Forum Shopping and "Italian Torpedoes" in Competition Litigation in the English Courts

By

Christopher Stothers, Mark Gardner and Sue Hinchliffe

Reprinted from **Global Competition Litigation Review**
Issue 2, 2011

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

Forum Shopping and "Italian Torpedoes" in Competition Litigation in the English Courts

Christopher Stothers
Counsel, Arnold & Porter (UK) LLP, London

Mark Gardner
Associate, Arnold & Porter (UK) LLP, London

Sue Hinchliffe*
Partner, Arnold & Porter (UK) LLP, London

Cartels; Competition law; EU law; Forum shopping; Italy; Private enforcement; Rubber; Stay of proceedings

Introduction

Jurisdiction to hear competition litigation in the European Union is normally determined under Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[1] This replaced the Brussels Convention and so is often called the "Brussels Regulation". In most circumstances, the Brussels Regulation does not mandate a single jurisdiction as the "forum conveniens" for a dispute but allows multiple possible jurisdictions. The dispute will therefore be decided by the court first seised, which can mean that "proceedings more naturally associated with one jurisdiction are tried in another merely because the proceedings in that jurisdiction were instituted first".[2]

As a consequence, forum shopping has become an inherent part of competition litigation in the European Union. Parties will initiate proceedings in the Member State(s) where they believe they will most likely achieve the optimal outcome, whether that is the result of a final judgment or commercial settlement. Although the applicable law should be the same regardless of the jurisdiction, in some cases it may be the law of the court seised[3] and other relevant factors may include preliminary relief; evidence collection; speed of proceedings; quality of tribunal; likelihood of success; final relief; cost; and (potentially) level of damages. Typically, potential parties to a dispute will have different perspectives on these factors and may race to the court in order to select their favoured jurisdiction.

The English courts have become a popular jurisdiction for potential claimants in follow-on competition litigation in the European Union, where damages are sought after the European Commission or national competition authorities have established an infringement of the competition provisions. The particular attractions of the English courts, despite limitations on collective action,[4] include their specialist courts and judiciary together with a willingness to hear pan-European damages actions whenever any member of the cartel's corporate group is domiciled in England (following *Provimi*[5]).

However, potential defendants have not stood still and waited while claimants shop for desirable fora. Some potential defendants have chosen to file declaratory proceedings in a court of their own choice. In some cases, that has been a court which will be slow to resolve the dispute, reducing the pressure to reach a settlement. Even if the selected court lacks jurisdiction to hear the dispute under the Brussels Regulation, proceedings elsewhere will be stayed until that court actually determines that it lacks jurisdiction. Where declaratory proceedings are filed in such slow courts, particularly where the basis for that court having jurisdiction is weak or non-existent, they are often referred to as "torpedoes".

"Torpedoes" are a familiar feature of intellectual property litigation, where they are designated according to the court chosen as, for instance, a "Belgian torpedo" or an "Italian torpedo".[6] Where the intellectual property rights are registered, particular issues arise due to the exclusive jurisdiction granted to the courts where they are registered, which effectively means there is a single court which can hear the case, and because substantive patent infringement law has not been harmonised across Europe, which means that conflicting judgments need not be irreconcilable.[7] Torpedoes have also featured in corporate loan disputes, where parties may file actions in breach of the exclusive jurisdiction chosen in the contractual documents.[8] However, they are relatively new

* The authors would like to thank Catherine Young, a Trainee at the firm, for her assistance in preparing this article.
[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
[2] *National Grid Electricity Transmission Plc v ABB Ltd* [2009] EWHC 1326 (Ch) at [26].
[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (the "Rome II Regulation") art.6(3).
[4] A long-standing issue not only in England but across Europe: see the Commission's Green and White Papers on "Damages actions for breach of the EC antitrust rules" COM(2005) 672 and COM(2008) 165, together with its more recent public consultation "Towards a Coherent European Approach to Collective Redress" SEC (2011) 173.
[5] *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm).
[6] Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" [1997] E.I.P.R. 382.
[7] Regulation 44/2001, art.22(4) as applied by the ECJ in *Gesellschaft fur Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)* (C-4/03) [2006] E.C.R. I-6509 and *Roche Nederland BV v Primus* (C-539/03) [2006] E.C.R. I-6535.
[8] Regulation 44/2001 art.23. See the *Primacom* case in Germany (LG Mainz, 09/13/2005, WM 2005, 2319) and England (*JP Morgan Europe Ltd v Primacom AG and Others* [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep. 665) and also *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588; [1994] 2 All E.R. 540, all cited in Hess, Pfeiffer and Schlosser, "Report on the Application of Regulation Brussels I in the Member States" (2007), para.436, available at *http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf* [Accessed April 29, 2011].

in competition litigation, where no such exclusive jurisdiction typically applies and so the use of the disparaging "torpedo" terminology is less justifiable.[9]

This article considers the implications for competition litigation of the Brussels Regulation, as applied by the English courts to forum shopping and "Italian torpedoes". It particularly considers the synthetic rubber litigation in England[10] and Italy,[11] and how the Commission's recently proposed changes to the Brussels Regulation might affect such litigation.[12]

Brussels Regulation

The Brussels Regulation sets out the basis for establishing which courts have jurisdiction to hear all civil and commercial matters, including competition litigation. It also determines how concurrent proceedings should be handled. A brief summary of its application to competition litigation follows, before consideration of the specific details of the synthetic rubber litigation.

Establishing jurisdiction

There are three bases for jurisdiction in the Brussels Regulation which are likely to be relevant for competition litigation: art.2(1) (domicile of defendant), art.5(3) (tort claims) and art.6(1) (closely connected claims). These will be considered in turn.

Article 2(1)—Domicile of Defendant

> "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

The general rule under art.2(1) is that a defendant domiciled in the EU should be sued in the Member State in which it is domiciled. "Defendant" here means the defendant in the proceedings filed; in a declaratory action, this is the potential claimant in the follow-on action for damages rather than the alleged infringer.

Article 5(3)—Tort Claims

> "A person domiciled in a Member State may, in another Member State, be sued: …
> 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"

Under art.5(3), tort claims may also be brought in the Member State where the "harmful event occurred or may occur". This has been interpreted to mean either the place where the damage occurred (for instance, where the products subject to the cartel were sold) or the place of the event giving rise to the damage (for instance, where the cartel arrangements were agreed by the participants).[13] If the former, jurisdiction is limited to the damage which occurred in the jurisdiction.[14] However, the latter can only be relied upon where the court can clearly determine that place,[15] which may be difficult in the case of multinational cartels.

Article 6(1)—Closely Connected Claims

> "A person domiciled in a Member State may also be sued:
> 1. where he is one of a number of defendants, in the courts for the place where any one of them 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;"

Article 6(1) of the Brussels Regulation allows for the potential consolidation of claims against members of a cartel provided that one of them is domiciled in the jurisdiction in question (and so is subject to the jurisdiction of that court under art.2(1)). The English courts refer to such an entity as the "anchor defendant".

Concurrent proceedings

Under the Brussels Regulation, therefore, a large number of courts across Europe may have jurisdiction to hear competition litigation in relation to a multi-jurisdictional cartel. To avoid conflicting judgments, the Brussels Regulation also identifies when courts must (art.27) or may (art.28) stay proceedings or decline jurisdiction to avoid conflicting judgments. The court first seised is required to hear the dispute, even if it perceives that another court is better placed to do so, unless it determines that it does not have jurisdiction under the earlier Articles.

[9] See, criticising the terminology, Moretti and Nascimbene, "No Scent of 'Torpedo'" [2009] G.C.L.R. 67. Hess, Pfeiffer and Schlosser, '*Report on the Application of Regulation Brussels I in the Member States*' (2007), paras 424–431 did not identify competition litigation as an area where torpedoes were typically engaged.
[10] *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm) (Cooper v Shell); *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864.
[11] Case No 53825/07 RG *ENI SPA v Pirelli SPA* (April 29, 2009). The Italian Proceedings were dismissed at first instance, on grounds of inadmissibility and insufficient detail in the pleadings. However, an appeal has been lodged with the next hearing fixed for January 2014.
[12] COM (2010) 748 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[13] *Cooper v Shell* at [65], applying *Reunion Europeene SA v Spliethoff's Bevrachtingskantoor BV* (C-51/97) [1998] E.C.R. I-6511. See also, *Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA* (21/76) [1976] E.C.R. 1735.
[14] *Cooper v Shell* at [65]. See also, *Shevill v Press Alliance SA* (C-68/93) [1995] E.C.R. I-415; *Sandisk Corp v Koninklijke Philips Electronics NV &Ors* [2007] EWHC 332 (Ch) at [25]; and more recently, *eDateAdvertising v X* (C-509/09 and C-161/10) (Advocate General's Opinion, March 30, 2011).
[15] *Reunion Europeene SA v Spliethoff's Bevrachtingskantoor BV* at [35].

Article 27—Same Cause of Action, Same Parties

> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

Once a court is seised of a dispute, art.27 requires subsequent proceedings in other courts to be stayed until the court first seised establishes that it has jurisdiction to hear the dispute. If it has jurisdiction, the other courts must then decline jurisdiction. However, if it finds that it does not, the other proceedings can continue. Until it decides, all other proceedings remain stayed.

This mandatory approach only applies where the cause of action and the parties are the same. The cause of action can be the same if proceedings involve the same subject matter (for instance, the same alleged infringement of the competition rules) even if one is for damages and the other is for declaratory relief.[16] The parties in the different actions do not have to be precisely the same corporate entities—for instance, parents and wholly-owned subsidiaries may be regarded as the same party. However, it is not sufficient that they have similar interests (such as an intellectual property owner and its licensee, or co-cartelists) unless those interests are identical and indissociable.[17]

Article 28—Related Actions

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
> 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
> 3. For the purposes of this Article, actions are deemed to be related where they 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."

Where the mandatory provisions of art.27 do not apply, art.28 gives courts other than that first seised the discretion to stay proceedings which:

> "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."

It also allows jurisdiction over the subsequent proceedings to be declined where these can be consolidated with the earlier proceedings. However, the discretionary nature of this Article limits the risk of proceedings being delayed by torpedoes, as the courts second seised of related (but not identical) actions can always choose to proceed with those actions.

Synthetic rubber

Commission decision and appeals

In December 2002 and January 2003, Bayer filed applications for leniency in relation to a cartel to fix prices and share customers for synthetic rubber primarily used in tyre production (Butadiene Rubber and Emulsion Styrene Butadiene Rubber). The European Commission investigated and on November 29, 2006 found that companies belonging to the Eni, Bayer, Shell, Dow, Unipetrol and Trade-Stomil groups had operated the cartel from at least 1996 to 2002, in violation of art.81(1) of the EC Treaty (now art.101(1) of the Treaty on the Functioning of the European Union).[18] The Commission fined five of the groups a total of €519 million (Bayer was immune due to its leniency application).

All parties except Bayer have appealed and those appeals are still pending.[19]

Follow-on actions

It was clear that the tyre manufacturers were considering seeking damages. Even before the Decision, Michelin had obtained the non-confidential version of the Commission's Statement of Objections.[20]

After receiving letters before action from lawyers in Milan acting for various tyre manufacturers, Eni commenced proceedings in Italy on July 29, 2007 against the tyre manufacturers seeking a declaration from the court that the cartel did not exist, or that even if it did, it had no effect on the prices for synthetic rubber. Eni filed against 28 defendant companies in the Pirelli, Michelin,

[16] *Dicey, Morris and Collins on The Conflict of Laws*, edited by L. Collins, 14th edn (London: Sweet & Maxwell, 2006), paras 12-053–12-056, citing *Gubisch Maschinenfabrik KG v Palumbo* (144/86) [1987] E.C.R. 4861.
[17] *Dicey, Morris and Collins on The Conflict of Laws*, edited by L. Collins (2006), paras 12-050–12-052, citing *Drouot* (C-351/96) [1998] E.C.R. 1-3075; *Berkeley Administration v McClelland* [1995] ILPR 201 (CA); *Mecklermedia Corp v DC Congress GmbH* [1998] Ch. 40. See also, *Cooper v Shell* at [72].
[18] Commission Decision in Case COMP/F/38.638, COM (2007) 5007 def (November 29, 2006).
[19] *Shell v Commission* (T-38/07), *Dow Chemical v Commission* (T-42/07), *Kaucuk v Commission* (T-44/07) [Unipetrol], *Unipetrol v Commission* (T-45/07), *Trade-Stomil v Commission* (T-53/07), *Polimeri Europa v Commission* (T-59/07) [Eni]. The appeals were heard in October 2009 and judgment is awaited.
[20] See *Polimeri Europa v Commission* (T-12/07 R), Order of May 3, 2007.

Continental, Goodyear, Bridgestone and Cooper groups (Italian Proceedings). Notably, unlike "torpedo" cases in other fields of law, there appeared good reason for Eni to commence proceedings in Italy, given that was where they had been threatened.[21]

Later that year, in December 2007, the tyre manufacturers launched the threatened claim for damages against 23 companies in the Bayer, Shell, Dow, Unipetrol and Trade-Stomil groups before the English courts (English Proceedings). None of the addressees of the Commission's decision are domiciled in England and only two of the 23 defendants listed in the English Proceedings are domiciled in England (one member of the Shell group and one member of the Bayer group). Eni was not included as a defendant to the English Proceedings.

In May 2008, the Dow group intervened in the Italian Proceedings and adopted the claims made by Eni. In June 2008, Dow then challenged the jurisdiction of the English court, in the English Proceedings, and, in the alternative, applied to stay the English Proceedings until the Italian Proceedings were resolved (Dow Application). The hearing of the Dow Application was stayed pending resolution at first instance by the Italian Courts.

In July 2008, the claimants in the English Proceedings commenced further proceedings against Dow Chemical Company Limited, a subsidiary of the Dow group that is domiciled in England but that was not an addressee of the Commission's decision. In September 2008, Dow Chemical Company Limited also intervened in the Italian Proceedings.

On April 29, 2009, the Italian Proceedings were dismissed at first instance, on grounds of inadmissibility and insufficient detail. Appeals were filed but the next hearing in those appeals has been fixed for January 2014.

On October 27, 2009, the High Court dismissed the Dow Application and concluded that the English courts did have jurisdiction to hear the claims and that there was no sufficient justification for a stay of the English Proceedings. Dow appealed this decision of the High Court to the Court of Appeal. On July 23, 2010, the Court of Appeal reached the same conclusion as the High Court, but with different reasoning.

Approach of the English courts in the rubber cartel

Unsurprisingly, the judgments of the English courts make it clear that they will resist attempts to delay proceedings in England, save where required to do so under the Brussels Regulation, requiring Italian torpedoes to be fired with great accuracy. However, the judgment of the Court of Appeal also casts serious doubt on the *Provimi* principle that a subsidiary company can be held liable for competition law infringements committed by its parent or sister companies even where the subsidiary company in question was not involved in the infringements.

The focus of the judgments was on arts 6(1) and 28 of the Brussels Regulation, although the High Court also considered arts 5(3) and 27.

Establishing jurisdiction

Article 5(3)—Tort Claims

Article 5(3) was only briefly considered by the High Court in *Cooper v Dow*, as jurisdiction was in any case found to exist under art.6(1).

The Court noted that, when it is difficult or impossible to determine where the harmful event giving rise to the damage took place, the claimant must find jurisdiction under art.5(3) in the place where the damage itself occurred. The court stated that it was "unrealistic" for the claimants to rely on the fact that the first of a number of cartel meetings took place in England when the other meetings in fact took place in several countries. Therefore, jurisdiction in England under art.5(3) would in this case have been limited to damages arising from synthetic rubber sold in England, and not that sold elsewhere in Europe.

A similarly restrictive interpretation of art.5(3) had been applied by the English courts in other cases. For instance, in *SanDisk v Philips*[22] SanDisk sought to bring actions for abusive enforcement of patent rights against four patent owners and their licensee, Sisvel. None of the defendants were domiciled in the United Kingdom and so SanDisk sought to rely on art.5(3). However, jurisdiction was refused because Sandisk was unable to establish that the alleged abuses took place in the United Kingdom nor that it suffered immediate damage in the United Kingdom. The fact that other Member State courts had indisputable jurisdiction over the individual defendants under art.2 (the General Rule) was regarded as relevant. The Court also held that it was necessary to preserve the exceptional nature of art.5(3) in order to ensure the uniform application of the Brussels Regulation.[23]

Article 6(1)—Closely Connected Claims

Before the High Court, Dow argued that the English domiciled "Anchor Defendants" were not addressees of the Commission's decision and so the claimants had no "real issue" against them. However, following the reasoning in *Provimi*,[24] the High Court rejected this argument. It stated that, as the claimants had demonstrated that the Anchor Defendants had sold synthetic rubber within the jurisdiction during the relevant period, there was an "arguable case" that they had implemented the illegal price fixing agreements. As a result, the High Court

[21] Again, see Moretti and Nascimbene, "No Scent of 'Torpedo'" [2009] G.C.L.R. 67.
[22] *SanDisk Corp v Koninklyke Philips Electronics NV* [2007] EWHC 332 (Ch).
[23] *SanDisk Corp v Koninklyke Philips Electronics NV* [2007] EWHC 332 (Ch) at [41].
[24] *Provimi v Aventis* [2003] EWHC 961 (Comm).

found that there was a valid claim against the Anchor Defendants and that such claims were so closely connected to the claims against the non-UK domiciled defendant companies that it was expedient to hear them together in the English courts.

On appeal, Dow claimed that the High Court had erred in following *Provimi*. Dow argued that a subsidiary company of an infringer could not be an Anchor Defendant where it was not party to, or aware of, the anti-competitive practices. If the Court of Appeal considered the point arguable, the question should be referred to the European Court of Justice (ECJ).

The Court of Appeal agreed that for the purposes of art.6(1) there must be a "real issue" between the claimants and one of the Anchor Defendants. However, it considered the pleaded case against the Anchor Defendants and found that the claimants had alleged that the Anchor Defendants were parties to, or aware of, the cartel. As a result, the claimants' case was not capable of being struck out, and that Dow's point on *Provimi* did not arise.

However, the Court of Appeal did use the occasion to cast some doubt on the outer limits of the *Provimi* judgment. The Court stated that:[25]

> "[a]lthough one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an Article [101] context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the Provimi point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely?"

The Court also indicated that, had it been necessary to address *Provimi* in its judgment, it would indeed have been inclined to make a reference to the ECJ.[26]

Having found that there was a real issue against the Anchor Defendants, the court agreed that this was sufficiently closely connected to the claims against the non-UK domiciled Dow group companies to make it expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Therefore, the English courts had jurisdiction to hear the claims under art.6(1) of the Brussels Regulation for pan-European damages.

The judgment of the Court of Appeal is to be welcomed by potential defendants to follow-on actions. The next time the *Provimi* issue arises, it is likely to be referred to the ECJ (with the consequential delays to the proceedings).Where links to England are weak, claimants may struggle to allege participation in the cartel by the English domiciled subsidiaries. Such allegations must be supported and, if they are not, defendants may be able to challenge them in order to dislodge the anchor.

Concurrent proceedings

Article 27—Same Cause of Action, Same Parties

The High Court held that art.27 did not apply because the parties were not the same. The cause of action in both the Italian and English proceedings was the same. Equally, the claimants in the English action were the same as the defendants to the Italian proceedings. However, the same could not be said for their opponents (Eni in Italy, the other rubber manufacturers in England). The opponents had common interests to a certain extent—they all wished to prove that the purchasers of synthetic rubber did not suffer loss as a result of the cartel. However, the Commission had found that Eni had held a prominent role in the cartel and so Eni could expect the other parties to claim in England that it should be liable for a higher proportion of any damages. It should, therefore, be able to adduce its own evidence and arguments without relying on those of others who may not feel as exposed. Consequently, the judge concluded that the interests of the other parties were not sufficiently aligned with those of Eni for them to be regarded as the same party. This issue was not appealed.

Article 28—Related Actions

The High Court therefore turned to art.28, to decide whether to stay the action in order to benefit from an Italian decision addressing the merits of the case. It acknowledged there was a risk of mutually irreconcilable judgments, as the actions were related and there was a risk that one court would conclude that the cartel caused no damage and the other would find otherwise. However, balanced against that it noted that: the proceedings were now more advanced in England than in Italy; there was no court which could be said to be the centre of gravity in what was a Europe-wide conspiracy; and proceedings in England would be continuing against the two groups who had submitted to the jurisdiction (Trade-Stomil and Unipetrol). On balance, the court held that the risk was insufficient to merit a stay of proceedings.

The Court of Appeal agreed, dismissing the appeal and stating that:[27]

[25] *Cooper v Dow* [2010] EWCA Civ 864 at [45].
[26] *Cooper v Dow* [2010] EWCA Civ 864 at [46].
[27] *Cooper v Dow* [2010] EWCA Civ 864 at [53].

> "[t]his was a carefully considered balancing exercise and we are far from persuaded that [the High Court] either erred in law or came to a decision outside the reasonable range of options open … We are certainly not persuaded that the fact that the Italian court was first seised of [Eni's] claim can operate as a sort of trump card or even as a primary factor where there was as much care and deliberation on the part of [Eni] in starting proceedings for negative declaratory relief as there was in the Claimants' decision to make their substantive claim in England."

Proposed amendments to the Brussels Regulation

The Commission was required to provide a report on the application of the Brussels Regulation no later than March 1, 2007.[28] This report appeared on April 21, 2009 and was accompanied by a Green Paper opening a public consultation on possible amendments.[29] In the light of the responses to that consultation, the Commission has now proposed various amendments to the Brussels Regulation in order to reduce delays to litigation and ensure good administration of justice.[30]

Torpedoes are possible primarily because of two factors; the automatic operation of art.27 and the length of time certain courts take to establish jurisdiction when first seised.[31] The Commission has sought to address the second issue in a proposed new sub-Article as follows:

> **"Article 29(2) [Article 27 renumbered as Article 29]**
>
> In cases referred to in paragraph 1 [proceedings involving the same cause of action and between the same parties], the court first seised shall establish its jurisdiction within six months except where exceptional circumstances make this impossible. Upon request by another court seised of the dispute, the court first seised shall inform that court of the date on which it was seised and of whether it has established jurisdiction over the dispute or, failing that, of the estimated time for establishing jurisdiction."

This amendment seeks to increase the speed with which courts first seised decide on jurisdiction and to improve the coordination between the relevant courts.

However, courts are still obliged to stay proceedings until the court first seised has established jurisdiction, even if the first court plainly lacks jurisdiction but has not yet made that determination within six months. There is no indication of what should happen if the determination of the court first seised is appealed, even though many courts in Europe would struggle to resolve a jurisdictional dispute at two instances within six months of the case being filed.

Equally, it is not clear how much difference will be made by the obligation to exchange information. Judicial co-operation in civil matters is already encouraged, formally and informally, and lack of communication between the courts was not identified as a contributing factor for the delay caused by torpedoes.[32] The UK government, in its review of the proposals, has expressed the view that mandatory exchanges of information between the courts will simply lead to further delay and expense for the parties involved.[33] However, it is possible that the communication will act as an incentive for courts to speed up their review and keep to the six-month target.

If the proposed amendment had applied to the synthetic rubber litigation, it would have required a decision on jurisdiction by the Italian court by January 29, 2008. In fact, the first instance decision was not made until April 29, 2009 (21 months after the Italian court was first seised). Equally, having stayed the Dow Application pending that decision, the first instance decision on jurisdiction by the English High Court took a further six months (October 27, 2009) with the appeal by the Court of Appeal taking a further nine months (July 23, 2010). That suggests that the six-month target is rather aspirational at best.

Conclusion

Major competition infringements are often cross-border in nature. It is unsurprising that follow-on damages actions are similarly cross-border. This is supported by the Brussels Regulation, under which several courts will typically have jurisdiction to hear such actions, encouraging forum shopping by claimants and defendants. Unlike intellectual property litigation, there is no jurisdictional rule requiring that cases be litigated on a country-by-country basis. Equally, unlike corporate loan cases, there will normally be no contract which determines jurisdiction.

The English courts established themselves as a leading forum for these disputes for claimants with the *Provimi* judgment, although the Court of Appeal has indicated in *Cooper Tire v Dow* that this likely remains subject to limits and that the issue is likely to find its way to the ECJ in the near future.

However, for defendants who seek their own choice of forum, rather than waiting for claimants to choose, the perceived slowness of the Italian courts may be very attractive, and "Italian torpedoes" may become as (in)famous in competition litigation as they once were in

[28] Brussels Regulation art.73.
[29] COM(2009) 175, Green Paper on the Review of Regulation 44/2001, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF* [Accessed April 29, 2011] following on from Hess, Pfeiffer and Schlosser, "Report on the Application of Regulation Brussels I in the Member States" (2007).
[30] COM(2010) 748 available at *http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf* [Accessed April 29, 2011].
[31] Where the court properly has jurisdiction, but is simply slow to decide the case on the merits, that is not properly a torpedo but raises general issues of forum shopping. For instance, it is the counterpart of so-called "rocket docket" filings in patent litigation before certain German infringement courts.
[32] Hess, Pfeiffer and Schlosser, "Report on the Application of Regulation Brussels I in the Member States" (2007).
[33] "Revision of the Brussels I Regulation — How should the UK approach the negotiations" Ministry of Justice, *http://www.justice.gov.uk/consultations/docs/brussels-I-european-commission-proposal.pdf* [Accessed April 29 2011].

patent litigation. The Commission has proposed amendments to the system to reduce potential delays. However, even if adopted these are unlikely to resolve the issue. In any case, the search for procedural advantages will continue when so many courts have jurisdiction to hear these disputes.

As a consequence, potential claimants and defendants in competition follow-on actions in Europe need to remain aware of the risks and potential rewards of forum shopping. In particular, and contrary to preferred English practice, they should be wary of engaging in extensive correspondence before commencing proceedings as this may leave their opponent free to start the proceedings and choose the forum. The Brussels Regulation gives a strong preference to the court first seised, which encourages this rush to the court. Even if the court first seised ultimately rejects jurisdiction, the resultant delay may significantly impact any commercial settlement. Accordingly, companies need to plan and implement their competition litigation strategy for follow-on actions as early as possible.