is significant about that passage is the frequent references to implementation within the EEA.

In other words, the key issue in *Intel* was not that Intel did not sell its chips in the EU but that it paid OEM customers not to sell certain PCs/laptops in the European Union. That agreement clearly was implemented in the European Union; there was an agreement that the OEM customer would not to sell at all into the European Union.

Third, whilst, superficially, the European Union and United States appear to proceed on different bases as respects territoriality, in truth the differences are probably small in practice. Unlike the Sherman Act, Article 101 TFEU contains express territorial limitations. Its wording prohibits "all agreements between undertakings…and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." This is not unique to Article 101 TFEU. As Advocate General Wathelet noted in Case C-231/14 P *Innolux v. Commission* EU:C:2015:292 "the wording of Articles 101 TFEU and 102 TFEU clearly states that those articles exclusively relate to practices which restrict competition within the European Union, rather than outside it" (para. 38).

But the FTAIA also now includes specific wording on this issue as a matter of U.S. Federal law, namely that jurisdiction does not extend to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect (a) on trade or commerce which is not trade or commerce with foreign nations, or (b) on import trade or import commerce with foreign nations. Justice Breyer explained how the FTAIA works in *F Hoffman-La Roche Ltd v. Empagran SA* (2004) 542 US 155 at 162:

> This technical language initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It

> then brings such conduct back within the Sherman Acts reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the effect must giv[e] rise to a [Sherman Act] claim. (emphasis in original)

The basis for these limitations was explained as follows in *F Hoffman-La Roche Ltd v. Empagran SA* (2004) 542 US 155:

> First, this court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations…This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow…This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.

Ultimately, however, there appears to be a high degree of convergence between U.S. and EU antitrust laws on these issues.[10] Indeed, the ruling in *Motorola Mobility v. AU Optronics Corp.,* 775 F 3d 816 (7th Cir 2014) seems very close in substance to that in *Iiyama*. It is of course true that EU competition law does not, unlike U.S. Federal antitrust law, ban indirect purchaser claims – indeed, it positively recognizes them. But the conclusion in *Motorola* was not confined to the indirect purchaser claim issue. A key plank of the ruling was that, irrespective of the ban on indirect purchaser claims, Motorola's injury occurred when it purchased abroad. Likewise, in *Iiyama*, the key point was that the losses, and distortion of competition, all occurred in Asia, and that the decision by the Iiyama Corporation to then supply the finished products to its EU subsidiaries did not "re-injure." Judge Posner also dealt with an important related point to do with Motorola's insistence that it dictated the price at which it bought mobile phones from its subsidiaries. He noted that "it would be odd to think that Motorola could obtain antitrust damages on the basis of its own pricing decisions." Thus, a further point may be that an injury said to result from an intra-group pricing decision is not a relevant antitrust injury (although *Iiyama* did not decide the case on this basis).

Finally, it will be interesting to see if plaintiffs seek to avoid the conclusions in *Iiyama* by relying on other theories, and how the courts will react to those. One theory that plaintiffs have tried in the United States is that the domestic effect of the anticompetitive conduct – higher prices – gave rise to their foreign injury of higher prices abroad because the defendants could not have maintained their global price-fixing arrangement without fixing the prices in the United States as well. In other words, there was a "but for" relationship between the domestic and foreign injuries.

[10] One possible difference is that the EU qualified effects test – if indeed one exists in law separately from implementation – appears stricter on plaintiffs than the qualified effects test as applied in U.S. law.

This theory was rejected in *Empagran S.A. v. F. Hoffmann-Laroche, Ltd*., 368 U.S. App. D.C. 18, 417 F.3d 1267, 1271 (D.C. Cir. 2005) ("*Empagran II*"). The reason is that a "but for" test is necessary but not sufficient as a matter of causation: the requirement under the FTAIA was to show a direct or, more likely, proximate causal relationship between the domestic effect and the foreign injury (and not merely a "but for" relationship). A similar conclusion was reached in *In Re Dynamic Random Access Memory* 546 F.3d 981 by the Ninth Circuit. This conclusion seems right; if not, territoriality would become irrelevant in practice since any global cartel could posit a "but for" effect of the kind advocated by the plaintiffs in *Empagran II* and *DRAM*. To posit these effects is almost a truism and would make causation redundant in every global cartel, which cannot be right.

Another analytical route may be to approach the question from the perspective of the applicable law, which will always be a question in an international dispute. In the European Union this issue will generally be determined by Rome II Regulation (Regulation 864/2007), although unharmonized national law rules may continue to apply to older cartels. Rome II fully envisages a conflict-of-law analysis being applied to a claim (allegedly) based on breach of EU competition law: see recitals 22 and 23, and Article 6. A key connecting factor in competition law cases is the identification of the particular market on which the relevant impact, for the purposes of that case, occurred. If, as a result of the applicable law analysis, the law of an EU Member State applies, then that will include Article 101 TFEU (since EU law is part of national law). By contrast, if the agreements, the relevant competition, and the effects occur outside the European Union, a non-EU law ought to apply, in which case EU competition law would not.

V. CONCLUSION

There has been justifiable concern in recent years about the proliferation of antitrust authorities worldwide resulting in "me too" regimes that have the effect of imposing multiple jeopardy for the same conduct and effects. In this sense my economist friend, Jorge Padilla, may well be right in lamenting that territoriality is over in the inter-agency sense.

But it is abundantly clear that the UK and U.S. courts at least understand the problems that extra-territorial application and multiple jeopardy can create, and they have placed real limitations on the extent to which foreign-only conduct and effects can be the subject of domestic damages litigation claims. The *Iiyama* judgment is part of this trend.

This trend reflects two core notions, one of which is new and the other ancient. It has been clear for centuries, as part of the general law, that States and their courts will not generally act extra-territorially. So, in the same way as states do not generally criminalize acts conducted wholly extra-territorially, antitrust law, too, has its limitations in terms of attacking conduct taking place overseas (even if, through many ripples, it has some domestic effects also).

The related, newer idea is that in an increasingly inter-connected world with proliferating antitrust regimes, there is more, not less, reason for States to be cautious in

extending their laws to foreign conduct or effects. It is one thing for public enforcement to express its disapproval, within its territory, of conduct also sanctioned elsewhere. That may be a reasonable expression of sovereign disapproval or in-territory deterrence. But it is quite a different matter for private litigants to have a general right to pursue their litigation in the jurisdiction that happens to be most friendly to that particular claim when they have voluntarily decided to domicile themselves elsewhere for reasons to do with tax or other advantages. To do so gives rise to a real risk of multiple jeopardy and over-compensation (or unjustified compensation where the proper jurisdiction and law would not compensate such a claim). In the EU the antitrust damages system is purely compensatory. If so, it is difficult to see a justification for that, and it would also offend public international law and comity if States, and their courts, were routinely to do this.