A Jurisdictional Toolkit for Claimants: Establishing Jurisdiction in England and Wales for Competition Follow-On Damages Claims Post-Vattenfall and Post-iiyama: Competition Litigation 2019

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1. Introduction

So far, 2018 has produced two significant judgments – *Vattenfall*[1] and *iiyama*[2] – concerning the requisite tests to be satisfied by claimants in order to withstand interlocutory challenges to the jurisdictional basis of claims in the Courts of England and Wales.[3] In the light of these recent judgments, this chapter will explore the nuts and bolts as to how the tests of "autonomous" and "territorial" jurisdiction apply to claims for competition damages. Whilst these two different forms of jurisdiction draw upon two sets of harmonised rules at a European level, they provide alternative but complementary purposes for claimants in founding jurisdiction in the English Courts.

2. The Importance of Seising Jurisdiction

Understanding the importance of seising the right jurisdiction serves as a useful yardstick when analysing the application of jurisdictional rules. Whilst jurisdictional rules establish the possibility to elect from a broad menu of 28 jurisdictions as potential fora, maybe three of those jurisdictions are currently said to be "claimant-friendly": England; the Netherlands; and Germany. The exercise of determining the jurisdiction – whether in one of the claimant-friendly jurisdictions or elsewhere – in which the claim should be pursued requires a careful assessment of a series of both substantive and procedural factors. Of course, claimants are concerned to litigate in a jurisdiction which offers the opportunity to maximise the chances of obtaining the damages claimed as quickly as possible.

Factors that determine a jurisdiction's attractiveness to a claimant include the ability to obtain disclosure, the efficiency of the Court, the availability of litigation funding and (where appropriate) insurance against adverse costs, the opportunity to engage in a settlement dialogue and the judiciary's experience in handling follow-on claims. Such factors will continue to be important unless the Damages Directive (which attempts to harmonise the position in some of these factors) applies.[4] For example, the Damages Directive, where it applies, will reduce the liability of the immunity recipient only to the loss/damage caused by their own actions.[5] In addition, and given that the immunity recipient is not jointly and severally liable, it will have no liability in contribution to the other infringing parties.[6] Nevertheless, the English jurisdiction was largely compliant with many of the provisions of the Damages Directive, and in many cases England remains a more attractive jurisdiction post-Damages Directive due to the wide-ranging disclosure regime and ability of the Competition Appeal Tribunal (the "**CAT**") to hear collective actions on an "opt-out" basis.

3. Establishing Autonomous Jurisdiction in England

The English High Court

As the very ambit of obtaining jurisdiction is limited by the application of jurisdictional rules, a forum selection exercise cannot be arbitrary. Regarding autonomous jurisdiction for European Union (the "**EU**") domiciled defendants, the Recast Brussels Regulation No. 1215/2012 (the "**Regulation**") applies to proceedings which were commenced on or after 10 January 2015.[7] As explored below, application of the Regulation often affords claimants the possibility to choose between a wide range of possible fora.

Option 1: defendant domicile

Unless the parties have agreed upon a conferment of jurisdiction to a specific Court, the possibility to establish jurisdiction is predominantly directed by the domicile of those who have been found to have engaged in anticompetitive conduct.[8] The starting position in determining jurisdiction is principally that, per Art.4(1), the defendant *domiciled* in an EU Member State should be sued in the Courts of that Member State. The "domicile" is to be broadly interpreted as it includes the place of the registered office, the central administration and the principal place of business.[9] Applying Art.4(1) to follow-on claims, the defendant will be an addressee of an infringement or settlement decision adopted by the European Commission (the "**Commission**"). This means that the claimant is *ostensibly* limited to those jurisdictions in which the cartelists are domiciled (and this may exclude favoured jurisdictions such as England, the Netherlands and Germany). In practice, however, one of the exceptions is usually relied upon (explored in the following sections below).

At this juncture it should be also noted that, whilst jurisdiction is predominantly determined by the defendant's domicile, a defendant may prematurely seek to determine jurisdiction of their own accord. The *lis pendens* rules of Art.29 provide that the "*court first seised*" shall have jurisdiction. Thus, defendants have been known to deploy an "Italian torpedo" by seeking a declaratory judgment for non-infringement. This, if strategically deployed, allows defendants to cease jurisdiction in a Court that is deliberately less favourable to a claimant, which has the effect of frustrating a claimant's attempt to bring a claim in another, more favourable, jurisdiction. In *Cooper Tire*, the defendants sought declaratory action that there was no cartel and that, in any event, any cartel would not have caused loss to the claimant.[10] However, the effectiveness of the Italian torpedo – so as to cause a concern for the possibility of irreconcilable judgments – is now questionable in circumstances where the High Court has refused to stay English proceedings where Italian proceedings would otherwise take so long to resolve. It is perhaps for this reason that an Italian torpedo has not yet been successful in sinking a follow-on claim, and that it is somewhat of a blunt tool for defendants.

Exception one – avoiding irreconcilable judgments

As well as limiting jurisdiction to the domicile of the defendant, a further net effect of applying Art.4(1) gives rise to difficulties for victims of mass torts, such as global cartels, where there are multiple defendants domiciled in several jurisdictions – and potentially both inside and outside of the EU. Art.8 remedies this by providing that the jurisdiction over one defendant may be extended to include other defendants, provided that the claims are "*so* *closely connected* *that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separating proceedings*" (our emphasis). As the recital to the Regulation explains, this is so that the rules on jurisdiction are "*highly predictable*" so as to "*avoid the possibility of the defendant being sued in a court of a Member State which he could not have reasonably foreseen*".[11] Thus, the application of Art.4(1) as discussed above is not absolute. This means that, in a cartel follow-on claim, a claimant need not sue each and every defendant in their Member State of domicile. This is also supported by the current principles governing joint and several liability, as the claimant need not sue all potential defendants in order to recover the total loss caused by the cartel. Furthermore, a claimant may strategically opt to sue only one or some of the addressees of a decision, thereby leaving those defendants to claim for Part 20 contribution proceedings against the others. Although both of these principles are slightly amended by the Damages Directive, the point remains that a claimant is permitted to sue in one Member State, provided that at least one of the defendants is domiciled there at the time of filing the claim.

Exception two – anchor defendants

The EU doctrine of "single economic unit" has also helped to remedy the "pot luck" nature of Art.4 and Art.8. This doctrine sets out that the notion of an "undertaking" should be widely construed, with a view to the "*personal, tangible and intangible elements which pursue[s] a specific economic aim on a long-term basis*" and thus which "*can contribute to the commission of an infringement*".[12] Accordingly, it provides that an action for a claim may be anchored by bringing it against a member of the addressee's economic unit and where that economic unit is domiciled. In this regard, an "anchor" entity would usually be a subsidiary of an addressee, but not an addressee itself (and therefore a subsidiary of a defendant where Art.8 would apply). This has the effect of expanding the list of potential jurisdictions with a view to the domicile of anchor subsidiaries.

Where an anchor defendant is included, then the claim in respect of that anchor defendant is theoretically one of stand-alone and not one of follow-on.[13] However, it has been held that the label attached to a claim – namely whether it is a stand-alone or follow-on claim, or a hybrid of the two – is irrelevant, as is also the consideration of what further evidence may obtained and argued at trial is irrelevant in a strike-out/summary judgment hearing.[14] Rather, what is important is whether the claim has a real prospect of success in the light of a decision finding. It follows that a claim for follow-on damages does not allow claimants to fully particularise their case *vis-à-vis* the anchor defendant and there is a presumption of generosity in favour of the claimant in respect of what is principally a stand-alone claim.[15] Thus, the position is, as stated in *Toshiba Carrier*,[16] which built upon *Provimi*[17] and *Cooper Tire*,[18] that the anchor subsidiary had knowingly implemented the cartel, and knowledge is capable of being imputed from the parent company having exercised a degree of "decisive influence" over its subsidiary.[19] We return to this discussion below in the light of a recent judgment.

Option 2: local damages

The above regime provides one method to establish autonomous jurisdiction. Art.7(2) alternatively provides that a defendant may be sued in the Courts of the place "*where the harmful event occurred or may occur*". EU case-law has interpreted this to mean the place: (i) where the damage occurred; or (ii) where the event giving rise to the damage occurred.[20] This shifts the test from defendant domicile to the nature and effect of the tort giving rise to a claim. However, this alternative is not entirely satisfactory where there are cross-border elements, because mass torts – such as global cartels – often inevitably span across several jurisdictions and/or continents. In such a case, it may be difficult to contend that the place of the harmful event is in one sole jurisdiction. That leaves only the possibility to found jurisdiction based on the place where the damage occurred, which also means that damages must be sought – unlike Art.4 – on a jurisdiction-by-jurisdiction basis.[21] It is for this reason that Art.7(2) tends not to resonate with multi-national claimants seeking losses that have occurred in several jurisdictions. Therefore, founding jurisdiction upon Art.7(2) in response to a worldwide or European Economic Area ("**EEA**")-wide cartel may be likened to fitting a square peg in a round hole, the potential result of which is an ineffective compensation recovery strategy.

The CAT

Up until October 2015, the same principles and flexibility as set out above were not capable of being cross-applied to the jurisdiction of the CAT. In *Emerson Electric*, whereby claimants sought follow-on damages pertaining to the carbon and graphite products cartel, it was held that only the addressee of a decision and not its subsidiaries were capable of being sued on the basis that those subsidiaries are not bound by the infringement decision (a point which was later affirmed by the Court of Appeal (the "**CoA**")).[22] However, this particular finding is now outdated and it is indicative of the CAT's previously limited jurisdiction to mirror the flexibility afforded to the High Court. The changes brought about by the Consumer Rights Act 2015 have, *inter alia*, resulted in an expansion to the CAT's jurisdiction so that it allows the CAT to hear stand-alone claims for competition damages – and thus claims against non-addressee entities. Accordingly, an anchor may be selected to found jurisdiction in the CAT just like in the High Court. However, this does not necessarily mean that the CAT is now *the* Court of choice in England, as other factors remain to be considered when choosing between the High Court and the CAT.

Autonomous jurisdiction: Vattenfall

Thus, the first building block for claimants is to consider whether their preferred forum has the authority to hear the claim as a matter of national procedural autonomy. For claims issued in the High Court and CAT, a defendant may indicate its intention to challenge jurisdiction and the Court's power to hear the claim as early as acknowledging the service of the claim form. This attracts an assessment of how the legal framework governing autonomous jurisdiction applies on a strike-out/summary judgment basis. Should the defendant(s) fail to indicate this intention early on and, instead, engage with pleadings, then this will likely be construed as a submission to the jurisdiction. However, as defendants are ever more focussed upon identifying ways to challenge a claim at the outset, jurisdiction regularly presents the first opportunity to do so. Indeed, the application for summary judgment/strike-out in *Vattenfall* is the most recent in the body of English case-law to apply the above-discussed framework.

Case background

In 2014, the Commission fined 11 producers of underground and submarine high-voltage power cables – used to connect grids and distribute electricity – for an almost decade-long cartel that begun in 1999. The fines totalled almost €302 million.[23] Several claims for follow-on damages have been brought against the addressee cartelists and their subsidiaries – and more may be expected.[24] Crucially, the Commission adopted an infringement decision and not a settlement decision. Due to the rules surrounding the rights of those that are mentioned in the decision and/or the Commission's file, early versions of decisions are barely helpful to those who have suffered loss as a result of a cartel. As an infringement finding, only a provisional non-confidential version of the decision has recently been made publicly available (the addressees were unsuccessful in challenging the Commission's publication of the decision – which was eventually published on 4 July 2018).[25]

The secretive nature of cartels means that it is difficult for claimants to know, and thus particularise in their pleadings, the extent to which the cartel will have caused monetary loss and damage. For this reason, obtaining a copy of the unredacted decision and access to the Commission's file is often crucial.

Vattenfall, a Swedish power company that supplies energy in several EEA markets, is one of several corporate groups currently pursuing follow-on damages relating to the power cables cartel. Shortly after filing its claim in March 2017 against two corporate groups of the addressees,[26] NKT and Prysmian – including two UK-domiciled subsidiaries that were not addressees in the decision (Prysmian Cables & Systems Ltd and NKT Cables Limited) – the defendants applied for summary judgment/strike-out of Vattenfall's claim in June 2017 on the basis that Vattenfall could not argue that those anchor subsidiaries are liable for the damage caused by the cartel. Vattenfall argued that the two UK anchor subsidiaries are sued on the basis of "knowing implementation" of the power cables cartel – attracting a two-pronged test requiring both knowledge and clear evidence of implementation of that knowledge.[27] Had the defendants been successful in arguing that the UK anchor subsidiaries should be struck-out of the claim, then Vattenfall would be estopped from relying on the above-discussed principles providing claimants with the ability to sue anchor defendants, resulting in a failure to cease English jurisdiction. Following a three-day hearing in February 2018, the High Court handed down its judgment on 4 June 2018 – the reasoning of which is explored below.[28]

Knowledge of the cartel

As regards knowledge, Vattenfall pleaded that it could not – without an unredacted copy of the decision and in the absence of disclosure of contemporaneous documents – plead that either of the defendants' UK subsidiaries "*knowingly implemented*" the cartel. NKT attempted to refute this presumption in a witness statement that neither the UK nor the UK subsidiary's personnel are mentioned in the decision. However, NKT's attempt to level the playing field by adopting an "all cards on the table" approach by offering up a witness statement (which would have the effect of demonstrating the NKT is no longer in exclusive knowledge) was firmly rejected as "*it can […] be reasonably expected that documents may emerge that may show assistance by D12 in relevant implementation and knowledge of cartel activities*".[29] As such, the High Court has mounted a high bar for defendants to meet when attempting to demonstrate the non-involvement of UK subsidiaries for the purposes of knowledge. In this regard, *Vattenfall* may be treated as providing claimants with a presumption that an addressee's subsidiary entities are privy to actual knowledge of the cartel. In addition, it was irrelevant that the anchor subsidiary was not 100% owned by the parent addressee – there was no evidence that the UK defendants determined their own conduct independently of the parent or any other member of the respective corporate group.[30]

Implementing knowledge

The High Court furthermore set a low threshold for claimants by listing non-exhaustive types of behaviour that would amount to the implementation of the cartel by an anchor subsidiary. This was perhaps driven by the fact that previous case-law had left this point open for defendants to exploit. Such behaviour would include: (i) the provision of indirect sales; (ii) the involvement of employees in activities that fall within the scope of the cartel; (iii) the anchor entity being a "*fiscal representative*" of an addressee; and (iv) the anchor subsidiary dealing with customers on behalf of other group members.[31] In addition, the Court has confirmed that there is no financial bar to establishing implementation as the *de minimis* sales made by the UK subsidiary (to the value of £8,000) were held to be irrelevant in dealing with this test.[32] Accordingly, the notion of implementation is, in line with previous authority, not subject to rigid criteria and may be established by claimants without much difficulty.

The threshold for summary judgment/strike-out

In order to refute such an application, the claimant must ultimately have a realistic prospect of success – one that is neither fanciful nor one which is merely arguable (but, instead, carries a degree of conviction). In the context of competition damages claims, however, the High Court judge was satisfied by the mere fact that the UK anchor defendants "*should have foreseen*" that they might become anchor defendants in England provided that they "*knowingly implemented the cartel*".[33] As such, it is "*properly arguable*" for the claimants to plead that the close connection test of Art.8(1) applies.[34] The High Court has therefore confirmed that issues such as causation and overcharge, which rely heavily on disclosure and the involvement of experts, are not capable of being answered on a summary basis due to the asymmetry of information available between claimants and the cartelist defendants at the time of filing the claim.

4. Establishing Territorial Jurisdiction in England

The framework

Cartels sanctioned by the Commission are increasingly global in scope.[35] Furthermore, cartelised markets for products that are part of a global chain of supply and demand, and that are typically manufactured in the Far East, have frequently raised the question of whether the territorial application of EU law extends to infringers of Art.101[36] who engage in collusive conduct outside of the EEA. Thus, once jurisdiction has been seised, there remains a question whether – as a matter of substantive law – the claim falls beyond the scope of the rules that determined the infringement by asssessing whether the sales in question fall within the territorial scope of Art.101. This issue is arguably one that combines both jurisdiction and applicable law. Unlike the issues before the Court in *Vattenfall*, such a "pure" interlocutory application need not be raised by defendants when acknowledging service of the claim – but it should be sought as soon as possible.[37]

As a matter of international competition law, whether Art.101 is capable of extra-territorial reach has been the subject of decade-old jurisprudence in the EU Courts. *Woodpulp* founded a test of "implementation" which focuses upon the place where anticompetitive behaviour is implemented, as opposed to where such behaviour is agreed.[38] In addition, *Gencor* established a test of "qualified effects" which looks at whether the anticompetitive behaviour would result in "immediate, foreseeable and substantial" effects.[39] Though closely related, the two different tests resulted in uncertainty as to whether the tests must be satisfied in tandem or whether the satisfaction of one of the tests would suffice. The very recent decision of *Intel* expressly endorsed the application of the "qualified effects" test, ruling that it pursues the same objective as the "implementation" test.[40]

iiyama – first instance decisions

iiyama – a Japanese-domiciled electronics company – issued two claims in the High Court in December 2014 in respect of the CRT glass,[41] Cathode Ray Tubes[42] and LCD[43] cartels.[44] Although an indirect purchaser of the cartelised products, long-established principles confirm that *iiyama*'s right to compensation is no-less worthy when compared to direct purchasers. However, *iiyama*'s position in the supply chain lead the defendants to question whether iiyama, having purchased particular specifications of computer monitors from original equipment manufacturers before iiyama itself shipped the end-products intra-group to its European subsidiaries, had a right to claim competition damages in circumstances where its indirect purchases of the cartelised components were made outside of the EEA. In determining this question, the High Court in *iiyama* was required to apply the same test of "real prospect of success" as was the case in *Vattenfall*, albeit through a different lens.

Regrettably, the High Court was unable to reach a unanimous conclusion on the issue. Whilst Mann J found in favour of the defendants in respect of the CRT glass and Cathode Ray Tube cartel claim, holding that the effect of the cartel was plainly "*knock-on*",[45] Morgan J agreed with *iiyama* in its LCD claim in holding that, had the cartel not been implemented within the EU, then *iiyama*'s computer monitors would have been available in the EU at a lower price.[46] Crucially, neither Mann J nor Morgan J had the benefit of *Intel* – and it is questionable whether the interlocutory challenge would have been made in the first place had *Intel* been of assistance to the parties and the Court. Nevertheless, the CoA heard a combined appeal by both sets of unsuccessful parties in late 2017, following which Mann J's decision was overturned and Morgan J's decision was upheld.[47]

iiyama – combined CoA outcome

The CoA held that there is no basis for strike-out/summary judgment where it *may* be shown that a cartel has been implemented, regardless of whether the cartelised product was sold directly or indirectly to the claimant: the effects of the cartel must not only have been "immediate, foreseeable and substantial" but also "*systemic*", thereby satisfying the "qualified effects" doctrine as endorsed in *Intel*.[48]   In determining whether there is "*directness of effect*" when assessing immediacy, it was held 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*" is not enough to fail the test for immediacy.[49] Mann J's characterisation of the cartel's effects as merely knock-on was an "*over-simplified approach to a complex problem*" – and the CoA was ultimately persuaded by the fact that the cartel was intended to have a worldwide effect.[50]   This means that the Commission's jurisdiction to adopt an infringement finding is incapable of being distinguished *vis-à-vis* the territorial scope of a follow-on claim for damages.

iiyama therefore provides a persuasive precedent for claimants in that it is a question of substantive law whether Art.101 applies on an extra-territorial basis. Although not the same as a full decision as to whether there was sufficient causation between the supply of the cartelised components to *iiyama* and the implementation and/or qualified effects of the cartel within the EEA, the judgment has set the stage for an argument in favour of a wide territorial scope to Art.101 – and one less argument for defendants to deploy in their *modus operandi*.

5. A World Post-Vattenfall and Post-iiyama

Having suffered a defeat and with permission to appeal to the Supreme Court refused by the CoA, the defendants in *iiyama* sought to appeal the CoA's decision directly at the Supreme Court. However, permission was refused by the Supreme Court in July 2018 as the panel of Justices were unconvinced that the applications raised a point of law of general public importance. This, alone, confirms the high bar that must be met when appealing to the Supreme Court. It further bolsters the impetus of the CoA's decision by crystallising it as a precedent for the claimant bar. Subject to any appeal by the defendants to the CoA in *Vattenfall*,[51] both *iiyama* and *Vattenfall* provide welcome clarification on the comparatively low bar for claimants to meet the differing tests for "implementation" across both autonomous and territorial jurisdiction. As such, a defendant's use of interlocutory tools should not invite the Court to hear a mini-trial, as it has been previously noted that "*there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment [...] than in trying the case in its entirety*".[52]

Thus, to echo the CoA in *Cooper Tire* and *Toshiba Carrier*, the approach endorsed by the Courts in *Vattenfall* and *iiyama* remains "*appropriate [...] prior to the disclosure of documents*" as the ability to determine jurisdiction depends so heavily upon a factual and legal assessment of the impact of the cartel. It is anticipated that the net effect of these two judgments will be to deter defendants from using jurisdictional issues as an attempt to reduce their liability for private follow-on damages by maintaining the high bar that must be met. At the same time, the two judgments provide further support to the starting position for potential claimants when pleading their claim, as the level of detail to be particularised regarding knowledge of implementation is sensibly low owing to the secretive operation of a cartel. As such, it remains "business as usual" in the English jurisdiction as at least *iiyama* may now proceed to trial.

6. Concluding Remarks

Having explored the "jurisdictional toolkit" available to claimants seeking follow-on damages following *Vattenfall* and *iiyama*, a question remains whether there is such a thing as "proper" jurisdiction to balance the entitlement of claimants who are in pursuit of compensatory damages, and the rights of the defendants who (notwithstanding their anticompetitive conduct) may be at risk of multiple jeopardy and over-compensation. However, to tilt the balance in favour of the defendants would be plainly wrong where claimants would otherwise be at the mercy of an inappropriate jurisdiction resulting in no or inadequate compensation. As such, the application of jurisdictional rules should not exhibit a bar to claims that are ultimately encouraged by public policy at both the national and EU levels. This represents the underlying theme in both *Vattenfall* and *iiyama*.

A further, unanswered, question is whether Britain's imminent departure from the EU will prompt a change in claimants' selection of a forum to litigate cartel claims. In the short term, the referendum's immediate aftermath has not instigated a sudden decline in follow-on claims being issued in England. However, and notwithstanding how Brexit may transpire, the experienced English judiciary and favourable body of case-law – such as *Vattenfall* and *iiyama* – will nevertheless remain as positive and attractive factors for claimants considering bringing a claim in England. Indeed, *iiyama* may constitute the high watermark in that – in the absence of the Regulation – the English Courts may be reluctant to serve outside of the jurisdiction.

In summary, any dispute as to the appropriateness of a claimant's entitlement to damages – based on the autonomy of a Court or the territorial reach of Art.101 – should continue to attract a common-sense approach where such issues are raised prematurely. Accordingly, the judgments of *Vattenfall* and *iiyama* should be welcomed by the claimant bar and provide encouragement to claimants who are considering bringing claims for follow-on damages in England.

7. Endnotes

1. *See Vattenfall AB & Others v. Prysmian SPA & Others* [2018] EWHC 1656 (Ch).

2. *See The LCD Appeals* [2018] EWCA Civ 220.

3. References to "England" and the "English Courts" are to be construed as references to England and Wales, respectively.

4. Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014/104/EU); as implemented in the United Kingdom by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

5. *Ibid* at [15].

6. *Ibid* at [16(2)].

7. For proceedings that commenced between 1 March 2002 and 9 January 2015, the original Brussels Regulation No. 44/2001 applies. In respect of signatory states, then the Lugano Convention applies. Note that, for claims that are not caught by the subject-matter or territorial scope of the Regulation, then national laws will apply when determining jurisdiction.

8. All references to Articles in this Chapter are to the Articles of the Regulation, unless stated otherwise.

9. Art.62 of the Regulation.

10. *See Cooper Tire and Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others* [2009] EWCA 2609 (Comm); and *Cooper Tire and Rubber Company and others v. Shell Chemicals UK Limited and others* [2010] EWCA Civ 864.

11. Recital (16) to the Regulation.

12. *See* Case T-11/89, *Shell International Chemical Co v. Commission* [1992] ECR II-757, at [311].

13. A distinction must be drawn between Art.288 TFEU, on the one hand, which holds that a decision of the Commission is only binding upon those "to whom it is addressed" and the ability of claimants, on the other hand, to sue an anchor defendant in order to file a claim against the addressees where the addressees themselves are domiciled in a different jurisdiction.

14. *See* *Bord Na Móna Horticultural Ltd & Anr v. British Polythene Industries Plc* [2012] EWHC 3346 (Comm).

15. *See* *Nokia Corporation v. AU Optronics Corporation* [2012] EWHC 731 (Ch) at [62–67].

16. *See* *KME Yorkshire Ltd & Ors v. Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190.

17. *See* *Provimi Ltd v. Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).

18. *Supra* note [10].

19. *Supra* note [17].

20. *See* Case 21/76 *Bier v. Mines de Potasse d'Alsace SA* [1976] ECR 1735.

21. *See* Case C-68/93, *Shevill v. Press Alliance* [1995] ECR I-415.

22. *See* *Emerson Electric v. Morgan Crucible* [2007] CAT 30.

23. Power Cables (COMP/39.610) (2 April 2014).

24. *See*, for example, Britned Development Ltd (Claim Number HC-2015-000268), National Grid Electricity Transmission (Claim Number HC-2015-000269) and Scottish Power (Claim Number HC-2015-000275).

25. Order of the Vice-President of the Court of Justice of the European Communities [2018] EUECJ C-65/18P(R)_CO (12 June 2018).

26. Claim Number HC-2017-000682.

27. *See* Vattenfall's Particulars of Claim at paragraphs [45] and [47].

28. *Supra* note [1].

29. *Supra* note [1] at [86].

30. *Supra* note [1] at [62].

31. *Supra* note [1] at [72–74].

32. *Supra* note [1] at [64–66].

33. *Supra* note [1] at [51].

34. *Supra* note [1] at [36].

35. Recent examples of Commission-decided cartels – excluding those considered in *iiyama* – involving non-EU domiciled addressees include: (i) Smart Card Chips (COMP/39.574) (3 September 2014); (ii) Rechargeable lithium-ion batteries (COMP/39.904) (12 December 2016); and (iii) Capacitors (COMP/40.136) (3 March 2018).

36. Treaty on the Functioning of the European Union.

37. It is noted that the defendants in *iiyama* had submitted to English jurisdiction by engaging in pleadings.

38. *See Ahlström Osakeyhtiö and others v. Commission of the European Communities* (C-89/85 A) [1988] ECR. 1-5913.

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

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

41. CRT glass (COMP/39.605) (19 October 2011).

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

43. LCDs (COMP/39.309) (8 December 2010).

44. Claim Numbers HC-2014-001979 and HC-2014-001980.

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

46. *See iiyama (UK) Ltd v. Samsung* [2016] EWHC 1980 (Ch).

47. *Supra* note [2].

48. *Supra* note [2] at [98].

49. *Ibid.*

50. *Supra* note [2] at [104].

51. Pursuant to paragraphs 8 and 9 of the Order by Mr. Anthony Elleray QC dated 6 August 2018, the defendants' application for permission to appeal was refused. Accordingly, the defendants have until 27 August 2018 to seek leave to appeal the High Court's judgment from the CoA.

52. *See Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical* [2006] EWCA Civ 661 at [5].