iiyama v Samsung and others: Court of Appeal considers the territorial limits of EU competition law

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INTRODUCTION

On 16 February 2018, the Court of Appeal handed down an important judgment in the case *of iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others (**"iiyama"**)*.[1] The proceedings relate to two competition law damages claims brought by the iiyama group in relation to cartels in the cathode ray tube (**"CRT"**) and liquid crystal display (**"LCD"**) sectors (CRTs and LCDs being component parts in televisions and computer monitors). Key to both cases was the indirect nature of the claimants' purchases from the cartelists; none of the claimants purchased cartelised products directly from any of the defendants and most of the stages of the supply chain through which iiyama had acquired the cartelised products took place in Asia. The High Court found at a preliminary stage that such indirect purchases from the cartels fell outside the territorial scope of EU competition law.

In a much-awaited judgment, the Court of Appeal addressed the question of whether, given the supply chains in question, iiyama had a real prospect of success in claiming that Article 101 of the EU Treaty had been infringed, such that it would be able to recover damages for losses suffered as a result of purchases of products at prices inflated by reason of a cartel. In short, the Court of Appeal overturned the decisions of the High Court, deciding that both cases should go to trial. The decision will be of particular relevance to other claimants seeking to recover losses in the English courts arising from the indirect sale of cartelised products into the EU.

BACKGROUND

iiyama (a Japanese maker of televisions and monitors) brought two damages claims against a number of companies in respect of the losses it had allegedly suffered as a result of the infringements which had been the subject of three European Commission cartel decisions relating to CRTs, the glass used in CRTs and LCDs.

iiyama's supply chain was largely the same for both the CRT and the LCD proceedings. The cartelised products, having been first supplied to entities outside the EU, were then supplied (by this stage incorporated into televisions and computer monitors) to a claimant holding company also outside the EU, which then supplied those transformed products to claimant subsidiary companies within the EU, for onward sale and distribution within the EU. The defendants to both

[1] [2018] EWCA Civ 220.

claims brought applications to dispose of the claims at a preliminary stage on the grounds that they fell outside the jurisdiction of EU competition law.

THE HIGH COURT'S JUDGMENTS

In the CRT proceedings the High Court found in favour of the defendants and disposed of the claims. In the LCD proceeding, the High Court allowed the claims to survive, but in a significantly reduced form.[2]

Mann J's decision in the CRT proceedings

In the CRT proceedings, Mann J held that the activities complained of by iiyama were outside the territorial scope of Article 101 and therefore could not be the foundation of iiyama's claim for damages. The court referred to the CJEU's decision in *Ahlström Osakeyhtiö v Commission* (***"Woodpulp I"***)[3], which established that Article 101 only applies to the extent that the cartel is implemented in the EU (known as the "implementation test"). On the facts of the case, the court observed that the CRT defendants sold their products in Asia and that the ultimate sale of the transformed products into the EU (i.e. indirect sale into the EU) did not amount to a sufficiently close connection between the CRT defendants' conduct and the EU. The court noted that the mere fact that the CRT defendants' sales had "*some end of the road effect*" in the EU did not mean that the cartel was implemented in the EU.

The court also referred to the General Court's decision in *Gencor Ltd v Commission* (**"Gencor"**)[4], which, in the context of the EU Merger Regulation, established that the Commission has jurisdiction where it is "*foreseeable that a proposed concentration will have an immediate and substantial effect*" in the EU (known as the "qualified effects test"). On the facts of the case, the court found that the effect of the CRT defendants' indirect sales into the EU was anything but immediate and was "*plainly a knock-on effect*". The court also deemed iiyama's case on substantiality and foreseeability to be "*very thin*".

Morgan J's decision in the LCD proceedings

In the LCD proceedings, Morgan J took a more layered approach to the territoriality analysis under Article 101 and allowed some of iiyama's claims to continue. The court held, in line with Mann J's findings in the CRT proceedings, that the LCD defendants' indirect sales into the EU did not amount to an implementation of the cartel in the EU.

However, despite this, the court allowed the claims to survive on the basis that it was arguable that there was an alternative connection to the EU. The court observed that the European Commission's decision relating to LCDs established that the relevant cartel was implemented in

[2] *iiyama v Schott & others* [2016] EWHC 1207 (Ch) and *iiyama v Samsung Electronics & others* [2016] EWHC 1980 (Ch).

[3] [1998] ECR-I-5913.

[4] [1999] ECR II-753.

the EU and that there was therefore an infringement of Article 101. The court held that the only relevant question for the purpose of iiyama's damages claim was whether iiyama could show that it suffered losses by reason of the relevant cartel being implemented more generally. In this context, Morgan J considered and found plausible the following two counterfactual arguments in support of iiyama's claim:

A. If the cartel had not been implemented in the EU, LCDs and products incorporating LCDs would have been available within the EU at non-cartelised prices. In this case, iiyama could and would have purchased them in the EU at non-cartelised prices.

B. If the cartel had not been implemented in the EU, it would have collapsed globally. In this case, iiyama could and would have purchased LCDs and/or products incorporating LCDs in Asia at non-cartelised prices.

THE COURT OF APPEAL'S JUDGMENT

Having been heard separately at first instance, the CRT and LCD proceedings were subsequently joined for appeal and the appeals were heard in December 2017. The Court of Appeal overturned the judgment of Mann J in the CRT proceedings and partially overturned the judgment of Morgan J in the LCD proceeding, deciding that both actions should go forward to trial.

Choice of law

The court observed that the first question that needs to be considered in any competition law damages action based on Article 101 is whether it is at least arguable that the claims are governed by the law of any EU Member State. If it is clear that the claims are governed by the law of a non-Member State and EU law does not apply, the actions fail insofar as they are framed as claims for breach of Article 101.

In order to determine the applicable law on the facts of the case, the court looked at sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995[5] and analysed various factors connecting the tort in question with England and other states. The court observed that it could not, without further information, identify the state where the most significant element of the tort occurred or the state with the most significant overall connection to the tort. Although the court seemed to recognise that it was arguable that the law governing iiyama's claims was the law of one of the Asian states where the relevant restriction on competition was first implemented, it concluded that it would be wrong to determine this issue adversely to iiyama without the further information which full disclosure and trial of the action would bring.

[5] The Rome II Regulation was inapplicable as the relevant facts occurred before its coming into force on 11 January 2009.

Territorial scope of Article 101

The crux of the Court of Appeal's judgment was that there was an arguable case that the cartel activities relied upon by iiyama satisfied the implementation test or the qualified effects test developed to delineate the territorial scope of Article 101. The core reasoning of the judgment was founded on the interpretation of the CJEU's judgment in *Intel Corporation Inc. v European Commission* ("***Intel***"), which was given after the High Court judgments:

A. The court acknowledged that there were obvious points of distinction between the facts and issues in *Intel* and *iiyama*. Nevertheless, the court decided to accept iiyama's argument that *Intel* provided substantial support for their argument that indirect sales into the EU may fall within the scope of Article 101.

B. The court observed that in *Intel* the CJEU expressly recognised the qualified effects test as a separate route to establishing jurisdiction and emphasised the need to examine the offending conduct "*as a whole*" to decide whether the three components of the test (i.e. foreseeability, immediacy and substantiality) are satisfied. The court's view was that, following the CJEU's findings in *Intel*, the legal situation was "*very different*" from that which Mann J confronted, "*at the time when the status of the qualified effects test was still uncertain*".

C. The court stated that whether the qualified effects test is satisfied depends upon the full examination of the intended and actual operation of the cartel as a whole. However, it held that it is at least arguable that intended effects of a worldwide cartel in the EU fall within the scope of Article 101, and that the production of such effects in the EU, if substantial and of a systemic nature, may properly be characterised as immediate effects of the offending agreements.

D. In relation to the CRT and LCD defendants' arguments that indirect sales into the EU can never satisfy the qualified effects test, the court held that the mere existence of a prior sale to an innocent third party outside the EU at an early stage of the supply chain does not, without more, lead to the conclusion that the test of immediacy is not satisfied. The court stated that the test is one of "*substance rather than terminology*" and that Mann J's description of the effect of the CRT sales in the EU as a "*knock-on effect*" should be reserved for a statement of the conclusion which is reached after a full analysis of the offending conduct.

Alternative connection to the EU

Having decided in favour of iiyama on the central issue on appeal, the Court of Appeal briefly commented on iiyama's other arguments that had persuaded Morgan J not to dispose of the LCD proceedings at a preliminary stage. The court noted that there was "*an air of contrivance*" about the counterfactual arguments put forward by iiyama in that they would likely not have been advanced had there been no need to demonstrate a direct causal link to the EU. However,

the court was persuaded that at this early stage in litigation iiyama should be allowed to plead its case as it saw fit and so allowed these claims also to go to trial.

SIGNIFICANCE OF THE COURT OF APPEAL'S JUDGMENT

The Court of Appeal's decision is a milestone in the development of English law on private enforcement of EU competition law. This is the first time that the Court of Appeal has considered the territorial scope of Article 101 in the context of a private action for damages. The decision is also the first English judgment analysing the implications of the CJEU's decision in *Intel*. Given that there has been a gradual increase in the number of competition law damages actions across the EU, it can be expected that the courts of (and litigants in) other EU Member States will pay close attention to the Court of Appeal's analysis of Article 101.

The Court of Appeal's interpretation of the qualified effects test will likely provide some encouragement to claimants seeking to recover losses arising out of indirect sales into the EU as the Court of Appeal was not persuaded by an argument that that such sales can never fall within the scope of Article 101. However, given that the judgment was delivered in the context of strike out and summary judgment applications, the issue of territoriality may be explored again following a full examination of facts at trial. Further, the Court of Appeal's decision may be subject to appeal to the Supreme Court. As a result, there may be further developments in this evolving area of law as the cases progress.

Slaughter and May acts for Koninklijke Philips NV and Philips Electronics UK Ltd, two of the CRT defendants in the case. The case is led by dispute resolution partner Richard Swallow, assisted by senior associate Camilla Sanger and associate Olga Ladrowska. Slaughter and May have instructed Marie Demetriou QC (Brick Court Chambers).

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