SCREEN CARTEL CASES SET THE BOUNDARY: TERRITORIAL LIMITS OF EU CARTEL DAMAGES CLAIMS

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I. INTRODUCTION

The English High Court has given important guidance on the territorial scope of European Union ("EU") cartel damages claims in two recent judgments, both concerning cases brought by the same group of claimants. In the first case, *iiyama v. Schott & others* (May 23, 2016 [2016] EWHC 1207 (Ch)), the Court struck out claims said to be worth nearly €1bn. In the second claim, *iiyama v. Samsung Electronics & others* (July 29, 2016, [2016] EWHC 1980 (Ch)), the claims survived but were significantly cut back.

These cases both addressed an issue that has arisen in a number of recent cartel damages claims, including in the English *AirCargo* claim: Can claims for breach of EU competition law be made in respect of purchases made outside the EU? Claimants have sought to adopt novel arguments in order to bring such claims in an attempt to bring in one place claims concerning worldwide purchases. The first of these judgments makes clear what claims cannot be made and the second highlights two theoretically possible claims that could be made, but which may be difficult to prove.

II. BACKGROUND TO THE CLAIMS

The two cases have remarkably similar fact patterns. The first claim (the "CRT claim")

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concerned two separate cartels which were subject to infringement decisions by the European Commission (the "Commission"): the Cathode Ray Tube ("CRT") cartel; and the CRT glass cartel. TVs and PC monitors used to be manufactured using CRTs, which were made from CRT glass.

The claim was brought by the iiyama group, a seller and distributor of computer monitors, which had purchased monitors from original equipment manufacturers ("OEMs") in Asia containing both CRT and CRT glass. Importantly, however, the CRTs and CRT glass incorporated in the monitors iiyama purchased had all been purchased in Asia, outside the EEA.

The second claim (the "LCD claim") related to a Commission decision finding a worldwide cartel in LCDs, used to make TVs and computers monitors. Again (with the possible exception of a small percentage of monitors bought after the end of the LCD cartel) iiyama did not purchase monitors that contained LCDs that had been sold in the EEA.

In both cases the basic supply chain (simplified here) had involved an initial sale of CRT/CRT glass/LCDs by the alleged cartelists to third party OEMs in Asia who manufactured the monitors. Those monitors were then sold in Asia to a Japanese company in the iiyama group which then sold the monitors to the claimant companies, who were other group companies based in the EU, who in turn sold the monitors within the EEA.

In both cases the defendants applied to strike out the claim and/or for summary judgment and/or a declaration that the English Court did not have jurisdiction. In both cases the defendants' central argument was that, as the purchases of allegedly cartelized products relied on by the claimants as the basis of their claims had been made outside the EU, the claim was outside the territorial limits of EU competition law. It was argued that the claims must fail for that reason.

The defendants' applications in the *CRT* claim were heard first and the judgment published just before the hearing in the *LCD* case. It is helpful, therefore, to look first at how the argument was dealt with in the *CRT* claim.

III. THE PARTIES' ARGUMENTS IN THE *CRT* CLAIM

At the hearing of their applications, the defendants argued that the claim disclosed no cause of action because the purchases of the allegedly cartelized products, on which the claim was based, had been made outside the EU and so their sale could not be an infringement of EU competition law. In this regard, the defendants argued that the claim failed to satisfy the requirements for the territorial scope of EU law established by the European courts in cases concerning the jurisdiction of the Commission. There are two key cases in this area, *Ahlström and others v. Commission* [1988] ECR 5193 ("*Woodpulp*") a cartel case, in which the Court established the now well known "implementation" test, and *Gencor Ltd v. The Commission* [1999] ECR II-753 ("*Gencor*") a merger case, in which the Court applied the so called "qualified effects" test:

- In *Woodpulp* the ECJ held that producers of woodpulp established outside of the common market but engaged in price coordination relating to sales made directly into the common market had breached Article 85 (now Article 101) because such direct

sales amounted to the implementation of an anticompetitive agreement within the common market; and

- In *Gencor* the CFI held in relation to a proposed merger that, notwithstanding the fact that all of the companies were not EU domiciled (save for a single holding company), the proposed merger was contrary to the then merger regulation. In so ruling, the CFI applied the above implementation test from *Woodpulp*. It also detailed a test for the territorial limits of EU law which required that the effect in the EU of the extra-EU conduct in question must be foreseeable, immediate and substantial effect.

There is some controversy as to whether these are in fact two separate tests and how they relate to one another. In the *CRT* claim, however, the defendants contended that whether the Court applied the *Woodpulp* "implementation" test, or the "qualified effects" test, as set out in *Gencor*, the claim failed and so it was not necessary to determine which test was correct.

The claimants argued that the fact that their monitors (which contained the CRT and CRT glass) were sold in the EU provided sufficient connection to the EU for EU competition law to apply, even if the CRTs and CRT glass had been purchased outside the EU. In advancing their case, the claimants sought to rely on *InnoLux v. European Commission* (2015) Case C-231-14P ("*Innolux*") concerning the fines imposed in relation to the LCD cartel. In that case, the Court had upheld fines that were calculated in part on the basis of the sale by the addressees of products containing LCD (so called "transformed products") into the EU. The claimants said that this was authority for the proposition that the sale of transformed products in the EU (in this case monitors containing CRT and CRT Glass) was sufficient to amount to a breach of EU competition law even if there was no sale of the cartelized products within the EU. The claimants also relied on a recital in the Commission's *CRT* cartel decision, which described the sales of CRTs "concerned by" the infringement as including indirect sales, i.e. CRTs sold by addressees of the Commission's decision to customers outside the EEA which were then incorporated into products and sold by third parties into the EEA. The claimants argued that the Commission's reference to indirect sales as being "concerned by" the infringement in the EEA meant these sales were also a means by which liability could be established.

IV. THE JUDGMENT IN THE *CRT* CLAIM

The Court held that, if the sales by the alleged cartelists said to be subject to the two cartels had occurred outside the EU (whether they were sales of the cartelized product itself or a product incorporating it) then there was insufficient connection with the EU to involve a breach of EU competition law. There was, therefore, no basis for a claim for breach of EU competition law in respect of those sales, and the claim must fail for that reason. In reaching this conclusion, the Court, for the first time, applied the established EU case law on the territorial scope of EU competition law to a damages claim.

In particular, the Court found that sales outside the EU could not be said to be "implementation" of anticompetitive behavior in the EU (applying *Woodpulp*) as "the mere fact that, even if true, there is some end of the road effect in the pricing of [the claimants'] purchases in Europe does not mean that it was implemented there."

Nor did the Court find that there was a foreseeable, immediate and substantial effect within the EU (applying *Gencor*). In particular, as the effect of the cartels was initially the sales of CRT Glass or CRTs to third party monitor producers based outside of the EU, this was not a sufficiently immediate effect on the EU market.

The Court also dismissed the claimants' reliance on *InnoLux* and noted that *InnoLux* concerned matters relating to fines and the CJEU did not consider that the same territorial considerations necessarily applied to both infringement and the power to fine. As to the CRT decision itself, the recital relied on was part of the remedies section of the decision (and not the section addressing liability) and the Commission's statements elsewhere in the decision appeared to be "positively disclaiming [indirect sales] as being relevant."

V. THE LCD CLAIM

As explained above, the *LCD* claim was based on very similar facts and supply chain. The hearing of the defendants' applications occurred very shortly after the Court's judgment in the *CRT* case was handed down. The judge in the *LCD* case was able to consider it and he essentially adopted its reasoning in the *LCD* case. In doing so he found that the claim for loss caused by an overcharge on purchases by iiyama of monitors containing LCD sold by the cartelists outside the EU was outside the territorial scope of EU competition law. The judge rejected an argument that the territorial scope of the damages claim for breach of EU competition law was in some way different from its scope for public enforcement purposes.

In the *LCD* claim, however, iiyama advanced two claims not pursued in the *CRT* case. The first was an argument that but for the implementation of the LCD cartel in the EU, LCDs would have been available in the EU at a lower price. iiyama said that in those circumstances it would have purchased monitors containing LCD purchased in the EU and that it had suffered a loss by not being able to do so. The judge accepted that such a claim would be within the territorial scope of EU competition law and could be pursued by iiyama. Such a claim, while theoretically possible, would no doubt face some significant hurdles in terms of proving causation. Iiyama will have to show that absent the LCD cartel in the EU, using LCD sold in the EU and made into monitors there, would have been less costly than using monitors made in Asia from Asian supplied LCDs.

The second argument made by iiyama, was that if there had been no implementation of the cartel in the EU, the worldwide cartel would have collapsed and iiyama could have purchased monitors using Asian supplied LCD at a lower price. The judge observed that both these claims would likely raise important points of policy in relation to matters such as the scope of the tort or whether there was any test of proximity for the harm claimed, but that these issues were not suitable to be determined on a summary basis.

In the *LCD* case, therefore, iiyama's claim will be permitted to continue, but limited to those claims within the scope of EU competition law, which does not include claims for an "overcharge" on purchases of the allegedly cartelized product made outside the EU.

VI. CONCLUSION

These two judgments are important in the development of cartel damages claims in the EU because they show how the territorial limits of EU competition law are to apply to such claims. A claimant who did not purchase (directly or indirectly) any of the cartelized products within the EU may still have a claim if she can show the EU implementation of a cartel somehow caused her loss. A claim for an "overcharge" on a purchase (directly or indirectly) made outside the EU is outside the territorial scope of EU competition law and cannot be pursued. Although the legal argument that allowed that conclusion to be reached was complex, the conclusion itself, once stated, is perhaps not unsurprising.