Setting the limits

It will now be harder to bring global cartel claims in the UK

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On 23 May 2016, the English High Court struck out a €1bn cartel damages claim in its entirety. The judgment, in the *Iiyama* case, sets important territorial limits on the scope of EU cartel damages claims, in particular where the claims are dependent on a chain of sales outside the EEA. This curtails recent attempts to bring global claims in the UK courts.

It is also a relatively rare example of the courts refusing to take a generous approach to the pleading of such claims. This stands in contrast to previous decisions in which the UK courts have been reluctant to strike out claims originating in EU cartel decisions prior to disclosure, and have granted considerable latitude to claimants in respect of pleading deficiencies justified by reference to the secret nature of cartels. *Iiyama* constitutes a warning to claimants to state explicitly whether they intend to bring claims which rely solely on the EU Commission cartel decision (follow-on claims) or also claims which go beyond the scope of the decision (standalone claims).

Background

Iiyama related to two cartels: (1) cathode ray tubes (CRTs), as sanctioned by the Commission in its decision of 5 December 2012; and (2) CRT glass, as sanctioned by the Commission in its decision of 19 October 2011.

CRT glass and CRTs were components utilised in the manufacture of televisions and computer monitors. The claimants were sellers of computer monitors (including in the EEA) and brought a damages claim based on article 101 TFEU on the basis that they were overcharged for CRTs and CRT glass as a result of the cartels.

Crucially, however, the claimants did not purchase either components or monitors in the EEA:

> "[The] sales of the allegedly cartelised products which ended up in Iiyama products sold in the EEA were all made in Asia. No glass which ended up in Iiyama monitors in the EEA was made in the EEA, or was sold by the cartelists in or into the EEA; no CRTs which ended up in the Iiyama monitors in the EEA were made or sold by the cartelists in or into the EEA. In each case there were intervening sales."

The defendants (addressees of the Commission decisions) argued (among other things) that as the purchases were made in Asia, they were beyond the territorial scope of EU competition law and sought to strike out the claims. The judge (Mr Justice Mann) therefore considered whether the claims should be struck out on the basis they did not disclose a sufficiently arguable case.

Judgment

The judge considered first whether, as pleaded, the claims were limited to pure follow-on claims and (if so) whether the Commission infringement decisions extended to the purchases in question. He went on to consider whether, even if the pleadings could be construed as making a standalone claim, it was arguable that article 101 TFEU applied.

In doing so, he took a comparatively strict approach to the claimant's pleadings, refusing to read into the claim form and particulars claims which they did not disclose on their face. This critical approach to pleadings may represent a return to orthodoxy after a succession of liberal approaches taken in relation to pleading in cartel damage claims. For example, the Court of Appeal in *Cooper Tire* stated that "[the] strength (or otherwise) of any such case cannot be assessed (or indeed usefully particularised) until after disclosure of documents because it is in the nature of anticompetitive arrangements that they are shrouded in secrecy". It is relevant to note, however, that previous cases had not involved primary sales outside the European Economic Area and the question of the territorial scope of article 101 TFEU.

The dispute as to the pleaded case

In relation to CRT glass, the judge concluded that the pleaded case was a follow-on claim, reliant solely on the infringement as found in the Commission's CRT glass decision. He held that the decision found an EEA cartel, in which products were sold into the European market by the cartelists to their European customers. The claimants could not therefore now seek to make a claim (as advanced at the strike-out hearing) based on an alleged global cartel to cover purchases in Asia of components manufactured in Asia and which passed down a supply chain outside Europe before ending up in monitors brought into Europe by the claimants. This was not the claim pleaded by the claimants nor was it supported by the decision. The CRT glass claims therefore failed on this ground.

In relation to CRTs, the position was more complicated, as the Commission decision did find there was a worldwide cartel, and the claimants did specifically plead there was a global cartel. The judge therefore first considered whether the Commission's decision extended to the facts in question such that the claimants could rely on the decision to found liability. He found that they could not. Although the Commission decided that the CRT cartel was a worldwide cartel, it found that this infringed article 101 TFEU on the basis that it was "intended to operate so as to rig prices for products sold by the cartelists to their European customers either in the form of the product (tubes) itself or in the form of monitors into which the tubes have been incorporated". The judge held that the Commission's infringement finding did not extend to CRTs sold in Asia which were then incorporated into monitors sold in Asia and eventually sold into Europe by non-cartelists (despite the fact that, for fining purposes, the

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Commission had taken into account indirect sales, ie the value of CRTs sold by the cartelists to customers outside the EEA, who would then incorporate these into finished products and sell them in the EEA).

Given the pleading of a global cartel, the judge then went on to consider whether, in respect of CRTs, the claimants had an arguable standalone claim relying on their case as articulated at the hearing.

The territorial application of article 101 TFEU

The defendants argued that such a wider claim could not be sustained as this was outside the scope of article 101 TFEU, as the alleged cartel was neither implemented in the EEA (pursuant to the implementation test) nor did it have immediate, substantial and foreseeable effects in the EEA (pursuant to the qualified effects test). In deciding this point, the High Court for the first time applied existing EU case law on the territorial scope of EU competition law to a cartel damages claim.

▌**The implementation test.** The implementation test arises from the CJEU's judgment in the Woodpulp litigation which held that: "the decisive factor is […] the place where [the agreement] is implemented". In that case, the foreign cartel, conducted by entities located outside the EEA, was implemented in the EEA when the cartelised goods were sold into the EEA by the cartel participants. The judge in *Iiyama* held that the CJEU did not suggest that an infringement could be found where the effects of the cartel are "somehow felt in a more indirect way" and concluded that the implementation test could not be met on the facts: "the mere fact that… there is some end of the road effect in the pricing of Iiyama purchases in Europe does not mean that the cartel was implemented there".

▌**The qualified effects test.** The possible alternative test arises from the now General Court's judgment in the *Gencor* case where it stated that "[application] of the [EUMR] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [EU]".

Given the various stages of the supply chain which took place outside Europe, the judge considered that the claimants did not have an arguable case that the cartel had an immediate effect in the EEA (even if they could prove substantiality and foreseeability on the facts): "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. Even if the effect of those sales is ultimately felt in the EU… that is not an immediate effect. If a label is required, it is a knock-on effect."

▌**The possibility of direct sales.** Counsel for the claimants argued that, if the claimants could point to a single direct sale by one of the cartelists into or from the EU of CRT glass or of a CRT which was subsequently used in a monitor sold by the claimants, this would be sufficient to bring the claim within article 101 TFEU, and that the claimants may become aware of such a sale through the process of disclosure.

The judge was unsympathetic to such a suggestion, saying that such a sale had not been pleaded and that "it is not apparent there is any material which would make such a pleading proper". Further the judge stated that:

> "[if] the claimants wished to run such a case, they would have to plead it properly and have some factual material which would support it… even if they would need an investigation, via disclosure, to make their case good. They are not entitled to speculate their way into an action so as to get as far as disclosure."

Decision

The judge therefore concluded that the defendants were entitled to summary judgment or striking out of the claim against them.

In relation to certain defendants, he also concluded that permission to serve out of the jurisdiction should be set aside. This was on the basis that, when seeking permission to serve out, Iiyama's solicitors had misrepresented the claim, failing (among other things) to disclose that it related to sales made outside the EEA and the legal complexities that would arise from that, and that it was not a pure follow-on claim.

Subsequently, Mr Justice Mann ordered Iiyama to pay indemnity costs, amounting to 70% of the defendants' costs, in light of the serious flaws in its case.

Conclusion

Subject to any potential appeal – permission has been denied by the High Court but Iiyama is currently seeking permission to appeal from the Court of Appeal – the *Iiyama* decision raises several considerations for those considering bringing a private damages action in the English High Court.

Claimants need to consider the nexus of the claim with the EEA carefully. Following *Iiyama*, it would appear that the High Court is not prepared to stretch either the implementation or the qualified effects tests to catch more indirect effects in the EEA under article 101 TFEU.

The decision in *Iiyama* comes after the decision of the Court of Appeal in October 2015 in the *Emerald Supplies* case, where the court struck out the claimants' attempt to rely on economic torts to bring damages claims based on cartel behaviour not covered by article 101 TFEU. The combined effect of both *Iiyama* and *Emerald Supplies* may significantly curtail attempts by claimants to bring global cartel claims in the UK.

In the future, claimants who do not have evidence of direct sales into or out of the EEA may wish to consider applying for pre-action disclosure before bringing a claim. Claimants may also wish to consider whether other (non-EEA) jurisdictions could provide a more appropriate forum in which to bring a private damages action.

It remains to be seen what the fate of a separate cartel damages claim that Iiyama has brought in relation to LCDs will be. The defendants in that case have also sought strike-out of the claim, which again relates to sales made in Asia, on which the High Court's judgment is awaited.

References:

Iiyama v Schott [2016] EWHC 1207 (Ch)

Cooper Tire & Rubber Company Ltd v Dow Deutschland Inc [2010] EWCA Civ 864

Case 89/85 Woodpulp (*Ahlstrom Osakeyhtio v The Commission*) [1988] ECR 5193

T-102/96 – *Gencor v European Commission*

British Airways v Emerald Supplies Ltd [2015] EWCA Civ 1024