Arnold & Porter’s
EU Competition Law Update

17 July 2013
3:00 p.m. BST, 4:00 p.m. CET, 10:00 a.m. ET
60 Minute Webinar

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Arnold & Porter’s
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60 Minute Webinar

Agenda

3:00 – 3:05 p.m.   Introduction

3:05 – 3:50 p.m.   Presentation and Discussion

Speakers:
Tim Frazer, Partner, Arnold & Porter LLP (UK), London
Christopher Stothers, Partner, Arnold & Porter LLP (UK), London
Susan Hinchliffe, Partner, Arnold & Porter LLP (UK), London

3:50 – 4:00 p.m.   Question-and-Answer Session

Attending this webinar qualifies you one accredited CPD hour - Ref 2616/ARPO. CLE is pending.
Tab 2: Presentation
EU Competition Law Update
17 July 2013

Patent settlement agreements and Exchanges of information
17 July 2013

Tim Frazer
Patent settlements – background to the current cases

- Sector study and follow-on surveys
  - Patent settlements are of particular interest to the Commission
  - They may sometimes restrict generic market entry in exchange for benefits transferred from the originator to the generic company
- Potentially problematic* patent settlements in the EU

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<td>Jan 2000-June 2008</td>
<td>22%</td>
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<td>July 2008-Dec 2009</td>
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<td>2010</td>
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* Settlements limiting generic entry with a value transfer from originator to generic company

Number of patent settlements and INNs 2000-2011

Source: European Commission, 6th Patent Settlement Monitoring Exercise
The two existing decisions

- **US: the Supreme Court in FTC v Actavis**
  - Rule of reason approach

- **EU: Lundbeck – Citalopram**
  - The Commission findings (what we know from the public domain)
    - Lundbeck product patents on Citalopram had expired
    - Lundbeck retained some manufacturing patents, but Citalopram generic entry was possible through alternative means of manufacture
    - Lundbeck launch of Escitalopram anticipated; some gap between potential generic entry and launch of Escitalopram
    - Very high reverse payments to generic companies
    - Included obligation not to enter with non-protected process, so went beyond scope of patent

The pending decisions

- **Servier and Others – Perindopril**
  - Patent settlement agreements
  - Acquisition of scarce key competing technologies
  - Intention to delay or prevent the entry of generic Perindopril

- **J&J and Novartis - Fentanyl**
  - Co-promotion agreement between J&J and generic competitor Sandoz (Novartis) to avoid competing
  - Prevented entry of cheaper generic
  - No regulatory barriers to develop and market generic – Sandoz could enter Dutch market
  - Monthly payments from J&J to Sandoz for as long as no generic product was launched in the Dutch market

- **Cephalon and Teva - Modafinil**
  - As part of a settlement agreement Teva undertook not to sell generic Modafinil products in the EEA markets before October 2012
Lundbeck – the lessons

- Commission will treat agreements as anti-competitive by object, where
  - Unjustifiable reverse payments
    - Does the generic company give value?
    - Are the amounts credible?
  - Going beyond scope of patents or not a genuine attempt to settle validity/infringement of patent
    - Does the generic agree to refrain from doing something that it was free to do irrespective of validity of patent?
    - Beware of aggressive or ambiguous internal documents

Lundbeck – the lessons (cont.)

- No challenge likely if settlement relies only on each party’s assessment of the strength of the patent and does not restrict generic entrant beyond the rights granted by patent law
  - Generic entrant can be prevented from entry for a period up to the remaining duration of the patent
  - Generic entrant should only accept restrictions that it feels obliged to accept in light of its view of the strength of the patent
Information exchange: the *Banana cases*

- **Facts:** competitors disclosed “quotation prices” to each other in advance and had other discussions on market conditions
- **Infringement:** information exchange between competitors
  - Not part of a broader cartel: no meeting of minds
  - No direct link between the conduct and consumer prices
  - No proven effect on competition – merely capable of affecting competition

“**Concerted practice by object**”

- No need for
  - An agreement between the parties or any other form of consensual conduct
  - Proof of any anti-competitive effect, once an anti-competitive object has been identified
- Legal presumption:
  - In the absence of contrary evidence, undertakings that take part and remain active on the market will take account of the information exchanged with their competitors in determining their future conduct
The underlying principle

- Each economic operator must determine independently the policy which it intends to adopt on the market. The removal or reduction of uncertainty restricts competition.
- The receiver of information about the future intentions of a competitor cannot cleanse itself of the stain of this infringement.
  - Even if it can demonstrate that its subsequent conduct was the result of market conditions and not the receipt of the information

Even discussions of public information...

- Discussions between competitors based on public information unconnected with price may be caught where bilateral exchange discloses competitors’ views about the information
- Distinction between discussions of external events and their joint evaluation by competitors may not always be bright in practice
Review rules of engagement

- Look to industry and corporate practices to ensure no information exchanges that might offend under this extended form of competition control
- Rules of engagement for discussions in trade association meetings and other competitor contacts should be reviewed, particularly if broad consent is given for discussions on public domain issues:
  - Changes to tax regime
  - Regulatory or legislative changes affecting the industry

Private antitrust damages actions

17 July 2013

Christopher Stothers
Private antitrust damages actions

- The European Commission has proposed to harmonise private antitrust damages actions

- Why have they done that?
- What are they proposing?
- How does that affect your business?

Basis for damages actions

- Articles 101 & 102 TFEU can be relied on in private litigation
- That includes the ability to recover (actual) damages:

26 The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27 Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

Courage v Crehan (Case C-453/99, 20 September 2001)
Basis for damages actions

- How such damages can be recovered is a matter of national practice

29 However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)...

_Courage v Crehan_ (Case C-453/99, 20 September 2001)

_Courage v Crehan_ – a case study

- 1991-1993: Mr. Crehan ran two pubs whose leases required him to buy his beer from a particular brewer (Courage); Courage sued Crehan for unpaid bills, but Crehan counterclaimed for damages on the basis that the beer “ties” were anticompetitive
- 1993-2001: Case delayed due to discussions with Commission and reference to ECJ on whether contractual party could sue
- 2003-2004: Trial judge found no infringement, but Court of Appeal overturned and quantified damage as c.£130,000
- 2006: House of Lords overturned and found no infringement
- 2007: Courage claimed costs of > £2 million for the 2004-2006 appeals
National practice is divergent

- Most damages actions follow-on from decisions by the competition authorities
- Most actions brought in one of three countries:
  - UK
  - Germany
  - The Netherlands
- Actions frequently stayed
- Actions typically settle without trial

Forum shopping – why do claimants target the UK?

- Extensive “disclosure” (discovery) obligations
- Forensic approach to damage quantification
- Cost recovery rules promote settlement
- Specialist courts and judges
- Very willing to hear cross-border (pan-EU) claims provided “anchor” defendant in UK
- Managed timetable and stay
- English language?
Actions filed – UK Competition Appeal Tribunal

Commission’s proposals for harmonisation

- Commission package 11 June 2013
  - Directive harmonising national procedures (draft)
  - Communication on quantifying harm (non-binding)
  - Recommendation on collective redress (non-binding)

- Latest (not last) step in slow process
  - Commission Study 2004
  - Commission Green Paper 2005
  - Commission White Paper 2008
Directive (draft)

- Key proposals for harmonisation
  - Limitation period: 5 years once public, suspended during authority proceedings/settlement discussions
  - Disclosure: broad but “proportionate”
    - Similar harmonisation in IP has not led to harmony
  - Leniency: protection for corporate statements and from joint & several liability for entire cartel damage
    - Query strength of protection in light of *Pfleiderer* and *Donau Chemie*, but ex-AG Mazák says strong
  - Passing-on: complicated shifts of burden of proof

Recommendation (non-binding)

- Key recommendations on collective redress
  - Opt-in actions only
  - Limited representative actions
  - No contingency fees
  - No punitive damages

- Generally concerned to avoid “US-style” class actions or abusive litigation
Draft UK Consumer Rights Bill

- Published 12 June 2013 for consultation
  - Comments requested by 13 September 2013
  - Then full Parliamentary process before adoption
- Section 82/Schedule 7 propose to amend UK rules on private actions
- Proposed to allow opt-out collective actions
  - But no contingency fees (DBA or damages based agreements) for such actions

Practical impact

- Some years before real impact will be seen
- Even then, unlikely to lead to major change
  - Experience from IP Enforcement Directive 2004/48 suggests national courts resistant to pressure
- Separate national developments more important
- Claimants (claimant lawyers) will not wait
- Defence strategies still based on current (developing) claim strategies
Proposed changes to the EU merger control regime

17 July 2013

Susan Hinchliffe

Proposed changes to the EU merger control regime

- Consultation on proposed amendments to the Notice on Simplified Procedure and to both the Short and the Long Form CO (and Form RS)
- Consultation on:
  - Extending the Commission’s jurisdiction in relation to non-controlling minority shareholdings (“structural links”)
  - Making it easier to refer mergers from the Member States to the Commission
The Good News...

Simplified procedure – expanding the categories of eligible transactions

- Positive proposal to extend the use of the Short Form procedure to concentrations where:
  - No overlaps of 20% or above (increase from 15%)
  - No vertical relationships where either party has a share of 30% or more (increase from 25%)
  - Markets where the combined share is higher but the increment is low ("small overlap cases"):  
    - Up to 50%
    - HHI delta below 150
The Good News But...

- Filing continues to be required for extra-territorial joint ventures with no effect in the EU
- Pre-notification discussions are strongly advised in small overlap cases and there is an express reference to the fact that the Commission will decide on a case-by-case basis that it can be relied upon e.g.:
  - Where the market is already very concentrated
  - The transaction removes an important competitive force
  - The concentration involves two important innovators
  - One firm has a promising pipeline product

Simplified procedure – addressing the information burden

- Some recognition in the amended notice of the burdensome nature of the Short Form and encouragement to seek waivers
- Section 5.3: additional supporting documentation required in relation to both the notified transaction and different options for acquisitions
- Additional information required for the small overlap cases
- The concept of Reportable Markets remains the same and information still required for extra-territorial JVs
Will the proposals meet the concerns raised about the EU process?

- Commission estimates up to 70% of all notifications will be done by way of a Short Form – an increase of 10%
- No clear measures to reduce the pre-notification process for a Short Form filing which can last at least one month and maybe longer
  - The discretionary nature of the use of the Short Form where the overlap is low may actually lengthen the process
- The Short Form remains potentially onerous and the scope for a full Form CO to be required is arguably expanded
- No solution offered for joint ventures with no effects in the EU

Changes to the Form CO

- Changes to the definition of affected markets
- All “plausible market definitions”
- Extending the scope of Section 5.4 documents
- Other notable changes
Changes to the Form CO (cont.)

- Changes to the market share thresholds for affected markets and those where the concentration may also have a significant impact:
  - Horizontally affected markets = 20% or more (up from 15%)
  - Vertically affected markets = 30% or more (up from 25%)
  - Potential competitors = one party has a share of 20% (down from 25%) and the other has plans to enter the market or has pursed such plans in the past three (up from two) years
  - One party has a share of 30% (up from 25%) and other has important IPRs
  - Neighbouring markets where one party has 30% (up from 25%)

Changes to the Form CO (cont.)

- Expanding the information requirements of the Form CO to include all “plausible market definitions”:
  - When presenting relevant product and geographic markets, the notifying parties must submit, in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions
  - Affected markets consist of “all plausible relevant product and geographic markets”
Changes to the Form CO (cont.)

- Extending the scope of Section 5.4 documents:
  - Documents *received by* any member(s) of the Board of management/directors/supervisory board as well as those prepared by or for them
  - *Minutes of meetings* of the Board of management/directors/supervisory board and shareholders’ meetings at which the transaction is discussed
  - Presentations analysis *different options for acquisitions*, including but not limited to the notified concentration
  - Analyses, reports, studies, surveys and any comparable documents of the *last three years* for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions

Changes to the Form CO (cont.)

- Other notable changes:
  - Section 1.4 on waiver requests
  - Section 1.5 deletion of the reference to “multiple” instances of incomplete contact information being grounds for declaring the Form CO incomplete
  - Section 1.8 on the submission of data for use in quantitative analysis
  - Section 1.9 on International Cooperation
Consultation on non-controlling minority shareholdings

- Should the Commission’s “merger tool kit” be expanded to investigate the creation of structural links?
- Should the same substantive test (SIEC) and turnover thresholds apply?
- Which of three basic systems should apply:
  - Pre-notification consistent with the system for the acquisition of control
  - Self-assessment
  - The “transparency system”
- In the transparency system, what information should be provided?
- What is the appropriate definition of structural links and what is an appropriate safe harbour?
- Should it be possible to submit a voluntary notification?
- Should the Commission be subject to a limitation period for taking action?

Should the tool kit be expanded to cover structural links?

- Structural links may lead to competitive harm:
  - By reducing competitive pressure between competitors
  - By substantially facilitating coordination among competitors
  - In vertical cases by allowing companies to hamper competitors’ access to inputs or customers
- Commission highlights that:
  - Other EU and non-EU jurisdictions are able to review structural links
  - Articles 101 and 102 TFEU do not provide the tools necessary for the Commission to review structural links
- Economic literature on structural links in Annex I and Commission cites the Ryanair/Aer Lingus case as an example of its inability to review harmful structural links
The three options for selecting cases

- Extending the existing ex-ante review to all relevant structural links
- Self-assessment:
  - No obligations imposed on the parties who can proceed with the transaction
  - Commission has a discretion to intervene ex-poste based on complaints or its own investigations
- Transparency system:
  - Parties required to submit a short information notice
- Under the latter systems, a voluntary notification option may be available:
  - Should it apply only to transactions that have not been implemented?
  - Will there be a standstill obligation?
- If a mandatory notification systems is used, should it be a Short Form?

Relevant structural links and a safe harbour threshold

- Safe harbour may be based on:
  - A market share threshold (e.g., 10%) and/or absence of special shareholder rights
  - Substantive criteria e.g., “material influence”
- No discussion of whether jurisdiction should be limited to structural links between competitors or those in a vertical relationships
Referrals to the Commission pre- and post-notification

- Article 4(5) pre-notification referrals: proposed changes:
  - Abolition of the Form RS, parties can directly notify the Commission using the Form CO.
  - The Commission would have jurisdiction unless a MS competent to examine the transaction objects. In practice this happens in only 3% of cases.
  - They would have 15 days to do so, running in parallel with the Commission’s Phase I review. The Commission requests comments on whether this period should be reduced to 10 days.
  - Possibility of broadening the exchange of information between the Commission and the competent MS to allow the MS to benefit from the investigative work already done.
  - Possibility to give notice of the parties intention to notify the Commission during pre-notification (to avoid unwelcome surprises).

- Article 22 post-notification referrals: proposed changes:
  - Commission can accept referral where only one MS makes a request
  - Only MS that are originally competent can request a referral
  - The referral would give the Commission competence over the whole of the EEA
Tab 3: Supporting Materials
European Commission Tables Measures to Facilitate Private Antitrust Damages Litigation in Europe

On 11 June 2013, the European Commission (the “Commission”) published a package of measures aimed at making it easier for victims of illegal cartels and other violations of European law to recover damages before national courts throughout the European Union (“EU”). Following several years of political debate, the key documents published by the Commission are:

- a proposal for an EU Directive on civil antitrust damages litigation.¹ The proposed Directive would partially harmonise the widely differing Member State rules of substance and civil court procedure that apply in private actions for damages concerning violations of EU competition law. It notably addresses: preservation and disclosure of evidence (including leniency documents), binding effect of authorities’ decisions, the ‘passing-on’ defence, limitation periods, joint and several liability of infringers, and proof and quantification of harm; and

- a non-binding Recommendation,² urging Member States to enable groups of victims to bring court actions more efficiently (“collective redress”) when seeking injunctions or compensation for violations of EU competition and any other substantive EU laws.

Both instruments apply to all types of EU competition law infringements (hard core cartels, general anticompetitive arrangements and abuse of dominance), and the Recommendation applies in addition to violations of any other EU substantive laws. The proposed Directive will now be discussed by the European Parliament and the Council, where it may face resistance at least on certain aspects. Once adopted, the Directive would allow EU Member States two years to bring the changes into force. The Recommendation on collective redress is immediately applicable but does not legally bind the Member States. It asks Member States to reform their national laws in line with the Recommendation during the next two years.

Implications for companies

Should the proposed Directive be voted into law and the Recommendation be followed by Member States, key implications for companies would include the following:

- More widespread private actions for antitrust damages throughout Europe.
  The measures can be expected to enhance the ongoing trend towards more private litigation for antitrust damages in Europe. This makes violations of EU competition law

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² Commission Recommendation on the common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights under Union Law, C(2013) 3593/3.
even more costly for infringers but also makes it easier for victims of infringements to obtain compensation.

- **No full harmonization of applicable rules.** Given the considerable leeway that Member States will enjoy in practice when transposing the Directive’s provisions into national law (and when applying that law), plaintiffs will likely continue to find it more attractive to bring damages actions in some Member States than in others. The Directive will not achieve full harmonization.

- **Easier access to evidence, with uncertain protection of business secrets and legal advice.** Companies’ business secrets and correspondence with lawyers may be caught by the Directive’s rules on mandatory disclosure of evidence. The Directive does not create a clear system for the protection of business secrets, leading to risk that a company’s business secrets might be improperly used outside the damages litigation. Moreover, the Directive does not enhance or harmonize the divergent Member State rules on legal professional privilege. This emphasizes the need for companies and advisors to carefully design strategies that minimize risks of mandatory disclosure, for example when conducting internal investigations.

- **Evidence resulting from a company’s voluntary cooperation with public enforcement authorities is granted only limited protection from disclosure.** Evidence that companies assemble or newly create for purposes of voluntarily cooperating with competition enforcement authorities notably in the context of leniency procedures will largely be subject to disclosure and thus become available to private plaintiffs. Before deciding to cooperate with enforcement authorities, companies should take this risk into account.

- **New document preservation obligations, even for non-parties to the litigation.** Companies should carefully review the Directive’s rules requiring them to preserve evidence that might be relevant to an antitrust damages action. Evidence preservation obligations apply not only to parties to the litigation, but also to third parties.

- **Collective redress, but no U.S.-style class-action culture.** The Recommendation suggests Member States should introduce collective redress mechanisms at least on an “opt-in” basis, but at the same time suggests safeguards to avoid introducing a U.S.-style class action litigation culture in Europe.

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### Key Provisions of the Proposed Directive

#### Principle of court-ordered disclosure of evidence (Article 5).

Courts must have the power to order any party to the litigation and third parties to disclose evidence that is relevant to the damages litigation, provided the pieces or categories of evidence requested are “defined [by the requesting party] as precisely and narrowly as he can on the basis of reasonably available facts” and provided that the obligation to disclose is “proportionate” in light of each side’s “legitimate interests”. This disclosure system is modelled on the rules that the EU introduced for civil litigation in the area of intellectual property law in 2004. Judging from that experience, the rules are likely to be interpreted fairly differently by courts in different Member States, notably as regards the specific detail that courts will require for the identification of evidence to be considered suitably precise. However, the Commission itself suggests that broad requests such as for ‘all documents submitted to the Commission by a leniency applicant’ should not be approved by a judge.

Confidential information of a company is not exempted from disclosure, although the Directive suggests that courts should take steps to preserve its confidentiality. How that will be handled in practice is not clear, thus leading to risk that disclosed confidential information will be improperly used outside the litigation. In addition, the Directive does not harmonize legal privilege rules, which will invariably mean that it will be easier for plaintiffs to obtain attorney-client communications or attorney work products in some Member States than in others (or than in the United States). International plaintiffs will seek to take advantage of this.

#### Limited exemptions from disclosure relating to leniency and public enforcement activity (Articles 6 and 7).

There are only a few narrow categories of evidence that are exempted from the obligation to disclose. These exemptions aim at protecting the competition authorities’ public enforcement activities, notably by keeping leniency programs sufficiently attractive. The Directive exempts leniency corporate statements and settlement submissions permanently from disclosure, and a few other types of documents (such as

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the Commission’s Statement of Objections and information prepared by the company specifically for purposes of the leniency procedure) on a temporary basis until the competition authority has closed its case. However, it remains to be seen whether these permanent or temporary disclosure bans will hold under the case law of the European Court of Justice in light of its Pfleiderer and Donau Chemie judgments. These judgments arguably may be read to suggest that as a matter of primary EU law national courts must in each specific case have the possibility to decide on the disclosure of any category of evidence, after weighing the interests for and against disclosure.

Overall, it is likely that most types of documents, such as pre-existing company documents that a leniency applicant submits to the authority together with its corporate statement, can be obtained by plaintiffs at some stage. This needs to be considered in the overall risk assessment when a company decides whether or not to voluntarily cooperate with a competition enforcement authority.

Evidence preservation obligations (Article 8). The proposed Directive introduces court-ordered sanctions for the destruction of evidence that is relevant to antitrust damages litigation. This effectively places an evidence preservation obligation on companies in situations where they hold relevant evidence and they know, or should reasonably know, that an action for damages has been brought. This obligation also applies to non-parties to the litigation, such as direct purchasers in litigation brought by indirect purchasers against a cartel of manufacturers.

Easier proof of violation, causation and harm (Articles 9 and 16). Final infringement decisions of the Commission or a Member State authority or a review court will constitute binding proof that a violation of EU competition law has occurred. Moreover, for situations of cartel infringements, the Directive sets out a rebuttable presumption that the cartel infringement caused harm. The burden for quantification of that harm lies with the claimant, but must not be made “practically impossible or excessively difficult” by procedural rules. Importantly, the court shall have the power to estimate the amount of harm.

Passing-on defense and claims by indirect purchasers (Articles 12 and 13). The draft Directive recognizes the passing-on defence, thus the rule that a cartel infringer should not have to compensate its direct customers if the infringer can prove that its direct customers have passed on the cartel-overcharge to their own purchasers (thus, to the “indirect purchasers” of the cartel infringer). The pass-on defence is not available if it is “legally impossible” for the indirect purchasers to claim compensation for their harm, but the Directive does not specify under which circumstances this would be the case. Indirect purchasers have standing to bring claims against the cartel members and benefit from a rebuttable presumption that the overcharge was passed-on to them. Moreover, courts can estimate which share of the initial overcharge was passed on to the indirect purchasers, making it easier for the indirect purchasers to prove their case.

Longer and harmonized limitation period (Articles 10 and 17). Plaintiffs have at least five years to bring their claims. This period does not start until the injured party knows, or could be expected to have reasonable knowledge of, all of the following elements: the behaviour constituting the infringement, the qualification of such behaviour as an infringement of competition law, the harm suffered and the identity of the infringer. In addition, the limitation period does not start before the day on which a continuous or repeated infringement ceases. The period is suspended during competition authority proceedings and for a period of at least one year after the infringement decision has become final, as well as for periods during which plaintiffs and defendants negotiate private settlements.

Joint and several liability (Articles 11 and 18). Each member of a cartel is jointly and severally liable vis-à-vis cartel victims for the damage caused by all cartel members. A cartel member who paid more to plaintiffs than the harm it caused can afterwards request contributions from the other cartel members so that every cartel member ultimately pays
according to its relative responsibility. However, to make immunity applications more attractive, the Directive holds a successful immunity applicant liable only vis-à-vis its own direct and indirect purchasers, unless the other victims of the cartel are unable to obtain full compensation from the other infringers. Similarly, to encourage private settlements, if a defendant reaches a private settlement with plaintiffs, that defendant would not subsequently have to respond to contribution claims from other defendants.

**Recommendation on Collective Redress**

The Recommendation urges Member States to introduce collective redress mechanisms that are “fair, equitable, timely and not prohibitively expensive.” The overall goal is to provide consumers and small businesses with a workable mechanism to bring claims that are too small to warrant individual court actions while preventing abusive litigation.

**Opt-in/ Opt-out actions.** The Recommendation favours the opt-in approach for collective redress, where claimants have to actively opt to be part of the action. However, Member States remain free to allow opt-out actions, as have recently been proposed in the UK.

**Representative actions.** Representative actions (that is, actions brought by a government or private entity on behalf of several claimants) should only be allowed if the entities have been officially designated or certified on an ad-hoc basis by a Member State court or authority. Moreover, the entity should be non-profit making; have objectives that have a direct relationship with the EU rights that are claimed to have been violated; and have sufficient capacity (e.g. financial and human resources) to represent multiple claimants.

**Funding of actions.** Concerns previously expressed that certain funding mechanisms can potentially incentivise abusive litigation are reflected in the Recommendation. Accordingly, Member States should not normally permit attorney fees that are calculated as a percentage of the compensation awarded (contingency fees). It remains to be seen how this Recommendation might impact upon UK-style conditional fee arrangements and/or damages-based agreements. Further, the Recommendation states that where funding is provided by a third party, safeguards should be put in place to guard against conflicts of interest and the possibility of undue influence of the third party in matters such as settlement discussions. The losing party should reimburse the necessary legal costs borne by the winning party.

**Injunctive and compensatory relief but no punitive damages.** Injunctive and compensatory relief should be available in collective redress actions. Punitive damages should not be awarded, as the Commission fears that the availability of punitive damages may give rise to abusive litigation.

**Other provisions.** The Recommendation also sets out the Commission’s position in relation to a number of other areas, including standing, admissibility and alternative dispute resolution. In addition, the Recommendation requests that Member States establish national registries of collective redress actions.

**Conclusions**

The measures published by the Commission represent its best attempt at offering a workable and balanced framework that allows all sides to advance their interests after years of controversial debate about private litigation for damages in the EU. They are unlikely to satisfy everybody, and lobbying can be expected to continue at the European Parliament and in some Member States until the final adoption of the Directive. That being said, it is clear that Europe is continuing on a path towards more private actions.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

**G. Axel Gutermuth**
+32 (0)2 290 7832
Axel.Gutermuth@aporter.com

**Christopher Stothers**
+44 (0)20 7786 6226
Christopher.Stothers@aporter.com

**Mark Gardner**
+44 (0)20 7786 6159
Mark.Gardner@aporter.com

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More Cost-Efficient Civil Litigation In England & Wales

On 1 April 2013, civil litigation in the English Courts will be radically reformed. These changes will reduce the risk of unanticipated costs and will add new tactical dimensions to litigation in the English Courts.

Primarily, the reforms will improve the transparency and predictability of England’s “loser pays” system. The reforms will require parties at the start of litigation to exchange detailed budgets of the costs they anticipate recovering from their opponent if successful, and to update those budgets during the course of litigation. The Courts will reduce the proposed budgets if they are disproportionate to the case. That does not directly restrict the freedom of the parties to run the litigation as they consider appropriate (including spending more than the Court-approved budget). However, any overspend will not be recoverable if that party is successful. In addition, the Court will manage cases in line with the budget and so this may mean that the scope of permitted evidence, or the obligation of the opponent to search for relevant documentation, may be restricted. Finally, there will be quicker determination and recovery of costs at the end of the case.

In addition, litigation funding will be reformed to allow litigation risk to be shared more flexibly with lawyers and/or third parties, without placing an increased burden on the other party to the litigation.

In this Advisory we outline the key changes and assess their likely impact on the way in which litigation is run in the English Courts. We also discuss the opportunities open to potential litigants in terms of funding and risk-allocation.

Background to the Reforms

In November 2008, Sir Rupert Jackson (a judge at the Court of Appeal) was appointed to review the costs of civil litigation in the English Courts. His Final Report was published in January 2010 and proposed "a coherent package of interlocking reforms, designed to control costs and promote access to justice".

Following a public consultation, the UK government has implemented almost all of the primary recommendations, most of which will take effect on 1 April 2013. ¹

¹ Primarily by the entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and amendments to the English Civil Procedure Rules (CPR). However, some of the recommendations have already been implemented. For example, the introduction of a cap on the level of recoverable costs in proceedings in the Patents County Court (PCC) came into effect on 1 October 2010. The reforms are widely regarded as having established the PCC as an attractive forum for the resolution of intellectual property disputes.
Costs Management Scheme

In the past, the level of costs expended by a party to litigation would only be fully disclosed to the Court and the other side at the end of litigation. The new costs management scheme gives the Court greater control on the expenditure of costs by the parties throughout the proceedings.

The costs management scheme will apply to most commercial cases commenced after 1 April 2013, provided that the sums in dispute are between £25,000 and £2 million, unless the Court orders otherwise. Even those proceedings not automatically subject to the scheme may be made subject to it if the Court so orders.

The scheme has 4 essential elements:

(i) The parties exchange litigation budgets at an early stage.

(ii) The Court will resolve any disputes over the proposed budgets.

(iii) So far as possible, the Court will manage the case so that it proceeds within the approved budgets, although the parties may seek to revise them if circumstances change.

(iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the most recently approved budget.

The new rules require all represented parties to exchange costs budgets shortly after the defence is filed. The deadline will be 7 days before the first case management conference unless another date is specified by the court.

These budgets must be in a prescribed form and include costs already incurred in the initial phases of the action (pre-action costs, issue of proceedings, and preparation of pleadings) and an estimate for each of the remaining phases of the proceedings up to trial. Any assumptions made in preparing the estimate need to be expressly set out. If the budget for the whole case exceeds £25,000, the estimate for each phase must be further broken down into the expected number of hours for each individual fee earner, adding on the expected disbursements (e.g., expert fees, barrister fees and Court fees).

If a party fails to file its costs budget in time, the budget will be deemed to comprise only any applicable Court fees, thus precluding the recovery of fees for lawyers, experts or any other costs.

The parties are encouraged to agree to each other’s costs budget so far as possible. If agreed in full, the Court will simply record that fact. If not, the Court will resolve the disputed areas. The criterion the Court will apply is whether the proposed budget falls within the range of reasonable and proportionate costs.

The requirement for costs budgets is not new: in many cases the parties are already required to file cost estimates with the Court before it makes case management directions. However the new rules require a significantly greater level of detail and also give the Court much greater powers to manage those costs. Under the new rules, once costs budgets have been filed, the Court will make a costs management order which fixes the parties’ budgets. The costs management order may also provide a timetable for future review of the budgets. This does not restrict the freedom of the parties to investigate and litigate claims as they consider appropriate (as already indicated, parties may exceed the amount of the Court approved budget if they wish to do so). Those costs will simply not be recoverable from the opposing party on the successful conclusion of the litigation.

The Court will take the budgets into account when making case management decisions. For example, under the new rules the parties are required to provide an estimate of the costs of proposed expert witnesses and to support their proposals regarding the disclosure of documents. The Court may limit the extent of the evidence permitted and/or disclosure ordered in order to keep the costs to be incurred.

The £2 million cut-off point, above which a case is not automatically subject to the costs management scheme, is intended to be an interim measure and is still subject to review prior to implementation. The rationale is that in high value cases the sums at stake in the litigation typically dwarf the parties’ costs, so it is less important for the parties to be reined in on their spending. How the “sums in dispute” will be calculated in non-monetary claims is yet to be determined. The automatic costs management scheme will not apply to any cases (regardless of value) in the Admiralty and Commercial Courts (which are typically very high value cases).

The precedent form provided for such budgets lists the following phases, although others may be relevant depending on the particular matter: Preparing for and attending the case management conference; Disclosure; Preparation of expert evidence; Preparing for and attending the pre-trial review; Trial preparation; Trial itself; Alternative Dispute Resolution/ Settling discussions.

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4 Prior to 1 April 2013 the Courts have approached the assessment of costs on the standard basis as requiring individual items to be reasonable in amount and necessary to the litigation, largely without having regard to the ultimate value of what was at stake in the proceedings. The CPR is to be amended to make clear that any costs incurred which are, in themselves, disproportionate to the litigation as a whole should not be recoverable from another party, even where they are necessarily or reasonably incurred. This reflects a fundamental change to the “overriding objective” of the CPR which is now to enable the Court to deal with cases “justly and at proportionate cost”.

5 Although not in cases in some specialist lists (e.g., the Patents Court).
proportionate to the value of the claim and in line with the approved budgets.

Parties may seek to revise their costs budgets as the litigation progresses. If the other party does not agree to any revised budget, the Court will decide whether the proposed revisions are appropriate. Only significant developments in the litigation will justify such revisions. Simply spending more than originally estimated on an anticipated task is not likely to justify any revision of the budget. However, where assumptions were expressly made in the initial estimate which have turned out to be false, this may justify a revision of the budget.

The onus is firmly on the parties to monitor costs throughout the proceedings to ensure that there have not been developments which would justify a revision of the budgets or, if there have, to notify the other parties and the Court promptly.

The importance of the approved budget comes at the end of the litigation. The ordinary rule that the loser pays the winner’s costs remains unchanged. However, when assessing whether a party’s incurred costs were reasonable and proportionate, the Court will not depart from the approved budget unless satisfied that there is good reason to do so. Thus, in essence, the budget acts as a cap on the level of costs which the winner may recover from the losing party. Equally, however, the budget will speed up the Court’s determination of costs and should allow successful litigants to recover their costs more quickly.

What does this mean for litigants?

Litigants and their legal advisers will need to predict and budget for the likely path of the litigation from the very start if they want to recover their costs at the end. Only significant developments later in the litigation will warrant a departure from the original budget. A party which fails, for example, to foresee the scale of a document review exercise required by the pleaded case will have to bear any costs above budget, even if its case is ultimately successful.

However, in return, litigants will have a much clearer idea of possible costs which will improve the management of litigation risk. Litigants will know from very early in the proceedings their likely maximum exposure for the other party’s costs should they be unsuccessful. Equally, early consideration of the budget means that parties will have a clearer idea of what costs they will recover if successful in the case. Under the previous rules, a successful party could typically expect to recover only 60% to 80% of its actual costs after a slow assessment for “reasonableness”. The new rules give parties greater certainty and transparency, in the early stages of the litigation, as to the likely costs which will be recovered if successful. This also means parties and their lawyers should be more informed when assessing which aspects of the case require the investment of time and resources.

Funding reforms

Funding of litigation and risk-sharing is also being made more flexible. Although lawyers are not obliged to offer any new alternative fee agreements, they are (and continue to be) obliged to provide clients with information that allows them to make informed decisions about the services they need and the costs of those services.

Conditional Fee Agreements

Parties can already share some litigation risk with their lawyers under a conditional fee agreement (CFA), which has been available in English civil litigation since 1995. Under a CFA, the client initially pays a reduced (or no) fee to his lawyers, but in the event of “success” the client becomes liable for the standard fee plus a percentage uplift on those standard fees. What is considered a “success” or “failure” is defined in the CFA itself, often by reference to a level of damages recovered. The uplift is based on the level of risk associated with the claim, and is capped at a maximum of 100% (in other words, double the standard fee).

To protect the client against exposure to the other side’s costs in the event of defeat, there is an established market in after-the-event insurance (ATE). Unsurprisingly, ATE premiums can be relatively high (25% to 60% of the sum insured, depending on the risk analysis). However, they are often deferred until the case is resolved and, like the CFA uplift, only payable in the event of success.

Prior to the Jackson reforms, provided the losing party was on notice, the standard fee, the CFA uplift and the ATE premium were all recoverable from the losing party. Therefore, the costs risk was primarily being shared between the litigant’s lawyers and the opposing party, save to the extent that costs were not recovered (when the litigant would remain liable). This led to them being used highly strategically and attracted significant criticism.

After 1 April 2013, the CFA uplift and the ATE premium will cease to be recoverable: a successful litigant will have to bear these costs and can only recover the standard fee from the opponent. This means the costs risk will be shared between the litigant, the litigant’s lawyers and the opposing party,
which is likely to make them a more credible fee option for commercial litigation in appropriate cases.

To mitigate the effect of these changes for personal injury claims, so-called ‘qualified one-way costs shifting’ will apply to those claims, with the effect that a successful defendant will not generally be able to recover its costs from the claimant save in certain limited circumstances. This removes the need for a claimant to obtain expensive and unrecoverable ATE insurance in respect of those costs. In addition, in personal injury cases the CFA uplift will be capped at 25% of damages (excluding sums for future losses).

**Damages-Based Agreements**

Risk-sharing is currently limited and a claimant cannot share the proceeds of a successful claim with its lawyers. However, from 1 April 2013, damages-based agreements (DBAs) will be permitted. Under a DBA, the lawyers' fees are set as a percentage of the sum recovered as damages in the claim (net of any costs recovered from the losing party) plus disbursements. DBAs are limited to a maximum of 50% in most cases.

For example, assume a claimant enters into a DBA with a 25% fee. The case is successful and the court awards £400,000 damages and £50,000 costs (according to the budget), which are paid. The claimant's lawyers keep £100,000 (25% of £400,000) and the claimant receives the remaining £350,000.

However, the claimant cannot recover more in costs than he is liable to pay his lawyers. Therefore, if in the same example the court awarded only £100,000 damages, it could only award costs of £25,000 (even if the budget would have allowed £50,000). In that case, the claimant’s lawyers would keep the £25,000 and the claimant would receive the remaining £100,000.

The draft Regulations currently before Parliament require a lawyer acting under a DBA to do so on a pure “no win, no fee” basis, not on the basis of reduced fees. In essence, the lawyer takes all the risk in relation to his own fees if the case is unsuccessful or low damages are recovered, while the client bears the risk of the opponent's costs or the cost of ATE insurance, together with having to pay high fees if a high-value claim succeeds. That risk-sharing profile is unlikely to make DBAs attractive for many commercial cases as opposed to CFAs or other fee arrangements. There is some debate as to whether this is an intended limitation and it is possible the Regulations may be amended to allow more flexible sharing of risk between client and lawyer.

**Conclusion**

The changes to English civil litigation on 1 April 2013 are intended to encourage more cost-efficient litigation, promoting access to justice and opening the courtroom door to litigants who may otherwise have been unable to pursue justice in the English Courts. Our team believes that it offers some attractive new possibilities for funding and sharing the risk of litigation with our clients. Arnold & Porter is very familiar with novel and creative funding arrangements, CFAs and third party funding options, and if you have any questions about this update or specific funding options for your case, please contact your Arnold & Porter attorney or:

**Alison Brown**
+44 (0)20 7786 6207
Alison.Brown@aporter.com

**Ian Kirby**
+44 (0)20 7786 6160
Ian.Kirby@aporter.com

**Adela Williams**
+44 (0)20 7786 6115
Adela.Williams@aporter.com

**Christopher Stothers**
+44 (0)20 7786 6226
Christopher.Stothers@aporter.com

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6 Save in specific circumstances, e.g., employment tribunals. Third party funders, however, have not been so restricted and it is not uncommon to see agreements where a third party funds the legal costs of litigation in exchange for a cut of the ultimate damages award.

7 25% in personal injury cases.

8 The draft **Damages-Based Agreements Regulations 2013** were laid before Parliament on 22 January 2013. They were considered by the Grand Committee of the House of Lords on 26 February 2013.
Forum Shopping and “Italian Torpedoes” in Competition Litigation in the English Courts

By

Christopher Stothers, Mark Gardner and Sue Hinchliffe

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Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)
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 Hinchiffe
Partner, Arnold & Porter (UK) LLP, London

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. 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.”

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 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, 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®).

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”. 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. Torpedoes have also featured in corporate loan disputes, where parties may file actions in breach of the exclusive jurisdiction chosen in the contractual documents. However, they are relatively new

1 The authors would like to thank Catherine Young, a Trainee at the firm, for her assistance in preparing this article.
3 National Grid Electricity Transmission Plc v ABB Ltd [2009] EWHC 1326 (Ch) at [26].
8 Provisions as provided by the ECI in Gesellschaft für Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kopplungsbau Beteiligungs KG (LamK) (C-4/01) [2006] E.C.R. 1-6509 and Roche Nederland BV v Primaxa (C-539/03) [2006] E.C.R. 1-6535.
in competition litigation, where no such exclusive jurisdiction typically applies and so the use of the disparaging “torpedo” terminology is less justifiable.3

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 and Italy,4 and how the Commission’s recently proposed changes to the Brussels Regulation might affect such litigation.5

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

“A person 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).6

If the former, jurisdiction is limited to the damage which occurred in the jurisdiction.7 However, the latter can only be relied upon where the court can clearly determine that place,8 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.

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6 Reunion Européenne Sa v Spliethoff’s Bevrachtingkantoor 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. 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.

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). 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.

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.

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, Polimeri Europa v Commission (T-12/07 R), Order of May 3, 2007.

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18 Shell v Commission (T-38/07), Dow Chemical v Commission (T-42/07), Kautuk 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.
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 torpedoed 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 Philips22 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

22 SanDisk Corp v Koninklijke Philips Electronics NV [2007] EWHC 332 (Ch).
23 SanDisk Corp v Koninklijke Philips Electronics NV [2007] EWHC 332 (Ch) at [41].
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:

“[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

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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.


\(^{31}\) When 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.


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.
EU & Competition briefing from Arnold & Porter (UK) LLP published in the May 2013 issue of The In-House Lawyer:

Information exchange: don’t slip on the banana skin
Information exchange: don’t slip on the banana skin

Two recent judgments of the General Court of the EU (the Court) provide a stark reminder of the long reach of competition law in relation to exchanges of information between competitors. Although the European Commission’s findings of fact in these cases disclosed a frequent and detailed series of communications concerning future prices, it would be wrong to dismiss the relevance of the Court’s approach as concerning only situations of grave infringements. The reasoning and underlying policy of the Court (and of the Court of Justice of the EU) applies to a much broader category of situations, many of which may be uncomfortably close to the kind of discussions between competitors in trade associations and elsewhere that have not raised red flags. The Banana cases are a warning to companies to look to their industry and corporate practices to ensure that there are no information exchanges that might offend under this extended form of competition control.

In the Banana cases, the Court was clear that an information exchange between competitors can infringe EU competition law even where the exchange of information did not form part of a broader cartel, and where there is no direct link between the conduct and consumer prices. This may be the case not only where the relevant market is a highly concentrated oligopoly, but also where it can be described as not being a fragmented market. In these circumstances, the parties’ subjective intentions are not relevant; nor is it necessary to consider whether the exchange affected any prices (whether consumer or otherwise); it will be unlawful merely because it is capable of affecting competition.

THE CONDUCT IN QUESTION
The Court judgments arose out of the European Commission’s investigation of the conduct of certain banana suppliers between 2000 and 2002. A dawn raid in 2005 was followed by a decision in 2008, under which the Commission found an infringement and levied fines. The Court confirmed and developed the policy articulated by the Court of Justice of the EU in T-Mobile Netherlands BV & ors [2009] relating to information exchanges. Such policy is that information exchanges can be prohibited as a striking form of anti-competitive arrangement – a ‘concerted practice by object’ – and that there is no need to demonstrate that the arrangement amounted to an agreement between the parties or any other form of consensual conduct – nor that it had any anti-competitive effect.

In its original decision, the Commission found that the companies had communicated to each other the prices that they intended to quote to banana purchasers in the EU. They set their quotation prices for their brands each week, in practice on Thursday mornings, and announced them to their customers. Prior to such announcement, they communicated bilaterally to disclose such quotation prices to each other. These quotation prices applied to green bananas – ie unripe bananas that would then be ripened by the retailer or by a ripener. They also quoted yellow banana prices on the basis of the green price plus a ripening fee. The quoted prices were not, however, the prices that were finally agreed by each supplier separately with their respective customers. Prices paid by retailers and distributors for bananas would be the result either of weekly negotiations or on the basis of pre-established pricing formulae comprising a fixed price or a price linked to the quotation price of the seller or of a competitor. The actual price could also be linked to the ‘Aldi price’, which was the weekly counter-offer made by the retailer Aldi (then the largest importing retailer of bananas in the EU) in response to the quotation price. This ‘Aldi price’ was increasingly used by others as an indicator for banana pricing formulae.

THE NATURE OF THE INFRINGEMENT
Although the quotation prices were not the actual prices, the Commission found that

‘The concept of an infringement constituted by an exchange of information through the medium of a concerted practice by object is disconcertingly wide.’

Tim Frazer, partner, Arnold & Porter (UK) LLP
E-mail: tim.frazer@aporter.com
they served as a signal to pricing trends and to the intended development of banana prices, particularly as the quotation price was directly linked to actual prices through the pricing formulae. Considering ‘the precise purpose of the concerted practice, in the economic context in which it is to be pursued’, the Commission found that the banana suppliers must necessarily have taken account of the information received from competitors when determining their conduct on the market, and that the conduct therefore was liable to influence operators’ pricing behaviour. It therefore gave rise to a ‘concerted practice having as its object the restriction of competition’ contrary to what is now Article 101 of the Treaty on the Functioning of the European Union.

To understand the breadth of the Court’s decision, it is worth revisiting the definition of a concerted practice. It is:

‘... a form of co-ordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.’

There must be a concertation between parties and subsequent conduct by them on the market and a relationship of cause and effect between the two. But the Court is willing to presume, in the absence of evidence to the contrary, that undertakings that take part and remain active on the market will take account of the information exchanged with their competitors in determining their future conduct.

As the Court confirmed in the Banana cases, since there was no attempt by the Commission to characterise the arrangements as an agreement, there was no need for it to demonstrate that there was a meeting of minds between the participants. By pursuing the conduct as a concerted practice by object, the Commission did not have to find any form of consensual conduct; this form of infringement does not require a meeting of minds and does not require the finding of an anti-competitive effect.

The concept of concerted practice by object is based on a stricter creed, under which two or more parties may find themselves liable for a serious infringement in spite of having agreed nothing, without proof of a joint intention, and whose subsequent conduct has no market impact. It is enough simply to rely on the requirement that each economic operator must determine independently the policy which it intends to adopt on the market. The receiver of information concerning the future intentions of a competitor cannot cleanse itself of the stain of this infringement even if it can demonstrate that its subsequent conduct was the result of market conditions and not the receipt of the information. The removal of the uncertainty as to a competitor’s future conduct is irremovable even in these circumstances.

It is fairly uncontroversial that, where an information exchange has an effect on competition, then an infringement will arise. The Court confirmed this when it stated that an information exchange is an unlawful if it:

‘... reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.’

But the Banana cases and T-Mobile were not based on the notion of a concerted practice that had an anti-competitive effect – they were based on the notion that the arrangements had an anti-competitive object. As indicated in the ‘object or effect’ bifurcation of Article 101, no anti-competitive effect need be proved once an anti-competitive object has been identified. To repeat this important principle in the context of a concerted practice: an arrangement is unlawful where there is no agreement, and no meeting of minds, and without proof of an effect on competition, merely on the basis of the ‘object’ of the arrangement.

There is therefore no need to take account of the actual effects of the arrangement once it is apparent that its object is to prevent, restrict or distort competition within the common market. This is because certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. As the Court found in T-Mobile, there will be an anti-competitive object if the arrangement has the potential to have a negative impact on competition – it must simply be capable of having an anti-competitive effect. But the fact that such effects actually arise is relevant only for determining the fine and not for the existence of the infringement itself.

The breadth of this policy is more starkly revealed in the T-Mobile case itself, from which much of the Court’s approach in the Bananas cases was derived. In that case, advocate general Kokott advised that an exchange of confidential information between competitors is tainted with an anti-competitive object if the exchange is capable of removing existing uncertainties concerning the intended market conduct of the participating undertakings ‘and thus undermining the rules of free competition’. She found that it is irrelevant whether the exchange constituted the main purpose of the contact or simply took place in the framework (or under the auspices) of a contact which in itself had no unlawful object. She classified infringements of competition by object as being comparable to certain criminal offences that rely purely on the presence of risk. For example, drunk driving is a criminal offence irrespective of whether, in fact, the driver endangered another road user or was even responsible for an accident. As in such cases, according to the advocate general:

‘... it is sufficient that a concerted practice has the potential – on the basis
‘One crumb of comfort is that the Court’s view that an exchange of information of the type in issue would be regarded as anti-competitive by object took account of the market context.’

... the joint evaluation by competitors of that event, in combination, as the case may be, with other information on the state of the market, and of its impact on the development of the sector, very shortly before their quotation prices are set.6

The fundamental principle endorsed by the Court was that the sharing, on a regular and frequent basis, of information relating to future quotation prices had the effect of artificially increasing the transparency of the market where the regulatory regime had already reduced the scope of competition. But despite finding that – because of the EU common organisation of the banana market – prices on the banana market were not based wholly on the free operation of supply and demand, the Court held that the co-ordination engaged in by the parties did have an anti-competitive object, because it further reduced uncertainty in the market.

CONCLUSION

The concept of an infringement constituted by an exchange of information through the medium of a concerted practice by object is disconcertingly wide. One crumb of comfort is that the Court’s view that an exchange of information of the type in issue would be regarded as anti-competitive by object took account of the market context. Infringements are far more likely to arise in a highly concentrated market – whether or not the increased transparency actually did distort rivalry on the market and increase the probability of collusion. But in a fragmented market, an exchange of such information may be neutral, or even pro-competitive. Of course, an exchange that in fact had an anti-competitive effect in a fragmented market would be an infringement by effect, even if not by object.

Most undertakings do not have discussions that touch on future pricing6 but many will, with the approval of counsel, discuss the likely impact of changes in market characteristics. The Court in the Bananas cases took issue with discussions of publicly derived information within the context of a concerted practice by object. It explained its concerns that information on weather conditions was one of a number of important factors in the determination of the level of supply in relation to demand, so:

... reference to them during bilateral discussions between well-informed traders necessarily resulted in a sharing of understanding of the market and of its evolution in terms of prices.’

This distinction, between discussions of external events and their joint evaluation, although clear in theory, may not always be so bright in practice. Those responsible for setting rules of engagement for discussions in trade association meetings and other competitor contacts should bear this broad approach in mind. Such an inclusive approach to prohibited topics of conversation between well-informed traders may well cover areas that have generally been considered to be relatively safe – such as the impact of changes in tax or regulation on the market. Although the Court indicated that it was permissible to exchange mere harmless gossip on the industry in general, this is not normally the area on which companies require detailed advice.

By Tim Frazer, partner, Arnold & Porter (UK) LLP
E-mail: tim.frazer@aporter.com.

NOTES

1) Fresh Del Monte Produce Inc v European Commission [2013] and Dole Food Company Inc v European Commission [2013], together referred to below as ‘the Banana cases’.
2) Fresh Del Monte Produce Inc, at paragraph 304.
4) Fresh Del Monte Produce Inc, at paragraph 303.
5) Dole Food Company, at paragraph 295.
6) Fresh Del Monte Produce Inc, at paragraph 346.
7) But see the Office of Fair Trading decision regarding the information exchange between a number of motor insurers, December 2011, OFT 1395.
EU & Competition briefing from Arnold & Porter (UK) LLP published in the July/August 2013 issue of The In-House Lawyer:

Passive investments and the EU Merger Regulation
Passive investments and the EU Merger Regulation

BY SUSAN HINCHLIFE
partner, Arnold & Porter (UK) LLP

PASSIVE INVESTMENTS AND cross-directorships among competing companies are common across numerous industries such as banking, airlines, energy and automobiles. There are various motivations for these types of arrangements, such as a desire to invest in a familiar industry, or to spread risk, share know-how and form strategic alliances.

These passive investments often take the form of a minority shareholding. While the acquisition of minority shareholdings may be subject to review under UK merger control rules, they are not captured under the EU Merger Regulation (EUMR). The announcement on 30 May 2013 of the UK Competition Commission’s (CC) provisional findings in relation to Ryanair’s 29.82% shareholding in Aer Lingus has again raised the issue of when such shareholdings should be controlled. The CC’s provisional findings were that, without the Ryanair shareholding, competition between Ryanair and Aer Lingus may have developed differently and they may have been stronger.

This article explains the types of substantive concerns that can arise in relation to minority shareholdings and discusses the proposals for the EUMR to be adapted to regulate such acquisitions. It also provides more detail on the CC’s provisional findings in relation to Ryanair/Aer Lingus – which appear to provide a clear example of when concerns may arise in the case of minority shareholdings.

SUBSTANTIVE CONCERNS OVER MINORITY SHAREHOLDINGS

The acquisition of a passive financial interest in a competitor may alter the acquiring firm’s incentive unilaterally to increase prices. As in a full merger, the acquiring firm will ‘internalise’ part of the impact of a price increase, by considering the consequences of this decision on its financial stake in the target. For example, where the acquirer increases its prices, to the extent that sales are recaptured by the target, the acquirer can stand to benefit from its stake in the profits from the target. Further, the increase in the acquirer’s prices, may incentivise the target (and perhaps other competitors) to increase their prices. Alternatively, where the acquirer has some influence on the decisions of the target (rather than a mere financial interest), the acquirer may be able to raise the prices of the target and recapture the sales itself, for its own gain.

Other concerns may arise where other potential investors are dissuaded from making investments in the target company because of the presence of the other minority shareholders. Similarly, the target company may be unable to take advantage of other competitive opportunities to merge with other companies as a result of the presence of a minority shareholder.

It is also worth noting that concerns are not necessarily limited to situations in which the acquirer and the target company are actual or potential competitors. Concerns may also arise if the activities of the two companies are vertically related. For example the existence of a minority shareholding may operate as a disincentive for the acquirer to integrate downwards (or upwards as the case may be). Additionally concerns over foreclosure may be raised. However, given that foreclosure theories of harm are relatively rare even in a full merger context, this may appear to be a much less significant concern that the context of minority shareholdings.

THE EU MERGER REGULATION

The issue surrounding the inability of the EUMR to address the acquisition of minority shareholdings was highlighted in the 2001 Green Paper on merger review, which said:

‘... with regard to minority shareholdings and strategic alliances, while acknowledging the potential structural effects of such transactions, the paper describes the difficulties in drawing borderlines with sufficient legal certainty’.

Currently, the EUMR only captures minority shareholdings if they involve a change of control (defined in terms of decisive influence). To the extent a transaction is not caught by this, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) may be relevant. However, it is generally accepted that there are limitations in the ability of Articles 101 and 102 TFEU to capture potentially anti-competitive minority stakes. Although they can be used in relation to information-sharing concerns, it does not seem as likely that they can assist (and neither can the EUMR) with the
anti-competitive incentives derived from a non-controlling minority stake.

In November 2012, Commissioner Almunia raised two possible options to remedy this issue: either ‘a selective system in which the Commission identifies the cases that may raise specific problems’ or ‘a mandatory notification system of the kind in use today for mergers involving the acquisition of control’.

The next stage will be seen if the European Commission (the Commission) embarks on a public consultation process. There are a number of possible approaches to the regulation of the acquisition of minority interests under the EU Mergers Rules (eUMR). These might be regulated only above a certain share level and/or where they concern existing or potential vertical relationships and/or concern transactions involving competitors. Notification might be mandatory as for existing acquisitions covered by the EU Mergers Rules, or voluntary.

Observers note that the Commission will to be careful not to create an undue regulatory burden, given that the vast majority of minority shareholdings will not pose any concerns. It may be that the power to act ex post and only in cases that are most likely to be problematic with well-defined safe harbours (e.g., in terms of market shares and minority shareholdings) may strike the right balance.

**UK SITUATION**

**Minority shareholdings under UK law**

In the UK, a merger situation arises where two enterprises come under common control. UK law recognises three levels of control: a controlling interest (an acquisition of 50% or more of the shares), the ability to control policy (de facto control or the ability to assert decisive influence), and the ability materially to influence policy. Each move up to the next level of control may be considered a merger situation.

The criteria used by the Office of Fair Trading (OFT) and the CC for evaluating material influence include: the size of the voting shareholding (in itself and relative to other shareholdings), any special voting rights attached to the shares, attendance and voting at shareholder meetings, and the ability to block special resolutions. In addition, the number of board members each shareholder is able to nominate, and the standing or influence those members have on the board, are also significant to the assessment. Industry knowledge, standing of the acquirer in the sector, and any supply arrangements or other contracts between the two companies (including financial arrangements) are also relevant.

A shareholding having at least 25% of the votes is presumptive of material influence in the UK. However, such influence has in practice also found in cases of shareholdings below this level. In BSkyB/ITV, based on the assessment of several factors, the CC found that a shareholding above 7.5% would enable BSkyB to block special resolutions of ITV. An acquisition of 17.9% in ITV by BSkyB was ordered to be reduced to a shareholding below 7.5%.

**The Ryanair/Aer Lingus case**

Ryanair/Aer Lingus is one of the most recent and high-profile cases concerning the acquisition of minority shareholdings. In 2007 the Commission blocked the first attempt by Ryanair to acquire all the shares in Aer Lingus, its closest competitor on the Irish market. In October 2010, the General Court upheld the Commission’s prohibition decision, while also deciding not to order the divestment of Ryanair’s 29.3% stake.

After having acquired 29.3% of Aer Lingus, Ryanair has, since 2007, been trying to acquire the remaining shares in that company. Although the merger has already been blocked twice by the Commission, Aer Lingus continues fighting in the UK courts to obtain divestment of Ryanair’s hostile shareholding. Frustration at the Commission’s inability to deal with the minority shareholding held by Ryanair in Aer Lingus is rumoured to be one of the driving forces behind Commissioner Almunia’s determination to extend the scope of the EUMR to the acquisition of some minority shareholdings.

In January 2013, Ryanair’s second attempt to acquire Aer Lingus was blocked by the Commission and this decision is now under appeal.

Separately, in September 2010 the OFT commenced an investigation into the acquisition of the minority shareholding. In January 2011 Ryanair contested that the OFT was out of time to make a referral to the CC, but the Court of Appeal rejected this claim in May 2012. Similarly, the Competition Appeal Tribunal (CAT) rejected Ryanair’s appeal in August 2012, and the Supreme Court refused leave to appeal. The referral to the CC followed in June 2012, giving the CC a decision deadline of 11 July 2013 to rule on the acquisition of the minority shareholding.

On 30 May 2013, the CC provisionally concluded that Ryanair’s 29.82% shareholding did give it material influence over Aer Lingus’ commercial policy and strategy. After having assessed the market definition, overlaps and counterfactual scenario, the CC has provisionally found that Ryanair and Aer Lingus impose a strong competitive constraint on each other, on overlap routes between Great Britain and Ireland. Further, they are likely to impose a competitive constraint (although less significant) on each other through the threat of entry on routes between Great Britain and Ireland on which the two airlines were not currently both active.

On most overlap corridors, Ryanair and Aer Lingus do not, largely, face a competitive constraint from any other airlines. However, the CC has taken the view that, without Ryanair’s shareholding, competition during the period since 2006 (or in the future) may have developed differently and may have been stronger. The CC notes that it is required to consider not only whether the transaction has, to date, led to a substantial lessening of competition (SLC), but also whether an SLC might be expected in the future.

The CC’s provisional conclusions were that:

- The holding would be likely to be a significant impediment to Aer Lingus’ ability to become a more effective competitor by being acquired by, merging with or acquiring another airline, scale being important for airlines. It could also make it more difficult for it to attract a strategic minority shareholding. This was a factor to which the CC gave particular weight. A number of significant synergies would be likely to arise from a combination...
between Aer Lingus and another airline, over and above those that might arise via looser forms of co-operation. Given wider trends in the airline industry, the pressure on Aer Lingus’ cost base, and the need for additional scale to remain competitive, are likely to become stronger over time.

- Ryanair’s ability to block a special resolution gives it influence over Aer Lingus’ ability to issue shares, and might hamper Aer Lingus’ ability to raise capital, particularly if it needed finance for an acquisition in the future.

- Ryanair would be able to influence Aer Lingus’ ability to dispose of some of its Heathrow slots in order to optimise its slot portfolio. This could increase Aer Lingus’ costs and restrict its flexibility with regard to its network. Given the value and strategic importance of Aer Lingus’ Heathrow slots, there could be a significant impact on Aer Lingus arising from its reduced ability to optimise its slot portfolio.

- Ryanair could influence Aer Lingus’ commercial strategy, under certain circumstances, by exercising the deciding vote in the context of an ordinary resolution.

- Aer Lingus’ effectiveness as a competitor is not affected by Ryanair’s rights (as shareholder) to request information, to call EGMs or propose resolutions at AGMs.

- Ryanair’s minority shareholding increased the likelihood of it mounting a full bid for Aer Lingus, which could significantly disrupt Aer Lingus’ commercial policy and strategy.

- It is unlikely that Aer Lingus would compete less fiercely with Ryanair in order to avoid antagonising its largest shareholder either now or in the future.

- Given the closeness of competition between Ryanair and Aer Lingus, Ryanair would have an incentive to use its influence to weaken Aer Lingus’ effectiveness.

- Although Ryanair’s financial success is linked with that of Aer Lingus through the shareholding, it is unlikely that Ryanair would compete less strongly with Aer Lingus because of its financial interest. Ryanair’s acquisition of its minority shareholding was part of its overall strategy of acquiring the entirety of Aer Lingus.

- It is unlikely Ryanair’s minority shareholding in Aer Lingus would lead to co-ordinated effects.

Compounding the CC’s concerns, it provisionally concluded that substantial entry on routes between Great Britain and the Republic of Ireland is unlikely due to: early morning capacity constraints at Dublin airport and some UK airports; the need to establish a well-known brand and base in Ireland; the relative unattractiveness of the Irish market; the potential for an aggressive response by existing operators; and the level of taxes and airport charges. In summary, it considers that entry or expansion by other airlines would be unlikely to offset any SLC.

The CC is considering the following options:

- Full divestiture. This would remove any ownership link between Ryanair and Aer Lingus. It is likely to be an effective remedy to all aspects of the SLC provisionally identified.

- Partial divestiture (such as to a level that would prevent Ryanair blocking a special resolution).

- Behavioural remedies to accompany a partial divestiture (such as remedies regarding voting behaviour and the solicitation or acceptance of board representation, and potential restrictions on the ability to acquire further shares in the future).

Ryanair has said that if the CC’s final decision maintains this position, it will appeal to the CAT and, if necessary, the Court of Appeal.

CONCLUSION

In conclusion, it is apparent from the experience in the UK that there is a substantive issue to address with minority shareholdings. Final decisions made in the Ryanair case are likely to be decisive for the EU. In the meantime, many open questions remain. If there really is a gap in the enforcement, is an alternative process required or is it the Commission that has simply failed to use the existing mechanisms of Articles 101 and 102 TFEU? If the Commission decides to change the EU MR, how can the process ensure that the potential benefits do not outweigh the costs and what exactly would the scope of the legal amendments look like?

By Susan Hinchliffe, partner, Arnold & Porter (UK) LLP.

E-mail: Susan.Hinchliffe@aporter.com.

NOTES


2) Joaquin Almunia spoke at the Conference of Competition Policy, Law and Economics, Cernobbio, Italy, 2 November 2012.

3) Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group’s acquisition of a 17.9% shareholding in ITV plc dated 29 January 2008 and British Sky Broadcasting Group Plc v The Competition Commission [2010].

4) Ryanair v Competition Commission [2012], judgment of 13 December 2012.

5) Ryanair Holdings plc v Competition Commission [2012], judgment of 8 August 2012.

6) Competition Commission’s Summary of Provisional Findings, of 30 May 2013.

www.inhouselawyer.co.uk
Tab 4: Speaker Biographies
Tim Frazer  
Partner

Tim Frazer represents and advises clients in a range of competition issues including merger, transactional, and conduct cases. He has obtained merger clearance at the European Commission (EC) and national competition authorities for complex cases requiring econometric evidence and Phase 1 disposals, such as Kraft Foods’ hostile bid for Cadbury plc and Kraft Foods/Danone. He has advised clients in price-fixing and other conduct cases in various jurisdictions worldwide. He has designed and implemented on-line competition compliance programmes and audits for international companies. His practice includes advising leading consumer products and pharmaceutical companies on distribution systems, procurement, parallel trade, abuse, and other conduct issues. He divides his time between the firm’s London and Brussels offices.

Tim has advised clients in the food, tobacco, chemicals, pharmaceuticals, medical devices, and consumer products industries, representing them before the UK Office of Fair Trading, the UK Competition Commission, and the European Commission.

He has authored several books on competition law, including Enterprise Act 2002, The Competition Act 1998, Competition Law and Policy, and Monopoly Competition and the Law, as well as many articles on competition law and theory.

Tim was previously a Professor and Dean of Law at Newcastle University.

Representative Matters

- Advised Genzyme in relation to the $20.1 billion hostile bid by Sanofi-aventis
- Advised Kraft Foods on its hostile bid for Cadbury plc and on the disposal of certain businesses required by the EC
- Advised Kraft Foods International on its purchase of the global biscuits business of Danone, and on the disposal of certain brands required by the EC

Contact Information
Tim.Frazer@aporter.com  
tel: +44 (0)20 7786 6124  
fax: +44 (0)20 7786 6299

Tower 42  
25 Old Broad Street  
London EC2N 1HQ

Practice Areas
Antitrust/Competition  
Telecommunications, Internet, and Media  
FDA and Healthcare

Education
LLM, Exeter University, 1976  
LLB, University of Nottingham, 1974

Admissions
England and Wales  
Brussels, Belgium
- Advised Philip Morris International in clearing its acquisition of Papastratos at the EC
- Advised Kraft Foods International in clearing its acquisition of United Biscuits business in Spain and Portugal, at the EC
- Advised IPC Media PLC in relation to conduct and acquisitions in the UK
- Advised Astellas Pharma on competition issues in Europe
- Advised the Association of British Pharmaceutical Industries and a number of leading pharmaceutical companies on the investigation by the Office of Fair Trading into drugs prices in the UK
- Advised Tate & Lyle PLC in relation to competition issues in Europe
- Advised Motorola on agreements and licences in Europe
- Advised eBay in relation to competition issues in Europe
- Advised Solvay UK on disposals in the UK
- Advised a number of leading pharmaceutical companies on acquisitions, co-marketing and co-promotion agreements, and supply-chain management issues in Europe
- Advised IHS (formerly Technical Indexes) on acquisitions and other competition issues in Europe
- Advised a media trade association on digital rights management issues in Europe

**Rankings**

- *The Legal 500 UK 2012* - Recommended for EU and Competition
- *PLC Which lawyer?2012* - Recommended for Life Sciences: Competition/Antitrust
- *PLC Which lawyer?2012* - Recommended for Competition/Antitrust: Non-contentious
- *Chambers Europe: Europe’s Leading Lawyers for Business 2011* for Competition/European Law
- *The International Who’s Who of Competition Lawyers 2011*
- *The Legal 500 UK 2011* - Recommended for Corporate and Commercial - EU and Competition
- *The Legal 500 UK 2011* for TMT: Pharmaceuticals and Biotechnology
Professional and Community Activities

- Fellow, Royal Society of Arts
- Visiting Professor, University of Newcastle, England

Articles

- Tim Frazer and Susan Hinchliffe "How reliable are warranties?" The In-House Lawyer Magazine March 2013
- Tim Frazer and Susan Hinchliffe "Proposed changes to the EU merger control regime" The In-House Lawyer Magazine, December 2012
- Susan Hinchliffe, Tim Frazer and Mark Gardner "The EC’s Decision in Kraft Foods/Cadbury: the assessment of mergers involving consumer products" Antitrust Magazine, Fall 2010
- W. Stephen Cannon, J. Mark Gidley, Michael Kades, Tim Frazer, Bob Leibenluft and Howard Morse "Health Care: Round Table" Global Competition Review, July 2010
- Tim Frazer and Lincoln Tsang "Getting The Deal Through: Pharmaceutical Antitrust - United Kingdom" Global Competition Review, 2010
- Tim Frazer and Lincoln Tsang "Getting The Deal Through: Pharmaceutical Antitrust - United Kingdom" Global Competition Review, 2009
- William Baer and Tim Frazer "International Leniency Regimes: New Developments and Strategic Implications" Corporate Counsel's International Adviser, 1 November 2005
- Tim Frazer “Transatlantic Tension” August 2002
- Tim Frazer “Competition Leniency” June 2002
- Ian Kirby and Tim Frazer "Parallel Trade - How to Protect Your Brand" January/February 2002

Books
- Tim Frazer "Effective Competition Compliance Auditing" Mar. 2012

Presentations
- Tim Frazer "Vertical Restraints and Competition Audits" PMI in Beijing, October 2008

Advisories
- "Supreme Court Opt for Rule of Reason Analysis in Andro-Gel Reverse Payment Decision" Jun. 2013
- "Competition Law and Procurement in the NHS- Recent Developments" Sep. 2011
- "Italian Torpedo" Fails to Sink Rubber Cartel Litigation in English Courts" Aug. 2010
- "Shorter Process and Fair Process- One Step Forward, Two Steps Back For the Office of Fair Trading" May. 2010
- "How the Kraft/Cadbury Bid Cleared Despite a High Market Share" Feb. 2010
"Germany Limits the Reach of its Merger Control Law but Introduces New Foreign Investment Supervision" Feb. 2009


"The Glaxo/Boehringer Case - Court of Appeal's Most Recent Decision, 'For the Present'" Feb. 2008

"The Office of Fair Trading Releases its Report into the Distribution of Pharmaceuticals in the UK" Dec. 2007

"ECJ Decision in the Glaxo/Boehringer Case" Apr. 2007

"THE OFT's NEW APPROACH TO CASE SELECTION: How To Tell If The OFT Will Proceed With A Complaint" Oct. 2006

"Opinion of the Advocate General in the Glaxo Boehringer Case" Apr. 2006

"New EU Regulation on Technology Transfer Agreements" Apr. 2004

"Parallel Trade: Update - Kohlpharma" Apr. 2004

"Parallel Trade: Advisory - Pharmaceuticals" Mar. 2004

"Parallel Trade: Advisory - Pharmaceuticals" Mar. 2004

"Parallel Trade: Update - Pharmaceuticals" Feb. 2004

"Parallel Trade: Update - Pharmaceuticals" Apr. 2003

"Parallel Trade: Update - Pharmaceuticals" Nov. 2002

Multimedia


Christopher Stothers
Partner

Christopher Stothers is a Partner in Arnold & Porter (UK) LLP’s competition (antitrust) litigation group in London and a solicitor-advocate in England and Wales. His practice concentrates on competition litigation and cross-border patent litigation. His practice also covers other types of intellectual property litigation, commercial litigation and arbitration, pharmaceutical regulation, and European Union law.

Dr Stothers is also a Visiting Lecturer in Intellectual Property and Competition Law at University College London. His 2007 practitioner textbook, "Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law", has been well received and was cited by the UK Supreme Court in 2012. He also wrote the Intellectual Property chapter of the 2003 and 2010 editions of "Oliver on Free Movement of Goods in the European Union". He is a frequent conference speaker and he regularly publishes articles in the leading intellectual property and competition journals.

He is committed to pro bono matters, including cases on recognition of change of gender for social security and tax purposes before the First Tier Tribunal, the Upper Tribunal, the Social Security Commissioners and the Court of Appeal.

Representative Matters

- Represented a service provider in antitrust litigation in England.
- Represented an electronics distributor in antitrust litigation in England.
- Advised a software technology company on Phase II merger control before the European Commission.
- Represented an enzyme manufacturer in cross-border patent litigation, including related competition issues.
- Defended a telecommunications company in cross-border patent litigation involving standard setting and FRAND issues.

Professional and Community Activities

Contact Information
Christopher.Stothers@aporter.com
tel: +44 (0)20 7786 6226
fax: +44 (0)20 7786 6299

Tower 42
25 Old Broad Street
London EC2N 1HQ

Practice Areas
Intellectual Property
Antitrust/Competition
FDA and Healthcare
International Arbitration

Education
PhD, Downing College, Cambridge, 2008
BCL, Brasenose College, Oxford, 2000
LPC, Nottingham Law School, 1999
BA, Downing College, Cambridge, 1998

Admissions
England and Wales
European Patent Office

arnoldporter.com
Arnold & Porter (UK) LLP is a limited liability partnership organized under the laws of the State of New York, is regulated by the Law Society, and is an affiliate of Arnold & Porter LLP, a limited liability partnership organized under the laws of the District of Columbia. A list of the firm’s partners and their professional qualifications is open to inspection at the London office. All Partners are either registered foreign lawyer or solicitors.
Committee Member, Competition Law Association (CLA), 2006 - Present

Committee Member, United Kingdom Association for European Law (UKAEL), 2009 - Present

Antitrust Committee Member, American Intellectual Property Law Association (AIPLA), 2009 - Present

Visiting Lecturer in Intellectual Property and Competition Law, University College London, 2007 - Present


Former Visiting Tutor in Contract Law, Oxford University, 2001

Articles

Christopher Stothers "Draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines" Submission of the Competition Law Association to the European Commission consultation, May 2013


Christopher Stothers "Private Actions in Competition Law: a Consultation on Options for Reform" Submission of the Competition Law Association to the Department for Business Innovation and Skills consultation, July 2012

Christopher Stothers "Copyright Owners Cannot Require Satellite Broadcasters to Impose Territorial Restrictions on the Use of Decoder Cards" *Journal of European Competition Law & Practice*, pages 265-268, June 2012

Christopher Stothers "Antitrust in the Pharmaceutical Sector in the EU" *AIPLA Antitrust News*, pages 15-17, May 2012


Christopher Stothers "Trade Mark Owner Can Object to Resale of 'Perfume Testers'" *Journal of European Competition Law & Practice*, pages 42-45, October 2010

Christopher Stothers "ECJ Rules on GSK's 'Dual Pricing' of Pharmaceuticals in Spain" *Journal of European Competition Law & Practice*, pages 123-124, March 2010

Christopher Stothers "ECJ Upholds 'Compulsory Licences' of Green Dot Trade Mark" *Journal of Intellectual Property Law & Practice*, December 2009
Christopher Stothers "Copyright and the EC Treaty: Music, Films and Football" posted with the kind permission of Sweet & Maxwell, 31(3) EIPR 272-282, May 2009


Books


Presentations

Christopher Stothers “The Murphy licensing case” Scottish Competition Law Forum seminar on Competition and the Media, Edinburgh May 2012


Christopher Stothers “Reconciling competing interests” LexisNexis conference on IP and Competition November 2011

Christopher Stothers “Private Actions” Arnold & Porter Antitrust Forum, Brussels June 2011

Christopher Stothers “Regulation of Competition in Europe and the UK: A Map for IP Users” CLT conference on IP and Competition Law May 2011

Christopher Stothers “Telecoms and Patents” Fordham Conference on International IP Law, New York April 2011

Christopher Stothers "Satellite decoder cases - competition issues" BLACA conference, Edinburgh October 2010

Christopher Stothers "IP and Abuse of Control" CLT conference on Ownership and Control of IP Rights May 2010

Christopher Stothers "Impact of the Single Market Imperative" SMi conference on Pharmaceutical Parallel Trade February 2010

Christopher Stothers "Competition law - Distribution agreements and selective distribution" UK Office of Fair Trading conference on Brand Protection and Competition January 2010

Advisories


"More Cost-Efficient Civil Litigation In England & Wales" Mar. 2013

"Italian Torpedo" Fails to Sink Rubber Cartel Litigation in English Courts" Aug. 2010
Susan Hinchliffe
Partner

Susan Hinchliffe is an English qualified solicitor with experience advising clients operating in a variety of industry sectors including: automotive components, pharmaceuticals and agrochemicals, telecommunications, branded consumer goods, and tobacco on a broad range of EU and UK competition law issues. Her practice has a particular focus on merger control, and she has advised on all aspects of the European Commission (EC) Merger Regulation in relation to numerous transactions. She also advises on UK merger control issues and has extensive experience in coordinating multijurisdictional mergers. Her practice includes counselling and compliance including the conduct of compliance auditing projects. She also advises on cartel matters including strategic issues, investigations and the management of large document review processes.

Ms. Hinchliffe also advises on European product regulations applying to a broad range of sectors including electrical goods, chemicals (including registration, evaluation, authorisation and restriction of chemical substances), food, and tobacco. This advice includes issues of interpretation and national implementation, and is frequently provided to clients in the context of their overall strategic planning.

Representative Matters

**Antitrust Transactions**

- *Monsanto* on the Phase II investigation by the European Commission of the sale of its sunflower seed business to Syngenta.
- *GE* on its acquisition of Wellstream PLC.
- *GE* on its US$2.8 billion acquisition of the well support division of John Wood Group PLC.
- *Kraft Foods* on its hostile bid for Cadbury PLC and on the disposal of certain businesses required by the EC.
- *Kraft Foods* in the sale of its salted snacks business in the Nordic and Baltic regions.

Contact Information
Susan.Hinchliffe@aporter.com
tel: +44 (0)20 7786 6122
fax: +44 (0)20 7786 6299

Tower 42
25 Old Broad Street
London EC2N 1HQ

Practice Areas
Antitrust/Competition
FDA and Healthcare
Telecommunications, Internet, and Media
Consumer Protection and Advertising

Education
LLB in Law with French,
Leicester University, 1990
Diplome d’Etudes Juridiques,
Strasbourg University, 1989

Admissions
England and Wales
Brussels, Belgium
- Monsanto in its US$850 million acquisition of De Ruiter seeds.
- Kraft Foods in its US$7.2 billion acquisition of Danone Biscuits including the negotiation of commitments to secure a Phase I clearance.
- SBC in relation to its US$16 billion acquisition of AT&T Corporation.
- AT&T in relation to its US$67 billion acquisition of BellSouth.
- ArvinMeritor on its (aborted) hostile bid for Dana Corporation, and on its subsequent acquisition of various manufacturing assets from Volvo AB.

Rankings

- The Legal 500 UK 2012 - Recommended for EU and Competition
- PLC Which lawyer?2012 - Recommended for Competition/Antitrust: Non-contentious
- The International Who’s Who of Competition Lawyers 2011
- The Legal 500 UK 2011 - Recommended for Corporate and Commercial - EU and Competition

Articles

- Susan Hinchliffe “Passive investments and the EU Merger Regulation” The In-House Lawyer Magazine July 2013
- Tim Frazer and Susan Hinchliffe "How reliable are warranties?" The In-House Lawyer Magazine March 2013
- Tim Frazer and Susan Hinchliffe "Proposed changes to the EU merger control regime" The In-House Lawyer Magazine, December 2012
- Christopher Stothers, Susan Hinchliffe and Mark Gardner "Forum Shopping and “Italian Torpedoes” in Competition Litigation in the English Courts" posted with the kind permission of Sweet & Maxwell, 4(2) Global Competition Litigation Review, pages 67-73, June 2011
- Susan Hinchliffe, Tim Frazer and Mark Gardner "The EC’s Decision in Kraft Foods/Cadbury: the assessment of mergers involving consumer products" Antitrust Magazine, Fall 2010
Books


Presentations

- Susan Hinchliffe "Competition Law Challenges in the Retail Sector" IBC Legal, Brussels, October 2011
- Susan Hinchliffe "Competition Law, Consumer Goods and Retail, Global Competition Review" London, May 2011
- Susan Hinchliffe "International Cartels" IBRAC Annual Antitrust Conference, Brazil, November 2010
- Susan Hinchliffe "Competition Law, Consumer Goods and Retail, Global Competition Review" London, March 2010

Advisories

- "Competition Law and Procurement in the NHS- Recent Developments" Sep. 2011
- "Italian Torpedo" Fails to Sink Rubber Cartel Litigation in English Courts" Aug. 2010
- "Shorter Process and Fair Process- One Step Forward, Two Steps Back For the Office of Fair Trading" May. 2010
- "How the Kraft/Cadbury Bid Cleared Despite a High Market Share" Feb. 2010
- "Germany Limits the Reach of its Merger Control Law but Introduces New Foreign Investment Supervision" Feb. 2009
- "BSKYB/ITV-The UK Competition Authorities Take the Rules on the Acquisition of Minority Shareholdings by Competitors One Step Further" Jan. 2008
- "The Office of Fair Trading Releases its Report into the Distribution of Pharmaceuticals in the UK" Dec. 2007
- "THE OFT's NEW APPROACH TO CASE SELECTION: How To Tell If The OFT Will Proceed With A Complaint" Oct. 2006
- "FTC and European Commission Focus on Obesity" Mar. 2005
"New EU Regulation on Technology Transfer Agreements" Apr. 2004

Multimedia

- Dr. Stephanie Birmanns, Susan Hinchliffe and Annette Luise Schild. "EU Competition Law Update" February 06, 2013.
- G. Axel Gutermuth, Luc Gyselen and Susan Hinchliffe, "WEBCAST: First Half of 2011 in Review: Developments in European Competition Law that Every in-house Counsel Should Know" June 30, 2011. (also available as a Podcast)

Newsletters

Tab 5: Practice Overview
ANTITRUST/COMPETITION

Our Antitrust/Competition practice is recognized worldwide for its breadth, depth, and excellence.

- Over 80 attorneys in our US and European offices handle complex and critical antitrust/competition matters.
- Our experience covers the full range of US and EU antitrust and trade regulation matters, such as pricing, mergers, distribution, advertising, intellectual property, dominance and abusive conduct, cartel, and state aids (both at the EU and Member State levels).
- Success requires close coordination. We frequently represent companies facing multijurisdictional merger, cartel, or abuse of dominance/monopolization investigations. Where appropriate, we involve attorneys from other practice groups for a multidisciplinary approach to client challenges.
- Our experience spans virtually all sectors, including biotechnology, chemicals, energy, information technology, consumer goods and services, financial services, media, pharmaceuticals, medical devices, healthcare, and telecommunications.

Third-party organizations repeatedly recognize the quality of our Antitrust practice:

- *Global Competition Review*'s “GCR Global Elite” 2012 ranked our practice as fourth worldwide.
- *Chambers USA 2013* ranked our practice as one of the top in the nation.

Our deep understanding of the antitrust agencies and our frequent dealings with them give us both valuable insight and credibility. Our team includes lawyers who have held significant senior government positions in Europe and the US, including Assistant Director of the FTC’s Bureau of Competition, Deputy Assistant Attorney General and Chief of the Communications and Finance Section at the Department of Justice Antitrust Division, and Head of the Food and Pharmaceuticals and Financial Services Units in the European Commission’s Competition Directorate General. *Chambers and Partners* quoted a client as saying, “This practice is in a league of its own: We particularly value its relationships with the regulatory agencies and have found it particularly reasonable and flexible with regard to its fees.”

**European Antitrust Practice**

Our European and International Competition Law practice is based in Brussels and London. Led by a senior team of six partners and three counsel, we provide clients the benefit of an in-depth understanding of the workings of the European legal institutions. We draw on decades of combined experience handling cases before the Commission (DG COMP), the EU General Court, and the Court of Justice, as well as national agencies and courts. Several of our attorneys have spent time working in DG COMP, including in senior positions. We also have insight gained from representing the Commission in cartel litigation before the EU courts. Our team has been recognized for its excellent judgment and skill in handling more complex cases and ability to work
on a global scale and provide practical advice. Clients also frequently praise our ability to work efficiently together with other counsel on large international matters.

We advise a global client base on the full array of competition law issues, including merger control, cartels, other restrictive practices, abuse of dominance, and state aid. Our clients often are at the forefront of their industry and come from all sectors of the economy, including life sciences, financial services, high-tech, FMCG, chemicals, and transport.

We help clients avoid and manage antitrust risk through compliance training and internal audits. We have significant experience handling the merger control aspects of large transactions, including Phase II investigations, negotiating complex structural and behavioral remedies, and coordinating multijurisdictional filings. We regularly represent clients in cartel investigations, assisting in dawn raids, seeking immunity or leniency, and coordinating those efforts with counsel in other jurisdictions. We frequently advise clients on information exchange between competitors, complex distribution and licensing issues, life-cycle management, and issues in the interface between competition law and IP.

Using our close relationships with leading national law firms worldwide, the practice offers a “one-stop shop” service to clients involved in multijurisdictional matters. Chosen for their in-depth experience, excellent client-service and local connection, we work through an informal and nonexclusive network of leading antitrust specialists from over 40 key antitrust jurisdictions in the Americas, Africa, Asia, Australia, and Europe.

Recent practice highlights include representing:

- Intel in the purchase of McAfee for US$7.68 billion.
- Several Asian and other international companies in pending cartel investigations before the EC.
- AREVA in EC cartel litigation before the European General Court and the European Court of Justice.

**Antitrust Litigation**

Arnold & Porter LLP’s Antitrust Litigation practice is characterized by the complexity of the cases we handle, our trial-ready approach and our track record. We succeed before trial, in the court room and on appeal. Our matters often involve high-stakes parallel government investigations and private civil actions, novel theories and cases in multiple courts. We meet these challenges through interdisciplinary teamwork. For each matter, lawyers from our offices from coast-to-coast in the US and in Europe work with our clients to form a case team that has trial, antitrust and industry experience.

- Titan America in a series of class actions alleging price fixing in the ready-mix concrete industry, in which our team defeated class certification for both direct and indirect purchaser classes.
- VISA USA in a series of matters raising antitrust challenges to VISA’s rules and structure in which we coordinated multiple defense efforts across cases with different plaintiffs and theories where different aspects of conduct were challenged.
- Laboratoires Fournier in a two-week jury trial against competitor and direct purchaser claims that our client and its contract partner had engaged in predatory innovation with regard to the launch of new prescription drug formulations.
Civil Antitrust Investigations
Our attorneys have broad experience in defending clients in civil antitrust investigations initiated by the US Federal Trade Commission (FTC) and Antitrust Division of the US Department of Justice (DOJ), US state attorneys general (including multistate attorney general working groups), the European Commission (EC), the UK Office of Fair Trading, the German Federal Cartel Office, and other government agencies around the world. We have several former government officials from the FTC, the Antitrust Division of the DOJ, and the EC in our group.

Our approach to these matters combines a comprehensive understanding of the facts and relevant legal standards with our in-depth experience regarding agency enforcement policies and priorities. We are able to successfully coordinate responses when there are parallel investigations by multiple enforcers, and understand the interplay between government investigations and related private litigation.

By virtue of our extensive experience working with the relevant investigating agencies, we are able to work with them to focus the areas of inquiry and minimize our clients’ burden in responding to requests for information and documents. Then, working with economists and other experts where appropriate, we act as aggressive advocates for our clients’ position on the legal and factual merits. In a number of cases, we have succeeded in convincing the enforcers to close their investigation without taking any action. Where, however, the enforcement agencies are committed to challenging the conduct that they have investigated, we have significant experience in working with clients and the enforcers to negotiate resolutions that address the enforcers’ concerns while protecting our clients’ core business interests.

While many of the civil antitrust investigations on which we work are nonpublic, significant examples of our recent work in this area include representing:

- Visa in several investigations by the DOJ and multistate attorney general working groups, two of which were closed without any action, and one of which was resolved by a consent decree.
- Intel in connection with the settlement of the FTC’s investigation of Intel’s conduct relating to microprocessors and graphics chips.
- A major Hollywood studio in an EU Commission investigation into most favored nation clauses in pay-TV agreements.

Consumer Protection and Advertising
Our attorneys provide counseling to many clients in the United States with respect to advertising, privacy, and consumer protection issues. We advise clients in connection with Federal Trade Commission (FTC) and state attorney general investigations, including inquiries relating to the marketing of domain name services, the marketing and selling of weight loss products and dietary supplements, the marketing of violent entertainment and food to children, and Fair Debt Collection Practices. We have negotiated consent orders with the FTC, as well as represented clients in federal litigation with the FTC in connection with the enforcement of those orders. We also advise clients with respect to specific FTC rules and state marketing laws, including Made in U.S.A. claims, environmental claims, telemarketing, mobile and other newer forms of marketing, sweepstakes, promotions, gift cards, and pricing claims.

The firm’s consumer protection attorneys handle all types of related private litigation cases from consumer fraud class action matters to competitor Lanham Act claims, as well as self-regulatory challenges before the National Advertising Division.
Our consumer protection and marketing experience extends internationally, and attorneys in our European practice advise on regulatory issues arising under EU law in relation to specific industry sections, including food, pharmaceuticals, financial services, tobacco, chemicals, and other consumer products.

**Criminal Antitrust Practice/Cartel Investigations**

International cartel enforcement is increasingly a coordinated effort by the Antitrust Division of the Department of Justice (DOJ), the European Commission (EC), and other competition authorities. As a result, we employ a coordinated, global strategy to defend clients. Our attorneys in the US and in Europe work in tandem with a network of counsel in other countries to fashion and implement a comprehensive strategy in criminal antitrust matters.

Arnold & Porter LLP lawyers represent an international clientele of business organizations and individuals. We are or have been involved in the most well-known industry-wide criminal and international cartel investigations conducted by the DOJ Antitrust Division or the European Commission (or both) for many years. These include investigations into the following industries, among others: municipal bonds, airline passenger and cargo, auto parts, refrigeration components, high-voltage power cable, cathode ray tubes (CRT), Dynamic Random Access Memory (DRAM)/computer memory devices, maritime shipping, optical disk drives, food additives, industrial chemicals, cellular phones, dairy foods, vitamins, orthopaedic implant devices, and industrial diamonds.

In the US, a key aspect of our cartel practice is the defense of private antitrust litigation which regularly follows closely after the announcement of a government investigation. In the EU, our attorneys litigate cartel cases in the Luxembourg-based General Court and the European Court of Justice (e.g., Dutch bitumen, gas insulated switchgears, international removals).

Our attorneys have obtained corporate amnesty agreements, secured nonprosecution dispositions, negotiated countless plea agreements, as well as tried cases on their merits. In a particularly significant criminal antitrust trial, we achieved dismissal of the US government’s criminal case against GE for allegedly fixing the price of industrial diamonds. Other representations include:

- Hoffmann-La Roche Inc. and Roche Vitamins Inc. in resolution of the largest criminal price-fixing case in US antitrust history.
- Micron Technology, Inc. in obtaining amnesty in connection with the DOJ’s criminal investigation of DRAM pricing.
- A major financial services firm in connection with government investigations into the marketing and sale of guaranteed investment contracts and other financial instruments to municipalities.

There have also been numerous nonpublic representations where we have successfully advocated for declination of prosecution and obtained other favorable results for our clients.

**Global Antitrust Counseling**

Antitrust and competition law concerns are best handled proactively—prior to the instigation of government investigations or civil litigation. Our attorneys work closely with our clients’ in-house counsel, local counsel, and business professionals to find effective and practical solutions to address potential antitrust concerns.
Clients turn to Arnold & Porter LLP for advice and counseling in both the US and Europe on antitrust and competition law matters, including distribution, pricing, compliance, joint ventures, licensing, purchasing, lawful collaboration with competitors, standard setting, and other trade association issues. The depth of our Global Antitrust/Competition practice allows the firm to offer a complete range of compliance, audit, and training programs tailored to the needs of each client. Most countries outside the US have adopted competition laws based on the wording and principles of EU law. Our European attorneys are therefore able to assist local and in-house counsel in developing compliance strategies based on their experience practicing EU law. Our lawyers help clients reduce antitrust risks as well as understand how the latest developments in antitrust laws worldwide may affect global business strategy or operations. Clients often seek our experience in applying antitrust laws to e-commerce, high technology licensing, and collaborative standard setting.

Our lawyers have provided antitrust counseling on a wide range of important client matters on both sides of the Atlantic, such as:

- Counseling a consortium of technology and media companies on standard-setting activities in the US and Europe.
- Conducting an internal antitrust compliance audit for a global energy and chemicals company as well as creating tailored compliance and training materials for the client.
- Assisting a medical technology company in a joint venture to create a global healthcare exchange for the sale of medical equipment and services.

**Mergers and Acquisitions**

Our antitrust group, which is comprised of attorneys in the US and Europe, has extensive experience securing approval for mergers and acquisitions from the US Federal Trade Commission (FTC) and US Department of Justice (DOJ) under the Hart-Scott-Rodino Act; the European Commission (EC) under the EC Merger Regulation; and other competition authorities around the world. Our experience covers virtually all industries, including biotechnology, computer and information technology, consumer goods and services, (petro) chemical, energy, financial services, healthcare, industrial equipment, media, pharmaceuticals, and telecommunications. We work with leading economists and other antitrust counsel to facilitate the speedy, successful, cost-effective, and seamless worldwide approval of transactions, whether for small private companies or the largest public companies, whether in one jurisdiction or involving competition authorities worldwide. We have several former government officials from the FTC, the Antitrust Division of the DOJ, and the EC in our group.

Arnold & Porter attorneys work with our clients at every step of the clearance process: analyzing risks associated with individual targets or buyers (and developing strategies as part of such engagements), structuring the transaction, conducting due diligence, facilitating appropriate information exchange between competitors, devising strategy to avoid gun-jumping, drafting contractual provisions relating to the merger review process and other antitrust aspects of the transaction, drafting of documents and participation in meetings with the agencies (both prior and after notification), representing clients in in-depth merger investigations, developing substantive defenses, devising and negotiating remedies with the enforcement agency where required, and generally working towards a coordinated timetable and outcome throughout the various jurisdictions involved in the approval process.

We work with our clients to fashion creative solutions to obtain expeditious clearance of their transactions. In some cases, we have delayed making formal filings until the competition agency
has had significant time to begin its investigation, thereby narrowing the scope of future requests. In others, we have worked out settlements early, thereby avoiding the need to respond to significant information requests. We recognize that no one strategy fits every transaction and tailor our approach to the specifics of each client’s needs.

Our lawyers have obtained antitrust clearance for some of the most significant and complex mergers and acquisitions on both sides of the Atlantic, including:

- General Electric in the sale of a majority stake of NBC Universal to Comcast
- Intel Corporation in its US$7.7 billion purchase of McAfee
- BASF SE in its US$3.8 billion purchase of Cognis