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## Editors' Note

In Europe, national rules restrict the development of private antitrust damages, which is why the European Commission has actively been seeking to raise the issue in public debate. Germany is one of the most restrictive countries because of prohibitions on class actions and contingency fees. However, as we discuss in this issue, an interim ruling from a German court may be the start of unblocking these two prohibitions in Germany, which potentially could act as a catalyst to greater EU private antitrust damages actions. Also in Germany, the jurisdictional scope of merger law has been extended, with a German court overruling the German merger control authority and clarifying that, in specific circumstances, the mere acquisition of an IP right can constitute a merger that is subject to prior consent from the German merger control authority. Merger control and, specifically, how to analyze non-horizontal mergers has been the subject of a public consultation exercise by the European Commission, through the publication of a draft guidance document. Mayer Brown responded to this consultation, and that response appears as an article in this issue. Finally, the pharmaceutical industry continues to be at the forefront of antitrust developments. An article offers an overview of, and our insights into, these developments, given our defense of AstraZeneca in the leading Article 82 EC Treaty case concerning an alleged abuse of a dominant position.

In the US, there have been a number of recent significant Supreme Court antitrust cases. We discuss two of them in this edition, with articles about the *Leegin* case, which overruled a 1911 decision concerning whether minimum resale price agreements are *per se* illegal, and the *Twombly* case, which addresses the proper pleading standard under Section 1 of the Sherman Act. Mayer Brown submitted a brief in *Twombly*. We also have an article about a significant case concerning the availability of treble damages in a class action under the New York antitrust statute, and an article about a recent case applying FERC preemption to a state antitrust claim.

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# Living with *Leegin*

## The demise of *Dr. Miles* and the *per se* rule against minimum resale price maintenance

Overruling a nearly 100 year-old precedent, in a 5-4 decision, the Supreme Court has ruled that agreements setting minimum retail prices and other minimum resale prices no longer are *per se* illegal under the US federal antitrust laws, and instead, must be "judged by the rule of reason" on a case-by-case basis. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (decided June 28, 2007), overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The facts were simple. Leegin, a maker of leather goods and accessories, asked retailers to agree to charge specified resale prices. When PSKS refused to stop discounting, Leegin terminated the relationship. A jury awarded nearly $4 million and on appeal the manufacturer did not dispute that it had entered into resale price maintenance agreements with its retailers. The Fifth Circuit affirmed on the authority of *Dr. Miles*, and the Supreme Court granted certiorari to reconsider the *per se* rule.


In an opinion written by Justice Kennedy, joined by the Chief Justice and Justices Scalia, Thomas, and Alito, the Court noted that there are three principal justifications for resale price maintenance: (1) combating the "free riding" that discourages dealers from providing services that consumers want (and, presumably, that manufacturers want); (2) facilitating entry by new brands; and (3) encouraging even dealers not threatened by free riding to provide more services, by overcoming the difficulty and inefficiency of requiring such services through contract. *Id* at 2708. The Court criticized the reasoning of *Dr. Miles*, observing that it was based, by way of a 1628 treatise, on the common law rule against restraints on alienation, and that the decision erroneously analogized vertical restraints to horizontal agreements among dealers. *Id* at 2714. The Court also rejected the argument that Dr. Miles should be retained on the ground of *stare decisis*, responding that: (1) the Sherman Act is akin to the common law and equally dynamic; (2) *Dr. Miles* already has been limited by subsequent cases; (3) *Dr. Miles* was inconsistent with cases (particularly *United States v. Colgate & Co.*, 250 U.S. 300 (1919)) permitting manufacturers to achieve the same end through different but less efficient means; and (4) non-price vertical restraints, such as territorial restraints, have a similar impact to resale price maintenance but have been subject to a different standard. *Id* at 2721-22.

The most crucial part of the opinion for many is what the Court had to say about how the rule of reason should be applied to resale price maintenance agreements in the future. The

Court pointed out that resale price maintenance may, in fact, have anticompetitive effects when it is "designed solely to obtain monopoly profits" by "facilitat[ing] a manufacturer cartel" or "organiz[ing] cartels at the retailer [or other dealer] level." *Id* at 2716. The Court held: "A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." *Id* at 2717. This is not surprising, and simply reconfirms earlier decisions on horizontal agreements among manufacturers or dealers to fix prices or divide customers. (Note that the Court cites *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982), more than once, suggesting that the current *per se* rule against horizontal *maximum* price fixing announced there remains unshaken, at least for the time being. Also note that when the Court provided examples of *per se* violations that still exist, it named only "agreements among competitors to fix prices … or to divide markets" and skipped any type of tying. *Id* at 2713.)

The Court went on to explain that even in the absence of horizontal agreements, resale price maintenance can still be unlawful, though not *per se* unlawful, when induced by a dominant retailer trying to frustrate innovation by smaller retailers, or when adopted by a dominant manufacturer trying to persuade dealers not to carry competing brands from smaller rivals or new entrants. *See id* at 2717.

**In other words, horizontal use of resale price maintenance remains *per se* unlawful; use by a dominant dealer or manufacturer will be subject to the rule of reason.**

In other words, horizontal use of resale price maintenance remains *per se* unlawful; use by a dominant dealer or manufacturer will be subject to the rule of reason.

And what is the "recipe" for conducting a rule of reason assessment of a resale price maintenance agreement? The Court pointed out that resale price maintenance "does have economic dangers" and noted that lower courts will have to be "diligent in eliminating their anticompetitive uses from the market." *Id* at 2709. It went on to explain that such diligence is a "realistic objective" so long as courts recognize three factors that are "relevant to the inquiry," specifically: (1) the number of manufacturers in a market adopting resale price maintenance, with "more scrutiny" required "if many competing manufacturers" adopt the practice; (2) the "source" of the restraint, i.e., the manufacturer or the dealers, with an independent decision by the manufacturer being less suspect; and (3) market power, as less powerful retailers cannot prevent manufacturers from distributing their products through other retailers, and less powerful manufacturers cannot "keep competitors away from distribution outlets." *Id* at 2719.

The Court added that as lower courts "gain experience" they can establish a "litigation structure" and "devise rules over time" for offering proof, "or even presumptions where justified," to make application of the rule of reason "fair and efficient." *Id* at 2720. Only time will tell which rules and presumptions might emerge, but it is clear that the key factors will be: (1) how "dominant" the retailer and manufacturer are (i.e., how much market power they each possess); (2) whether the manufacturer or the dealer is the real source of the restraint; and (3) how widely resale price maintenance is adopted among the brands competing in the relevant market.

The dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, described the application of the rule of reason to resale price maintenance as the onset of a

period of "legal turbulence." *Id* at 2737. The dissent remarked that under the rule of reason it may not be very easy "to separate the beneficial sheep from the antitrust goats," because it is often difficult to identify who actually instigated a vertical restraint – the manufacturer or the dealers – and because the majority's "invitation" to evaluate market power will invite battles of experts, applying "abstract, highly technical, criteria to often ill-defined markets." *Id* at 2730. Note that the dissent expressed concern over "tacit collusion" among manufacturers, not just outright conspiracy, while the majority limited its concern with manufacturer collusion to hardcore manufacturers' cartels. The dissent also went on to summarize statistics suggesting that retailing and manufacturing has become more concentrated in America, citing as examples makers of various household appliances. *Id* at 2733-34. In the end, the dissent conceded that if the Court were writing on a clean slate, the *per se* rule might properly be modified, particularly to accommodate an exception for new entrants, but concluded that the case had not been made for overturning a nearly 100 year-old precedent. *Id* at 2734.

So, what can we expect now? Before long, we may begin to see nationwide advertising featuring uniform prices for some products at retailers across the country. But before entering into agreements to fix resale prices, there are some critical questions you must confront:

- Will your new agreements pass muster under a reasonableness test? The Supreme Court did not rule that resale price maintenance is *per se* **legal**, only that it is no longer *per se* **illegal**. Will your new resale price agreement meet the Court's new criteria?
- What other restraints do you already impose on your dealers? May dealers carry competing brands, or have they agreed to carry your brand exclusively? The existence of exclusive dealing on top of resale price maintenance may impact the analysis.
- How many competing brands will also elect to use resale price maintenance agreements? How many will not? How significant are these competing brands? If resale price maintenance becomes widespread in your market, how will this affect the reasonableness of your agreements?
- Is there any hint of horizontality among dealers? If dealers get together to agree on resale prices, such a "horizontal" agreement will still be *per se* illegal; and if a manufacturer or other supplier participates in that agreement, that party can face liability, too.
- Worse yet, is there any hint of horizontality among manufacturers? If manufacturers or other suppliers reach an understanding on the resale prices each will set, this will be treated as horizontal, cartel-type price fixing, with criminal consequences possible.
- What about private label brands? If a manufacturer sells a branded product to retailers and also produces a retailer's private label variety of the product, may the manufacturer agree with the retailer on the resale price of either brand? Both brands? Would such agreements be "vertical" or "horizontal"?
- Do your present contracts permit the introduction of resale price maintenance agreements? Do your present contracts instead specify that each dealer is free to set its own resale prices? (Such provisions became popular in years past as a defense against allegations of resale price maintenance.)

**The Supreme Court did not rule that resale price maintenance is *per se* legal, only that it is no longer *per se* illegal.**

- Are you subject to state franchising or distributor laws, and if so, do those laws permit the introduction of resale price maintenance?
- Do the antitrust laws and other competition laws of the states in which your products are resold permit enforcement of resale price maintenance agreements? Not all necessarily do.
- Will your agreements apply to resale in other countries, including sales through the Internet? If so, do the laws of those countries permit resale price maintenance?
- If a manufacturer or other supplier controls the resale prices at which its dealers resell, will it become responsible, under the so-called "indirect purchaser" doctrine, for any price discrimination engaged in by those dealers that might violate the Robinson-Patman Act or state price discrimination laws? If so, how can a supplier minimize its exposure?
- How will dealers react? What will happen if dealers enter into resale price maintenance agreements and then violate them? Do all dealers need to be treated the same?
- How will competitors react? Will brands choosing not to introduce resale price maintenance agreements be neglected by dealers or will they gain an advantage, at least at some dealers?
- How will consumers react? Research suggests that the human brain is wired to love a bargain – can resale price maintenance backfire?

**The answers will not be the same for all companies or all products.**

Yet these questions need to be answered for each individual situation, and an approach needs to be tailored for each seller and each product before launching into minimum resale price agreements.

**Bottom Line:** The Supreme Court has ushered in a lively new era of distribution in America, but this is not a "one size fits all" world. Master it, and you can make the most of it.

**Richard Steuer (New York)**

## *Bell Atlantic Corp. v. Twombly*

### Has the Supreme Court really challenged the standard for notice pleading in antitrust lawsuits?

One Supreme Court blog attempted to answer the question as follows: "I think we can all relax. *Bell Atlantic v. Twombly*, decided May 21, 2007, merely elaborates on the question what it means for a complaint to give 'notice' of what the plaintiff is complaining about."[1] However, the flurry of activity by antitrust defendants during the week following that Supreme Court decision would suggest otherwise.[2]

In *Twombly*, the Supreme Court interpreted Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief,"[3] in the context of a claim under Section 1 of the Sherman Act. In reversing the United States Court of Appeals for the Second Circuit, and affirming the district court, the Supreme Court concluded that the complaint failed to state a claim under Section 1 because the complaint failed to allege the existence of an agreement among the defendants; the complaint alleged that the defendants had engaged in parallel conduct, which, if engaged in independently, did not violate the Sherman Act.


There is little doubt that antitrust defendants will reevaluate the complaints against them based on *Twombly*, and urge district courts to do the same. Indeed, a June 1, 2007, article reported that within a week of the decision, *Twombly* was called to the attention of the district court in Manhattan by BP, which faces an antitrust class action there; Intel Corporation filed a supplemental brief citing *Twombly* to support its motion to dismiss an antitrust class action filed against it in Delaware; and the defendants in a lawsuit filed by families of the victims of the 9/11 terrorist attacks cited *Twombly* in a call to a district court in New York to dismiss the co-conspirator allegations.[4] It remains to be seen what impact the decision will have on these cases, and antitrust litigation generally, especially in light of the Court's caution against reading too much into the decision: "Here … we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its fact."[5]

*Twombly* was a consumer class action lawsuit filed in the wake of the Telecommunications Act of 1996 (the "Telecommunications Act" or the "Act"),[6] which was enacted to promote competition in the market for local telephone service.[7] The 1984 divestiture of American Telephone & Telegraph Co. (AT&T) created seven Regional Bell Operating Companies, which were referred to as the "Baby Bells" or "Incumbent Local Exchange Carriers"

(ILECs), to provide local telephone service on an exclusive basis, and a separate competitive market for long-distance telephone service from which the ILECs were barred. The Telecommunications Act essentially restructured the local telephone service markets by eliminating the exclusive franchises and requiring the ILECs to facilitate market entry. Under the Act, ILECs were obligated to share their local service networks with what became known as "competitive local exchange carriers" (CLECs) by allowing the CLECs to: (1) purchase at wholesale and resell local telephone services to end users; (2) lease, on an unbundled basis, elements of the ILEC network at low cost-based rates; or (3) interconnect the CLEC facilities with the ILEC network. Pursuant to the Act, each ILEC could enter the long-distance service markets once it demonstrated compliance with its obligations to facilitate market entry. Eventually, each of the ILECs earned the right to offer long-distance service in its respective state.

William Twombly had filed a putative class action lawsuit in the District of Connecticut against one Baby Bell, SBC Communications, Inc., alleging violations of Section 2 of the Sherman Act based on alleged failures to comply with Telecommunications Act obligations to facilitate market entry. After the Supreme Court decision in *Trinko v. Verizon*,[8] which held that the failure to comply with the network-sharing obligations of the Act was not actionable under Section 2, Twombly dismissed the Connecticut lawsuit, and, with others, filed a lawsuit in the Southern District of New York, alleging violations of Section 1 of the Sherman Act.

**The Telecommunications Act essentially restructured the local telephone service markets by eliminating the exclusive franchises and requiring the ILECs to facilitate market entry.**

The plaintiffs in *Twombly* (respondents before the Supreme Court) filed their lawsuit against four ILEC[9] alleging that they violated Section 1 of the Sherman Act[10] in two ways. First, the plaintiffs alleged that the ILECs engaged in parallel conduct in their respective service areas by resisting the obligations imposed by the Telecommunications Act. The "parallel conduct" consisted of the same conduct alleged in the prior lawsuit in Connecticut including, *inter alia*, entering into "unfair agreements" with CLECs, overcharging them, providing them inferior connections to the ILECs' networks, and sabotaging the CLECs' relationships with their customers. The alleged purpose of the conduct was to prevent CLECs from competing successfully in the regional local telephone service markets. The plaintiffs alleged that the ILECs had a "compelling common motivation" to prevent the CLECs from competing in their respective markets. According to the complaint, if any CLEC had successfully competed in any particular ILEC's market, it would have revealed the ease with which competitive entry was possible in other ILECs' markets in the absence of the alleged coordinated conduct by the ILECs.

Second, the plaintiffs alleged that the ILECs allocated the local telephone service market by agreeing not to compete with each other (as CLECs) in their respective regional territories. The plaintiffs alleged that there were "substantial competitive advantages" for the ILECs to enter each other's markets, because of the geographic configuration of their respective markets. The ILECs' markets were not contiguous; rather, pockets of some ILECs' territories were completely surrounded by other ILECs' territories purportedly making market entry inviting. According to the complaint, the ILECs did not seek to compete "in a meaningful manner," a result that the plaintiffs alleged would be "unlikely" in the absence of an agreement not to compete.[11] The plaintiffs further alleged that the CEO of one ILEC had been quoted by the

*Chicago Tribune* as saying that competing in another ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right."[12] According to the plaintiffs, that statement, which was made at a time when the particular ILEC was losing money, was an admission that the ILECs were colluding.[13] Significantly, however, the plaintiffs omitted that CEO's further statement that entry into another ILEC's territory as a CLEC was not a "sustainable economic model."[14] The plaintiffs alleged that the result of the ILECs' conspiracies was to drive the CLECs out of business and prevent competition in the local telephone and high speed internet market, with the effect of harming consumers of those service, by forcing them to pay higher local telephone and internet service rates than they otherwise would pay in a competitive market.[15]

The U.S. District Court for the Southern District of New York dismissed the complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court held that, while allegations of parallel conduct may suggest an agreement, "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."[16] The district court noted that "parallel conduct is a common and often legitimate phenomenon, because similar market actors with similar information and economic interest will often reach the same business decisions."[17] The court further observed that in the context of a motion for summary judgment, a plaintiff must show that the defendants' parallel conduct resulted from an agreement, as opposed to independent action, with evidence of at least one "plus factor" – i.e., "evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire."[18] Thus, on a motion to dismiss, a plaintiff must allege specific facts suggesting a conspiracy, "such as motivation or conduct that lends itself to an inference of an agreement," and that "are sufficiently suggestive of a conspiracy to warrant discovery."[19]

As to the plaintiffs' first theory, the district court held that allegations of parallel conduct to bar CLECs from the ILECs' territories were insufficient to state a claim under § 1 of the Sherman Act, finding that the alleged behavior of each ILEC in resisting competition from the CLECs was consistent with an independent interest in defending its own territory. With respect to the allocation of markets allegations, the district court found the complaint to be insufficient, because it lacked facts "suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy."[20]

The Court of Appeals for the Second Circuit reversed, holding that the district court had applied the wrong standard by *requiring* the plaintiff to allege "plus factors,"[21] and stating that "there is no reason we can perceive to require the plaintiffs to include allegations of 'plus factors' in their complaint, since they may not be required to establish 'plus factors' at trial – if, for example, they can prove conspiracy directly."[22] The second circuit stated that the "pleaded factual predicate must include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," and concluded that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy."[23] Significantly, the second circuit was "not unsympathetic" to the concerns of the district court that, in the absence of a heightened pleading standard, antitrust defendants would be

forced to spend millions of dollars defending against meritless claims.[24] However, the court of appeals noted that "in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants, although litigation … may place substantial … burdens on the defendants, neither the Federal Rules nor the Supreme Court has placed on plaintiffs the requirement that they plead with special particularity the details of the conspiracies …"[25]

The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct," and reversed the second circuit, holding that the complaint should be dismissed.[26]

In so doing, the Court noted that § 1 of the Sherman Act does not bar all unreasonable restraints of trade; only "restraints effected by a contract, combination or conspiracy."[27] Thus, the critical question is whether the challenged conduct resulted from independent action, or "from an agreement, tacit or express."[28] Further, "conscious parallelism" is not itself unlawful;[29] the "inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior; consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[30]

Therefore, the Court held that a complaint alleging a claim under Section 1 of the Sherman Act must allege enough facts which, taken as true, suggest that an agreement was made;[31] it is insufficient to allege that the defendants engaged in parallel conduct and assert that such conduct was the result of a conspiracy. The allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[32] There must be enough facts alleged to raise a reasonable expectation that discovery will uncover evidence of an agreement. In short, the complaint must allege "plausible" grounds on which to infer an agreement.[33] The need for plausibility at the pleading stage is to demonstrate "enough heft" to show that the plaintiff is entitled to relief, and to justify subjecting the defendant to costly discovery. The Court recognized that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery …, but quite another to forget that proceeding to antitrust discovery can be expensive."[34]

In reaching its decision, the Supreme Court stated that the oft-cited "no set of facts" language in Justice Black's opinion in *Conley v. Gibson* "has earned its retirement."[35] The Court noted that that passage so often is cited in isolation and without reference to the Court's understanding that the complaint in that case contained "concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief."[36] The Court stated that "Conley, then described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[37]

The Supreme Court agreed with the district court that the plaintiffs' complaint failed to allege a plausible claim of conspiracy in restraint of trade, finding that "the nub of the complaint" was that the ILECs' parallel conduct, "consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves," was consistent with independent action and

"Bell Atlantic Corp. v. Twombly" continued on page 29

# Precedent for Antitrust "Class Actions" in Germany? The Düsseldorf Court Interim Judgment in the Cement Case

## Antitrust damages on the rise in the EU

In a recent interim decision, the regional court of Düsseldorf broke new legal ground for German antitrust litigation by declaring bundled damages claims admissible.[1] For the first time, potential claimants did not bring individual standalone actions to German courts, but bundled their claims by assigning them to a single company. The decision has the potential to accelerate the recent rise of antitrust actions for damages. This rise has been spurred by an initiative of the European Commission to encourage antitrust actions and the *Manfredi* judgment of the European Court of Justice, which expressly recognized the rights of private litigants.[2] The German legislature reacted to this development by amending the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, "GWB") to facilitate antitrust actions for damages.

## Regional court allows bundled damages claim

Four years after being fined a sum of €660 million by the German Federal Cartel Office (FCO) for participating in a "hard core" cartel, six cement producers were again challenged for their alleged infringement of competition law, this time by Cartel Damage Claims SA (CDC), a Belgian company specifically set up to pursue antitrust claims received from persons who suffered damages as a consequence of any cartel practices.

Under German civil law, claims can be assigned to a third party, which in turn can assert the claim in its own name. In the present case, 29 customers of the alleged cartel members sold and assigned their claims to CDC. In turn, CDC brought a €114 million damage action before the court. For the assigned claims, CDC paid a fixed minimum price. The 29 customers and CDC further agreed that this fixed minimum price may be increased by a variable component between 75-85 percent of the realized claim, the exact amount depending on contributions for court and legal fees paid to CDC.

The court ruled that this "business model" of CDC was permissible, despite the defendants' arguments that German litigation rules do not allow for class action claims and that contingency fees are essentially banned. Particularly, the court concluded that CDC did not lack standing. The court did not consider the claim to be a "representative action," for which CDC would have lacked the requisite legal interest. Rather, because the parties had unconditionally and

fully assigned their rights to CDC, the court ruled that CDC was asserting its own rights. The court also rejected the defendants' argument challenging the validity of the damage claims assignments. The defendants argued that the consideration for the transfer of the rights violated federal rules on attorneys' fees and German legal ethics because it *de facto* entailed a contingency fee. Even though the court will decide this question only in its substantive assessment of the case, the court already made clear that it does not doubt the validity of the assignments.

## Final judgment not expected before autumn at the earliest

The court still has to rule on the merits of the case. The FCO has already established that an infringement has occurred, and because one of the assignors successfully claimed access to the FCO's case file, CDC can base parts of its claim on the FCO's findings. In case the FCO decision is upheld – five of the six defendants have appealed against it – CDC still needs to establish the level of damages. The claim is based on a comparison of prices of cement on the relevant market before and after the establishment of the cartel and more than 300,000 invoices from the defendants for cement supplies. The court will also have to decide on the applicability of the "passing on" defense and the question of joint liability of the cartel members. According to the *Manfredi* judgment of the European Court of Justice, an award of interest from the date of damage occurrence should be included in the quantum of damages.

## Breakthrough for class action style antitrust litigation?

**Certainly, the assignment of antitrust damage claims to a third party is different to US-style class actions.**

The interim decision of the Regional Court of Düsseldorf has received wide attention throughout the German legal community. Certainly, the assignment of antitrust damage claims to a third party is different to US-style class actions. Most importantly, the court decision has no binding effect upon other class members. It only concerns the plaintiff and the assignors. However, the results achieved are similar. The decision significantly strengthens the position of potential plaintiffs. In the past, German litigation rules and costs have been a disincentive to antitrust damage actions: the "loser pays" principle, the obligation to pay certain fees upfront, and the ban on contingency fees made antitrust actions very costly.

The CDC model removes these obstacles by reducing the individual litigation costs and by creating an economic result very similar to contingency fees. In addition, in a recent decision, the German Federal Constitutional Court loosened the restrictions on contingency fees, which could add further momentum to class action style antitrust litigation in Germany.[3] Together with the recent changes aimed at facilitating damage claims, the court's ruling is therefore another indication that civil antitrust litigation is gaining ground in the EU. Especially where competition authorities already have established an infringement, follow-up private actions are very likely to occur.

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## Endnotes

1 Landgericht Düsseldorf, Zwischenurteil of 2 February 2007 – 34 O (Kart) 147/05.

2 ECJ joined cases C-295/04 to C-298/04 *Manfredi a.o.* [2006] ECR, I-6619). See "ECJ and European Commission encourage damages actions for breach of EC antitrust rules," Antitrust Quarterly, Issue 10.

3 Bundesverfassungsgericht, Beschluss of 12 December 2006, 1 BvR 2576/04.

# IP & Merger Control – The "National Geographic" Case

The merger control proceedings regarding the German edition of the well-known magazine "National Geographic" provides interesting insight into the applicability of the German merger control regime vis-à-vis the acquisition of intellectual property rights.

## Background

Back in 1999, the German publisher Gruner + Jahr (G+J) and the Spanish publisher RBA acquired, through a joint venture company, the license to publish a German edition of the National Geographic magazine from National Geographic Society. The German competition authority (*Bundeskartellamt*, "BKA") was not notified about the acquisition of the license under the German merger control regime. In 2004, G+J notified the BKA of the publisher's intention to purchase RBA's interest in the joint venture.

The BKA assessed the transaction and prohibited it on the grounds that it would strengthen a dominant position in the market of popular science magazines. The BKA went one step further and launched an *ex-officio* investigation in relation to the 1999 acquisition, which concluded in the BKA prohibiting that original transaction. Both administrative decisions were appealed, first before the German Higher Regional Court Düsseldorf (OLG) and subsequently before Germany's Federal Court of Justice, the *Bundesgerichtshof* (BGH). The *ex-officio* case raises the interesting question as to what extent the acquisition of a license may constitute a reportable transaction.

**The BGH upheld the view of the OLG that the acquisition of a license does not constitute the acquisition of an asset.**

## Subject-matter of German merger control

Similar to many other countries, the subject-matter of German merger control is a "concentration" between parties. The law provides four types of concentrations that may fall under pre-merger scrutiny if the parties to the concentration exceed the relevant turnover thresholds. A concentration is: (i) the acquisition of all or a substantial part of the assets of another undertaking – asset acquisition (Section 37(1) No.1 GWB); (ii) the acquisition of control of the whole or parts of another undertaking – acquisition of control (Section 37(1) No.2 GWB); (iii) the acquisition of shares in another undertaking, if such acquisition reaches 50% or 25% of the capital or voting rights of the other undertaking – share acquisition (Section 32(1) No.3); or (iv) the acquisition of a competitively significant influence (Section 37(1) No.4 GWB).

## Acquisition of a license is not an asset acquisition

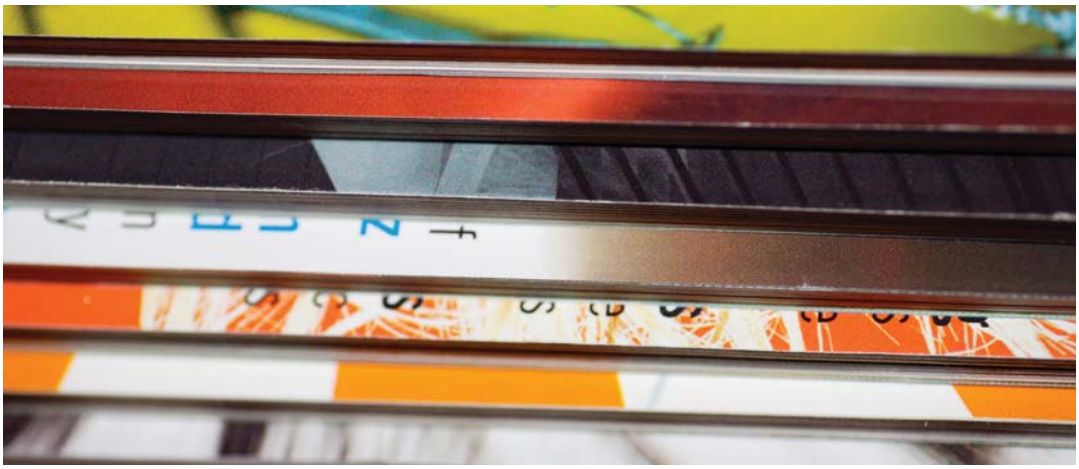
The BGH upheld the view of the OLG that the acquisition of a license does not constitute the acquisition of an asset. It held that a license does not represent an unrestricted right (that is, it does not confer the ownership of a right, but the use of it), and that there is no need to extend the notion of "asset" to restricted rights, as the acquisition of such rights may fall under the notion of "acquisition of control."

## Acquisition of a license may constitute an acquisition of control

The interesting part of the BGH decision deals with the question of under what circumstances a license agreement constitutes acquisition of control of the whole or parts of another

undertaking pursuant to Section 37(1) No.2 *lit.* a) GWB, through the right to use all or parts of the target's assets. For the interpretation of "all or parts of assets" the BGH referred to a previous decision – *Warenzeichenerwerb* (BGHZ 119, 117, 120 et seq.) – which required the assets to constitute a "substantial part" of the selling entity. A part is substantial if, in relation to the total assets of the seller, it is quantitatively sufficiently high, or if it has a qualitative significance.

The BGH stressed the importance of the quality criteria as it distinguishes internal from external growth of a company. Merger control does not aim at controlling, or even preventing, internal growth, it only scrutinizes the external growth of firms through acquisitions that enable the acquiring firm to step into the market position of the seller. As the BGH confirmed, this usually occurs through the acquisition of an operative unit or a certain business of the seller.



The acquiring firm may also step into the market position of the seller, even if it does not purchase a manufacturing business. In these cases, the subject-matter of the acquisition must constitute a separable asset value of the selling entity. It must also constitute the fundamental reason behind the market position enjoyed by the seller, which, as a result, is capable of being transferred to the acquiring firm. In addition, and as in all other asset acquisition cases, the assets only constitute a substantial part if they are capable of appreciably strengthening the market position of the acquiring firm.

Clearly, those elements become increasingly difficult to apply in a jurisdictional analysis, as substantive, market-related elements have to be taken into consideration. The BGH recognized that a jurisdictional analysis requires clear criteria in order to enable merging firms to assess the formal applicability of German merger control rules. Therefore, the BGH stated that the rights subject to the license must constitute the fundamental reason for the licensor's *existing* market position.

Going back to the case, the BGH confirmed that by acquiring the license, G+J had merely obtained the possibility of gaining a market position, but could not step into an existing market position as a German edition of the "National Geographic" had not yet been published. As the English edition – although well-known – did not belong to the same market, G+J did not step into an existing market position in the relevant German market.

The BGH firmly rejected the view of the BKA that the potential market position of a German edition was sufficient to establish a "substantial part." Potential market positions

"German National Geographic" continued on page 30

# Mayer Brown's Submission to the European Commission on Merger Regulation

## In response to consultation on the European Commission's proposed guidelines on the assessment of non-horizontal mergers under the EC Merger Regulation

### 1. Introduction

Mayer, Brown, Rowe & Maw LLP welcomes the opportunity to respond to the public consultation launched by the Commission on 13 February 2007 on the Draft Commission Notice – Guidelines on the assessment of non-horizontal mergers (**NHM**) under the Council Regulation on the control of concentrations between undertakings (**Draft Guidelines**).

This document reflects the views of Mayer, Brown, Rowe & Maw LLP, and it does not represent the views of any of our individual clients. Our comments refer selectively to a number of issues addressed by the Commission, which, we believe, should be reviewed:

a) *Introduction* (sections I - II): The Commission should clearly specify that NHM are in principle pro-competitive or have at least neutral effects on competition, and that in most cases they do not give rise to competition law concerns.

b) *Market share level* (section III): In our view, the 30% market share level is too low. The 30% market share initial indicator of the absence of competition concerns should at least be triggered on the basis of the shares of the acquired company alone (without counting the shares of the acquiring company as the Draft Guidelines suggest). In addition, mergers involving NHM in markets characterized by technological innovation should also benefit from the safe harbor instead of being exempted from it.

c) *Incentive to foreclose* (sections IV, V): We consider that the Commission should provide more guidance on the Article 82 EC defense.

d) *Standard of foreclosure* (sections IV, V): We believe that the Commission should clarify the standard of proof for foreclosure effects.

e) *Efficiencies* (sections IV, V): We believe that the Draft Guidelines do not allow any real scope for parties to a NHM to claim efficiencies.

f) *Burden of proof:* We consider it necessary that the Commission clarifies the burden of proof and the level of evidence required for both the Commission (to prove incompatibility of the NHM with the common market) and the parties to the NHM (to prove efficiencies generated by the merger).

g) *Commitments:* We consider it necessary that the Commission provides clarification on whether behavioral commitments would be available to the parties to a NHM as an effective remedy.

h) *Portfolio effects:* The Draft Guidelines make a very brief and unclear reference to portfolio effects. We believe that the Commission should either elaborate further on this issue or delete the reference.

## 2. Comments

**a) The approach of the Commission towards NHM seems negative**

Although there is no presumption of legality for NHM, economic theory substantiated by empirical evidence indicates that vertical and, even more so, conglomerate mergers are less likely than horizontal mergers to have anti-competitive effects. Indeed, the generally advocated and supported view is that, in most cases, NHM generate efficiencies and increase consumer welfare.

In our view, the Draft Guidelines acknowledge the pro-competitive character of NHM only to a limited extent (see paragraphs 11 - 14), and they do not stress sufficiently the principle that NHM are generally pro-competitive. In contrast, the Draft Guidelines focus mainly on the potential foreclosure effects, while they do not clarify adequately that foreclosure would not be expected to occur in most of cases.

Therefore, we strongly suggest that the Commission revisits the Introduction and the Overview sections. We would prefer a clear message to business that NHM are in principle pro-competitive, or at least have neutral effects on competition, and that they may give rise to competition law concerns only in atypical circumstances.

**In our view, the Draft Guidelines acknowledge the pro-competitive character of NHM only to a limited extent, and they do not stress sufficiently the principle that NHM are generally pro-competitive.**

**b) The safe harbor market share level is too low**

The Draft Guidelines (paragraph 25) indicate that it is unlikely that the Commission identifies concerns in NHM where the *"the market share post-merger of the new entity in each of the markets concerned is below 30% and where the post-merger HHI is below 2000".* The accompanying footnote states that the threshold has been set at 30% by analogy to the relevant market share threshold provided for in the Vertical Block Exemption Regulation (**BER**)[1].

In our view, this "safe harbor" is a welcome development. Nonetheless, we consider that the level is set too low. The application of the 30% threshold of the BER to the NHM is arbitrary and does not serve to justify its application to conglomerate mergers. In relation to vertical mergers, no explanation is offered and we are not aware of any reason why the BER market share should be relevant "by analogy". The BER merely applies to the relationship between independent undertakings that are vertically related and that decide to enter into an agreement of a limited duration.

In any case, it should be recollected that even for vertical agreements, the assumption of the 30% market share threshold was not evident. The Commission in its Green Paper[2] which preceded the adoption of the BER, initially contemplated two different thresholds for vertical agreements, namely 20% or 40%. In the end it opted for the 30% threshold.

In our view, a threshold of 40%, as first considered by the Commission in its Green Paper for the BER would seem appropriate, particularly as the Draft Guidelines make it clear that it does not technically create a safe harbor.

Alternatively, and following the model of the US Non-Horizontal Merger Guidelines[3], it may be appropriate to introduce a market share-based threshold that measures only the

acquired company's market share. Under this approach, a detailed analysis of potential anti-competitive effects arising from NHM would only be necessary when the market share of the acquired company exceeds a certain market share threshold, irrespective of the shares of the acquiring company in vertically related or neighboring markets.

The Draft Guidelines also provide (paragraph 25(a)) that when a merger *"involves a company that is likely to expand significantly in the near future, e.g. because of a recent market innovation"* the Commission may examine closely the anticompetitive effects arising from the proposed NHM, even if the parties' market shares are below 30%. We have two comments in connection with this statement.

First, in our view, innovation markets are dynamic, and characterized by volatile market shares and by the potential for competitors to leapfrog the parties' current or anticipated innovations. Therefore, the Draft Guidelines fail to appropriately recognize the dynamics of those industries.

Second, the Commission seems to adopt a similar approach as in horizontal mergers regarding concentrations involving companies that are likely to expand significantly in the foreseeable future. However, NHM are different and given the highly dynamic nature of the markets characterized by innovation, such a negative approach is not sufficiently justified to exclude them from the nominal benefits of the safe harbor threshold.

**[W]e believe that NHM involving markets characterized by technological innovation should benefit from the safe harbor.**

Based on the above, we believe that NHM involving markets characterized by technological innovation should benefit from the safe harbor.

**c) The Article 82 EC defense is vague**

The Commission follows the jurisprudence rendered by the EC Courts in terms of taking into account the potential illegality of the alleged anticompetitive conduct in question to reduce or even eliminate the merged entity's incentives to engage in such conduct. However, the Commission lays down limiting parameters in the consideration of such a disincentive including that (i) the conduct must be clearly, or highly probably unlawful under Community law; (ii) the likelihood that the conduct will be unlawful; and (iii) the penalties that could be imposed.

By definition, the first condition excludes certain types of conduct that are not clearly unlawful under Article 82 EC (e.g. raising rivals costs) and consequently narrows the scope of the Article 82 EC defense. In our view because a NHM does not *per se* lead to dominance, concerns arising from NHM would to a great extent not qualify as clear-cut violations of Article 82 EC, therefore, the disincentive argument will have limited application.

We consider that the Commission has set high standards in order to accept the Article 82 EC defense and it should be examined whether this is in line with the ECJ/CFI case law on *Tetra Laval*[4] and *General Electric*[5]. In our view the position of the Commission is far more restrictive than the one intended by the EC Courts.

Further, the interface in practice between Article 82 EC and the ECMR is not clear. Article 82 EC provides for an *ex post* assessment of illegal conduct while the ECMR is a prospective

analysis of the impact that a concentration will likely have on competition. Although the Commission's approach is a result of the CFI/ECJ's case law, better guidance as to the application of Article 82 EC on merger analysis would be helpful.

Finally, it should be also noted that the judgments of the CFI and the ECJ in the above mentioned cases concerned Commission decisions that were adopted under the previous ECMR. There seemed a concurrence of objectives in the previous ECMR and in Article 82 EC, since the former prohibited the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded and the latter prohibits the abuse of dominance insofar as it affects trade between Member States. Dominance was therefore the common denominator in both instances. However, under the new ECMR the test, at least *de jure*, is somewhat different, in that it prohibits concentrations that would significantly impede effective competition without necessarily requiring the creation or strengthening of a dominant position. This effectively creates a gap between the current ECMR and the possible application of an Article 82 EC defense which in our view would deserve an explanation.

**d) The standard of foreclosure needs to be clarified**

The Draft Guidelines attribute great importance to the marginalization of competitors. The Commission does not seem to distinguish between "foreclosure" of competitors and "marginalization" of competitors, the latter of which may merely reduce the competitive constraint to the merged entity exercised by less efficient competitors.

For example, in paragraph 46 (and footnote 39), the Draft Guidelines state that in the vertical context, anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market, thereby leading to an upward pressure on their sales prices. This sentence refers to footnote 39, which states that *"where downstream prices are not likely to increase in the short run, foreclosed rivals may still lose significant sales to the merged entity, and as a result of lower revenue streams, foreclosed rivals may be restricted in their ability to invest so as to further compete downstream, to the detriment of consumers in the future".* In our view, the way this point is presented suggests that the mere disadvantaged position of less efficient competitors may create foreclosure concerns, despite the fact that the competitors are not in reality foreclosed from the market. This creates uncertainty as to the standard that the Commission will use to establish foreclosure effects in the context of NHM.

**e) The limiting assessment of efficiencies**

Anticompetitive effects do normally not arise for NHM. Unlike horizontal mergers, NHM do not involve the elimination of a direct competitor. As a result, efficiencies in the context of NHM do not derive from direct cost savings, but instead from a combination of complementary or independent vertical and/or conglomerate assets. It is commonly accepted that NHM give rise to a broad range of efficiency gains in terms of pricing efficiencies, productive efficiencies, preventing profit expropriation, avoiding the hold-up problem which deter investments, and eliminating transaction costs[6]. Some authors even conclude that there should be a rebuttable economic presumption in favor of NHM[7].

However, the Draft Guidelines consider the efficiencies separately from the question whether the NHM under review would lead to a significant impediment to effective competition. As in the context of horizontal mergers, efficiencies for NHM are considered as a potential justification to already identified and substantiated anticompetitive concerns. This seems counter-intuitive simply because, in most cases, the pro-competitive efficiency effects of NHM cannot be separated from the potential anticompetitive effects[8]. Both efficiencies and foreclosure effects will have the same source. In our view, the Draft Guidelines should therefore render the efficiencies analysis an integral part of the Commission's assessment, and not assess efficiencies only as a potential justification to anticompetitive effects of the proposed concentration. It follows that the Commission should actively include in its own agreement of the anticompetitive effects its views of efficiencies arising. By analogy, this is similar to the issue that not all anticompetitive effects are caught by Article 81(1) EC.

Further, efficiencies that arise from NHM should not be subject to the same stringent conditions as efficiencies resulting from horizontal mergers. In particular, the obligation for the parties to identify and substantiate efficiencies together with the cumulative conditions required by the Commission (merger-specific, verifiable and benefiting consumers) are unduly burdensome in the NHM context. In relation to a number of efficiencies, it would be difficult for the parties to a NHM to prove that the projected efficiencies are merger specific. The Commission mentions that, particularly for vertical mergers, efficiencies may not always be merger specific (paragraph 56), and therefore would reject such efficiency claims. This seems to be too dismissive.

**In our view, the Draft Guidelines should therefore render the efficiencies analysis an integral part of the Commission's assessment, and not assess efficiencies only as a potential justification to anticompetitive effects of the proposed concentration.**

Further, the decisional practice of the Commission suggests an extremely restrictive approach towards efficiencies. In the recent *Inco/Falconbridge*[9] case, the Commission explicitly dealt with efficiencies and found that there were no efficiencies because they were not-merger specific and would not be passed on to consumers because of high barriers to entry. Therefore, there is a concern as to whether the Draft Guidelines allow any real scope for the parties to successfully claim efficiencies in NHM. Again, NHM are very different to horizontal mergers. If the Commission does not expand the scope for consideration of efficiencies under NHM, then, in our view, the notifying parties to NHM are being improperly guided, which is a fault in itself and is likely to lead to unnecessary litigation before the EC Courts.

### f) The burden of proof is unbalanced

Given the prospective nature of the analysis to be undertaken, especially for conglomerate mergers, the obligation for the Commission to prove to the requisite standard the likelihood of anti-competitive effects of the merged entity's conduct is high.

In *Tetra Laval*, the ECJ stated that in a prospective analysis of future conduct (which inherently applies to NHM and especially conglomerate mergers), the chains of cause and effect are dimly discernible, uncertain and difficult to establish[10]. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly

important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

The Draft Guidelines do not clearly establish the Commission's burden of proof to prove anticompetitive effects arising from NHM. Based on the Court precedents, the Commission's evidentiary burden is significant, given that it would have to demonstrate why the merged entity would have the incentives and ability to engage in certain practices in the medium term (*i.e.* potentially several years after the merger). The Draft Guidelines do not make any precise statement on who bears the burden of proof and the level of the evidence required. By contrast, the Draft Guidelines impose on the notifying parties a very strict evidentiary burden to prove efficiencies. In our view, the Commission should address these points.

### g) The potential for commitments need to be addressed

The Draft Guidelines do not make any reference to commitments of any nature being able to counteract specific foreclosure concerns in the context of NHM. The ECJ confirmed in *Tetra Laval* that, in conglomerate mergers, a behavioral commitment might be the only effective remedy that is available because the structural effects of an operation will only be perceived in the future after possibly anticompetitive conduct has taken place[11].

We would welcome any clarification by the Commission on this point, in particular to confirm whether behavioral commitments may be put forward by the parties as an effective remedy. The relevance of this clarification is undoubted, especially since the Commission is cautious of behavioral remedies as it is also shown in its recently published draft Notice on remedies (see paragraphs 67 and 68)[12].

### h) The portfolio effects need to be clarified

Paragraph 103 of the Draft Guidelines indicates that customers may have a strong incentive to buy a range of products from a single source (one stop-shopping), e.g. because it saves transaction costs. The Draft Guidelines identify this point in passing as "portfolio effects".

It is true that portfolio effects doctrine is intrinsically related mainly to conglomerate mergers. However, the message, in our view, is unclear and may create confusion as to the nature of portfolio effects. For portfolio effects to arise several elements need to be present (e.g. dominance in at least one market of the complementary product range, unique range of complementary products, inability of competitors to replicate, likelihood of competitors' exit etc.[13]). If the Commission considers portfolio effects to be an issue, we would recommend including a paragraph on the constitutive elements of the portfolio effects doctrine in relation to NHM.

For any questions, please contact Kiran Desai (kdesai@mayerbrownrowe.com), Jens Peter Schmidt (jpschmidt@mayerbrownrowe.com), Arantza Golderos (agolderos@mayerbrownrowe.com) or Margarita Peristeraki (mperisteraki@mayerbrownrowe.com).

**Mayer, Brown, Rowe & Maw LLP**
**Brussels, May 2007**

"Mayer Brown Submission" Endnotes begin on page 31

# EU Antitrust and Pharma – Current Trends

The pharmaceutical industry is one of the most highly regulated industrial sectors in Europe. Despite resources being tied up in operating within a strict regulatory environment, it is one of the remaining leading high-technology industries in Europe, amounting to about 18% of all business R&D investments and about 3.5% of the total EU manufacturing value added. However, between 1990 and 2005, R&D investment in the United States grew 4.6 times, while in Europe it only grew 2.8 times. Today there is also rapid growth in the research environment in emerging economies such as China and India. These external and internal pressures on the EU research-based pharmaceutical industry mean it faces three main issues:

- Counterfeiting
- Innovation
- Parallel trade

## Counterfeiting

Counterfeiting is seen as one of the big problems facing pharmaceutical manufacturers. According to the World Health Organization, of all the medicines available on the international market today, 10% are fake. In some countries, the figure for counterfeit medicines can be as high as 50%.[1] The European Parliament has adopted a non-binding resolution calling for the creation of an international convention to fight counterfeiting of medicines.[2] The EU has been urged by the Member States to create a specific criminal offence for counterfeiting in each country. Currently, no EU anti-counterfeiting measures exist specifically for medicines. The issue has also recently been thrown to the fore by Pfizer's claim that its move to a single-drug distribution channel in the UK with a sole supplier, Boots' Alliance UniChem, was spurred by its need for tighter control over its supply chain, making it much harder for fake medicines to invade the market. In 2006, counterfeit Lipitor (atorvastatin, a Pfizer blockbuster to help fight heart disease and high cholesterol) entered the UK supply chain on at least three occasions. Many other pharmaceutical companies have since stated their intention to evaluate their supply chains, and the UK Office of Fair Trading is currently in the midst of a market study into the distribution of medicines in the UK.[3]

## Innovation

The European Commission has repeatedly affirmed the need to stimulate R&D and innovation as a necessary step towards economic growth, social inclusion, and, ultimately, consumer welfare.[4] The goal of the 2000 Lisbon Agenda[5] is to make Europe more dynamic and innovative so that it is better able to compete on the world stage. The pharmaceutical industry is one of the key sectors in this respect. In 2002, the G10 Medicines Group adopted recommendations to enhance competitiveness in the pharmaceutical industry while sustaining high public health standards.[6]

The pharmaceutical sector is totally dependent on innovation, which is a high risk and costly venture.[7] Investment in innovation will be made only if, and for as long as, the few successes are sufficient to compensate the many losses. Intellectual property protection is critical in this respect because it offers the holder the prospect of exclusivity, during the limited period of the effective life of the patent. The decision in the *AstraZeneca* case (see below) may be explained in part by the Commission's aim to promote inter-brand competition by spurring on innovation between pharmaceutical producers and by increasing price competition stemming from generic entry after patent expiry.[8]

In 2006, the European Commission also established the European High Level Pharmaceutical Forum to provide a platform for discussing the effects of pharmaceutical innovation on national health systems in Europe. The Forum concentrates on three core issues: pricing and reimbursement of medicines (following the G10's recommendations), information to patients on new medicines, and the cost and clinical effectiveness of medicines.

**The decision in the AstraZeneca case may be explained in part by the Commission's aim to promote inter-brand competition by spurring on innovation between pharmaceutical producers and by increasing price competition stemming from generic entry after patent expiry.**

The *AstraZeneca* case is on appeal to the Court of First Instance in Luxembourg.[9] The European Commission has argued a new form of abuse of a dominant position. AstraZeneca's conduct is of a type not previously examined under Article 82 EC. The case concerns two alleged abuses by AstraZeneca of government procedures aimed at excluding generic firms and parallel traders from competing against AstraZeneca's product "Losec." The alleged abuses consist of (1) the misuse of the patent system by knowingly making misrepresentations to patent offices with a view to extending the basic patent protection for Losec, and (2) the misuse of the system for authorizing the marketing of medicines by deregistering the original capsule version of Losec in selected countries with a view to preventing the authorization of generic versions of Losec as well as to excluding parallel trade.

The EU Competition Commissioner, Neelie Kroes, has said that she "fully supports the need for innovative products to enjoy strong intellectual property protection so that companies can recoup their R&D expenditure and be rewarded for their innovative efforts. However, it is not for a dominant company but for the legislator to decide which period of protection is adequate. Misleading regulators to gain longer protection acts as a disincentive to innovate and is a serious infringement of EU competition rules. Health care systems throughout Europe rely on generic drugs to keep costs down. Patients benefit from lower prices."[10]

The trial court's decision in *AstraZenca* considers that both infringements were committed with the intention of unfairly restricting competition from generics and parallel imports. The ruling in relation to the first alleged abuse is both highly specific and unlikely to be replicated. What is more, it penalizes AstraZeneca for misunderstanding a rule that was far from clear at the time of the infringement. In relation to the second alleged abuse, the implication is that a dominant company is under an obligation not only to continue to supply existing customers but to supply all comers. Under existing case law, obligations to supply new customers have been imposed only in very unusual circumstances, such as "essential facilities" cases. Overall, it does not seem clear what the effects on competition were. The case seems to be more about fairness than consumer welfare.

Acting fairly towards regulatory agencies was taken to a new level by pharmaceutical manufacturer Bristol-Myers Squibb (BMS). On May 10, 2007, BMS admitted misleading the Federal Trade Commission (FTC). It must pay a $1 million fine (€740,000) and it has pleaded guilty to settle a criminal antitrust probe in the US.

The US Department of Justice's antitrust division had been investigating BMS for making false statements to the FTC. BMS admitted failing to tell the FTC about a secret deal with Canada's Apotex. BMS paid an undisclosed amount to prevent Apotex from making a generic version of blockbuster drug, Plavix. The agreement settled patent litigation against Apotex. The FTC's concerns over being misled resulted, ultimately, in raids by the Federal Bureau of Investigation on the offices of Peter Dolan, chief executive at BMS.

BMS has further disclosed that it is under investigation from the FTC and the New York attorney general. Those investigations are assumed to remain active. BMS is also facing class actions across the United States from customers claiming the deals harmed them by reducing competition.

Innovation is also central to the US approach. In April 2007, the Federal Trade Commission and the Department of Justice issued a joint report on innovation and competition[11] to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property. The report discusses issues that include refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. In relation to the last point, the Boehringer investigation by the European Commission is relevant.

**Quota systems and dual pricing are potentially in breach of EU competition law.**

On April 17, 2007, the European Commission published a preliminary notice of initiation of proceedings against the pharmaceutical manufacturer Boehringer in relation to its alleged misuse of the patent system with the objective of excluding potential competition in relation to drugs for chronic obstructive pulmonary disease. This does not imply that the Commission has conclusive proof of an infringement – it only signifies that the Commission is dealing with the case as a matter of priority. Boehringer denies that it is dominant or has committed an abuse.[12]

## Parallel trade

Parallel trade of medicines affects sales of about €4.2 billion per annum.[13] In some EU Member States, the share of parallel imports represents up to 15% of the total pharmaceutical market. It is well known that the European Commission has sought to prevent pharmaceutical companies from entering into quota systems or dual pricing in order to prevent parallel traders from profiting from regulated price differentials in medicines between Member States. Parallel traders buy medicines in cheap countries and sell them in expensive countries. Quota systems and dual pricing are potentially in breach of EU competition law. The European Commission's fight against these activities is aimed at single-market integration. The EC does not want pharmaceutical manufacturers to divide up the EU into territorial

pricing zones. However, it is national regulation that creates the distortions, and new legislation would be a better tool to use rather than the competition rules.[14]

New pricing schemes to tackle parallel trade are regularly in the news. Pfizer has orchestrated the signing of detailed contracts with a select group of its wholesalers in Spain. These contracts do two things. First, they create an information system by which the wholesalers must inform Pfizer of their sales data. Second, they implement a *de facto* dual pricing system. It is a dual pricing system because Pfizer establishes, for the sale of its products, two different prices: a "regulated price" with the Spanish Administration and a higher "Pfizer price." The information system serves to identify — each month — whether wholesalers have agreed to Pfizer's demands and only supplied pharmacies within Spain. If this is the case, Pfizer reimburses its wholesalers the difference between the "Pfizer price" and the "regulated price," amounting to a rebate for the wholesaler. However, for exported products, there is no reimbursement. This system therefore introduces a dual price, one for the domestic market and one for export. The "Pfizer price" is deliberately set high to impede exports.[15]

GlaxoSmithKline has decided to address the system by getting governments on board.[16] It has agreed to new-style flexible pricing deals with two European governments, allowing it to raise the price of some drugs once additional clinical data on their value is available. This also allows for price cuts if medicines fail to offer value. Several countries, including France, have argued recently for a more flexible approach to valuing medicines that reward truly innovative products with higher prices but cut prices for those that are little different compared to existing drugs. The new model is designed to get away from the current practice of fixing the price of medicine at the time of launch, when the least information is known about its value.

**New pricing schemes to tackle parallel trade are regularly in the news.**

In 2006, the Hellenic Competition Commission (HCC) in Syfait[17] (Syfait II) and the Court of First Instance in Luxembourg (CFI) in the GSK dual pricing case (GSK DP)[18] delivered judgments. Syfait II concerned supply planning of Lamictal, Imigram, and Severent by GlaxoSmithKline in Greece. This matter had earlier been considered by an Advocate General at the European Court of Justice.[19] GSK DP concerned GlaxoSmithKline's General Sales Conditions for the sale of its products to wholesalers in Spain, under which wholesalers were charged a higher price for products intended for export than the price charged for products intended for resale in Spain.

The HCC found that the refusal to supply did not constitute an infringement of Article 82 EC because the behavior did not place the complainants in an inferior position or lead to the exclusion of the complainants from the market. The HCC did observe, however, that a restriction of trade between Member States may result from a refusal to supply orders in full in which case the refusal could be considered abusive under Article 82 EC Treaty. There has since been another preliminary reference to the European Court of Justice from the Athens Appeals Court regarding a number of questions in relation to supply quota systems.[20]

"EU Antitrust and Pharma" continued on page 32

# *Sperry v. Crompton Corp.* – Class Actions for Treble Damages Rejected Under New York's Antitrust Statute

On February 22, 2007, the New York Court of Appeals held, in *Sperry v. Crompton Corp.*, that treble damages under New York's antitrust statute, the Donnelly Act, constitute a penalty and so are not recoverable in a class action.[1] In coming to this conclusion, the Court of Appeals explicitly declined to address the question whether a plaintiff may maintain a class action under the Donnelly Act by forgoing treble damages in favor of actual damages.[2] The opinion was a major victory for defendants, and is of great and immediate practical impact in New York because it forecloses all treble-damages class actions under the Donnelly Act.[3] Its impact outside New York is less certain, though its decisive rejection of an unjust enrichment theory as an end run around an otherwise prohibited antitrust class action may provide guidance to prevent other jurisdictions from allowing such an approach.

## Factual background

The plaintiff, Paul Sperry, brought the purported class action against several corporations — Crompton Corporation, Uniroyal Chemical Company, Ltd., Flexsys NV, Flexsys America LP, Bayer AG, Bayer Corporation, Rhein Chemie Rheinau GmbH, and Rhein Chemie Corporation — involved in the production and sale of rubber-processing chemicals. Sperry proceeded on behalf of himself and all other consumers "who purchased tires, other than for resale, that were manufactured using rubber-processing chemicals sold by defendants since 1994." Because the defendants were not engaged in the manufacture or sale of end products such as tires, Sperry's purported class action was on behalf of indirect purchasers.[4]

**On February 22, 2007, the New York Court of Appeals held, in *Sperry v. Crompton Corp.*, that treble damages under New York's antitrust statute, the Donnelly Act, constitute a penalty and so are not recoverable in a class action.**

Sperry's complaint set forth a cause of action under the Donnelly Act for treble damages for engaging in an arrangement that restrained competition in violation of New York General Business Law § 340, and a cause of action for unjust enrichment.[5] The underlying conduct of which Sperry complained concerned a conspiracy to fix prices of rubber-processing chemicals, a conspiracy that had already resulted in guilty pleas by some of the defendants and a suit by direct purchasers of rubber-processing chemicals in federal court.[6] In making out his Donnelly Act claim against defendants, Sperry relied upon a 1998 amendment to the Donnelly Act that explicitly allowed suits by indirect purchasers.[7]

The trial court dismissed the complaint in its entirety, and the Appellate Division affirmed. The reasoning of the lower courts did not differ significantly from the reasoning of the New York Court of Appeals. It is therefore most useful to focus on the New York Court of Appeals opinion.

## New York Court of Appeals opinion

The New York Court of Appeals, like the lower courts before it, addressed the question of whether Sperry's claim was valid under the Donnelly Act almost exclusively in statutory-construction terms. New York CPLR § 901 sets out the prerequisites to a class action in the state of New York. Under New York CPLR § 901(b), "an action to recover a penalty … may not be maintained as a class action," unless the statute creating or imposing the penalty

"specifically authorizes" such an action. The question the court focused upon was whether the Donnelly Act's treble-damages provision, N.Y. Gen. Bus. Law § 340(5), which provides that a successful antitrust plaintiff "shall recover three-fold the actual damages sustained thereby," constituted a "penalty" for purposes of N.Y. CPLR § 901(b).

To answer this question, the New York Court of Appeals, in an opinion by Judge Graffeo, engaged in a detailed and thorough analysis of legislative history. The court found that N.Y. CPLR § 901(b) had been added in 1975 as part of a general overhaul of New York's class action provisions to respond to concerns that, in class actions, "recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved."[8] Groups advocating the provision in 1975 argued that "there was no need to permit class actions in order to encourage litigation by aggregating damage when statutory penalties and minimum measures of recovery provided an aggrieved party with sufficient economic incentive to pursue a claim."[9] Assemblyman Stanley Fink, the bill's sponsor, echoed these concerns at the time.[10] Just weeks after the passage of the class action statute, the New York Legislature amended the Donnelly Act to provide for treble damages as opposed to actual damages.[11]

Prior to *Sperry*, the New York Court of Appeals had never construed the meaning of the term "penalty" under N.Y. CPLR § 901(b), nor had it characterized the treble damages under the Donnelly Act as being penal or compensatory in nature. While Sperry and the defendants relied upon a grab bag of cases to support their respective positions, it is important to note that lower New York courts when addressing this exact question consistently concluded that the Donnelly Act's treble-damages provision constituted a penalty for purposes of N.Y. CPLR § 901(b).[12] The court reviewed the relevant case law, with particular attention to a case upon which Sperry relied heavily, *Cox v. Lykes Bros.*[13] In Cox, an opinion by then-Judge Cardozo, the New York Court of Appeals had held that double payment available to seamen for late wages under federal statute was not a penalty because the statute expressly provided that such compensation shall be "recoverable as wages." Turning away from the particular holding of the case, the New York Court of Appeals quoted another passage, "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. The nature of the problem will determine whether we are to take one viewpoint or the other."[14]

The court found these words by Judge Cardozo particularly relevant. The Legislature's purpose in enacting CPLR § 901(b) was to decline to make class actions available "where individual plaintiffs were afforded sufficient economic encouragement to institute actions

(through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status."[15] The court reasoned that this purpose was sound policy because "class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be small."[16] Placing the Donnelly Act into this context made clear that its treble damages "should be regarded as a penalty insofar as class actions are concerned."[17] The court explained its reasoning and holding as follows:

> Although one third of the award unquestionably compensates a plaintiff for actual damages, the remainder necessarily punishes antitrust violations, deters such behavior (the traditional purposes of penalties) or encourages plaintiffs to commence litigation—or some combination of the three. But we need not break down the remaining damages into specific categories for purposes of determining whether it is a penalty under CPLR 901(b). Where a statute is already designed to foster litigation through an enhanced award, CPLR 901(b) acts to restrict recoveries in class actions absent statutory authorization.[18]

In coming to this conclusion, the court distinguished United States Supreme Court opinions describing antitrust treble damages as compensatory. The court noted that while it would "generally construe the Donnelly Act in light of federal antitrust case law," it would approach the statute differently where "[s]tate policy, differences in statutory language or the legislative history justify such a result."[19] Furthermore, the Federal Rules of Civil Procedure governing class actions did not contain any analogous limitation in the context of statutory penalties, so no Supreme Court cases directly addressed the issue at hand.[20]

**The immediate impact of the *Sperry* opinion is clear — the dismissal of class actions for treble damages under the Donnelly Act.**

As noted above, because Sperry had sought treble damages consistently throughout the litigation, the court explicitly found that the question of whether a plaintiff may forgo treble damages to pursue a class action under the Donnelly Act was not before it.[21]

Finally, the court made short work of Sperry's unjust enrichment argument. It agreed with Sperry "that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment," but nevertheless rejected such a claim in the case at hand because "the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim. Additionally, in this situation it is not appropriate to substitute unjust enrichment to avoid statutory limitations on the cause of action created by the Legislature."[22]

## Potential impact of opinion

The immediate impact of the *Sperry* opinion is clear — the dismissal of class actions for treble damages under the Donnelly Act. The case has already resulted in one such dismissal.[23] Though the question of whether a class action can be maintained under the Donnelly Act by plaintiffs who forgo treble damages remains an open one, the New York Court of Appeals certainly provided no indication that plaintiffs will be able to do so.[24] At the very least, even if New York *were* to allow such class actions, the *Sperry* opinion would cut by two-thirds the damages available.

The impact of the case outside New York is less certain, though it could be significant. One interesting aspect of the case is that it was an indirect-purchaser class action. The United States Supreme Court held 30 years ago that indirect-purchaser suits are so speculative and fraught with the danger of duplicative recovery that they are invalid under federal antitrust law, even when brought on an individual basis.[25] The Supreme Court later held that states could still authorize indirect purchasers to recover under *state* antitrust laws,[26] and many states passed "repealer" statutes like the 1998 amendment to the Donnelly Act. However, faced with the prospect of actually certifying a class in the indirect-purchaser context, most states have balked. As an article in the Antitrust Law Journal has explained, "[t]he vast majority of trial courts that have rigorously applied the requirements for class treatment in actual indirect purchaser suits have refused to certify the class."[27]

Because the New York Court of Appeals relied on a statutory interpretation applying to *all* class actions under the Donnelly Act, it had no need to reach the specific policy reasons for disallowing class actions in the indirect-purchaser context. That said, these policy issues provided a backdrop to the case, and helped to explain why, when the New York Legislature amended the Donnelly Act to allow indirect-purchaser antitrust suits in 1998, it did not also amend the act to permit class actions for indirect or direct purchasers. State courts faced with manifest workability problems in indirect-purchaser class actions may note and find persuasive New York's general disallowance of class action suits for antitrust claims.[28]

Perhaps of even broader impact is the New York Court of Appeals's sharp and unequivocal rejection of Sperry's unjust enrichment claim. Allowing unjust enrichment claims to be brought by indirect purchasers for alleged price-fixing would enable plaintiffs to make an end run around the fact that federal law and the laws of many states disallow antitrust suits to be brought by indirect purchasers. This is exactly what Sperry attempted in this case when faced with the disallowance of class actions under the statutory Donnelly Act. A recent law review article — *Undoing the Otherwise Perfect Crime — Applying Unjust Enrichment to Consumer Price-Fixing Claim*s, by Daniel R. Karon in the West Virginia Law Review[29] — argued broadly for just this approach.

There are manifest problems with allowing such unjust enrichment claims, however. First, they raise the same workability problems as indirect-purchaser individual suits and class actions generally. Also, such claims clearly violate the "remoteness" principle, the idea that, while "any wrongful act * * * can reach beyond the person who is directly hurt * * * [a]t some point, imposition of liability becomes too tenuous, too remote."[30] The United States Supreme Court has elaborated on this principle, the requirement of a "direct relation between the injury asserted and the injurious conduct alleged":

> At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third

"Sperry" continued on page 33

## Indirect Power Purchasers' State Antitrust Claims Preempted by FERC

A California mid-level court of appeal recently dismissed a lawsuit brought by purchasers of retail electric power against producers and sellers of wholesale electric power because the suit was preempted by a federal regulatory scheme. *Wholesale Electricity Anti-Trust Cases I & II*, No. D047697, 55 Cal. Rptr. 3d 253 (Cal. App. 4 Dist. Feb. 26, 2007). The decision suggests that the preemptive effect of the Federal Energy Regulatory Commission's (FERC's) regulations should be broadly construed to require private plaintiffs to seek redress from FERC rather than bring antitrust lawsuits regarding the wholesale sale of electric power.

This case was an appeal from the Superior Court of San Diego, which dismissed the action for lack of jurisdiction, holding that the plaintiffs' claims were preempted by federal law.[1] The plaintiffs in this case were public entities and retail purchasers of electric power. They brought suit against companies that generate, trade, and sell wholesale electric power, including Dynegy, Inc., Morgan Stanley Capital Group, Inc., AES Corporation, and Sempra Energy, Inc. In their 2002 master complaint, the plaintiffs argued that the defendants violated both California's antitrust laws and California's unfair competition law, claiming that the defendants withheld supply and colluded to fix prices of power, which resulted in "grossly inflated" prices.[2] Plaintiffs claimed they were due damages and other relief as a result of the defendants' alleged "manipulation, distortion, and corruption of California's deregulated wholesale electricity market."[3] The plaintiffs also argued that the defendants' conduct resulted in "widespread electricity shortages and astronomical prices," harming Californians as a whole.[4]

The Court of Appeal, Fourth District affirmed the trial court, holding that to allow the plaintiffs to sue pursuant to state antitrust and unfair competition laws would intrude upon "an area reserved exclusively to FERC."[5] The court explained that the presumption against preemption applies where the state, and not the federal government, traditionally regulates a particular field. Relying on recent Ninth Circuit decisions, the court held that FERC has "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[6] Therefore, a state court may not "determine the rates that 'would have been achieved in a competitive market.'"[7]

The court held that plaintiffs must seek redress from FERC, rather than state courts,[8] and that the Federal Power Act provides "safeguards to oversee the reasonableness of rates for the wholesale electricity market."[9] Additionally, the court reasoned that FERC provides

remedies, such as requiring refunds and ordering utilities to disgorge profits, and that these remedies were available to the plaintiffs.[10]

While recognizing that in some cases there is a presumption against preemption, the court did not apply that presumption in this case because the regulation of wholesale electricity rates long has been under the purview of the federal government.[11]

The defendants also argued, and the court agreed, that the filed rate doctrine barred the plaintiffs' action.[12] The filed rate doctrine "provides that state law, and some federal law (e.g., antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."[13] The court held that market-based rates regulated by FERC are within the scope of the filed rate doctrine.[14]

The court made these holdings despite the fact that FERC had a "difficult history,"[15] concluding that FERC had been provided with "sufficient regulatory authority such that federal preemption principles must be applied to these antitrust/UCL challenges arising from wholesale electricity market activities."[16] The *Wholesale* court also determined that the filed rate doctrine strengthened its finding that the plaintiffs' claims were preempted because there were market-based rates.[17]

**The court held that plaintiffs must seek redress from FERC, rather than state courts, and that the Federal Power Act provides "safeguards to oversee the reasonableness of rates for the wholesale electricity market."**

In sum, the decision stands for the proposition that FERC preemption as well as the filed rate doctrine are likely to prohibit most, if not all, private antitrust litigation regarding the wholesale sale of electric power.

**Holly H. Daee (Washington, D.C.)**

## Endnotes

1 *See Wholesale*, 55 Cal. Rptr. at 257.

2 *See id.* at 257-58.

3 *Id.* at 258.

4 *Id.*

5 *Id*. at 265.

6 *Id.* at 263 (citing *Public Utility Dist. No. 1 of Grays Harbor County Washington v. Idacorp Inc.*, 379 F.3d 641 (9th Cir. 2004)).

7 *Id.* at 264 (citing *Public Utility Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc*., 384 F.3d 756 (9th Cir. 2004)).

8 *Id.*

9 *Id.* at 269.

10 *Id*. at 270.

11 *Id*. at 261-62.

12 *Id*. at 272.

13 *Id*. at 271.

14 *Id.* at 272.

15 *Id.* at 270 (noting FERC's "past institutional failures").

16 *Id*.

17 *Id.* at 272.

"Bell Atlantic Corp. v. Twombly" continued from page 8

did not allege a "plausible suggestion of conspiracy."[38] As to the first of the plaintiffs' theories (i.e., that the ILECs engaged in conduct designed to prevent competition from CLECs), the Court stated that nothing in the complaint suggested anything more than the natural, economic incentive to resist competition from CLECs in each ILEC's respective territory. The Court noted that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing."[39]

The Court also concluded that the plaintiffs' second theory (i.e., that the ILECs did not enter each other's service territories in a significant way) failed to allege a plausible conspiracy. The Court stated that it was necessary to view the defendants' behavior in the context of the regulatory world in which they had operated. Prior to enactment of the Telecommunications Act, the ILECs operated as government-sanctioned franchises within designated territories. The Court observed that each ILEC likely preferred to operate in that world and "knew the adage about him who lives by the sword."[40] Thus each was "sitting tight, expecting [its] neighbors to do the same thing."[41] Further, the allegations in the complaint supported that theory; while the complaint generally alleged that the ILECs passed up attractive business opportunities in other ILECs' territories, it failed to allege that competing as a CLEC was potentially lucrative or better than other opportunities available to the ILECs. Indeed, the complaint alleged that the ILECs resisted cooperating with the CLECs, creating insurmountable barriers to profitability — and providing no plausible reason why an ILEC would want to compete as a CLEC in another territory. Thus, the Supreme Court reversed the second circuit, holding that the complaint should be dismissed because it failed to allege plausible grounds on which to infer a conspiracy.

Although, as noted above, defendants have been relying on *Bell Atlantic Corp. v. Twomb*ly to test the waters for dismissal in pending actions, it is too early to predict whether that opinion will change the outcome for many cases. The Supreme Court expressly noted that in reaching its decision, "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 [which requires more particularized allegations in certain instances], which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'"[42] The Court stressed that it was not ruling that the allegations in the plaintiffs' complaint were insufficiently particularized, but "rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."[43]

**Diane Green-Kelly (Chicago)**

## Endnotes

1 http://www.lawmemo.com/sct/blog/bell_atlantic_v_twombly/index.html.

2 Mayer Brown represented one of the petitioners and filed a brief in this case.

3 Fed. R. Civ. P. 8(a)(2).

4 Christine Caulfield, *Plaintiffs Urge Court to Be Wary of Twombly Ruling*, Competition Law 36 (Portfolio Media, N.Y. 6/1/07).

5 550 U.S., 127 S. Ct. 1955, 1974 (2007); *see also id.* at 1973 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard …").

6 Pub. L. No. 104-104, 110 Stat. 56 (codified in various section of Titles 15 and 47 of the United States Code).

7 *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 102 (2d Cir. 2005).

8 540 U.S. 298 (2004).

9 Through mergers and acquisitions, the seven original Baby Bells became the four ILEC defendants in *Twombly*.

10 Section 1 of the Sherman Act prohibits "[e]very contract combination … or conspiracy, in restraint of trade or commerce …" 15 U.S.C. §1.

11 *Twombly*, 425 F.3d at 103.

12 *Bell Atlantic Corp.*, 127 S.Ct. at 1962 (quoting ¶¶ 40-41 of the Complaint).

13 *Twombly*, 425 F.3d at 103.

14 *Bell Atlantic Corp.*, 127 S.Ct. at 1972 n.13.

15 *Id.* at 5; *Twombly*, 425 F.3d at 102.

16 *Bell Atlantic Corp.*, 127 S.Ct. at 1963 (quoting *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 179 (2003)).

17 *Twombly*, 313 F. Supp. 2d at 179.

18 *Id.*

19 *Id.* at 180.

20 *Id.* at 1963 (quoting *Twombly*, 313 F. Supp.2d at 188).

"Bell Atlantic Corp. v. Twombly" Endnotes continued on page 30

"Bell Atlantic Corp. v. Twombly" Endnotes continued from page 29

21 *Id.* (quoting *Twombly*, 425 F.3d at 114).

22 *Twombly*, 425 F.3d at 114.

23 *Id.*

24 *Twombly*, 425 F.3d at 116.

25 *Twombly*, 425 F.3d at 116.

26 *Bell Atlantic Corp.*, 127 S.Ct. at 1963.

27 *Id.* at 1964. (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984)).

28 *Id.* (quoting *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954)).

29 *Id.* (quoting *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

30 *Id.*

31 *Id.* at 1966.

32 *Id.*

33 *Id.* at 1965.

34 *Id.* at 1966-67.

35 *Id.* at 1969.

36 *Id.* Justice Black's opinion states the proposition that a complaint must provide fair notice of the grounds for relief and "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. 41, 45-46 (1957).

37 *Bell Atlantic Corp.*, 127 S.Ct. at 1969.

38 *Id.* at 1971.

39 *Id.*

40 *Id.* at 1972.

41 *Id.*

42 *Id.* at 1973 n.14.

43 *Id.*

"German National Geographic" continued from page 12

and their realization are strategies of internal growth. Only the requirement that there be an *existing* market position is sufficient to distinguish those corporate strategies that fall under the merger control regime and those that do not. The court also referred to the European Commission Notice on the concept of concentration under the EC Merger Control Regulation, which states that assets in question may be brands or licenses, but must constitute a business to which a market turnover can be clearly attributed.

## Conclusion

The purchase of a license can fall under the German merger control regime. The reason that the National Geographic transaction fell outside the scope of the notion of concentration was the fact that G+J did not step into an *existing* market position. This means that in cases where IP rights have been used and have generated turnover, a market position may exist that, to the extent it is capable of strengthening the market position of the acquiring firm, may make a pre-merger notification to the German BKA necessary.

**Jens Peter Schmidt (Brussels)**

"Mayer Brown Submission" Endnotes continued from page 18

## Endnotes

1 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. Official Journal L 336 of 29 December 1999, p. 21-25.

2 See Commission's Green Paper on vertical restrains in EU competition policy of 22 January 1997, paragraphs 42 and 44.

3 Originally issued as part of "US Department of Justice Merger Guidelines" of 14 June 1984, available at http://www.usdoj.gov/atr/public/guidelines/2614.htm.

4 Judgment of the Court of Justice of 15 February 2005, in Case C-12/03 P, *Commission v Tetra Laval BV*.

5 Judgment of the Court of First Instance of 14 December 2005, in Case T-210/01, *General Electric v Commission*.

6 See among others, Jeffrey Church, Impact of Vertical and Conglomerate Mergers (2004), pages 281 - 287, available at http://europa.eu.int/comm/competition/mergers/others/merger_impact.pdf.

7 The Efficiency-Enhancing Effects of Non Horizontal Mergers, by RBB Economics (Simon Bishop et al.), 2005, page 3. See, also the ECJ in Tetra Laval (paragraph 44) stated: "The analysis of a conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible".

8 See, RBB Report cited above, page 121. The Report concludes that the two step approach to assessing efficiencies can only be appropriate if two conditions are met: (i) the anticompetitive issues raised by the NHM can be assessed separately from the likely effects of any efficiency; and (ii) a direct trade off comparison can be made, i.e., the efficiency can be readily translated into an impact on pricing incentives.

9 Case No COMP/M.4000 of 4 June 2006, *Inco/Falconbridge*, paragraphs 537 *et seq*.

10 See *Commission v Tetra Laval*, cited above, paragraph 44.

11 See *Commission v Tetra Laval*, cited above, paragraphs 88 and 89.

12 Draft Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, available at http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf.

13 OECD, Portfolio Effects in conglomerate mergers, DAFFE/COMP2002(5) of 24 January 2002, p. 21, available at http://www.oecd.org/dataoecd/39/3/1818237.pdf.

"EU Antitrust and Pharma" continued from page 22

In GSK DP, the CFI recognized the particular characteristics of the pharmaceuticals industry, but held that despite the European Commission's conduct of "a relatively brief examination," the Commission was right to find that GSK's arrangement had as its actual or potential effect the restriction of competition. GSK's arrangement was found to restrict competition because it had the effect of reducing the welfare of consumers, including the social security institutions and the national sickness insurance schemes, by depriving them of the advantages of reduced prices and costs that would have flowed from intra-brand competition on the national markets of importation. The CFI acknowledged that, although the effect of precluding pressure on the unit price of the medicines in question may be marginal, if considered at the individual level of one of the national markets affected, such actions nonetheless contributed to a network effect where the agreement (1) concludes with a significant number of Spanish wholesalers and (2) affects a significant number of products and national markets. The case has been appealed by all parties. It is the first time the CFI has expressly stated that a limitation of parallel trade does not by its very nature lead to a restriction of competition contrary to competition law.

In 2007, the Paris Court of Appeal[21] upheld a decision by the French Competition Council that pharmaceutical manufacturers were allowed to refuse to supply wholesalers who were only active in export markets, i.e., the wholesalers did not supply the domestic market and only existed to sell medicines at a profit abroad. The Competition Council held that it was not abusive for a pharmaceutical company to refuse supplies that were intended for the domestic market to an exporter at a regulated price.

It seems as though the tide is turning in favour of pharmaceutical manufacturers. New initiatives to evaluate and tackle counterfeiting are underway and the European Commission appears to be gaining ground in its drive to promote innovation by increasing inter-brand competition. There is an increasing trend towards recognizing the unique nature of the market for pharmaceutical products in Europe, most notably demonstrated by the CFI's recognition that limits placed on parallel trade by pharmaceutical companies need not be anti-competitive.

**Clare Brown (London)**

## Endnotes

1 The World Health Organization estimates that the counterfeiting of medicines now affects 10% of the world market, and the Food and Drug Administration puts the figure at more than 10%; up to 70% of anti-malaria drugs circulating in Cameroon are counterfeit, a figure confirmed for six other African countries by the WHO in 2003; 25% of all medicines used in developing countries are apparently counterfeit (50% in Pakistan and Nigeria).

2 September 6, 2006, following the Statement on the fight against counterfeiting by the Heads of State and Government of the G8 at the St Petersburg Summit on July 15 and 16, 2006.

3 http://www.oft.gov.uk/news/press/2007/60-07. The decision to undertake a market study reflects the importance of ensuring that the distribution of medicines involving pharmacists, hospitals and dispensing doctors is timely, efficiently delivered, and cost-effective for patients. The UK National Health System spends more than £10 billion per year on the purchase of prescription medicines. UK pharmacies currently provide more than 800 million prescriptions per year.

4 Communication to the Spring European Council, "Working together for growth and jobs — A new start to the Lisbon Strategy," February 2, 2005.

5 The Lisbon Agenda sets out the Community's priorities for the development of economic activities in the European Union: Commission Contribution to the Special European Council in Lisbon, March 23-24, 2000, "The Lisbon European Council — An Agenda of Economic and Social Renewal for Europe," February 28, 2000.

6 http://ec.europa.eu/enterprise/phabiocom/p9.htm.

7 Case T-168/01, *GlaxoSmithKline v. Commission*, judgment of September 27, 2006, at paras. 258, 264 and 271. Research-driven pharmaceutical companies invest up to 15-20% of their sales in R&D, which represents a higher percentage than any other industrial sector (including high-tech industries such as computers, electronics or aerospace). Source: European Federation of Pharmaceutical Industries and Associations.

8 European Commission Competition Policy Newsletter Spring 2007 "Competition in Pharmaceuticals: the challenges ahead post AstraZeneca" by Nadia de Souza of DG Competition, at page 39. Case T-321/05 *AstraZeneca v. European Commission*. At national level, GlaxoSmithKline received France's first predatory pricing fine on March 14, 2007 from the French Competition Council of $13.2 million, for allegedly pricing an injectable antibiotic below cost to prevent generic makers from entering the market.

9 Mayer Brown acts for AstraZeneca PLC in this matter. On October 29, 2005, an outline of the grounds for appeal were published (Official Journal C271/24 of October 29, 2005).

10 EUROPA - Rapid - Press Release IP/05/737 dated June 15, 2005.

11 U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Enforcement Property Rights: Promoting Innovation And Competition (2007) http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

12 http://www.boehringer-ingelheim.com/corporate/asp/news/ndetail.asp?ID=4514.

13 Source: European Federation of Pharmaceutical Industries and Associations.

14 The Greek Competition Authority has recently issued its decision in Syfait II where it suggested a legislative approach would be better rather than relying on antitrust enforcement. Syfait/GSK, HCC Decision Number 318/V/2006.

15 http://www.handelrownolegly.pl/img/24201938.pdf.

16 *The Scotsman*: Glaxo pioneers new European drug pricing model By Ben Hirschler, European Pharmaceuticals Correspondent – September 2006.

17 Syfait/GSK, HCC Decision Number 318/V/2006.

18 Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*. Now on appeal to the European Court of Justice — lodged at the ECJ on December 12, 2006, Case C 501/06P.

19 Case C-53/03, *Syfait and others v. Glaxo Wellcome*. AG Jacobs issued an opinion on the case in which he concluded that a restriction of supply by a dominant pharmaceutical undertaking in order to limit parallel trade is capable of justification as a reasonable and proportionate measure in defence of that undertaking's commercial interests. However, AG Jacobs emphasized that his opinion is highly dependent on the specific economic and regulatory context in which the case arose and that his conclusion was specific to the pharmaceutical industry "in its current condition" and to the particular type of conduct being examined.

20 Cases C-468-478 *Sot. Lelos kai Sia EE & Others v. GlaxoSmithKline*, OJ[2007] C20/03-13.

21 Decision No. 05-D-72 of the French Competition Council (Conseil de la Concurrence) of 20 December 2005, upheld on appeal by the Paris Court of Appeal in a judgment of January 23, 2007 (Pharma-Lab, RG n°2006/01498).

"Sperry" continued from page 26

> person by the defendant's acts was generally said to stand at too remote a distance to recover.[31]

In *Sperry*, the New York Court of Appeals effectively recognized and applied the remoteness principle. The court described the indirect relationship between the purported class and the defendants, and explained that the "connection" between them was "simply too attenuated to support such a claim" of unjust enrichment.[32] This clear holding may stand as persuasive authority for other state courts faced with an indirect-purchaser antitrust claim pitched in the guise of an unjust enrichment claim.

**Daniel Kirschner (New York)**

## Endnotes

1 *Sperry v. Crompton*, 8 N.Y. 3d 204, 209 (N.Y. 2007).

2 *Id*. at 215.

3 Mayer Brown filed an amicus brief on behalf of the Chamber of Commerce of the United States of America.

4 *Sperry*, 8 N.Y. 3d at 209.

5 *Id.* at 209. Sperry also set forth another complaint under the Donnelly Act that he lost before the Supreme Court and abandoned on appeal. *Id.* at 210 n.3.

6 *See* Brief of Defendants-Respondents at 6-7, *Sperry v. Crompton*, 8 N.Y. 3d 204 (N.Y. 2007) (No. 2004-06517).

7 N.Y. Gen. Bus. L. § 340(6). More than 20 years before this amendment to the Donnelly Act, the United States Supreme Court had held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchaser suits are invalid under federal antitrust law, even when brought on an individual basis.

8 *Sperry*, 8 N.Y. 3d at 211.

9 *Id.*

10 *Id.*

11 *Id.* at 212.

12 *See, e.g.*, *Sperry v. Crompton Corp.*, 26 A.D.3d 388, 810 N.Y.S.2d 498 (2nd Dep't 2006); *Paltre v. General Motors Corp*, 26 A.D.3d 481, 810 N.Y.S.2d 496 (2nd Dep't 2006); *Cox v. Microsoft Corp*, 290 A.D.2d 206, 737 N.Y.S.2d 1 (1st Dep't 2002); *Asher v. Abbott Laboratories*, 290 A.D.2d 208, 737 N.Y.S.2d 4 (1st Dep't 2002); *Lennon v. Philip Morris Companies, Inc.*, 189 Misc2d 577, 734 N.Y.S.2d 374 (Sup. Ct. N.Y. 2001); *Rubin v. Nine West Group*, 1999 WL 1425364 (Sup. Ct. N.Y. Nov. 3, 1999); *Russo & Dubin v. Allied Maint. Corp*, 95 Misc.2d 344, 407 N.Y.S.2d 617 (Sup. Ct. N.Y. 1978);

"Sperry" Endnotes continued on page 34

"Sperry" Endnotes continued from page 33

*Blumenthal v. Am. Soc'y of Travel Agents, Inc.*, 1977 WL 18392 (Sup. Ct. N.Y. July 5, 1977); *Leider v. Ralfe*, 387 F.Supp.2d 283 (S.D.N.Y. 2005).

13 237 N.Y. 376 (1924).

14 *Sperry*, 8 N.Y. 3d at 213 (quoting Cox, 237 N.Y. at 380).

15 *Id.*

16 *Id.*

17 *Id.* at 214.

18 *Id.*

19 *Id.* at 215 (quoting Anheuser-Busch, Inc. v. Abrams, 71 N.Y. 2d 327, 335 (N.Y. 1988)).

20 *Sperry*, 8 N.Y. 3d at 215.

21 *Id.*

22 *Id.* at 215-16.

23 *In re Automotive Refinishing Paint Antitrust Litigation*, 2007 WL 1377700, *3 (E.D. Pa. May 8, 2007) (federal court sitting in diversity held its ruling pending resolution of *Sperry* and dismissed Donnelly Act class action for treble damages after *Sperry* was decided).

24 N.Y. Gen. Bus. Law § 340(5) says that the plaintiff "***shall*** recover three-fold the actual damages sustained thereby" (emphasis added), raising the question whether plaintiffs have the ***option*** of forgoing treble damages.

25 *Illinois Brick*, 431 U.S. at 736-46.

26 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

27 William Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1 (1999).

28 The amicus brief filed in this case by Mayer Brown on behalf of the Chamber of Commerce of the United States addressed these workability problems in detail.

29 108 W. Va. L. Rev. 395 (2005).

30 Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 Cornell J. L. & Pub. Pol'y 421, 421 (1999) (emphasis in original).

31 *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (internal quotation marks and citations omitted). The amicus brief filed in this case by Mayer Brown on behalf of the Chamber of Commerce of the United States developed this argument at greater length.

32 *Sperry*, 8 N.Y. 3d at 216.

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