GCR INSIGHT

PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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Contents

Part II: Comparison Across Jurisdictions

PART I
KEY ISSUES AND OVERVIEWS

04

Territorial Considerations: the EU Perspective

Camilla Sanger and Olga Ladrowska[1]

Introduction

Globalisation has led to the unprecedented integration of national economic markets. Economic activities have become truly international and it is not uncommon for different stages of a single supply chain to take place in multiple countries. In this context, it is hardly surprising that anticompetitive behaviour and its effects are now, as one commentator put it, 'not constrained by national boundaries'.[2]

In this economic environment, it has become increasingly difficult (but arguably also increasingly important) to delineate the territorial scope of various national and international competition law regimes. This requires the careful balancing of many public and private law considerations, including the interests of particular regulators and courts; and issues of international comity, procedural efficiency and fairness. Excessively wide jurisdictions of particular regulators or courts over either public or private enforcement may be perceived as an encroachment on another state's or institution's right to enforce competition law within its territory. It can, therefore, offend the territoriality principle of public international law, which holds that each sovereign state has exclusive power to make or enforce laws relating to conduct that takes place within its territory.[3] In practical terms, excessively wide jurisdictions of particular regulators or courts may also lead to parallel proceedings and inconsistent findings.

One possible answer to the legal challenges presented by globalisation is harmonisation across competition law regimes. However, while there have been some harmonisation efforts in the area of competition law, the prospect of a worldwide competition law regime continues to be elusive.

1 Camilla Sanger is a partner and Olga Ladrowska is an associate at Slaughter and May.

2 R Whish and D Bailey, *Competition Law*, OUP 2015, p. 518.

3 For a discussion of the territoriality principle see: J Crawford, *Brownlie's Principles of Public International Law* (9th ed.), OUP 2019, pp. 442-3.

The analysis below explores the current law relating to the territorial reach of EU competition law and focuses on the question of the limits of EU territorial jurisdiction for competition law claims. The chapter is divided into two sections: the first concerned with public enforcement and the second with private enforcement.

Public enforcement

EU competition law applies to any conduct that has an appreciable effect on trade between Member States. Article 101 of the Treaty on the Functioning of the European Union (TFEU) provides that: 'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of 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* . . . '(emphasis added). Article 102 of the TFEU provides that: 'Any abuse by one or more undertakings of a dominant position *within the internal market* or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade *between Member States* . . .' (emphasis added).

The Court of Justice of the European Union (CJEU), the EU General Court and the European Commission have long grappled with the question of whether (and if so, in what circumstances) Articles 101 and 102 of the TFEU can apply to non-EU undertakings and to conduct that takes place outside the EU. The CJEU's and EU General Court's jurisprudence on this issue has resulted in the development of two tests that are designed to define the limits of the territorial reach of EU competition law: the implementation test and the qualified effects test.

Development of the implementation test and the qualified effects test

One of the first CJEU's cases discussing the territorial reach of EU competition law was *Ahlström Osakeyhtiö v. Commission* (*Woodpulp*).[4] The case concerned the European Commission's infringement decision against various wood pulp producers with registered offices outside the EU. The wood pulp producers sought annulment of the European Commission's decision and argued that their conduct fell outside the territorial scope of the predecessor of Article 101 of the TFEU.[5] The CJEU observed that any cartel-related infringement of competition law consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice, and its implementation.[6] The court further noted that if the application of prohibitions laid down by competition law were to depend on the place where the agreement, decision or concerted practice was formed, the result would be to give parties an easy means of evading those prohibitions.[7] Accordingly, the CJEU held that, for the purposes of the territoriality analysis, 'the decisive factor is . . . the place where [the agreement, decision or concerted practice] is

4 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, *Ahlström Osakeyhtiö v. Commission*, EU:C:1988:447.

5 Article 85 of the Treaty establishing the European Economic Community.

6 *Woodpulp*, para. 16.

7 *Woodpulp*, para. 16.

implemented.'[8] The test set out by the CJEU has become known as the implementation test. On the facts of *Woodpulp*, the CJEU held that the implementation test was satisfied in a situation where the cartelists set the prices of wood pulp, which was being sold directly into the EU.[9]

Subsequently, the territorial reach of EU competition law was considered in *Gencor Ltd v. Commission* (*Gencor*).[10] The case concerned the European Commission's decision to prohibit a concentration proposed by a South African company and an English company, on the basis that it led to the creation of a dominant duopoly position between their respective subsidiaries. The European Commission was concerned that this duopoly position would have significantly impeded competition in the EU. On appeal to the EU General Court, the South African company sought annulment of the European Commission's decision and argued that the Commission had no jurisdiction over the concentration because the then applicable merger regulation[11] only applied to concentrations carried out within the EU. In addressing the territorial reach of EU competition law, the EU General Court briefly referred to *Woodpulp* before holding that the 'application of the [EU merger regime] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [EU]'.[12] The requirement of foreseeable, immediate and substantial effects as set out by the EU General Court has become known as the qualified effects test.

Following the decisions in *Woodpulp* and *Gencor*, there was significant uncertainty as to the status of the implementation test and the qualified effects test and, in particular, the applicability of the latter in the context of Articles 101 and 102 of the TFEU. The CJEU subsequently addressed some of these issues in *Intel Corp. v Commission* (*Intel*).[13] The case concerned the European Commission's infringement decision that found that Intel had abused its dominant position contrary to Article 102 of the TFEU. The European Commission found that Intel had engaged in two types of anticompetitive conduct, namely conditional rebates and 'naked restrictions', which were intended to exclude a competitor, AMD, from the market for central processing units (CPUs). The first type of conduct consisted of granting rebates to computer manufacturers, which were conditional on those manufacturers purchasing all or almost all of their CPUs from Intel. The second type of conduct consisted of making direct payments to computer manufacturers so that they would delay, cancel or restrict the marketing of certain products equipped with CPUs produced by AMD. The specific CPUs that were relevant to the case were supplied by Intel to a computer manufacturer in China.

On appeal to the EU General Court and then to the CJEU, Intel sought annulment of the European Commission's decision and argued that its conduct fell outside the territorial reach of EU competition law. Both the EU General Court and subsequently the CJEU rejected this argument. In relation to the applicable territoriality tests, the CJEU noted that the qualified effects test pursues the same objective as the implementation test, namely '[the prevention of] conduct which, while not adopted within the EU, has anti-competitive effects liable to have an impact on the EU market'.[14] Accordingly, the CJEU reasoned that the qualified effects test provided another

8 *Woodpulp*, para. 16.
9 *Woodpulp*, para. 17.
10 Case T-102/96 *Gencor Ltd v. Commission* [1999] ECR II–753.
11 Council Regulation (EEC) No. 4064/89 of 21 December 1989.
12 *Gencor*, para. 90.
13 Case T-286/09 *Intel Corp. v. Commission* EU:T:2014:472.
14 *Intel*, para. 45.

possible basis for the European Commission's jurisdiction.[15] In relation to the interpretation of the qualified effects test, the CJEU observed that to determine whether the test is satisfied, it is necessary to 'examine the conduct of the undertaking in question, *viewed as a whole*' (emphasis added).[16]

On the facts of *Intel*, the CJEU found that the qualified effects test was satisfied on the following grounds:

- it was foreseeable that Intel's agreement with a computer manufacturer for the delivery of CPUs in China would have an immediate effect on competition in the EU (and it was sufficient to take account of the probable effects of the relevant conduct for this condition to be satisfied);[17]
- Intel's conduct was capable of producing an immediate effect in the EU because it formed part of an overall strategy intended to foreclose its competitor's access to the market, including the EU;[18] and
- Intel's conduct had a substantial effect on the EU market as it formed part of an overall strategy intended to foreclose its competitor's access to the most important sales channels.[19]

Unresolved issues and further development

The CJEU's judgment in *Intel* has provided some clarity on the framework to be applied to determine the territorial reach of EU competition law, in that it recognised the qualified effects test as a separate basis for establishing jurisdiction (at least in the context of infringements of Article 102 of the TFEU). However, the CJEU's analysis in *Intel* is arguably not comprehensive and the arguments about the territorial reach of EU competition law may well need to be reconsidered or refined in future case law. Among other things, the CJEU did not analyse in significant detail the relationship between the implementation test and the qualified effects test, nor any potential limitations of the latter. Additionally, the CJEU did not expressly confirm the applicability of the qualified effects test to cases concerning infringements of Article 101 of the TFEU, which means that parties in future cases can potentially argue that the judgment should be confined to cases concerning infringements of Article 102 of the TFEU (and, perhaps even more specifically, to foreclosure cases). Further, and more generally, the CJEU did not fully and directly engage with the question of whether the European Commission has (or should have) any interest in regulating conduct that does not take place in the EU, but which has an effect on the EU market. The argument, which was raised by Intel on appeal,[20] is effectively that too broad an approach to territoriality could give rise to jurisdictional conflict between the European Commission and other regulators and therefore result in the risk of double jeopardy.

In light of the above, it seems likely that *Intel* will not be the CJEU's last word on the issue of the territorial reach of EU competition law. Instead, as noted by one Member State court, it is probably fair to say that the recognition of the qualified effects test in *Intel* 'can . . . be expected to provide a solid foundation for further incremental development of the Court's jurisprudence

15 *Intel*, paras 46 and 47.
16 *Intel*, para. 50.
17 *Intel*, para. 51.
18 *Intel*, paras 52-53.
19 *Intel*, paras 55–58.
20 *Intel*, para. 37.

in this difficult area of law'.[21] Given that the question of the territorial reach of EU competition arises in many of the European Commission's decisions, it may be that the CJEU will have the opportunity to revisit this issue in the near future.[22]

Private enforcement

Beyond the public enforcement context, issues concerning the territorial reach of EU competition law have obvious implications in the private enforcement context. Prospective claimants in competition damages actions will follow the recent developments of EU law in this area with interest, as such developments may directly affect their ability to bring competition damages claims in Member State courts. As a general rule, the more liberal the court's approach to the territorial reach of EU competition law, the more likely it is that individuals and corporations who have allegedly suffered a loss at different stages of the supply chain will be able to bring competition damages actions there (even if their claims have only a remote territorial connection with the EU).

The implementation and qualified effects tests

The CJEU has not (yet) specifically addressed the question of how the implementation and qualified effects tests should be applied to competition damages claims. However, the issue has been considered in detail by at least one Member State court.[23] On 16 February 2018, the English Court of Appeal handed down judgment in *iiyama (UK) Ltd and others v. Samsung Electronics Co Ltd and others* (*iiyama*),[24] and the case has become a leading English authority on the territorial reach of EU competition law in competition damages claims brought by indirect purchasers (i.e., parties that have not purchased the cartelised products directly from the cartelists, but instead acquired them at a later stage in the supply chain).

The proceedings in *iiyama* concerned two competition law damages claims brought by the iiyama group in relation to cartels in the sectors of cathode ray tubes (CRTs) and liquid crystal displays (LCDs). CRTs and LCDs are component parts in television and computer monitors. What is crucial to the territorial analysis in this case is the indirect nature of the claimants' purchases of CRTs and LCDs from the cartelists and the fact that most of the stages of the supply

21 The English Court of Appeal in *iiyama (UK) Ltd and others v. Samsung Electronics Co Ltd and others* [2018] EWCA Civ 220 (*iiyama* (Court of Appeal)), para. 94.

22 The question of the territorial reach of EU competition law was recently considered by the EU General Court in various decisions relating to the power cables cartel. See for example: Case T-441/14 *Brugg Kabel AG and Kabelwerke Brugg AG Holding v. European Commission*, EU:T:2018:453 (*Brugg)*; Case T-447/14 *NKTVerwaltungs GmbH, formerly nkt cables GmbH and NKT A/S, formerly NKT Holding A/S v. European Commission* (*NKT*), EU:T:2018:443. At the time of writing, the appeals to the CJEU in these cases are pending (see for example: Case C-591/18 P for *Brugg* and Case C-607/18 P for *NKT*) but it is unclear whether the appellants allege that the European Commission and the EU General Court erroneously applied the implementation test or the qualified effects test.

23 As far as the authors know, the *iiyama* decision is the first case post-*Intel* in which a Member State court has been asked to determine the issue of EU territorial reach in a competition damages claims context.

24 *iiyama* (Court of Appeal). For a detailed analysis of the case see: R Swallow, C Sanger, O Ladrowska, i*iyama v. Samsung and others: Court of Appeal considers the territorial limits of EU competition law*, available at: www.slaughterandmay.com/media/2536714/iiyama-v-samsung-and-others.pdf. Slaughter and May acts for Koninklijke Philips NV and Philips Electronics UK Ltd, which were two of the CRT defendants in the *iiyama* case.

chain through which the claimants had acquired the cartelised products took place outside the EU. The CRTs and LCDs were first supplied to original equipment manufacturers (OEMs) in Asia. The OEMs incorporated the CRTs and LCDs into computer monitors and supplied these to a claimant holding company, also in Asia. The claimant holding company then supplied the computer monitors to claimant subsidiary companies within the EU, for onward sale and distribution in the EU.

At first instance, the English High Court addressed the question of territoriality separately in the CRT proceedings[25] and the LCD proceedings,[26] arguably reaching different conclusions. In the CRT proceedings, Mann J disposed of the claims on the basis that the activities complained about by the claimants were outside the territorial scope of Article 101. The Court applied the implementation test as set out in *Woodpulp* and held that the defendants' CRT sales outside the EU did not satisfy the test. The Court also observed that the mere fact that the defendants' sales had 'some end of the road effect'[27] in the EU did not mean that the cartel was implemented in the EU. The Court also referred to the qualified effects test as set out in *Gencor* and held that, if the Court were to apply the test,[28] the claimants would likely not be able to satisfy the immediacy condition as the effect of the defendants' CRT sales in the EU was 'plainly a knock-on effect'.[29]

In the LCD proceedings, Morgan J approached the territoriality analysis slightly differently and allowed some of the claimants' claims to proceed. While Morgan J agreed with Mann J's interpretation of the implementation test and held that the defendants' indirect LCD sales into the EU did not amount to implementation in the EU, the Court nevertheless observed that it was arguable that the claims had an alternative connection to the EU. The Court's reasoning was that the European Commission's infringement decision concerning LCDs had already established that the implementation test was satisfied (at the public enforcement stage) and that the only relevant question (at the private enforcement stage) was whether the claimants could show that they had suffered losses as a result of the cartel having been implemented in the EU. On the facts, Morgan J found that it was arguable that the claimants could show that if the cartel had not been implemented in the EU the claimants would have purchased LCDs in Europe at non-cartelised prices; or the cartel would have collapsed worldwide and the claimants would have purchased LCDs at non-cartelised prices in Asia.

The CRT and LCD proceedings were joined for appeal and the Court of Appeal decided that the claims in both sets of proceedings should go to trial, thereby overturning Mann J's judgment in the CRT proceedings and partially overturning Morgan J's judgment in the LCD proceedings. The Court of Appeal considered the implementation and qualified effects tests and held that there was an arguable case that the cartel activities fell within the territorial scope of Article 101. The Court of Appeal emphasised that the law relating to territoriality had developed since Mann J's judgment in the CRT proceedings, as the CJEU's judgment in *Intel* expressly recognised the qualified effects test as a separate basis for establishing jurisdiction.[30] Applying the

25 *iiyama (UK) Ltd and others v. Schott AG and others* [2016] EWHC 1207 (Ch) (*iiyama* (CRT proceedings)).

26 *iiyama (UK) Ltd and others v. Samsung Electronics Co Ltd and others* [2016] EWHC 1980 (Ch) (*iiyama* (LCD proceedings)).

27 *iiyama* (CRT proceedings), para. 140.

28 The judgment was given before the CJEU judgment in *Intel* and there was significant uncertainty as to the applicability of the qualified effects test outside the context of merger control.

29 *iiyama* (CRT proceedings), para. 149.

30 *iiyama* (Court of Appeal), para. 94.

qualified effects test, the Court of Appeal held that the intended and actual operation of the cartel should always be examined 'as a whole',[31] but on the facts it was at least arguable that the intended effects of a worldwide cartel in the EU fell within the scope of Article 101. Regarding the CRT and LCD defendants' argument that indirect sales into the EU can never satisfy the qualified effects test, the Court of Appeal ruled that the fact that there was a 'sale to an innocent third party outside the EU at an early stage of the supply chain'[32] did not automatically lead to the conclusion that the immediacy criterion in the qualified effects test was not satisfied. The Court explained that the test of immediacy, similarly to the other criteria, requires 'an overall assessment in light of the offending conduct viewed as a whole'.[33]

The Court of Appeal's decision in *iiyama* was a significant step towards clarifying the application of the implementation and qualified effects tests in the private enforcement context. However, it is important to note that the judgment was delivered in the context of strike out and summary judgment applications, which means that to succeed the claimants needed to show merely that they had a real prospect of success on the claim. The Court of Appeal held that the claimants satisfied this (arguably low) threshold in relation to the territoriality arguments, but seems also to have accepted that the relevant issues may need to be examined (once again) in the proceedings following a full examination of facts at trial.[34] More generally, it will be interesting to see if the courts of other Member States choose to follow the approach to EU territorial reach adopted by the English Court of Appeal in *iiyama*. While the decision is clearly not binding on those courts, it may be persuasive in cases that are argued before them on similar grounds. Given the importance of the issue and the current status of the EU law, it may well be that we will see a reference to the CJEU for a preliminary ruling on the application of the implementation test and the qualified effects test in the private enforcement context.

Further limitations on the territorial reach of EU competition law

When analysing the territorial reach of EU competition law, consideration must also be given to jurisdiction and choice of law rules. These rules provide the traditional method of allocating competence between different courts and legal systems to determine civil claims. Jurisdiction rules determine which courts should have jurisdiction to hear the case and choice of law rules determine what law should be applied to decide it. Jurisdiction and choice of law need to be viewed as distinct issues: the court of one country may have jurisdiction but the applicable law may be that of another country.

In the private enforcement context, EU competition law can only be effective if a Member State court takes jurisdiction over the relevant claims and applies the relevant EU law to them (as part of the national law of a Member State whose law is held to govern the dispute).

31 *iiyama* (Court of Appeal), paras 93–98.

32 *iiyama* (Court of Appeal) para. 98.

33 *iiyama* (Court of Appeal), para. 98.

34 *iiyama* (Court of Appeal), para. 95.

Jurisdiction rules

The EU regime for jurisdiction rules applicable to civil and commercial matters, including competition damages actions, is contained in the Recast Brussels Regulation.[35] In terms of its temporal scope, the Recast Brussels Regulation applies to proceedings commenced on or after 10 January 2015.

The core jurisdiction rule under the Recast Brussels Regulation is set out in Article 4(1) and provides that a claim should be brought in the courts of a Member State where the defendant is domiciled. There are, however, a few exceptions to this rule and in the context of competition damages claims there are two special jurisdiction provisions that prove particularly useful.

First, pursuant to Article 7(2), in matters relating to tort, delict or quasi-delict, a claimant may bring a claim in the courts of a Member State where the harmful event occurred or may occur. The CJEU's jurisprudence makes it clear that the phrase 'the place where the harmful event occurred or may occur' refers to both the place where the event giving rise to the damage occurred or may occur, and the place where the damage occurred or may occur.[36] In the context of competition damages claims based on breaches of Article 101 of the TFEU, the CJEU applied the test in *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel BV and others* (*CDC*)[37] and held that the relevant event takes place where the anticompetitive agreement was concluded, and the relevant damage occurs where the claimant suffered loss, such as at the claimant's registered office. In a recent judgment in *Tibor-Trans Fuvarozo és Kereskedelmi Kft v. DAF Trucks NV*,[38] the CJEU further clarified that 'the place where the harmful event occurred or may occur' can cover the place where the market affected by a competition law infringement is located, such as the place where the market prices were distorted and in which the victim claims to have suffered that damage (even where the action is against a cartelist with whom a claimant had not established any contractual relations).

Second, pursuant to Article 8(1) of the Recast Brussels Regulation, where there are multiple defendants domiciled in different Member States, a claimant can opt to bring a claim in the courts of a state where one of those defendants is domiciled, provided 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 separate proceedings. In *CDC*, the CJEU held that cartelists could reasonably expect to be sued in the courts of a Member State in which one of them was domiciled, on the ground that 'determining separately actions for damages against several undertakings domiciled in different Member States, which, contrary to EU competition law, participated in a single and continuous cartel, may lead to irreconcilable judgments . . . '.[39]

35 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

36 See Case C-21/76 *Handelskwekerij GJ Bier BV v. Mines de potasse d'Alsace SA* ECLI:EU:C:1976:166, para. 25.

37 Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel BV and others* EU:C:2015:335.

38 Case C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft v. DAF Trucks NV*. ECLI:EU:C:2019:635.

39 *CDC*, para. 25.

In relation to the enforceability of jurisdiction agreements in competition damages actions, it is settled law that it is for individual Member State courts to interpret such agreements to determine which disputes fall within their scope.[40] However, the CJEU has recently offered some guidance in relation to the particular issues that Member State courts may face while interpreting such clauses in competition damages actions. In *CDC*, the CJEU held that a jurisdiction agreement will not be effective in respect of claims based on breaches of Article 101 of the TFEU unless it specifically refers to disputes arising out of infringements of competition law. Subsequently, in *Apple Sales International et al v. MJA*,[41] the CJEU made an arguably inconsistent finding that the mere fact that a jurisdiction agreement does not expressly refer to disputes arising out of infringements of competition law does not prevent it from applying to claims based on breaches of Article 102 of the TFEU.

Generally, the combined effect of Articles 4(1), 7(2) and 8(1) of the Recast Brussels Regulation is that claimants enjoy considerable freedom to bring competition damages actions in a Member State court of their choice. In practice, this means that claimants can engage in 'forum shopping' in an attempt to find a Member State court with the most claimant-friendly procedural rules[42] and potentially also the most liberal approach to the territorial reach of EU competition law.

Choice of law rules

The EU regime for choice of law rules applicable to non-contractual obligations is contained in the Rome II Regulation.[43] In terms of its temporal scope, the Rome II Regulation applies to proceedings in which the events giving rise to the relevant damage occurred after 11 January 2009.[44]

The general rule, which is set out in Article 6(3)(a), provides that the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected. There is currently little guidance on the interpretation of the 'affected market' test. However, there is certainly scope for the test to be applied liberally and by reference to specific facts before a Member State court. For example, in one English case claimants commenced proceedings for breach of Article 101 of the TFEU, alleging that they had paid inflated interchange fees that formed part of the merchant service charge (MSC). The court accepted that the country where the market was affected was 'the country in which the [claimant] was based at the time of the transaction upon which an MSC was paid by the [claimant] . . . '[45]

40 See Case C-214/89 *Powell Duffryn plc v. Wolfgang Petereit* EU:C:1992:115, para. 37; Case C-269/95 *Benincasa v. Dentalkit* EU:C:1997:337, para. 31; *CDC*, para. 67.

41 Case C-595/17 *Apple Sales International et al v. MJA*. ECLI:EU:C:2018:854.

42 However, the incentives for such forum shopping may be reduced following the implementation of the Damages Directive (Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 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), which seeks to harmonise both substantive and procedural rules for competition damages actions across Member States.

43 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

44 See Articles 31–32 of the Rome II Regulation and Case C-412/10 *Homawoo v. GMF Assurances* ECLI:EU:C:2011:747.

45 *Deutsche Bahn v. Mastercard* [2018] EWHC 412, para. 22.

Further, Article 6(3)(b) of the Rome II Regulation provides that when the market is, or is likely to be, affected in more than one country, the claimant seeking compensation who sues in the court of the domicile of the defendant may instead choose to base its claim on the law of the court seised, provided that the market in that Member State is among those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises. Article 6(3)(b) also stipulates that where the claimant sues (in accordance with the applicable rules on jurisdiction) more than one defendant in the court of the domicile of one or more of them, it can only choose to base its claim on the law of that court if the restriction of competition on which the claim against each of the defendants relies also directly and substantially affects the market of the Member State in which that court is situated. This provision allows claimants to have their competition damages claim heard by one Member State court applying the same law, even where more than one defendant is involved or damage occurred in several Member States.

In relation to the enforceability of choice of law agreements, Article 6(4) provides that such agreements are not effective in competition damages claims insofar as they aim to displace the applicable law determined in accordance with Article 6(3). This limitation on parties' freedom to select the applicable law governing their relationship appears to be justified on the ground that Article 6 concerns not only parties' individual interests but also broader public interests.

From the perspective of the territorial reach of EU competition law, an interesting question concerns the interplay between the territoriality analysis pursuant to the implementation test and the qualified effects test and the choice of law analysis. This issue was briefly considered in the Court of Appeal's judgment in *iiyama*. The court noted that the first question that needs to be addressed in any competition damages action based on Article 101 of the TFEU is whether it is at least arguable that the applicable law is the law of any Member State (and that, accordingly, Article 101 of the TFEU should apply). Clearly, if the applicable law is the law of a non-Member State (and so EU law does not apply), the action fails insofar as it is framed as a claim for breach of Article 101 of the TFEU.[46]

Conclusion

Issues concerning the territorial reach of EU competition law involve difficult questions of both public and private law. While recent case law has provided some clarity on the relevant legal tests and how they should be applied, there are still a number of unanswered questions that arise in the context of both public and private enforcement of EU competition law. As a result, it is likely that there will be further developments in this evolving area of law and the issue of the territorial reach of EU competition law will continue to arise in proceedings before the European Commission, CJEU, EU General Court and in Member States courts.

46 *iiyama* (Court of Appeal), paras. 43–60. On the facts of *iiyama*, the Court of Appeal did not rule on applicable law in the context of strike out and summary judgment applications and therefore did not have to consider the relationship between the territoriality analysis pursuant to the implementation and the qualified effects tests, and the choice of law analysis in much detail. However, the issue may well be revisited in another case involving international supply chain and remote territorial connection with the EU.

Appendix 1

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Camilla Sanger is a partner in the dispute resolution group at Slaughter and May. Camilla's multi-specialist practice includes handling complex commercial disputes of a varied nature, often involving multiple jurisdictions, with particular expertise in competition litigation. Camilla has acted on a large number of high-profile follow-on and stand-alone damages cases, including before the Court of Appeal. Camilla is recognised in *Who's Who Legal Future Leaders: Competition* and has been named a 'next generation partner' in both commercial litigation and competition litigation in *The Legal 500: UK*. She is frequently asked to speak on panel events on private enforcement issues.

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Olga Ladrowska is an associate in the dispute resolution group at Slaughter and May. She has a multi-specialist practice advising clients on a wide range of contentious commercial matters, with a particular focus on competition litigation. Olga has acted on complex multi-jurisdictional follow-on damages cases, including before the Court of Appeal. Prior to joining Slaughter and May, Olga completed a PhD in private international law at the University of Cambridge.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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