The first blow is half the battle; the 'torpedo' in (international) legal proceedings

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1 Introduction
Procedural law provides the rules of play for litigation. As lawyers in (international) litigation practice, we increasingly see, however, that procedural law can be of service when making strategic choices before commencing and/or during proceedings. One good example in this context is "forum shopping", where one party from several objectively competent forums unilaterally selects the forum where a favourable decision is anticipated. The (strategic) choice of where an action is brought is not reserved solely to potential claimants. The (potential) defendant can also exert influence on this. A defendant or potential defendant can do this by claiming what is termed a negative declaration (also described as filing a negative action). This is understood to mean a claim of a defensive nature. The final objective of a negative action is to obtain a declaratory decision to the effect that a subjective right on which a potential claimant is or might be relying does not exist, or at least that its substance is more restricted than the claimant or potential claimant suggests. Bringing a negative action therefore means that a party has control (to some extent) over the jurisdiction where the proceedings are commenced. In the past, potential defendants often opted for a jurisdiction that was known for protracted proceedings (for instance, due to backlogs in the courts), so as to cause delays (which might be advantageous). Italy used to be well-known as a jurisdiction with protracted proceedings, therefore reference was made to "launching an Italian torpedo" when a potential defendant initiated a negative lawsuit (before an Italian court). Protracted proceedings now appear to be much less of an issue with Italian courts and (as we shall explain below) factors other than protracted proceedings can be of relevance in determining which court in which country should be approached pre-emptively by a potential defendant. Against this background, it is no longer customary to talk about "Italian torpedoes", though practitioners nowadays ordinarily talk about torpedoes (and launching them).

Originally, the negative action was frequently observed in intellectual property (IP) cases. Nowadays, we also see torpedoes being launched in a range of (international) cartel damages cases. A good example of this is a recent judgment by the District Court of Gelderland. We will discuss this judgment in this article. Before doing so, however, we first make a few introductory comments about the torpedo in cartel damages claims in relation to which we will provide a brief explanation of the following three topics: (1) the negative action and its connection with the lis pendens rule under the Brussels I Regulation (the Regulation), (2) competent courts in (negative) cartel damages claims, and (3) abuse of procedural law in negative actions. We will also consider the

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5 The term cartel damages means: claims for damages brought by (allegedly) disadvantaged parties, for instance further to cartel rulings by (international) competition authorities. This type of claim often concerns clustered damages claims collected and brought by a (claim)vehicle especially set up for this very purpose, see also E.M.M. Besselink & M. van Hooijdonk, De 'Italiaanse torpedo' getorpedeerd?[in Dutch], MP 2015, vol. 3, p. 18.
subject matter from a slightly wider perspective by taking a glance outside the Dutch borders. In this context, we will assess how English courts deal with pre-emptive negative actions that were brought earlier in a different Member State. The reason that we take this look across the border is twofold. First, whether or not to initiate proceedings in the UK is in practice often taken into consideration in a strategic assessment, partly in light of the high(er) costs that may be involved in litigating in England and partly in view of of the far-reaching disclosure obligations under English procedural law (see also section 2). Second, we have noticed that in practice every now and then the perception exists that English courts are less willing to apply the Regulation strictly. We have tried to test the accuracy of this perception. We round off with our conclusions.

2 The torpedo in cartel damages cases

In practice, the Netherlands is regularly perceived as an attractive jurisdiction to litigate in cartel damages cases. Apart from the Netherlands, Germany and England are also known as preferred jurisdictions for initiating proceedings in cartel damages cases.

Various circumstances can play a role in the choice of where to initiate a cartel damages claim. Important factors in choosing a forum include the costs of the proceedings and the potential risks of a (high) order for costs. In addition, favourable procedural law can be relevant in the assessment where proceedings will be initiated. In this context, in the first place consideration could be given to the differences that exist in relation to the possibilities of gathering evidence. The English legal system is well-known for its extensive disclosure obligations. During the disclosure phase, the parties to the proceedings are obliged to submit all documents that are relevant to the dispute. This includes not only documents that support the parties’ own positions, but also those that negatively affect them. Selecting, submitting and preparing large numbers of documents takes a great deal of time. The parties to the proceedings can experience this as burdensome and, of course, apart from that disclosure can entail a certain degree of exposure. Secondly, favourable procedural law can, for example, call a halt to the existing possibility under certain (substantively applicable) legal systems to claim punitive or treble damages due to breach of the public order. Other relevant circumstances include the duration of the proceedings, language barriers and geographical distances. Similarly, a party will in general terms weigh the advantages of initiating proceedings in a foreign jurisdiction against initiating proceedings in its home country. In its own jurisdiction, a party is familiar with the (procedural) legal system and will have a better grasp of the potential risks and expenses relating to litigation.

2.1 The negative action and its link to the lis pendens rule under the Regulation

The Regulation contains rules of private international law to determine which courts have jurisdiction over claims in European civil and commercial matters. The Regulation contains a lis pendens rule which intends to regulate situations where cross-border proceedings are pending in different Member States. The main rule under Article 29 of the Regulation entails that if a claim is pending before two courts of Member States at the same time between the same parties, concerning the same object and involving the same cause of action, the court that is seised last is required to stay the proceedings on its own motion. If the court first seised confirms its jurisdiction, then the court subsequently seised must decline jurisdiction. In the European Court of Justice (ECJ) held that the lis pendens rule also applies to negative actions. In Tatry, the ECJ held that the positive and negative damages action was founded on the same cause of action and that both actions concerned the same object. On this basis, a negative action initiated by the (alleged) cartel member cannot be compromised by a subsequent positive claim for damages initiated by a disadvantaged party. In practice, the (alleged) cartel member can take advantage of this by

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10 Zippo 2009, p. 673.
11 The Recast Regulation came into effect on 10 January 2015. The reordering included a renumbering of the Regulation’s articles. For reasons of clarity, we have followed the numbering of the current Regulation in this article. Article numbers from the current Regulation’s predecessor, i.e. Regulation (EC) 44/2001, are designated as ‘[former Article No.]’.
12 Recital 21, Regulation.
13 ECJ 25 October 2012, case C-133/1, NJ 2013/80, with commentary by L. Strikwerda (Folien Fischer Ritrana).
14 ECJ 25 October 2012, case C-133/1, NJ 2013/80, with commentary by JCS ([Gubisch].
15 ECJ 6 December 1994, case C-406/92, NJ 1995/659 with commentary by ThMdB (Tatry). In his opinion for the judgment, A-G Tesauro pointed out that the two claims were ‘nothing other than (…) two sides of the same coin’ (no. 16).
16 C. Vanleenhove, European Court of Justice Opens the Door Further to Torpedo Proceedings, NiPR 2013, vol. 1, p. 25.
proactively bringing a negative action before its court of preference. The (alleged) cartel member can seek a declaratory decision from that court to the effect that there is no liability vis-à-vis (a large number of) purchasers. The added value of acting in this way is that the (alleged) cartel member may prevent disadvantaged parties from bringing claims for damages in a jurisdiction that the (alleged) cartel member perceives as being less attractive. In order to effectively prevent potentially disadvantaged parties from bringing damages claims in a certain jurisdiction, the (alleged) cartel member will often try to involve as many potential disadvantaged parties in the proceedings as possible, in light of the requirement of Article 29 of the Regulation that both claims must concern the same parties.18

Aside from the lis pendens rule in Article 29 of the Regulation, in Article 30 (former Art. 28) the Regulation also contains a provision dealing with the situation that ‘related actions’ are pending before courts of different Member States. Whereas Article 29 of the Regulation allows no degree of discretion of the court to assess whether the proceedings must be stayed if the cumulative requirements incorporated in that Article are satisfied, Article 30 of the Regulation particularly leaves it in the court’s discretion to decide whether ‘related actions’ have to be stayed in the given circumstances. Actions are considered ‘related’ when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separately judging the cases.19 Art. 30 of the Regulation might, for instance, come into play if not all of the parties involved in an (earlier) negative action are similar to the parties to a (later) positive action.

2.2 Competent courts for (negative) cartel damages claims

An (alleged) cartel member can bring a negative action before all of the ‘normally’ competent courts.20 Consequently, the negative action can in any case be brought before the court of the defendant’s domicile (Art. 4 [former Art. 2] of the Regulation).21 If there are multiple defendants, Article 8(1) [former Art. 6(1)] of the Regulation offers a solution: jurisdiction in relation to one of the defendants implies jurisdiction in relation to the other defendants as well. A precondition for the application of Article 8(1) of the Regulation is that jurisdiction in relation to the primary (or ‘anchor’) defendant exists on the basis of Article 4 of the Regulation.22 Art. 8 of the Regulation further requires that the claims be so closely connected that it is expedient to hear and determine them together. In the recent CDC Hydrogen Peroxide SA v Evonik Degussa judgment, the ECJ held that this requirement is in principle satisfied in case of cartel damages claims.23 This line was already recognised in case law of the lower courts of the Netherlands.24 A recent judgment of the District Court of Amsterdam confirms that reliance on Article 8 of the Regulation also succeeds in the case of a negative action in a cartel damages case:

‘In the view of the District Court, there is a close connection, within the meaning of Article 6(1) [now Art. 8(1), authors] Brussels I, between the claims brought against the defendants based in the Netherlands on the one hand and the defendants based in Germany and the United Kingdom on the other hand. The claims, or at least the claims against which KLM et al. are now defending themselves by means of a negative declaration, are based on the same (alleged) cartel and the said defendants belong to the same group of companies (the DB Group). (…)’25

On the basis of Article 7(2) [former 5(3)] of the Regulation a negative action may also be brought before the court of the place where the harmful event occurred (locus delicti).26 In the scholarly literature doubts were expressed as to whether Art. 7(2) of the Regulation also applies in cartel damages cases.27 This question also arose in the CDC Hydrogen Peroxide SA v Evonik Degussa judgment mentioned above. The ECJ held that Art. 7(2) of the Regulation is indeed applicable to cartel damages claims. According to the ECI, the place where the harmful event occurred in a cartel damages claim is primarily the place where the cartel

18 The case law of the ECJ makes it clear that the expression ‘the same parties’ does not mean that the parties must always be the same legal entities. Parties can be considered ‘the same’ if the interests of the parties concerned are ‘identical and indissociable’; see ECJ 19 May 1998, case C-351/96 (Drouot Assurances).
21 Vanleenhove 2009, p. 25.
22 Strikwenda 2012, p. 266.
23 General Court 21 May 2015, Case C-352/13, RvdW 2015/933 (CDC v Degussa).
26 ECJ 25 October 2012, case C-133/11, NJ 2013/80, (Folien Fischer v Ritrauma). The place where the harmful event occurred covers both the place of the act (Handlungsort) as well as the place where the damages had its immediate effect (Erfolgsort).
was definitively established. In case of a negative action, it is conceivable that an (alleged) cartel member will argue that the harmful event occurred in the country where it operates. If the cartel was definitively established in that country, the judgment of the ECJ offers a point of reference for the argument that the court in that country will have jurisdiction over the negative action. In this sense, this judgment increases the possibilities for an (alleged) cartel member to forum shop.

2.3 Abuse of procedural law in negative actions

For some, seeking negative declaratory relief has a negative sound. Negative actions are quite often associated with abuse of procedural law. However, the ECJ has always been rather receptive to these arguments. By way of an example, the ECJ has emphasised in a number of judgments that the lis pendens rule must be complied with strictly and that deviating from this rule is in principle not justified on the basis of any (alleged) improper use of rights. By extension, the ECJ held in Turner v Grovit that a party may not be prevented from initiating legal proceedings in a Member State on the basis that the purpose of initiating those proceedings is to obstruct proceedings in another Member State. The ECJ also emphasised in Gasser that when the conditions in Article 29 of the Regulation are satisfied, the court last seised must always stay the proceedings until the court first seised has established its jurisdiction. According to the ECJ, this is not affected by the circumstance that the court first seised is designated by an exclusive choice of forum agreement, and that contrary to this agreement a negative action was brought before a court that may need an ‘unreasonably long period’ to establish its jurisdiction.

In light of this case law, it will be difficult for a court to circumvent the application of Article 29 of the Regulation, irrespective of the motives of the party initiating the negative action. Gasser has been heavily criticised in the scholarly literature. Some consider that strict enforcement of the lis pendens rule provokes a ‘race to the courthouse’, while others say that it ‘promotes a claims culture’. The ECJ appears to be fairly insensitive to these arguments. With Gasser, the ECJ cleared the way for negative actions. It must be noted that the Gasser judgment was rendered on the basis of the predecessor of the current Regulation (i.e. Regulation (EC) 44/2201). The present Regulation makes an exception to the strict lis pendens rule for exclusive choice of forum agreements. Article 31(2) of the Regulation states that, in the case of a choice of forum agreement, the (exclusively) chosen court has priority. When a case is brought before a chosen court, any other court that is seised must stay the proceedings until the chosen court has ruled on the validity of the choice of forum. This exception solely applies to choice of forum agreements (as defined in Article 25 [former Art. 23] of the Regulation) and does not detract from the fact that, in the absence of such an exclusive choice of forum agreement, there is no scope for deviating from the primary rule in Article 29 of the Regulation.

3 Judgments of the District Court of Gelderland and the Landgericht Mannheim

3.1 The (alleged) ‘sugar cartel’

The German competition authority, known as the Bundeskartellamt, announced on 18 February 2014 that it had reached a settlement with three large German sugar producers in the matter of the ‘sugar cartel’. Südzucker, Nordzucker and Pfeifer und Langen had allegedly made anticompetitive arrangements in the period from 1990 to 2009 and were collectively fined EUR 280 million. The media immediately reported that Südzucker, Nordzucker and Pfeifer und Langen were facing several damages claims the impact of which could accumulate to as much as EUR 3 billion. One of the purchasers that actually initiated proceedings was Dawn Foods, a producer and supplier of ‘sweet pastries’ based in the USA. Dawn Foods and its affiliated legal entities had been purchasing the sugar they needed for their products from Südzucker since 1996. Based on the findings of the Bundeskartellamt, Dawn Foods, in the proceedings before the District Court of Gelderland, claimed compensation for the loss incurred due to Südzucker’s participation in the (alleged) cartel. Two weeks before the Dutch proceedings were initiated, however, Südzucker pre-emptively commenced a negative action before the Landgericht Mannheim in Germany. In the Dutch proceedings five entities of the Dawn Foods group were involved as claimants, two of which, Dawn Foods B.V. and Dawn Foods Germany GmbH,
were also involved in the German proceedings as defendants. In the Dutch proceedings Südzucker principally argued that the District Court of Gelderland lacked jurisdiction, pursuant to Article 29 of the Regulation. Alternatively, Südzucker asserted that the Dutch proceedings must be stayed on the basis of Article 30 of the Regulation. Dawn Foods, on the other hand, argued that Articles 29 and 30 of the Regulation lack applicability because Südzucker was abusing procedural law.

3.2 Intermezzo – Landgericht Mannheim 10 July 2015

Before the Landgericht Mannheim, Dawn Foods also argued that Südzucker abused procedural law by initiating a negative action. Dawn Foods consequently requested the Landgericht Mannheim to disallow Südzucker’s action. On 10 July 2015, the Landgericht held that Dawn Foods’ argument of abuse of procedural law was not valid. Referring to Turner v Grovit and Gasser, the Landgericht recollected that a party is not prohibited from initiating legal proceedings in a particular Member State, on the sole basis that doing so might obstruct proceedings in a different Member State. By extension, with reference to CDC Hydrogen Peroxide SA v Evonik Degussa, the Landgericht held that it had jurisdiction over Südzucker’s claims on the basis of Article 7(2) of the Regulation because the ‘sugar cartel’ was established and put into practice – in first instance – in Germany. The Landgericht commented that Südzucker was at liberty to exercise its right to choose any competent court. In principle, Dawn Foods had to accept that choice. The Landgericht also considered it important that Germany is generally not a Member State known for unacceptably slow legal proceedings. The fact that there was no abuse was not altered by the circumstance that – in the words of Dawn Foods – there had been a race to serve the writ, or that Südzucker had commenced the proceedings ‘secretely’.

3.3 Attitude of courts in the Netherlands and Germany towards the torpedo in cartel damages cases

In the Dutch proceedings, the question under consideration was whether Südzucker could rely on Articles 29 and 30 of the Regulation, or whether this would be impeded by abuse of procedural law. According to Dawn Foods, Südzucker’s abuse entailed primarily secretly initiating proceedings in Germany while settlement negotiations were ongoing, and without Dawn Foods having to be prepared for this, by virtue of which Südzucker artificially created the conditions for application of Articles 29 and 30 of the Regulation. The District Court of Gelderland held that it was not its task to explore the question whether a party was abusing the right to bring an action by initiating proceedings in Germany. This is a matter for the German court. Since the German court ruled that initiating proceedings in Germany was not abusive, the District Court of Gelderland had to respect this. Article 29 of the Regulation was therefore applicable (as the conditions in that Article were otherwise satisfied). Consequently, the Dutch proceedings had to be stayed until the jurisdiction of the German court was irrevocably established. The District Court of Gelderland held, in line with Tatry, that any declaration that it lacks jurisdiction can only concern the defendants that are also parties to the German proceedings. After all, Article 29 of the Regulation only applies to claims pending before different courts between the same parties. Only Dawn Foods B.V. and Dawn Foods GmbH were involved in both the German and the Dutch proceedings. In respect of the remaining defendants, Article 29 of the Regulation is not applicable. The District Court of Gelderland did not follow the argument made by Südzucker that all of the parties involved in the proceedings should be deemed as the same party. According to the District Court of Gelderland, the claimants were each separate legal entities so that equation was out of the question. Apparently, it was insufficiently evidenced that the interests of the other entities were ‘identical and inseparably’ connected with those of Dawn Foods B.V. and Dawn Foods GmbH. Nevertheless, the District Court of Gelderland accepted the alternative claim on the basis of Article 30 of the Regulation in respect of the other entities, so that it stayed the proceedings in respect of those entities as well.

The judgments by the District Court of Gelderland and the Landgericht Mannheim confirm that initiating a claim for a negative declaratory decision in one Member State can be an effective way of parrying proceedings before a court in a different Member State.

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38 Landgericht Mannheim 10 July 2015, 7 O 120/14 Kart., at 2(b).
39 This coincides with the opinion of Kropholler, who considers it desirable that a claimant in a negative action has the same options available as a claimant in a positive claim, for reasons of procedural equality. Another view would be based on the premise that a ‘natural claimant’ must have more choice options than a ‘natural defendant’ who files a negative action; see J. Kropholler, Europäisches Zivilprozessrecht [in German], Frankfurt am Main: Fachmedien Recht und Wirtschaft 2005, p. 351.
40 Landgericht Mannheim 10 July 2015, 7 O 120/14 Kart., at 2(bb).
41 District Court of Gelderland 16 September 2015, C/05/273576/HA ZA
42 When the District Court of Gelderland issued its ruling, the ruling by the Landgericht Mannheim was still subject to appeal.
43 District Court of Gelderland 16 September 2015, C/05/273576/HA ZA 14-653 (Dawn Foods v Südzucker et al.), para. 5.7.
45 See ECJ 19 May 1998, case C-351/96 (Drouot Assurances).
Neither court saw any reason for dismissing this procedural strategy and both courts explicitly dismissed claims for abuse of procedural law. In light of the case law from the ECJ mentioned above, at first sight it appears to be an uphill battle to argue that bringing a negative action constitutes abuse of procedural law. It is clear that the sole fact that Südzucker secretly initiated proceedings, contrary to pending settlement negotiations, is not sufficient to establish abuse. This, however, does not alter the fact that Dawn Foods’ indignation may be understandable. As is customary before initiating proceedings, Dawn Foods tested the temperature of the water by means of out-of-court correspondence. This practice, sending a letter before claim, may now be under pressure due to torpedo actions. Although prior notice before initiating proceedings is still regularly observed, this may cost a party dearly. By announcing proceedings, but not initiating them, the (allegedly) disadvantaged party paves the way for a negative action, further to which the option to approach a court of choice is no longer available. The judgments we have discussed show that this can have certain undesirable consequences for an (allegedly) disadvantaged party.

Other recent case law confirms that Dutch courts are willing to accept the torpedo in cartel damages actions. According to the District Court of Amsterdam, as a starting principle, claiming a negative declaratory decision fulfils a legitimate function. This is no different in cartel damages cases:

‘The starting principle is that claiming a negative declaratory decision fulfils a legitimate function. This is likewise permitted in cartel damages cases. KLM et al. have adequately explained their interest at this stage: clarity about the legal position. (…)’.46

In this case, the District Court of Amsterdam attached particular weight to the fact that the interests of KLM specifically entailed avoiding being held liable on several occasions for the same loss, as at the same time multiple proceedings were pending before the District Court of Amsterdam in which indirect purchasers were involved who – according to KLM – were pursuing the same claims for damages.47


4 Consideration of the application of the Regulation in English law

In the introduction, we argued that (alleged) cartel members might have an incentive to avoid proceedings under English jurisdiction. We have assessed whether a party can effectively torpedo proceedings brought later in England by pre-emptively initiating a negative action in a (different) Member State, pursuant to Articles 29 (and 30) of the Regulation. In this regard, the question arises how English courts consider torpedoes that were launched in different jurisdictions. In practice, we see that this question is commonly answered in a sense that the English courts would adopt a critical attitude towards the Regulation on this point. As explained below, the opposite is actually the case.

England used to be known as a jurisdiction where negative actions were viewed with distrust.46 In Volvox Hollandia, Lord Justice Kerr considered pre-emptive forum shopping to be even more reprehensible than normal forum shopping.49 According to Dicey, the critical attitude from the English judiciary has now made way for ‘neutral caution’.50 Mr Justice Morrison appears to be even more amiable: ‘proceedings in which the only claims are for negative declaratory relief are no different from any other action’.51 Beyond the scope of the Regulation, an English court is free to assess whether a negative action has been filed purely for the purpose of forum shopping or as the case may be whether there is an abuse of (procedural) law.52 This is different for situations that fall within the scope of the Regulation. Lord Wolff’s opinion in Messier-Dowty Ltd v Sabena S.A is clear on this point: the correct approach under the Regulation is to treat negative declaratory actions in exactly the same way as their positive counterparts.53 Judge Hirst pointed out, in Charman v W.O.C Offshore B.V, that if the conditions under the Regulation are satisfied, English courts may not apply any other tests (for abuse).54 Bell also indicates that an English court has no further discretion in the context of Article 29 of the Regulation.55

Recently, the Supreme Court of England issued a judgment on a situation in which Article 29 of the Regulation was invoked.56 Although two of the three Lords in this specific case came to the


55 Bell 2003, p. 265.

56 The Alexandros T [2013] UKSC 70.
conclusion that Article 29 of the Regulation was not applicable because the action previously initiated in Greece did not concern the same object as the claim for damages that was brought in England, the Supreme Court confirmed that Article 29 of the Regulation must be interpreted autonomously and in accordance with the directions from the ECJ. Interpretation of the concepts the same parties, the same object and the same cause of action needs to be consistent with the case law of the ECJ. According to the Supreme Court the essential question for application of Article 29 of the Regulation is:

‘(…) whether the claims in England and Greece are mirror images of one another, and thus legally irreconcilable, as in Gubish and The Tatry, in which case Article 27 [now Art. 29; authors] applies.’

The Supreme Court explicitly aligned itself with the rationale of the Tatry judgment, from which follows that when a negative action is brought in a different Member State first, the English court that is seised subsequently must decline jurisdiction, provided that the other conditions in Article 29 of the Regulation are satisfied. This same rationale can also be found in more recent case law (of lower English courts).

Another important precedent that shows how English courts deal with claims for a negative declaratory decision that were filed beforehand in another Member State, is JP Morgan. In this case, a number of banks, including JP Morgan, had lent substantial amounts to Primacom, a German company. The underlying loan agreement contained a choice of forum for an English court. After Primacom was unable to pay the outstanding interest during two instalments, Primacom pre-emptively initiated proceedings in Germany, seeking a declaratory decision that no interest was due. At this point, JP Morgan initiated proceedings in England for payment of the interest. In the English proceedings, Primacom relied on Article 29 of the Regulation. Justice Cooke held that the same question was central to both matters, i.e. Primacom’s obligation to pay interest under the loan agreement. He considered that it made no difference that one claim was formulated positively and the other negatively, nor that Primacom’s claim for a negative declaratory decision was solely based on tactical considerations. As the German court was seised first and since the same parties were involved in both sets of proceedings, the English court, which had been seised subsequently, had to stay the proceedings. The fact that an exclusive choice of forum for the English court was made did not make a difference in this respect, nor that Primacom could by no means provide reasons why the German court might accept jurisdiction. Referring to Gasser and having due regard to the fact that the lis pendens rule in Article 29 of the Regulation has to be strictly enforced, Justice Cooke held that he had to stay the proceedings:

‘(…) I am driven to the conclusion, by reference to the ECJ decisions that the same cause of action is involved in these two sets of proceedings in relation to interest and that the requirements of legal certainty, comity, and trust in the judicial institutions in the Community require me to stay the (…) proceedings under art 27 [now 29; authors] until such time as the Mainz court decides upon its own jurisdiction.’

Specifically in the context of cartel damages claims, the Cooper Tire case is still worth mentioning. In Cooper Tire, Enichem, one of the (alleged) cartel members, pre-emptively initiated a negative action in Italy against 28 defendants (various entities within among others the Pirelli, Michelin, Continental, Bridgestone and Cooper groups). A few months later, these groups initiated proceedings in England against a number of (alleged) cartel members (but not against Enichem), claiming damages. In the English proceedings the argument was made that the English court seised later lacked jurisdiction on the basis of Article 29 of the Regulation and that it had to stay the proceedings as the Italian proceedings had been initiated earlier. It was established that the positive claim for damages was based on the same cause of action and concerned the same object. The central issue was whether in both proceedings the same parties were involved. According to the High Court, the

58  Bell 2003, p. 266.
59  See, e.g., Marodi Service de D Mialich v Mikkal Myklebusthaug Rederi A/S 2002 S.L.T. 1013, 2002 G.W.D. 13-398, OH, 18 April 2002; and Katsouris Brothers Ltd v Haitoglou Bros S/A [2011] EWHC 111 (QB). In the latter case, a defendant in England was sued for indemnification by a claimant (a ‘Part 20 action’). In the meantime, the defendant had initiated proceedings before a Greek court in Thessaloniki, claiming a declaratory decision to the effect that there was no liability (which included any claims for indemnification). The defendant argued as a defence in the English Part 20 action that the Greek court had been seised earlier and that the English court had to stay the proceedings under Article 29 of the Regulation or else deny jurisdiction. Following Tatry, the High Court held that the Greek proceedings pertained to (at least in part) the same claim as the claim pending in England. Article 29 of the Regulation accordingly applied, so that the English court had to decline jurisdiction.
61  See also De Vareilles-Sommières 2007, p. 28.
62  This might not be the case under the current Regulation (recast); see Article 31.2 of the Regulation.
63  Cooper Tire & Rubber Company and others v Shell Chemicals UK Ltd and others [2009] EWHC 2609 (Comm).
parties could not be considered ‘the same’ within the meaning of Article 29 of the Regulation since Enichem was the claimant in Italy while Enichem was not involved in the English action. The High Court rejected the argument made by the (alleged) cartel members that their interests were ‘identical and indissociably’ connected with those of Enichem. According to the High Court, the entities were ‘legally distinct and separate entities’. For this reason, reliance on Article 29 of the Regulation could not be accepted. The High Court also held that there was no reason to stay the proceedings on the basis of Article 30 of the Regulation, principally because (1) the claims in question had already been dismissed in the first instance in Italy, and (2) there was a significant chance that a decision on the merits would be issued earlier in the English proceedings. This judgment was upheld on appeal. In the scholarly literature it is argued that this judgment confirms that English courts are less willing to apply the rules of the Regulation strictly and that they do not want to facilitate the torpedo tactic. This seems to tend to the suggestion that English courts are willing to test torpedoes under the Regulation on abuse. In our view, however, this cannot be concluded from this judgment. In Cooper Tire, in the given circumstances, the High Court simply saw no (or at least a very limited) risk of irreconcilable decisions, so that there was no reason to stay the proceedings. This, however, does not mean, as suggested, that English courts are, for other reasons, less inclined to apply Article 29 (and 30) of the Regulation in cartel damages actions.

As far as we are concerned, it seems clear that English courts observe these rules strictly, also in cases where a party preemptively seeks a negative declaratory decision in a different Member State.

5 Conclusions

Negative declaratory actions can be an important strategic tool. Our conclusion – in line with the case law of the ECJ – is that Dutch and German courts will not deal with negative actions any differently than how they deal with positive damages claims. The recent judgments issued by the District Court of Gelderland and of Amsterdam in particular confirm this for the Netherlands. As for England, we identify that the perception, which appears to have arisen in relation to a nuanced attitude of the English courts towards a strict application of the Regulation, is incorrect as far as Articles 29 and 30 are concerned. We note that English courts will certainly be guided by the leading case law of the ECJ when it comes to interpreting and applying these Articles as well. This means that before English courts the threshold for any argument of abuse of law under Articles 29 and 30 of the Regulation, is similarly very high. The limits for forum shopping may perhaps be found in other provisions of the Regulation. For instance, Article 8(2) of the Regulation explicitly refers to a test for abuse. This, however, has no impact on torpedo actions.

64 Cooper Tire & Rubber Company and others v Shell Chemicals UK Ltd. and others [2009] EWHC 2609 (Comm), at 86.
65 Cooper Tire & Rubber Company Europe Ltd. and others v Dow Deutschland Inc. and others [2010] EWCA Civ 864.