PRIVATE LITIGATION GUIDE

THIRD EDITION

Editors
Nicholas Heaton and Benjamin Holt

Private Litigation Guide

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Introduction

Nicholas Heaton and Benjamin Holt[1]

We are delighted to edit a further edition of the GCR Private Litigation Guide. Part I of the Guide includes 10 chapters written by leading practitioners, exploring in depth the key themes raised in competition litigation across the globe, such as jurisdictional considerations, class actions and damages. These chapters explore different perspectives on key issues, including views from the standpoint of both claimant and defendant and from different parts of the world.

Part II of the Guide contains an invaluable summary of the position on a jurisdiction-by-jurisdiction basis to allow quick access to key information and a cross jurisdictional analysis. It takes the form of a series of questions covering the most critical private litigation issues. Experienced practitioners in eight countries have supplied digestible, targeted responses to these questions. The Guide presents these insights in an accessible manner that lets users focus on specific issues and compare them across jurisdictions.

This Guide reflects the remarkable growth of private competition litigation across the world. Indeed, 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 with regard to key issues.

The landscape is continuing to evolve at pace.

In Europe, three distinct trends are evident. First, the effect of the EU Directive on competition damages claims, implemented by Member States in 2016 and 2017, is now being felt. Some jurisdictions in which there had previously been little private competition litigation have seen a dramatic growth of claims, such as Spain. By requiring Member States to ensure that law and procedures meet minimum requirements, the Directive has no doubt gone a long way to meet

1 Nicholas Heaton and Benjamin Holt are partners at Hogan Lovells.

the objective of facilitating claims. Although those minimum requirements are now met in all EU jurisdictions, it would be a mistake to think this has resulted in a harmonised approach. In fact, there is variation in the way in which the Directive has been implemented and there remain significant differences between the regimes in Member States. Claimants, defendants and their lawyers need to be on top of these. However, just as a degree of harmonisation is achieved within the EU, the UK's departure from it as a result of Brexit will throw up fresh challenges in this area. The second trend is the expansion of different forms of class action in Member States. The opt-out regime in the UK is beginning to bite, with the first claim recently certified and many others waiting their turn, and 2020 saw the introduction of new regimes in the Netherlands and Italy. These promise to change the dynamic in the EU yet again. The third trend is the developing depth of experience and a lengthening track record of judicial decisions on important issues in those jurisdictions in which private competition litigation has been more common for some time, such as the UK, Germany and the Netherlands.

In the United States, where private damages procedures are well developed, competition litigation has become increasingly high-profile and complex, and courts continue to grapple with various procedural issues related to competition lawsuits. Many of these disputes make their way to federal appellate courts and the US Supreme Court, where every decision has the potential to dramatically affect the law. In recent years, for example, the Supreme Court has weighed in on the interpretation of long-standing precedent prohibiting indirect purchasers from suing for damages under US federal law and addressed the appropriate analysis of two-sided markets in antitrust litigation. In addition, standards applicable to class actions have been hotly contested in lower courts in recent years, and a new round of disputes about the circumstances under which antitrust plaintiffs may certify a class is emerging as a key issue before appellate courts.

In other parts of the world, the story is more complex. For example, in Asia, private competition litigation levels generally continue to rise in Japan but have fallen from a recent high in China. South America, Brazil and Mexico now have laws in place to facilitate private competition claims, but actual litigation is still nascent. Canada has also seen recent important developments regarding certification of competition class actions, but has yet to see an award of damages at trial in such a case. Nevertheless, it is increasingly apparent that these jurisdictions, and others covered in this Guide, cannot be ignored in any assessment of the threats and opportunities private competition litigation brings.

Antitrust and competition practitioners, as well as corporate counsel, often require a basic understanding of the key aspects of private antitrust litigation in many different countries. For example, how does one bring a claim in the first

instance? What are the standards for collective actions? Can indirect purchasers collect damages and is a passing-on defence available? Different countries and different jurisdictions take a divergent approach to these and many other questions.

GCR has created this book to address this daunting task and to provide a method of comparing and contrasting specific issues and topics across jurisdictions. The Guide was developed in conjunction with the competition litigation team at Hogan Lovells, which has extensive experience litigating antitrust and competition claims in many jurisdictions.

Part 1

Key Issues

CHAPTER 1

Territorial Considerations: the EU and UK 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

1 Camilla Sanger is a partner and Olga Ladrowska is an associate at Slaughter and May. The authors would like to thank Tabitha Brown for her assistance in preparing this chapter.

2 R Whish and D Bailey, *Competition Law*, OUP 2018, p. 494.

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.

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. It also discusses instances where the UK's approach is different from the EU's approach, following the UK's recent withdrawal from the EU. 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.

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.

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

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.

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 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]

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. Before *Woodpulp*, the territorial reach of EU competition law was discussed in case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export* ECLI:EU:C:1971:113. In that case, the CJEU held that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of Article 101 of the TFEU if that agreement is operative on the territory of the internal market.

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

6 *Woodpulp*, Para. 16.

7 *Woodpulp*, Para. 16.

8 *Woodpulp*, Para. 16.

9 *Woodpulp*, Para. 17.

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

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 C-413/14 *Intel Corp. v. Commission* ECLI:EU:C:2017:632.

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 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'.[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]

14 *Intel*, Para. 45.
15 *Intel*, Paras. 46 and 47.
16 *Intel*, Para. 50.
17 *Intel*, Para. 51.
18 *Intel*, Paras. 52–53.
19 *Intel*, Paras 55–58.

Following on from Intel, the EU General Court has reiterated in Quanta Storage v. Commission,[20] Toshiba Samsung Storage Technology Corp. v. Commission[21] and International Skating Union v. European Commission[22] that the implementation test and the qualified effects test are alternative and not cumulative approaches for establishing the European Commission's jurisdiction.

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. 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. 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,[23] 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 that Intel may 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 in this difficult area of law'.[24] 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 future.

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20 Case T-72/15 *Quanta Storage v. Commission* ECLI:EU:T:2019:519.

21 Case T-8/16 *Toshiba Samsung Storage Technology Corp. v. Commission* ECLI:EU:T:2019:522.

22 Case T-93/18 *International Skating Union v. Commission* ECLI:EU:T:2020:610.

23 *Intel*, Para. 37.

24 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.

Private enforcement

Beyond the public enforcement context, issues concerning the territorial reach of EU and UK competition laws have obvious implications in the private enforcement context. Prospective claimants in competition damages actions will follow the recent developments in this area with interest, as such developments may directly affect their ability to bring competition damages claims in Member State or UK courts. As a general rule, the more liberal the court's approach to territoriality, 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 or the UK).

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 an English court.[25] 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),[26] 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 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

25 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.

26 *iiyama* (Court of Appeal). For a detailed analysis of the case see: R Swallow, C Sanger, O Ladrowska, 'iiyama 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 acted for Koninklijke Philips NV and Philips Electronics UK Ltd, which were two of the CRT defendants in the *iiyama* case.

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[27] and the LCD proceedings,[28] 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'[29] 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,[30] 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'.[31]

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

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

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

29 *iiyama (CRT proceedings)*, Para. 140.

30 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.

31 *iiyama (CRT proceedings)*, Para. 149.

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.[32] Applying the qualified effects test, the Court of Appeal held that the intended and actual operation of the cartel should always be examined 'as a whole',[33] 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'[34] 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'.[35]

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 would need to be examined (once again) in the proceedings following a full examination of facts at trial.[36]

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32 *iiyama* (Court of Appeal), Para. 94.

33 *iiyama* (Court of Appeal), Paras. 93–98.

34 *iiyama* (Court of Appeal), Para. 98.

35 *iiyama* (Court of Appeal), Para. 98.

36 *iiyama* (Court of Appeal), Para. 95. It is worth noting that the claims in *iiyama* were ultimately withdrawn and the case did not proceed to trial.

More generally, it will be interesting to see if the courts of 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 and UK competition laws

When analysing the territorial reach of EU and UK competition laws, 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.

EU 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.[37] 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

37 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).

occur, and the place where the damage occurred or may occur.[38] 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)[39] 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 judgment in Tibor-Trans Fuvarozo és Kereskedelmi Kft v. DAF Trucks NV,[40] the CJEU 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).[41] In a judgment in RH v. AB Volvo and others,[42] the CJEU further clarified that 'the place where the damage occurred or may occur' can cover the place where the claimant purchased the goods affected by the anticompetitive arrangements or, where purchases have been made in several places, the place where the claimant's registered office is situated.

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

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

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

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

41 In case C-27/17 AB *'flyLAL-Lithunian Airlines' v. Starptautiskā lidosta 'Rīga' VAS and 'Air Baltic Corporation' AS* ECLI:EU:C:2018:533, the CJEU dealt with similar questions specifically relating to Article 102 of the TFEU. In that case, an airline was alleged, among other things, to have engaged in predatory pricing. The CJEU concluded that 'the place of the event giving rise to the damage' was the place where predatory pricing was offered and applied (as that represented the event of greatest importance in the airline's predatory pricing strategy).

42 Case C-30/20 *RH v. AB Volvo and Others* ECLI:EU:C:2021:604.

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'.[43]

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.[44] 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,[45] 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[46] and potentially also the most liberal approach to the territorial reach of EU competition law.

43 *CDC*, Para. 25.

44 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.

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

46 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.

UK jurisdiction rules

Following the UK's withdrawal from the EU, its courts will no longer apply the rules in the Recast Brussels Regulation unless proceedings were initiated on or before 31 December 2020. For proceedings initiated after this date, the courts will apply the common law rules.

In England, the courts have jurisdiction under the common law rules if the claim form is served on the defendant while it is physically present in England, if the defendant submits to the jurisdiction of the court or if the court gives permission for the claim to be served outside of the jurisdiction under one of the jurisdictional 'gateways'.[47] The 'gateways' that are commonly relied upon for competition law claims are:

- the tort gateway, which gives English courts jurisdiction over a tort claim where (1) the damage was sustained, or will be sustained, within the jurisdiction; or (2) the damage that has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction;[48] and
- the necessary or proper party gateway, which gives English courts jurisdiction over a claim where there is another claim that the court has jurisdiction over and the defendant is a necessary or proper party to that claim.[49]

Broadly, many of the gateways are fairly similar to the jurisdiction rules in the Recast Brussels Regulation. However, the key difference between the EU's and UK's approaches to jurisdiction is that the latter rests on the principle of forum (non) conveniens. Pursuant to this principle, the courts can decline jurisdiction if there is a more appropriate forum to hear the dispute.[50] This contrasts with the EU's position, which generally requires a relevant Member State court to exercise its jurisdiction when it is conferred on it by a particular provision of the Recast Brussels Regulation.

Following the UK's withdrawal from the EU, the UK applied to accede to the 2007 Lugano Convention[51] in its own right. The 2007 Lugano Convention governs issues of jurisdiction and enforcement of judgments between the EU and Iceland, Norway and Switzerland. It is in materially similar terms to the

47 CPR 6.36 and Paragraph 3.1 of Practice Direction 6B.

48 Paragraph 3.1(9) of Practice Direction 6B.

49 Paragraph 3.1(3) of Practice Direction 6B.

50 The *forum (non) conveniens* principle is set out in the seminal case of *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

51 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 (OJ L 339).

predecessor of the Recast Brussels Regulation[52] and adopting it in the UK could go some way to addressing the concerns about the divergent approaches to jurisdiction between the EU and the UK. However, the UK's application requires the consent of the existing contracting parties and the European Commission has confirmed that the EU was not in a position to give its consent.[53]

Choice of law rules

The EU regime for choice of law rules applicable to non-contractual obligations is contained in the Rome II Regulation.[54] 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.[55] On 31 December 2020, the Rome II Regulation ceased to apply in the UK following its departure from the EU. However, the UK has opted to retain the Rome II Regulation in domestic legislation (UK Rome II)[56] and so the choice of law rules in the EU and the UK remain materially the same.

The general rule under the Rome II Regulation (and UK Rome II), 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 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

52 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

53 Note verbale: Communication from European Commission representing the EU to the Swiss Federal Council as the Depositary of the Lugano Convention, 22 June 2021 (https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG-ann-EU.pdf).

54 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.

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

56 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (Retained EU Legislation).

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]'.[57]

Further, Article 6(3)(b) of the Rome II Regulation (and UK Rome II) 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 (or in a court in a part of the UK for UK Rome II) may instead choose to base its claim on the law of the court seised, provided that the market in that Member State (or the UK for UK Rome II) 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 (or in a court in a part of the UK for UK Rome II), 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 (or the market in the UK for UK Rome II).

In relation to the enforceability of choice of law agreements, Article 6(4) of the Rome II Regulation (and UK Rome II) 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 and UK competition laws, 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

57 *Deutsche Bahn v. Mastercard* [2018] EWHC 412, Para. 22.

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.[58]

Conclusion

Issues concerning the territorial reach of EU and UK competition laws involve difficult questions of both public and private law. Although 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 and UK competition laws. 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 and UK competition laws will continue to arise in proceedings before the EU, Member State and UK courts. It is also possible that, in some circumstances, further divergences between the EU's and the UK's approaches may develop in the years following the UK's withdrawal from the EU.

58 *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

About the Authors

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Camilla Sanger is a partner in the disputes and investigations 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. She also has extensive experience of collective proceeding actions. 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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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 – explores in depth key themes such as territoriality, causation and proof of damages that are common to competition litigation around the world with jurisdictional overviews and Q&As. 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 Austria, China and Japan.

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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