

Extraterritoriality—the Court of Appeal takes an expansive view of article 101 TFEU’s scope

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Introduction

Victims of cartels will welcome the recent judgment of the Court of Appeal (“CoA”),¹ in which it was affirmed that *Intel*² provides a persuasive basis to argue that the territorial application of art.101 Treaty on the Functioning of the European Union (“art.101”) extends to harm arising from transformed products originating outside of the European Union (“EU”). Whilst such issues are to be ultimately determined at trial alongside the precise quantification of the claim, the fact that the CoA has determined that such issues are inappropriate for pre-trial disposal provides clear support that claimants have locus standi to bring such claims in the first place.

The case concerned the joined appeals of two conflicting High Court decisions handed down in 2016. To date, the jurisprudence surrounding the territoriality of art.101 has been confined to a handful of decisions by the General Court of the European Union (“GC”) and the Court of Justice of the European Union (“CJEU”), the application of which has been left open to debate, until now. The CoA’s judgment therefore contains three firsts: (i) the first decision at UK appellate level regarding compensation for indirect purchasers in the context of the territorial scope of art.101; (ii) the first decision at UK appellate level to hold that the question of territorial scope of art.101 is unable to be assessed on an

interlocutory basis; and (iii) the first court in the UK (at the time of writing and to the authors’ knowledge, also across the EU) to apply and express a view on *Intel*. Accordingly, this article explores the territorial scope of art.101 in the context of *iiyama*’s pursuit for follow-on damages, and how the CoA’s ruling will up the ante for similar claimants.

Background to *iiyama*’s claim

The anti-competitive conduct giving rise to damages

“Follow-on” damages, as opposed to “stand-alone” damages, rely upon decisions adopted by the European Commission (the “Commission”) (or a national competition authority) for the purposes of establishing that a competition law prohibition has been infringed, and therefore the liability of those involved in carrying out the infringing conduct. The onus of proving the remaining ingredients of a claim for damages, namely causation that resulted in damage and the level of overcharge, rests with the claimant.

On the basis of one settlement and two infringement decisions adopted by the Commission between 2010 and 2012, *iiyama* issued two claims in the High Court in December 2014: first, *iiyama Benelux BV & Others v Schott AG & Others*³ (“*iiyama 1*”), which is a claim for follow-on damages in respect of the CRT glass cartel⁴ (a component supplied to manufacturers of cathode ray tubes which is used in the production of *iiyama*’s computer monitors) and the cathode ray tubes cartel⁵ (including colour display tubes and colour picture tubes that are also used for *iiyama*’s computer monitors); and, secondly, *iiyama (UK) Ltd & Others v Samsung Electronics Co Ltd & Others*⁶ (“*iiyama 2*”), which is a claim for follow-on damages in respect of the LCD cartel⁷ (the liquid crystal display panel which is the successor technology to cathode ray tubes, used in *iiyama*’s computer monitors). For convenience, we will collectively refer to the cartelised CRT glass, cathode ray tubes and LCDs as the “cartelised component(s)”.

Indirect purchasers

A fundamental cornerstone to the sphere of private enforcement of competition law is that any undertaking that has suffered loss as a consequence of anti-competitive practices is entitled to receive compensation before a national court.⁸ This has been unanimously interpreted

¹ *The LCD Appeals* [2018] EWCA Civ 220 in appeals: *iiyama Benelux BV and Others v Schott AG and Others* A3/2016/2765; *iiyama (UK) Ltd & Ors v Samsung Electronics Co. Ltd & Ors* A3/2016/4232; *iiyama (UK) Ltd & Ors v Samsung Electronics Co. Ltd & Ors* A3/2016/4238; *iiyama (UK) Ltd & Ors v Samsung Electronics Co. Ltd* A3/2016/4246, handed down on 16 February 2018.

² *Intel Corporation Inc v European Commission* (C-413/14 P) EU:C:2017:632.

³ Claim no.HC-2014-001979.

⁴ *CRT glass* (COMP/39.605) (19 October 2011).

⁵ *Cathode ray tubes* (COMP/39.437) (5 December 2012).

⁶ Claim no.HC-2014-001980.

⁷ *LCDs* (COMP/39.309) (8 December 2010).

⁸ *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) EU:C:2006:461; [2006] 5 C.M.L.R. 17.

by academics and practitioners alike that *indirect* purchasers are just as worthy of compensation as *direct* purchasers of a cartelised product. This position has also been codified in the Damages Directive,⁹ which came into force—albeit belatedly—in the UK on 9 March 2017.¹⁰ As a result of the Damages Directive, indirect purchasers benefit from a rebuttable presumption that loss has been passed onto them.¹¹ It should be noted from the outset that *iiyama*’s claim *pre-dates* the Damages Directive; the substantive provisions do not have retrospective effect and thus only apply to conduct occurring on or after the date of implementation of the Damages Directive. Nevertheless, whilst the distinction between the two categories of purchasers is indicated by the labels “direct” and “indirect”, it goes to the crux of *iiyama*’s case and is therefore worthy of brief explanation against the backdrop of the Damages Directive.

The supply chains

iiyama group is an ultimately Japanese domiciled electronics company that designs, manufactures and distributes electronic products, such as display screens and computer monitors, into the EU (amongst other geographic markets). The definitions of “direct purchasers” and “indirect purchasers” in the Damages Directive (again, not directly applicable to *iiyama*’s case but helpful in terms of understanding the distinction) clarify that a direct purchaser is one which acquired products or services that are the object of an anti-competitive infringement “directly from an infringer”, whereas an indirect purchaser is one which acquired products or services either containing or deriving from the anti-competitive infringement “not directly from an infringer, but from a direct purchaser or subsequent purchaser”.¹²

In terms of *iiyama*’s place in the supply chains of the cartelised components; the *iiyama* claimants purchased computer monitors incorporating the cartelised components from original equipment manufacturers (“OEMs”) in Asia, having first tendered to OEMs for a particular specification of computer monitor. Prior to this, however, the OEMs purchased the cartelised components directly from the cartelists; a process which also took

place in Asia. *iiyama* then shipped the computer monitors intra-group from Asia to its European domiciled subsidiaries, and then onto distributors for onward sale within the European Economic Area (“EEA”). Therefore, there existed a number of layers between the cartelists (on the one hand) and the European *iiyama* subsidiaries (on the other) which eventually received computer monitors incorporating the cartelised components—resulting in *iiyama* being a subsequent purchaser of the cartelised components, having not purchased them directly from the cartelists. This—albeit grossly simplified—description of the supply chains underpins the source of contention in the High Court cases, and the basis for the argument put forward by the defendants in *iiyama 1* and *iiyama 2* that the claims were beyond the territorial scope of art.101. Ultimately, cartels involving indirect purchases may be contrasted to the cartelisation of end-products, such as trucks for which the Commission has imposed record-breaking fines¹³ and which invite claims to be made by direct purchasers (although not exclusively) who, until now, may have been considered to have an easier ride when compared to indirect purchasers.

Notwithstanding the position taken by the defendants, indirect purchaser claims in the sphere of private damages are certainly not a new phenomenon. For example, Vodafone is pursuing follow-on damages in the High Court in respect of the Commission’s finding of the smart card chips cartel¹⁴ whereby SIM card manufacturer intermediaries—and not the addressees of the Commission’s finding—incorporated the cartelised smart card chip into SIM cards which were then purchased by Vodafone.¹⁵ It might also be said that follow-on claims similar to that of *iiyama* are likely to be more prominent in years to come. In this regard, the Commission has uncovered similar types of cartels whereby an end-product *incorporates* numerous components that may have been subject to a cartel having a centre of gravity outside of the EEA. For example, there are follow-on claims being pursued in the High Court further to the lithium-ion batteries cartel,¹⁶ and the Commission recently adopted a decision against manufacturers of electrolytic capacitors.¹⁷ Furthermore, *iiyama* is not alone in its pursuit

⁹ Directive of the European Parliament and of the Council of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (2014/104/EU).

¹⁰ Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

¹¹ Directive of the European Parliament and of the Council of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (2014/104/EU), art.14.

¹² Directive of the European Parliament and of the Council of certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (2014/104/EU), art.2.

¹³ *Trucks* (COMP/39.824) (19 July 2016).

¹⁴ *Smart Card Chips* (COMP/39.574) (3 September 2014).

¹⁵ See *Vodafone Group Services Limited & Others v Infineon Technologies AG & Others* (claim no.HC-2017-001969). Pending the outcome of the CJEU’s appeal by two of the addressees, a trial date has been listed for 2019. Advocate General Wathelet has opined that the GC’s ruling against Infineon (one of the addressees) should be set aside in his opinion dated 12 April 2018 (Press Release no.43(18)).

¹⁶ *Rechargeable lithium-ion batteries* (COMP/39.904) (12 December 2016); see *Media-Saturn-Holding GmbH & Others v Panasonic Marketing Europe & Another* (CP-2018-000004).

¹⁷ *Capacitors* (COMP/40.136) (21 March 2018).

for damages in respect of the CRT glass, cathode ray tubes and LCD cartels¹⁸—and, at the time of writing, at least two claims in relation to the cartels in question are reported to have settled prior to the handing down of the CoA’s judgment.¹⁹

Pre-iiyama: from wood pulp to loyalty rebates

The case law that goes to the heart of iiyama’s case revolves around whether EU competition law has extra-territorial reach and stems from the basic wording in art.101: “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*” (our emphasis). Whilst the “internal market” is *where* the effect of anti-competitive conduct is to occur (or, if by object, to have been intended to occur)—see Advocate General Wathelet’s comment that “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”²⁰—it cannot be said that art.101 imposes the jurisdictional standard for what it is seeking to regulate, namely the *extent* of the effect and *from where* that effect should derive. This leaves open a fundamental question: does the territorial scope of art.101 extend to anti-competitive practices that have geographically taken place outside of the EU but that cause damage to the internal market in an indirect manner?

The “implementation test”

Ahlström Osakeyhtiö & Others v Commission,²¹ decided by the CJEU in a famously short judgment in 1988, concerned an application by the addressees for the annulment of a finding by the Commission that wood pulp producers in non-EU countries had infringed the predecessor to art.101 (Treaty establishing the European Economic Community art.85) (“*Woodpulp*”). The centre of gravity in that cartel, similar to the CRT glass, cathode ray tube and LCD cartels in question, was outside of the EU. The CJEU held that anti-competitive practices may only be caught by art.101 if they are *implemented* within the EU, thereby setting the stage for what is commonly known as the “implementation test”. In reaching this decision, the CJEU held that the “decisive factor” for

implementation is the *place* of implementation rather than *where* the anti-competitive agreement was formed, because

“if the applicability of prohibitions [...] were made to depend on the place where the agreement [...] was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions”.²²

The “implementation test” would therefore avoid the ability for a court to reach a finding that those who act contrary to the EU competition law regime would not be liable for conduct that affected the internal market—even if the agreement to do so otherwise was made outside of the internal market.

However, whilst *Woodpulp* went some way to determine that “implementation” rests upon the geography of the conduct and not of the agreement, it perhaps did not make full use of the opportunity to spell out what might constitute “implementation” in the context of art.101. This is a regrettable fact, particularly given the already short judgment of the CJEU. Even a basic dictionary definition of “implementation”—being “the process of putting a decision or plan into effect”²³—does not assist in understanding its application in the context of territorial scope. However, *Woodpulp* concerned price-fixing behaviour of sales *directly* into the EU—while other anti-competitive practices as set out in art.101 extend to, for example, the carving up of markets and exchanging certain types of information. The implementation of such practices is not necessarily to be assessed upon the same basis when compared to that of price-fixing (which is centred around actual sales). Whilst such comments would have been obiter in any event, the GC did not opine on what the position would have been in the case of indirect sales into the EU.

The “qualified effects” test

Just over a decade later, *Gencor Ltd v Commission*²⁴ was handed down by the GC in 1999 (“Gencor”). Unlike *Woodpulp*, *Gencor* concerned an application for annulment of a finding by the Commission that a merger was incompatible with the EU merger control regime. In assessing the application of art.101, the CJEU established the “qualified effects” doctrine to determine whether the effects of creating a dominant duopoly—in *Gencor*’s case—would have been “immediate, foreseeable and substantial”.²⁵ Taking each of these ingredients in turn: (i) “immediate” should have regard to the immediate

¹⁸ See, for example (without limitation), *Granville Technology Group & Others v Asahi Glass Co. Ltd & Others* (claim no.CL-2017-000645), *Leeds City Council & Another v Samsung Electronics Co. Ltd & Others* (claim no. HC-2015-002852), *Ingram Micro (UK) Ltd & Others v Samsung Electronics Co. Ltd & Others* (claim no.CL-2016-000757) and *Media-Saturn Holding GmbH & Others v Toshiba Information Systems (UK) Ltd & Others* (claim no.HC-2017-001043).

¹⁹ Claim no.HC09C04421 involving Nokia was reported to have settled pursuant to an interim report published in July 2013 (see MLex report dated 18 July 2013 titled “Company Statement: Nokia Q2 2013 report [damages settlement]”); and *Argos Ltd & Others v Samsung Electronics (UK) Ltd* (claim no. HC-2016-003505) (see MLex report dated 1 March 2018 titled “LG Display, Argos settle UK cartel claim”).

²⁰ *Inmolum v European Commission* (C-231/14 P) EU:C:2015:292.

²¹ *Ahlström Osakeyhtiö and others v Commission of the European Communities* (C-89/85 A) [1988] E.C.R. I-5913.

²² *Ahlström Osakeyhtiö* (C-89/85 A) [1988] E.C.R. I-5913 at [16].

²³ *Oxford English Dictionary* (Oxford University Press, 2018).

²⁴ *Gencor Ltd v Commission of the European Communities* (T-102/96) EU:T:1999:65.

²⁵ *Gencor Ltd* (T-102/96) EU:T:1999:65 at [92].

effect of creating conditions in which anti-competitive abuses would be possible; (ii) “foreseeable” should have regard to the significant impediment of effective competition in the market; and (iii) “substantial” should have regard to the effect of creating a long-lasting dominant position.

Thus, in some respects, it might be said that *Gencor* plugged the gap created by *Woodpulp*, in that “implementation” could alternatively be assessed by the actual effects of the anti-competitive practice. On the other hand, however, it might also be said that *Gencor* left the question of territorial scope in no better state than what was left by *Woodpulp*. This is because, unlike *Woodpulp*, *Gencor* concerned a merger decision (ex ante competition) and not a price-fixing cartel (ex post competition): the crux of the case was “the alteration of the competitive structure within the common market”.²⁶ Whilst both forms of anti-competitive practice fall within the scope of art.101, they necessarily attract different analyses. Therefore, whilst *Gencor* side-stepped and distinguished *Woodpulp* (without overruling) owing to ex ante as opposed to ex post competition, the resulting “implementation” and “qualified effects” tests are considered to co-exist. It is also worth noting that the Commission’s decisions in relation to the LCD and cathode ray tube cartels (and that are publicly available at the time of writing) make overt reference to the application of the test in *Woodpulp*, and *Gencor* in the alternative.²⁷

Clarification at last?

With almost two decades of silence having passed, we arrive at the seminal ruling of the CJEU in *Intel Corporation Inc v Commission*, handed down in September 2017 (“*Intel*”). This is the last of three cases relevant to the assessment of territoriality. This case—similar to the theme in *Woodpulp* and *Gencor*—concerned yet another form of anti-competitive practice: namely whether a dominant undertaking granting loyalty rebates had the effect of restricting competition. Despite the prolonged silence since *Gencor*, *Intel* is the first judgment in the body of EU case law to expressly endorse the application of the “qualified effects” test (although it is also noted that several Advocate Generals have both supported and tentatively opposed the idea prior to the *Intel* ruling—see, for example, the opinions of Advocate Generals Mayras,²⁸ Darmon in *Woodpulp* and Wahl in *Intel*). In particular, the CJEU in *Intel* ruled that “global” breaches of art.101 should be seen as a whole in order to avoid an “artificial fragmentation of

comprehensive anti-competitive conduct”²⁹ which would otherwise undermine the competition law regime in the EU. The CJEU moreover held that:

“the Commission’s jurisdiction under public international law to find and punish conduct adopted outside the European Union may be established on the basis of either the implementation test or the qualified effects test”,³⁰

and that the qualified effects test “pursues the same objective, [as the *Woodpulp* test] namely preventing conduct which, while not adopted in the EU, has anti-competitive effects liable to have an impact on the EU market”.³¹ As appears to be common theme in this patchwork quilt of case law, the CJEU perhaps did not use the opportunity to set out its preference for either *Woodpulp* or *Gencor* in the context of a price fixing cartel involving indirect sales. However, that was neither the crux of *Intel* nor was it strictly necessary to do so. The significant point was that *Intel* constitutes a clear endorsement of a wide application of the territorial scope of art.101 by confirming that *Gencor* has read-across in addition to *Woodpulp*.

Mixed results in the High Court

Having reviewed the relevant tests, we now return to *iiyama*’s case. The defendants applied for strike-out/summary judgment of both High Court claims which were heard in March and May 2016 respectively. Crucially, they were heard in the period post-*Gencor* and pre-*Intel* (and, indeed, before Advocate General Wahl’s opinion in *Intel* of 20 October 2016, in which Advocate General Wahl opined that the GC had erred in law in applying the “implementation” and “qualified effects” test³²). As explored below, the *iiyama* claimants emerged from the High Court with mixed results.

*iiyama 1*³³—CRT glass

In the first High Court proceedings, the defendants contended that *iiyama*’s claim—as pleaded—disclosed no arguable cause of action, since purchases of the cartelised components were made outside of the EEA. In this regard, *iiyama* had pleaded that the addressees of the CRT glass decision had operated in a “global cartel”.³⁴ However, this was not necessarily reflected in the sentiment of the Commission’s settlement decision; the scope of the decision was on an EEA-wide basis only. On deciding to grant the defendants’ application, Mann J ruled that “any cartel has not been shown, or pleaded,

²⁶ *Gencor Ltd* (T-102/96) EU:T:1999:65 at [68].

²⁷ As the addressees of the CRT glass cartel had settled with the Commission, the Commission’s analysis on the application of *Woodpulp* and *Gencor* is limited in the settlement decision.

²⁸ See opinion given in *Imperial Chemical Industries v Commission* (48/69) EU:C:1972:32.

²⁹ *Intel Corp v Commission* (C-413/14 P) EU:C:2017:632 at [57].

³⁰ *Intel Corp v Commission* (C-413/14 P) EU:C:2017:632 at [40].

³¹ *Intel Corp v Commission* (C-413/14 P) EU:C:2017:632 at [45].

³² Opinion of Advocate General Wahl in *Intel Corporation Inc v Commission* (C-413/14 P) EU:C:2016:788.

³³ *iiyama Benelux BV & Ors v Schott AG & Ors* [2016] EWHC 1207 (Ch).

³⁴ *iiyama Benelux BV & Ors v Schott AG & Ors* [2016] EWHC 1207 (Ch) at [100].

to have a sufficiently close connection with the EU”.³⁵ This insufficient nexus was founded on the basis that there was no implementation of the cartel in the sense of *Woodpulp* because *iiyama*, unlike *Woodpulp*, concerned *indirect* sales of the cartelised components: “[t]here is no suggestion that infringement can be found where the effects of the cartel are somehow felt in a *more indirect way*”³⁶ (our emphasis). Mann J also held that there were no qualified effects of the cartel in the sense of *Gencor*, particularly on the grounds of immediacy which was held to be “plainly a knock-on effect”.³⁷ In this regard, Mann J noted that immediacy is a “concept...capable of flexible application, depending on the facts” and “the consequences of the non-EU cartels fixing their prices...will have been felt in the market into which they were sold, which is not the EU market”.³⁸ This finding of potential flexibility is difficult to reconcile, as Mann J ruled largely on the basis of *iiyama*’s pleadings, and not necessarily with regard to facts or evidence that would have been presented at trial. Having failed at the hurdle on immediacy, the case on the remainder of the “qualified effects” test (namely “substantiality” and “foreseeability”) was noted to be “very thin”.³⁹

*iiyama 1*⁴⁰—Cathode ray tubes

In contrast to CRT glass, the Commission *did* find a worldwide cartel in the cathode ray tubes decision. However, the issue rested upon whether the Commission had made a finding of liability in relation to the cartelised components that were not sold into the EEA by the addressees, but via third parties. The defendants contended that the Commission had not made such a finding in relation to indirect sales, and that this was only a consideration for setting the fines—and in any event, such a finding would fall beyond the scope of art.101. Accordingly, having noted that *Intel*—which it must be stressed was only at the GC level at this juncture—did not assist the claimants’ case, Mann J ruled that, “it was not made apparent to me what the grounds of appeal were or how an appeal might, in reality, produce a decision more favourable [to *iiyama*]”.⁴¹

*iiyama 2*⁴²—LCD

In a much shorter (or “nuanced”, as the CoA eventually put it⁴³) judgment just months later, and having the benefit of *iiyama 1* to critique, the High Court expressed similar concerns vis-à-vis the difficulties imposed by the supply chains and the nexus to the EEA, and thus whether there were “qualified effects” in the sense of *Gencor*. However,

the High Court was ultimately persuaded by *iiyama*’s argument that if the cartel had not been implemented within the EU, then its computer monitors—which incorporated the cartelised component—would have been available within the EU at lower, uninflated, prices. Furthermore, *iiyama* contended that the internal market was so integral to the operation of the cartel that, but for its implementation in the EU, the cartel would have collapsed elsewhere. Such a finding was not necessarily clear-cut, as Morgan J had noted that the issues in the case “raise important questions of policy as to the operation of Article 101,”⁴⁴ but it was a victory for *iiyama* nevertheless.

Clarification in the Court of Appeal

The irreconcilable decisions in the High Court resulted in predictable appeals to the CoA that were granted on the papers in December 2016 (both Mann J and Morgan J had refused appeal). At the point of appeal, it is noted that *iiyama* discontinued their claim in relation to the CRT glass cartel—and thus *iiyama*’s case and the appeal turned to the cathode ray tubes and LCD follow-on claims only. Following a three-and-a-half-day hearing in December, the CoA handed down its judgment on 16 February 2018 to conciliate the conflicting findings of the High Court, and it ruled unanimously in favour of *iiyama*—the core principles of the CoA’s judgment are explored below.

Territorial scope post-iiyama

The CoA’s judgment focuses substantially upon the treatment of the extra-territorial issues in *Woodpulp*, *Gencor* and *Intel*; and for obvious reasons—the pre-*iiyama* state of play in the High Court was that there existed a combination of certainty and uncertainty surrounding *what* test should apply and *how* the test(s) should apply (noting that neither AG Wahl’s opinion in *Intel*, nor *Intel* itself, was known at this juncture). Indeed, this is evident from the obiter comments of Morgan J in *iiyama 2*, in which it was acknowledged that “there is room for argument whether there are now two tests for territorial scope”.⁴⁵ What is apparent from the judgment is that the CoA avoids making a finding on the basis of *Woodpulp* and *Gencor* alone, unlike *iiyama 1* and *iiyama 2* in the High Court. Whilst *Intel* was not available to the High Court, it is perhaps a signal that the incremental development of the case law has resulted in *Intel* constituting the tipping point of authority in this area. In this regard, the CoA does not necessarily make a finding

³⁵ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [151].

³⁶ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [118].

³⁷ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [149].

³⁸ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [148].

³⁹ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [147].

⁴⁰ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch).

⁴¹ *iiyama Benelux v Schott* [2016] EWHC 1207 (Ch) at [139].

⁴² *iiyama (UK) Ltd & Ors v Samsung Electronics Co Ltd & Ors* [2016] EWHC 1980 (Ch).

⁴³ *The LCD Appeals* [2018] EWCA Civ 220 at [21].

⁴⁴ *iiyama (UK) Ltd v Samsung* [2016] EWHC 1980 (Ch) at [53].

⁴⁵ *iiyama (UK) v Samsung* [2016] EWHC 1980 (Ch) at [27].

on the basis of *Woodpulp* and/or *Gencor* alone. In making its finding on the basis of *Intel*, the CoA agreed with *Iiyama* that *Intel* is “an important decision” and, heeding to the CJEU’s warning, that

“it provides substantial support for the argument that a worldwide cartel which was intended to produce substantial indirect effects on the EU internal market may satisfy the qualified effects test for jurisdiction”.⁴⁶

Therefore, the first point to note is that *Intel* represents the lead authority on the question of territoriality and, in particular, that the “qualified effects” test deriving from *Gencor* is now established as a basis for EU jurisdiction. The CoA’s judgment might be seen as a turning point from the High Court’s preference for the test of “implementation” over “qualified effects” in *Iiyama 1* and *Iiyama 2*; Whish and Bailey have previously observed that the “submissions of the UK Government in the [*Woodpulp*] case maintained its traditional hostility to the effects doctrine”.⁴⁷

Although the CoA referred to *Intel* as providing a “solid foundation for further incremental development”,⁴⁸ the CoA arguably took it upon itself to develop this area further in clarifying the scope of “immediacy”—albeit only via stepping stones as opposed to building blocks. As such, the qualified effects test following *Intel* is to be determined widely on the basis of “substance rather than terminology”, and furthermore that the “directness of effect should [not] be treated as an additional requirement to immediacy of effect”.⁴⁹ The temptation of the CoA to make an actual finding of whether the test is satisfied is to be read between the lines, and whilst the CoA does not go as far as producing a concrete finding on *Iiyama*’s specific case, it was clearly persuaded by the fact that indirect effects are capable of satisfying the notion of immediacy. In this regard, it ruled that “the mere existence of even one prior sale to an innocent third party outside the EU at an early stage of the supply chain”⁵⁰ is not enough to fail the immediacy test, resulting in a firm rejection of the finding in *Iiyama 1* that the effects were merely knock-on: this finding was characterised by the CoA as an “over-simplified approach to a complex problem” and that the test for immediacy was not a “diagnostic tool in its own right”.⁵¹ The CoA therefore took *Intel* further, by holding that if such effects may satisfy the test of immediacy if they were “substantial” and of “systemic nature”.⁵² The CoA attached no weight

to the defendants’ argument that *subsequent* sales of the cartelised components failed for lack of immediacy; instead, the CoA attached significant weight to the fact that the cartel was “always intended to have worldwide effect” and that its “purchases are ultimately made, at an inflated cartel price, within the territory of the EU”, the existence of which “on any substantial scale, must therefore have an effect on the operation of the internal market”.⁵³ It therefore follows that the jurisdiction of the Commission to adopt an infringement finding in the first place is not necessarily distinct to the territorial scope of a follow-on claim for damages—and therefore art.101 has a potentially wide territorial scope.

Inappropriate use of strike-out/summary judgment

Furthermore, and not forgetting the context in which the High Court and CoA were deciding, it was necessary for *Iiyama* to demonstrate that it had an arguable case fit for trial.⁵⁴ In this regard, the CoA made it clear that “the issue of territorial jurisdiction cannot be determined *adversely* to the claimants in either case on a summary basis” (our emphasis),⁵⁵ particularly “on the basis of assumed facts”.⁵⁶ Echoing the sentiment of *Intel* and profoundly disagreeing with Mann J’s “clear enough”⁵⁷ analysis, the CoA held that determination of the issue depends upon “a full examination of the intended and actual operation of the cartel as a whole” which may only take place “in light of the full facts as they emerge and are assessed at trial”.⁵⁸ Accordingly, *Iiyama*’s case was at least arguable in the context of *Intel*, as explored above. It should also be noted that the questions of jurisdiction and applicable law, which were presented to the CoA by the defendants in a last resort attempt to save their application, were also held to be inappropriate for determination summarily.

Whether the High Court had appropriately applied *Intel* in the first instance—not forgetting that *Intel* was still to be determined by the CJEU at the time—is initially excused by the CoA in holding that the circumstances before Mann J were “very different... at a time when the status of the qualified effects test was still uncertain”.⁵⁹ However, such sympathy is ultimately short-lived as ultimately the CoA described the approach of Mann J as being narrow.⁶⁰ Thus, whilst the CoA is keen to reiterate several times that such a finding cannot be made summarily, there is reason to believe that the CoA was potentially persuaded by a finding in favour of *Iiyama*.

⁴⁶ *The LCD Appeals* [2018] EWCA Civ 220 at [95].

⁴⁷ R. Whish and D. Bailey, *Competition Law*, 8th edn (Oxford University Press, 2015), p.533.

⁴⁸ *The LCD Appeals* [2018] EWCA Civ 220 at [94].

⁴⁹ *The LCD Appeals* [2018] EWCA Civ 220 at [98].

⁵⁰ *The LCD Appeals* [2018] EWCA Civ 220 at [98].

⁵¹ *The LCD Appeals* [2018] EWCA Civ 220 at [104].

⁵² *The LCD Appeals* [2018] EWCA Civ 220 at [98].

⁵³ *The LCD Appeals* [2018] EWCA Civ 220 at [100].

⁵⁴ *Three Rivers District Council v The Governor and Company of the Bank of England (No 3)* [2003] 2 A.C. 1 at [261].

⁵⁵ *The LCD Appeals* [2018] EWCA Civ 220 at [107].

⁵⁶ *The LCD Appeals* [2018] EWCA Civ 220 at [95].

⁵⁷ *The LCD Appeals* [2018] EWCA Civ 220 at [102].

⁵⁸ *The LCD Appeals* [2018] EWCA Civ 220 at [95].

⁵⁹ *The LCD Appeals* [2018] EWCA Civ 220 at [94].

⁶⁰ *The LCD Appeals* [2018] EWCA Civ 220 at [110].

Nevertheless, the CoA has made it clear that the threshold for success in the context of a strike-out/summary application of a follow-on claim is high, and it is potentially one less tactic for defendants to deploy in their wider strategy to obfuscate a bona fide claim for follow-on damages. Indeed, the use of interlocutory applications was already a rare phenomenon pre-*iiyama* in the context of follow-on claims. Although, at the time of writing, the High Court's judgment in a strike-out/summary judgment hearing on the basis of a challenge to the court's jurisdiction in another case is awaited,⁶¹ the CoA's judgment is likely to act as a deterrent for defendants to use interlocutory applications in the future, at least on the question of territorial scope of art.101.

No safe harbour for cartelists

Echoing the warnings of a narrow art.101 interpretation in *Woodpulp* and *Intel*, the CoA held that “[t]hose who participate in a worldwide cartel cannot complain if their conduct gives rise to proceedings in different jurisdictions, or if they have to meet possibly overlapping claims.”⁶² It follows that had the High Court findings in *iiyama 1* been maintained by the CoA, then there would have been a “very real risk” that the cartelists would “escape the European Union’s jurisdiction”.⁶³ It is therefore clear from the CoA’s judgment that there is no safe harbour for cartelists (indeed, if there were ever one): in the context of indirect effects

“what matters is that...it must have been contemplated that the supply chains whereby cartelised goods ended up being purchased within the EU might include intra-group transactions.”⁶⁴

This is a clear advocacy that the notion of “foreseeability” is to be construed widely; and is wholly appropriate given that the cartelised components in question are commodity products. The CoA’s judgment can be read to reinforce the notion that cartelists cannot escape liability on the basis that a supply chain resulted in indirect routes to market—it does not afford cartelists the capacity to forum shop in anticipation of private actions being issued; this should remain an advantage exclusively to claimants. A consequence of a limited territorial application to art.101 would otherwise create a safe harbour for cartelists to manipulate the operation and structure of a cartel. In this sense, the (now wide) territorial scope of art.101 is as much of a deterrent as to the subject matter of art.101 itself. After all, and as is endorsed by the Damages Directive, private enforcement is an important supplement to the public enforcement of competition law, in particular the Commission’s efforts to uncover cartels and sanction cartelists.

Summary of the CoA’s finding

It is important to bear in mind the sequence of events that led up to the CoA’s ruling: (i) *Intel* was not handed down until September 2017—long after the High Court rulings in *iiyama 1* and *iiyama 2*; (ii) Advocate General Wahl’s opinion was also not available until after the High Court rulings in *iiyama 1* and *iiyama 2*; and (iii) *iiyama*’s claim was and remains in its infancy, with no case management directions having been given. Whilst it is entirely foreseeable that the CoA would have stayed proceedings pending the outcome, would the CoA have ruled in the same way “but for” the existence of *Intel*? Arguably the answer to that has to be in the affirmative, as even without *Intel*, the CoA’s judgment is resolute in holding that the issues are inappropriate for summary determination. That said, whether the CoA would have used the opportunity to clarify the uncertainty in the case law pre-*Intel* is more difficult to tell.

Nevertheless, the ultimate result of the CoA’s finding was that *iiyama* was granted permission to amend its pleadings to align both claims in terms of argumentation, namely that both the cathode ray tubes and LCD cartels had the same causative effect on the internal market. In this regard, and acknowledging the infancy of the proceedings, it was held that “any suggestion of such prejudice [to the defendants] would...be fanciful” such that “the claimants should be allowed to plead their case as they see fit”.⁶⁵ In addition, whilst the CoA refused the defendants’ application to appeal to the Supreme Court, the defendants have sought direct leave to appeal the CoA’s finding at the Supreme Court. At the time of writing, it remains to be seen whether the Supreme Court will allow the application to hear an appeal.

Although not the same as a full decision as to whether there was a sufficient causal nexus between the supply of the cartelised components to *iiyama* and the implementation and/or qualified effects of the cartel within the internal market, the judgment unambiguously holds that the position in *Intel* is directly applicable to *iiyama*’s case and, therefore, has set the stage for an argument in favour of a wide territorial scope to art.101. Due to the infancy of *iiyama*’s case, we might not expect a trial to be listed until 2020 at the earliest. The next critical step to proceedings after a case management conference will be disclosure, which will no doubt require at least partial access to the Commission’s file to get to the heart of the operation of the cathode ray tube and LCD cartels.

Conclusion

As Whish and Bailey have aptly put it:

⁶¹ See *Vattenfall AB & Others v Prysmian S.p.A & Ors* (claim no.HC-2017-000682), which was heard between 5 and 7 February 2018 with judgment reserved.

⁶² *The LCD Appeals* [2018] EWCA Civ 220 at [99].

⁶³ *The LCD Appeals* [2018] EWCA Civ 220 at [99].

⁶⁴ *The LCD Appeals* [2018] EWCA Civ 220 at [100].

⁶⁵ *The LCD Appeals* [2018] EWCA Civ 220 at [115].

“[t]he adverse effects of cartels and anti-competitive behaviour...are not constrained to national boundaries...[i]t is perfectly possible for a few producers to operate a cartel that has significant effects throughout the world”.⁶⁶

The CoA’s judgment is thus an unequivocal endorsement of this statement and of *Intel*, in that the effects of cartels are to be widely assessed—that is, from the moment of cartelisation to the moment that the cartelised product or component arrives in the internal market. Accordingly, indirect purchasers who—like *Iiyama*—purchased transformed products originating outside of the EEA, should not be precluded from pursuing damages by the mere fact that their supply chains, or the existence of several layers upstream that are beyond their control, result in less “direct” routes for the cartelised product or component to reach the internal market. Not only would the alternative scenario lead to a fragmentation of the EU competition regime as forewarned by the CJEU as early as 1988 in *Woodpulp* and as recently as 2017 in *Intel*, but it would also bring into question the *raison d’être* of art.101 and the very notion that underpins the ability for victims to bring claims for competition law damages in the first place.

Whatever the impact of Brexit may eventually be, there is no doubt that the judgment sends clear signals to the claimant bar that the UK continues to be a pioneering and leading forum in this area. The CoA’s judgment will, therefore, cement the UK’s position as a favourable forum to commence a claim. It is an insight into how extra-territorial scope of the EU competition regime might apply to anti-competitive conduct taking place in the UK, and thus whether Brexit would achieve an apparently desired exit of the UK from the competence of the EU’s jurisdiction. Perhaps most importantly, the judgment serves as a template that, in a post-Brexit world with no benefit of the Recast Brussels Regulation, the UK courts might be reluctant to serve out of the jurisdiction.

To conclude, whilst the full determination of the issue may have been temporarily kicked into the long grass, the veracity of the judgment should not be understated—it contains a persuasive basis and encouragement for *Iiyama* to continue the pursuit of its claims. The ruling represents an unambiguous vindication for the claimant bar and it sends out a positive message to indirect purchasers who are currently pursuing, or are contemplating bringing, similar actions.

⁶⁶ Whish and Bailey, *Competition Law*, 8th edn (2015), p.518.