Overview

On February 16, 2018, the UK Court of Appeal adopted its much awaited ruling in the iiyama case. Taking stock of the Court of Justice (CoJ) ruling in Intel last year, the Court of Appeal allows plaintiffs in civil cartel damages actions to advance claims based on overcharges incurred by their supply chain operations outside of the European Union (EU), provided that such overcharges ultimately hit their finished goods sales within the EU.

This is perhaps an inevitable proposition, which will probably send shock waves way beyond the Channel. While this judgment does not bind the European Courts, this UK precedent will inspire other national courts across the EU. In addition, following Intel, the European Commission (EC) is most likely emboldened to prosecute non-EU based cartels affecting upstream activities with an indirect effect on sales of finished goods in the EU.

Background

The judgment of the UK Court of Appeal arises out of three EC decisions: the Liquid Crystal Display (LCD), adopted on December 8, 2010 (the LCD Decision); the Cathode Ray Tubes (CRT) Glass Decision (the CRT Glass Decision), adopted on October 19, 2011; and the TV and Computer Monitor Tubes Decision (the CRT Decision), adopted on December 5, 2012. All three decisions related to infringements of Article 101(1) of the Treaty on the Functioning of the EU (TFEU).

Subsequently, iiyama Corporation, which has subsidiaries that sell monitors in the EU (the Claimants), brought two civil damages cases in England and Wales: one against certain addressees of the LCD Decision, and one against certain addressees of the CRT Glass and CRT Decisions (the Defendants).

As it generally happens in civil cases, the Defendants raised a number of procedural issues at the start of the proceedings. In particular, they argued that none of iiyama’s European subsidiaries purchased cartelized products from any of the Defendants. Those subsidiaries purchased OEM products that incorporated the cartelized components; but the Defendants’ sales of those cartelized products all took place in Asia and did not involve any shipments to the EEA. In the LCD case, iiyama’s supply chain took the following form (a similar pattern existed in the CRT and CRT Glass cases):

- The Defendants supplied LCD to OEMs (original equipment manufacturers) based in Asia;
- The OEMs sold monitors incorporating LCDs to iiyama Corporation in Asia;
- iiyama Corporation sold the monitors to its EU subsidiaries;
- The subsidiaries then sold monitors to dealers in the EU.
On the basis of the above chain supply, the Defendants took the view that the sales of cartelized LCDs to iiyama in Asia had a remote effect in the EU. Accordingly, under the applicable EU case-law on EU anti-cartel jurisdiction, iiyama’s claims fell outside the territorial jurisdiction of Article 101 TFEU.

In two orders dated June 24, 2016 (Justice Mann’s order, concerning the CRT and CRT Glass claims) and October 24, 2016 (Justice Morgan’s order, concerning the LCD claims), the High Court sided with the Defendants: in both cases, the cartel conduct, insofar as it affected iiyama, is too far remote to fall within the ambit of Article 101(1) TFEU. Therefore, the High Court dismissed iiyama’s claims.

iiyama appealed both orders before the Court of Appeal on the grounds, inter alia, that the recent judgment of the CoJ in Intel (adopted after Justice Mann and Justice Morgan’s orders) provided strong support to their case.

Pre-Intel: a Cautious Approach to the Extraterritorial Reach of EU Competition Law

The Court of Appeal started by re-examining the state of the EU case-law prior to the adoption of the Intel judgment by the CoJ. The Court of Appeal recalled that, at that time, the EU case-law focused on two main doctrines.

1. The implementation doctrine

In A. Ahlström Osakeyhtiö and others v Commission (Woodpulp I), the CoJ stated that for any anti-competitive conduct under Article 101 TFEU, two distinct elements are required: (1) the formation of an agreement or concerted practice among competitors; and (2) its implementation in the EU. However, it does not matter whether the agreement is formed inside or outside the EU.

This doctrine raises a fundamental question: what amounts to implementation of a cartel in the EU?

- Direct sales in the EU. This point is fairly uncontroversial: in Woodpulp I, the CoJ considered that direct sales of cartelized products within the EU amounted to implementation in the EU.
- Indirect sales in the EU, i.e. when the first sale of the cartelized products to an independent buyer happens outside of the EU. This scenario is more controversial. While the EC has often claimed that indirect sales were sufficient to establish its jurisdiction over a given conduct, it has resisted using this line of commerce for fining purposes.

2. The qualified effects doctrine

Under this doctrine, the EC needs to show that the conduct had substantial, immediate, and foreseeable effects in the EEA. This doctrine has been first invoked by the GC in Gencor, a merger control case, and was never formally endorsed by the CoJ in behavioral cases until Intel. Therefore, pre-Intel, the status of the qualified effects doctrine was uncertain.

Intel: A Significant Opening for the Extraterritorial Reach of EU Competition Law

The UK Court of Appeal then proceeded to examine the Intel case and its implications on the civil claims advanced by iiyama.

Intel arises out of a EC decision dated May 13, 2009, in which the EC imposed a record fine of €1.06 billion on Intel Corporation (Intel) for engaging in abusive practices on the market for central processing units of the x86 architecture (‘x86 CPUs’, i.e. a key computer component) from 2002 to 2007. The EC found that Intel engaged in two specific forms of illegal practices, namely: (1) exclusivity rebates, i.e. rebates granted to manufacturers on the condition that they would buy all or almost all of the x86 CPUs from Intel; and (2) so-called ‘naked restrictions’, i.e. direct payment to a retailer on condition that it stocks only computers with Intel x86 CPUs.

Some of these exclusivity rebates and naked restrictions were granted to Lenovo, a Chinese manufacturer, in 2006 and 2007 (the Lenovo agreements): (1) the 2006 agreement encouraged Lenovo to postpone and finally cancel the launch of two products including competing CPUs on the worldwide market, in exchange for a financial incentive; and (2) the 2007 agreement incentivized Lenovo to source exclusively from Intel CPUs for its notebooks, in exchange for a rebate.

Intel requested the GC to annul the decision. Among other pleas, Intel argued that the EC had no jurisdiction over the Lenovo agreements, which had been entered into and implemented in Asia. In a judgment dated June 12, 2014 (T-286/09), the GC dismissed Intel’s argument, on the basis that the Lenovo agreements satisfied both the implementation and the qualified effect doctrines. The GC emphasized that the two doctrines were alternatives and did not have to be cumulatively fulfilled in every circumstance.
The implementation doctrine was met since the Lenovo agreements were intended to be implemented worldwide by Lenovo, including in the EEA. In this regard, the GC noted that the fact that Intel did not sell directly CPUs within the EEA did not preclude implementation at EEA level: the Lenovo agreements could also be implemented through indirect sales, i.e., sales of CPUs to Lenovo in Asia, which would then be incorporated into computers that Lenovo would sell within the EEA. For a critique of the GC’s position on this point, see our prior briefing here.

The qualified effects doctrine could also apply as Intel’s conduct could have immediate, substantial and foreseeable effects in the internal market. In this regard, the GC found that, while the Lenovo agreements themselves did not necessarily have a substantial effect on the EEA market, they were part of a much broader single and continuous infringement (which arguably produced such effects).

In a judgment adopted on September 6, 2017, the CoJ confirmed the GC’s approach to the qualified effects doctrine (and noted that the GC’s considerations on the implementation doctrine were added for the sake of completeness). According to the UK Court of Appeal, the CoJ’s judgment is important for at least three reasons:

- For the first time, the CoJ confirmed the applicability of the qualified effects doctrine in the context of an antitrust violation. This is an important recognition that puts an end to the uncertainty as to the applicability of this doctrine in cartel cases.
- The three conditions of the qualified effects test (immediacy, substantiability and foreseeability) must be examined in the context of the offending conduct as a whole. In Intel, this meant that the CoJ did not examine the Lenovo agreements separately from the rest of the infringing conduct, but, rather, as forming part of an overall anticompetitive conduct.
- Intel’s conduct in making the anti-competitive arrangements outside the EU was capable of producing an immediate effect in the EU. In Intel, the GC and the CoJ considered that this effect was also direct, since the conduct resulted in rival CPUs not being available on computers sold in the EU. The UK Court of Appeal noted that the qualified effects test does not require the conduct to produce direct effects in the EU: “[w]e are unable to accept the proposition 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 must, without more, lead to the conclusion that the test of immediacy cannot be satisfied.”

On the basis of the above elements, the UK Court of Appeal sided with iiyama Intel is indeed a game changer, because it confirms the availability of a jurisdictional test that does not include a requirement of directness of the effect. Therefore, Intel “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 effect test for jurisdiction.”

Alternatively, the UK Court of Appeal also considered that, following the CoJ’s judgment in Intel, the implementation doctrine may be applicable to iiyama’s indirect purchases to the Defendants. In our view, this affirmation is less substantiated, since the CoJ’s judgment does not confirm the GC’s finding that the implementation test may be met through indirect sales.

Towards the Extension of the Jurisdiction of the EC to Indirect Sales?

Over the years, investigated businesses have struggled to rebut the EC’s jurisdiction over anticompetitive conducts that are initiated outside of the EEA by non-EU based companies. The issue is indeed inherently complex and sensitive, and the existing case-law prior to Intel did little to clarify the boundaries of the extraterritorial reach of EU competition law, thus leaving businesses and competition lawyers in limbo.

One particularly thorny issue relates to indirect sales, and whether such sales should fall within the ambit of Article 101 TFEU. Until now, the EC has often claimed that indirect sales were sufficient to establish its jurisdiction over a given conduct, while refraining from including such sales in determining the amount of the fines (see our briefing on fines imposed in relation to extraterritorial infringements).

As suggested by the UK Court of Appeal, Intel may well be a game changer. Admittedly, Intel does not clarify the status of indirect sales in the context of the implementation doctrine. However, the recognition by the highest EU Court of the availability of the qualified effect test as an alternative will allow regulators to prosecute any worldwide cartel, provided that it has substantial, immediate and foreseeable effects in the EEA. According to the CoJ, the question whether the investigated parties have made direct or indirect sales in the EU would not be determinative.

What matters is for the anti-cartel enforcer to take account of the probable effects of the impinged conduct on competition in the EU, in terms of foreseeability, immediacy and substantiability. Contrary to the position of AG Wahl in Intel, the CoJ does not require proof of actual effects on competition in the EU, thereby keeping the bar low for the enforcer to assert jurisdiction.

What about civil claims? The position of the UK Court of Appeal would potentially result in a significant extension of the extraterritorial reach of EU competition law in the context of civil damages claims. But interestingly, the national judge will have to ascertain the actual effect of the conduct on claimants, in particular the causal link between the cartel conduct and the losses actually incurred by the claimants in the EU. This is an interesting debate: antitrust liability at the administrative stage does not necessarily translate in civil liability and damages in national courts.
Finally, some may argue that *iiyama* is an English case and therefore should not impact cartel enforcement at EU level, especially with Brexit looming on the horizon. We disagree with this position: in our view, *iiyama* is simply the first application of the CoJ’s findings in *Intel* at national level.

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