The Dutch torpedo case

A new dimension to forum shopping in cartel damages

by Sarah Beeston and Anouk Rutten*

Plaintiffs forum shop when bringing a competition law related damages claim. That is well known. The advantages of forum shopping are apparently now also recognised by potential defendants. This is illustrated by the first Dutch torpedo case.

Here, in anticipation of damages claims against them, potential defendants have themselves brought a case in the Netherlands. They are seeking a declaration of non-infringement or non-liability. In this case, the Dutch courts have (again) accepted jurisdiction, confirming their readiness to take on the challenges posed by this new area of law.

In this article we shall discuss this case in the light of the principles of jurisdiction under private international law. We shall consider its implications for the procedural strategy of companies which have been found to have participated in an international cartel and whether such implications will be shortlived, given the imminent implementation of Directive 2014/104/EU on damages actions for infringements of competition law (the Directive). We anticipate that forum shopping is here to stay and is likely to lead to even more actions, offensive and defensive in a number of jurisdictions, including the Netherlands.

Facts behind the Dutch torpedo

In November 2010, the European Commission imposed fines on 11 airlines for allegedly participating from 1999 until 2006 in a price-fixing cartel on fuel and security surcharges.

KLM, Martinair and Air France (KLM) did not wait to be sued but, in 2011, launched what is being called the “Dutch torpedo”. KLM brought a legal action in the Netherlands requesting the court for a declaration that it is not liable to pay compensation to Deutsche Bahn (DB) in respect of any infringements of competition law. DB requested the court to declare the action of KLM inadmissible as an abuse of procedural law.

However, the court ruled that there is no abuse of procedural law because the claim of a negative declaration fulfills a legitimate function. The Dutch court also accepted jurisdiction, based on the facts that at least one of the (potential) defendants – affiliates of DB – is domiciled in the Netherlands and the legal actions of KLM against the various defendants are closely related. It was not disputed that the Dutch-based defendants bought airfreight services from KLM. As a consequence, the Dutch court considered itself competent to rule on the claim.

The Italian and Dutch torpedoes

The description “Dutch torpedo” refers back to what is known as the “Italian torpedo”. Italian torpedoes are cases brought in Italy by a potential defendant in a patent claim requesting a declaration of non-infringement. The choice of Italy in such cases is driven by the desire to take advantage of the lengthy proceedings in Italy and delay the outcome. As a consequence of the lis alihi pendens (“dispute elsewhere pending”) principle, once a torpedo has been launched, other courts have to suspend proceedings subsequently brought before them until the court where the proceedings have been first initiated has ruled on whether it has jurisdiction. By requesting a declaration of patent non-infringement in Italy, regardless of whether the Italian courts have jurisdiction, an alleged infringer can hijack proceedings.

There are clear similarities but also a major difference between the Italian and Dutch torpedo cases. The Italian torpedo refers to a strategy to delay proceedings. In contrast, the Netherlands is known for the efficiency and speed of legal proceedings. The facts of the Dutch torpedo case, to the extent that they give rise to any competition concerns, provided sufficient grounds to bring a case in other countries, such as Germany.

This brings into question the motives of defendants in bringing a case in the Netherlands rather than allowing potential plaintiffs to bring a case in another member state. Sometimes attack is the best form of defence. By initiating proceedings in the Netherlands, the defendants can also profit from the fact that the costs of legal proceedings are relatively low. Even if a party requesting a declaration of non-infringement or non-liability loses a case, their procedural cost risk will not bear any relation to the actual cost of the other party. The costs that may be awarded to the losing party by a court are fixed.

In addition, the efficiency of the proceedings may also be an advantage to a defendant wishing to avoid long and costly litigation. A potential disadvantage of launching a Dutch torpedo in anticipation of proceedings is that it may be the equivalent of opening Pandora’s box. If damages claims are possible but not probable, it may be better to leave well alone. A further disadvantage of the speed and modest costs is the risk that new claimants may appear in the event of a ruling against the defendant. The applicable law and the relevant limitation periods are therefore important issues to consider before initiating a Dutch – or, for that matter, a UK or a German – torpedo.

Competition cases give rise to forum shopping

Since the procedural and material rules relating to damages claims are not harmonised, forum shopping has been an attractive route in cartel damages claims. The Brussels I Regulation (the Regulation) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides the framework to determine which court has jurisdiction in civil damages claims.

The main rule of this legislation is that defendants can be summoned before the court in the country where they are established. There are, however, a few exceptions to this rule that provide an opportunity for claimants to choose the court where they summon the defendants. Forum shopping is thus made possible by the exceptions in the Regulation. The most commonly relied upon exception in competition law damages cases is the provision that a defendant can be sued in the courts of the place where a co-defendant (the anchor defendant) is

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domiciled, provided that the claims are closely connected and there is a risk of irreconcilable judgments if the claims are heard in different national courts (articles 2 and 6 of the Regulation).

Forum shopping is only possible if courts are willing to accept jurisdiction. In practice, this depends on the interpretation by the courts of the exception. In the case of the articles 2 and 6 exception, this often depends on the interpretation of “closely connected”. Close connection means that the claim has to be based on similar facts and legal situation. But it does not mean that these have to be identical. For example, in a single and continuous agreement, the facts and legal situation between the defendants are unlikely to be identical due to differences in the involvement of the defendants. They are, though, likely to be similar enough to allow for reliance on the articles 2 and 6 exception. A number of cases – including the Dutch torpedo case – illustrate the fact that the Dutch courts readily accept jurisdiction even when the Dutch connection is not strong.

In 2014, the Dutch court accepted jurisdiction in a case brought by a claims vehicle, CDC, against AkzoNobel, Eka and Kemira in respect of the sodium chlorate cartel. The court considered itself competent, based on the arguments that the claim of CDC against the different defendants rested on the same factual situation and legal grounds. This was despite the fact that the Dutch defendant in the case was not a cartel participant but a parent company fined by the Commission in its capacity as parent.

In the Dutch torpedo case, the court ruled that the claims which KLM anticipates are closely connected because they are based on the same (alleged) cartel. The defendants belong to the same group (Deutsche Bahn) and the claims concern the same facts and legal situation. The Dutch court rejected the argument that the differences in the applicable law of the different damage claims of DB in America and Germany should lead to the conclusion that the criterion of “closely connected” does not apply to the request of KLM for a declaration of non-infringement or non-liability.

**Favoured nations**

In recent years, not only the Netherlands but also Germany and the UK have been considered attractive jurisdictions by plaintiffs bringing damages claims.

The attraction of the Netherlands stems from the efficiency of the proceedings and the relatively low costs. Moreover, there is a theoretical advantage that a collective settlement can be declared binding on all potential claimants. To date, however, there have been no competition law related cases where parties have made use of this opportunity.

Germany has also been a popular forum. An active claims vehicle, Cartel Damages Claims, was set up by two German founders and has brought a number of claims in Germany. German courts have also accepted jurisdiction on the basis of the articles 2 and 6 exception in Brussels I. In the Hydrogen Peroxide case, the anchor defendant settled with CDC shortly after the case was brought. As a consequence, the jurisdiction of the German court was challenged.

The German court referred the case to the European Court of Justice for a preliminary ruling on this issue. The ECJ ruled that the German court maintained jurisdiction even when the anchor defendant, the only party domiciled in Germany, was dropped from the proceedings. The case would have been different if there had been an abuse of law – for example, a delay in concluding the settlement until after the proceedings had been initiated, with the aim of guaranteeing the jurisdiction of the German courts. However, German proceedings are in general proving slower than proceedings in other countries. The recent finding of inadmissibility of the cession of claims to a claims vehicle, although fact-specific, may reduce the attraction of Germany as a jurisdiction, for plaintiffs at least.

As a result partly of the relative fast proceedings and other procedural advantages, the UK has also been a favoured forum for damages claims. The Consumer Rights Act 2015 (CRA), which came into force on 1 October this year, is likely to increase the attraction of the UK courts. As a result of the CRA, the Competition Appeal Tribunal will have jurisdiction to hear standalone competition claims (claims not based on an infringement decision); fast-track procedures will be put in place for small and medium-sized companies; and collective proceedings with opt in/opt out and settlement mechanisms will be available to claimants.

**Will harmonisation discourage forum shopping?**

Forum shopping is attractive due to the absence of harmonised rules relating to damages claims. The Damages Directive – published in December last year – aims to align to a certain extent some of the rules of the member states with regard to antitrust damages actions. Given the ambitious aim of the Directive, it would seem logical to conclude that the implementation of the Directive in December 2016 will lead to a drop in forum shopping in the future. The Commission has explicitly claimed that the Damages Directive will improve the current situation of underdeveloped and uneven private enforcement. Still, the Commission has opted for a directive rather than a regulation. Therefore the member states themselves will decide how the European objectives can be achieved by national legislation.

The changes that the Directive requires the member states to implement include among other things: easier access to evidence (with the exception of leniency statements and settlement submissions); the weight that must be given to an infringement decision of a national competition authority; minimum standards with regard to limitation rules; the introduction of the presumption that cartels cause harm; and the introduction of the presumption that damages are passed on to indirect purchasers.

Some of these provisions – when implemented – will result in greater proximity between the procedural and material rules in the different member states. However, the Directive still leaves substantial room for different implementing measures. Moreover, most of the provisions of the Directive do not relate to aspects that are taken into account in forum shopping: the costs and efficiency of the proceedings. Therefore, it is unlikely that the implementation will deter forum shopping.

**Conclusion**

The Dutch torpedo case is the next phase in forum shopping in cartel-related damages cases. It again illustrates that the Netherlands is an attractive forum not only as concerns plaintiffs but also defendants. The changes in law which member states are required to implement on the basis of the Directive are, in our view, unlikely to lead to a level of approximation that is sufficient to take away the incentive to forum shop.