February 2018

UK Competition Law Newsletter

Highlights

— Court of Appeal ruling in *iiyama v. Samsung*: Court of Appeal finds that English courts may in principle award damages for cartel conduct implemented entirely outside the EEA.

— European Commission publishes draft withdrawal agreement between the EU and the UK, envisaging that EU institutions would remain competent to initiate new administrative procedures under EU law where the underlying facts occurred before the end of the Brexit transition period.

Court of Appeal ruling in *iiyama v. Samsung*[1]

On 16 February, the Court of Appeal handed down its judgment in *iiyama v. Samsung*.[2] This decision addresses the question of whether claims for damages relating to cartel conduct implemented outside the European Economic Area ("EEA") can be brought in the English courts. In determining that this question could not be decided on a summary basis, the Court effectively held that English courts may in principle award damages for cartel conduct implemented entirely outside of the EEA. Unless the Court of Appeal's judgment is overturned on appeal to the Supreme Court, the case will now proceed to trial.

Background

The claims for damages arose out of two European Commission ("EC") infringement decisions, relating to worldwide cartels in the supply of LCDs[3] and CRTs[4]. In each case, the cartel participants were domiciled outside the EEA and the anticompetitive arrangements were made through a series of meetings in Asia, principally in Taiwan and South Korea.

In each case, the EC asserted jurisdiction under Article 101 TFEU (and Article 53 of the EEA Agreement) on the basis that (i) the cartelists sold some of their products directly to customers in the EEA,[5] and/or (ii) the infringement had foreseeable, immediate, and substantial effects (so called "qualified effects") in the EEA.[6] The EC fined the LCD and CRT manufacturers approximately €640 million and €1.47 billion, respectively.

[1] Cleary Gottlieb represents a defendant in these proceedings. The views expressed in this Newsletter are, however, personal to its authors and are not intended to reflect the views of any of the Firm's clients.
[2] *iiyama* (UK) *Limited and Ors v. Samsung Electronics Co. Ltd. and Ors* [2018] EWCA Civ 220.
[3] LCDs are components used in a wide range of applications, such as LCD televisions and computer monitors.
[4] CRTs (cathode ray-tubes) are components used in televisions and computer monitors.
[5] This is a well-established ground for asserting jurisdiction over foreign defendants who participate in a cartel outside the EEA and "implement" it in the EEA through direct sales. *See Woodpulp (Ahlstrom Osakeyhtio v The Commission* [1988] ECR 5193.
[6] The EC based this part of its decisions on the "qualified effects" test for jurisdiction set out in Case T-102/96 *Gencor*, at paragraph 90.

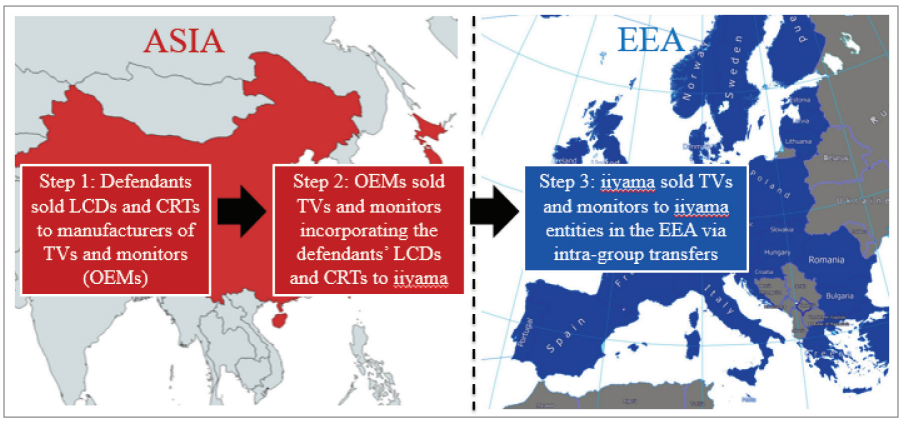

Figure 1 – iiyama television and monitor supply chain

The claimant, iiyama, is a Japanese distributor of televisions and computer monitors incorporating LCDs and previously CRTs. iiyama launched separate claims for damages in the English High Court against the addressees of each EC decision (and certain of their UK subsidiaries). iiyama claims that certain of its European subsidiaries suffered loss because the CRTs and LCDs that were incorporated in iiyama-branded monitors (and originally sold to OEMs in Asia) had been sold at an unlawful overcharge. iiyama's supply chain is represented in Figure 1.

The defendants sought strike-out/summary dismissal of iiyama's claims and contested the English court's jurisdiction on various grounds, including that any loss suffered by iiyama was outside the territorial scope of Article 101 because the CRTs and LCDs contained in the iiyama-branded monitors were first sold to third-party entities outside the EEA. As a result, the sales of the CRTs and LCDs did not constitute implementation of the cartel in the EEA, and the subsequent importation of the transformed products containing CRTs and LCDs into the EEA (principally through intra-group transfers by iiyama) did not give rise to qualified effects in the EEA. The defendants' arguments partially succeeded in the High Court.

The Judgment

On a series of cross-appeals, a central question before the Court of Appeal was whether iiyama had a real prospect of success in claiming that its losses resulted from an infringement of Article 101 in circumstances where the cartelised sale of CRTs and LCDs had taken place outside of the EEA. The Court of Appeal held that it could not decide that question against iiyama on a summary basis for the following reasons.

— Despite the EC's finding that the cartels were entered into by Asian companies in Asia, and evidence that the cartelised sales of CRTs and LCDs in iiyama's televisions and monitors took place almost exclusively in Asia, the Court could not exclude the possibility that iiyama *might* be able to show at trial that the claims fell within the scope of Article 101.

— The Court of Appeal referred to a European Court of Justice ("CJEU") judgment in ***Intel***,[7] which found that an agreement between Intel and a non-EEA manufacturer not to sell certain products in Europe could constitute "qualified effects" for the purposes of Article 101. Following the same approach, the Court of Appeal could not exclude the possibility that sales of televisions and monitors containing CRTs and LCDs sold to iiyama in Asia and subsequently transferred to iiyama subsidiaries in the EEA could also result in "qualified effects" in the EEA.

— The argument that losses in Europe arising out of sales of CRTs and LCDs at an unlawful overcharge in Asia were outside the scope of Article 101 could therefore not be decided on a summary basis and required the full facts to be considered at trial.

[7] Case C-413/14P, *Intel Corporation Inc v European Commission*, [2017] 5 CMLR 18.

Analysis

The Court of Appeal has for the first time ruled that English courts may in principle award damages for cartel conduct that takes place entirely outside of the EEA. The Court dismissed the defendants' submissions that this is a purely legal question that could, and should, be determined summarily in the defendants' favour.

Unless the Court of Appeal's judgment is overturned by the Supreme Court, the case will now proceed to trial, and the High Court will assess iiyama's damages claim. In assessing that claim, the High Court will examine whether cartelised sales of CRTs and LCDs in Asia were capable of having foreseeable, immediate, and substantial effects in the EEA in circumstances where those products entered the EEA as part of transformed products supplied through intra-group transactions among iiyama subsidiaries.

By leaving open the possibility that English courts may adjudicate damages claims relating to products sold entirely in foreign jurisdictions, the judgment presages a potentially significant expansion of the English courts' extra-territorial reach. In this respect, the Court's judgment is more expansive than the approach taken by the EC, whose decisions are limited to asserting jurisdiction only in relation to direct sales of cartelised products into the EEA. The Court's judgment also leaves open the possibility that defendants may face parallel proceedings in respect of the same claim in more than one jurisdiction.

Given the importance of these issues, which involve EU law and public international law principles of comity and sovereignty, the Supreme Court may well choose to hear an appeal if one is filed. In such circumstances, the Supreme Court could decide to delay rendering judgment pending referral to the CJEU of one or more questions of EU law relating to the geographic reach of Article 101.

Judgments, Decisions, and News

Court Judgment

Sainsbury's v Visa. On 23 February, the High Court handed down the second part of its ruling on a claim brought by Sainsbury's against Visa for breach of Article 101 TFEU and Chapter I of the Competition Act 1998. The High Court had already handed down the first part of its ruling on 30 November 2017, where it found that Visa's conduct in setting a default multilateral interchange fee ("MIF") payable by acquirer banks to issuer banks in UK payment card transactions did not infringe Article 101(1). In its latest ruling, the High Court found that, had the agreement fallen within Article 101(1), it would not have qualified for exemption under Article 101(3).

Sainsbury's original claim was that Visa breached Article 101 by setting a default MIF, as this effectively set the minimum fees that merchants must pay to acquiring banks. In its first ruling in November, the High Court found that the competitive situation would be no different in a scenario where Visa set a default MIF from one where it did not: in both cases, there would be no incentive for banks to depart from the default interchange fee, regardless of the level at which the default fee was set. The Court found that Visa's conduct did not distort competition and was not, therefore, in breach of Article 101. In its recent ruling, the Court added that, had Visa's default MIF fallen within Article 101(1), the agreement would not have qualified for an exemption under Article 101(3) because Visa failed to adduce "cogent" evidence showing that its setting of the MIF contributed to efficiencies in the form of higher card usage.

The Court of Appeal is due to hear appeals to these rulings in April, together with appeals to two separate judgments concerning the MIF under the MasterCard scheme: *Sainsbury's v MasterCard* (Competition Appeal Tribunal judgment of July 2016) and *Asda v MasterCard* (High Court judgment of January 2017).

Antitrust

On 28 February, Carole Begent, Head of Legal at the Payment Systems Regulator ("PSR"), announced in a speech to the British Institute of Internal and Comparative Law that the PSR had opened an investigation under the Competition Act. She said that the PSR had conducted dawn raids at a significant number of sites around the UK but did not provide any further details of the investigation. The PSR exercises concurrent enforcement powers under the Competition Act in relation to participation in payment systems.

Markets

Non-Workplace Pensions Discussion Paper. On 2 February, the Financial Conduct Authority ("FCA") launched a consultation on non-workplace pensions. The purpose of the consultation is to better understand the market for non-workplace pensions, including whether competition is working well and if there are issues that need to be addressed in order to protect consumers. In particular, the FCA is looking to understand how the differences and similarities between the workplace and non-workplace markets impact competition and consumer outcomes. The FCA is also looking at whether providers are competing on charges and if there are barriers to consumers identifying, and choosing, from more competitive products. The FCA is seeking feedback by 27 April.

Phase 2 Merger Investigation

Electro Rent/Microlease. On 5 February, the CMA published Provisional Findings and Notice of Possible Remedies relating to the completed acquisition of Microlease by Electro Rent. Electro Rent and Microlease supply equipment for testing and measuring electronic devices in various sectors, including defence, aerospace IT and Telecoms. The CMA provisionally found that the transaction would lead to the removal of each of the parties' closest competitor in the UK and might be expected to result in a substantial lessening of competition in the market for rental of testing and measuring equipment ("TME").

The CMA provisionally found that, although other forms of TME provision (especially the sale of new or used equipment) are alternatives to rental for some customers, they are not sufficiently close alternatives to TME rental to fall within the same market. The CMA found that Microlease was the leading supplier of TME rental, and it found that Electro Rent, although less established in the UK, was its closest competitor.

The CMA based its findings on (i) the parties' internal documents, corroborated by evidence received from third parties, which consistently showed that the parties competed closely to supply a significant proportion of customers in the UK, (ii) the fact that the parties were the only two UK rental partners of some of the largest OEMs of TME equipment, which allows them to purchase TME equipment at discounts not available to other suppliers, (iii) the fact that other rental suppliers either do not supply the same customer groups or focus on narrower segments, and (iv) a lack of evidence of recent entry or plans for entry or expansion by other suppliers.

The CMA is considering various structural remedy options involving the sale of part or all of the parties' businesses to address these competition concerns.

Phase 1 Merger Investigations

Universal Sealants/Ekspan Holdings. On 26 February, the CMA cleared the completed acquisition by Universal Sealants (U.K.) Limited of Ekspan Holdings Limited.

Mole Valley Farmers/Countrywide Farmers. On 21 February, the CMA decided to refer the proposed acquisition by Mole Valley Farmers of 48 of Countrywide Farmers' country stores for a Phase 2 investigation unless the parties offer acceptable undertakings. The CMA found that the proposed transaction might reduce competition in up to 45 local areas, given that the parties were the only suppliers of bulk agricultural products and retail country stores (selling animal feed, clothing, pet food, and gardening tools) in those areas.

Aviagen Group/Hubbard Holding. On 13 February, the CMA announced that it has decided to clear the merger, and published its decision on 28 February.

European Metal Recycling/Metal & Waste Recycling. On 7 February, the CMA decided to refer the completed acquisition by European Metal Recycling Limited of Cufe Investments Limited (holding company of Metal & Waste Recycling) for a Phase 2 investigation. The decision comes after European Metal Recycling informed the CMA on 31 January that it would not be offering undertakings. In the Phase 1 decision, the CMA found that the transaction might lead to a reduction in choice, price, quality, and service to customers, given that the parties were the two main metal recycling companies in the area around and north of London.

The CMA has several ongoing Phase 1 investigations:

SSE Retail/Npower merger inquiry *(decision due by 26 April 2018)*.

GVC Holdings/Ladbrokes Coral Group *(decision due by 6 April 2018)*.

Tarmac/Breedon *(decision due by 26 April 2018)*.

Vanilla Group/Washstation *(decision due by 2 April 2018)*.

Sysco Corporation/Cucina Lux Investments/Brake Bros Limited/Kent Frozen Foods *(decision due by 23 March 2018)*.

Zenith Hygiene Group/Bain Capital *(decision due by 20 March 2018)*.

Vp/Brandon Hire Group Holdings *(decision due by 16 March 2018)*.

Derby Teaching Hospitals/Burton Hospitals *(decision due by 15 March 2018)*.

Henderson Retail/Martin McColl *(decision due by 9 March 2018)*.

Other Developments

House of Lords publishes report of impact of Brexit on UK competition policy. On 2 February, following a fact-finding inquiry, the House of Lords EU Internal Market Sub-Committee published a report considering the impact of Brexit on competition law and state aid enforcement, as well as exploring future UK policy in these areas post-Brexit. The inquiry explored (i) the opportunities and challenges for re-shaping the UK competition regime post-Brexit, (ii) potential future cooperation arrangements between UK and EU competition authorities, and (iii) the case for the UK to establish a domestic state aid framework post-Brexit. Among other things, the report considers that arrangements similar to the current EU block exemptions (which exempt certain agreements from antitrust prohibitions) should continue to apply after Brexit, to provide certainty and minimise disruption for businesses. The report calls on the Government to negotiate a comprehensive competition cooperation agreement with the EU and other countries to facilitate future mutual assistance in competition enforcement. It also calls on the CMA to explore means by which the burden on businesses of dual notifications of mergers to the Commission and the CMA could be minimised, such as encouraging businesses to agree to waivers allowing the Commission and CMA to share and discuss information.

CMA delivers speech on enforcement developments and future concerns. On 20 February, Sarah Cardell, the CMA's General Counsel, gave a speech to the UK Competition Law 2018 conference in which she reflected on the CMA's major activities in the past year across antitrust and consumer law enforcement, litigation, mergers, and market studies and investigations, as well as considering the impact of Brexit on the CMA's future enforcement activities. Confirming the CMA's "*emphasis on the ramping-up of [its] enforcement activities*", she stressed the need "*to ensure that [the CMA's] legal analysis and [its] review of the evidence are robust*" and to "*respect parties' rights of defence and that [the CMA] follow proper procedures*." Ms Cardell highlighted the following major developments including (i) fining of Hungryhouse for its failure to provide certain documents in a merger context, (ii) the launch of competition and consumer law investigations into practices in the home insurance and hotel online booking sectors following the CMA's report in September 2017 into

digital comparison tools, and (iii) litigation before the Competition Appeal Tribunal, where the CMA had a mixed record.

Ms Cardell said that Brexit "*offers [the CMA] very positive opportunities to consolidate and extend the impact of [its] work*", given that the CMA would likely "*take on a greater role in both merger control and antitrust enforcement*." Nevertheless, she noted the "*many benefits in retaining broad consistency with the application of EU competition law*" post-Brexit, in order to (i) provide consistency for businesses, especially those engaged in cross-border trade, (ii) facilitate parallel investigations, (iii) minimise the risk of divergence and reduce the prospect of litigation over previously-established principles. Finally, Ms Cardell stressed that the CMA was "*keen to ensure a smooth transaction … both in order to avoid unnecessary duplication but also to minimise the risk of enforcement gaps and ensure UK consumers are properly protected*" and called on the UK Government to provide further certainty on the transitional arrangements before Brexit.

European Commission publishes draft withdrawal agreement between the EU and the UK. On 28 February, the EC published the draft Withdrawal Agreement between the EU and the UK. The draft agreement sets out the proposed arrangements for the UK's withdrawal from the EU, including during the transition period (*i.e.*, between the date of entry into force of the agreement and 31 December 2020). Under Chapter 2 of Title X of the draft agreement, it is envisaged that EU institutions should continue to have the power to initiate administrative procedures under EU law up until the end of the transition period. Moreover, Article 89 provides that EU institutions would remain competent to initiate new administrative procedures under EU law "*where the facts forming the subject matter of the administrative procedure occurred before the end of the transition period*." If agreed, this would mean that the EC could open new antitrust or merger investigations after the end of the transition period, provided the underlying conduct occurred before the end of that period. The draft agreement is, however, subject to negotiation between the EU and the UK, and a final version is not expected to be agreed before October 2018.

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