Parallel Trade
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ARNOLD & PORTER (UK) LLP

Regulatory – IP – Competition

INTRODUCTION

In 2002 we published in PLC magazine an article which gave an overview of the then current law as it related to parallel trade in the EU. We produced an update in April 2003 designed specifically for our pharmaceutical clients. Since last April there have been a number of decisions of the European Court of Justice (ECJ), the European Free Trade Association (EFTA) court, and the English High Court of particular relevance to the pharmaceutical sector. This update is designed to be a companion to our earlier article and update. Please contact any of the authors listed at the end of this update if you would like copies of the earlier publications.¹

There are three distinct, but often overlapping, legal areas that affect the ability of pharmaceutical companies to resist parallel imports and competition from generics, namely regulatory, intellectual property, and competition.

REGULATORY

KOHLPHARMA – “COMMON ORIGIN”

Background. In De Peijper (Case – C-104/75), the ECJ held that where a manufacturer produces the same product (or a variation of it having no therapeutic difference) and places it on different national markets within the Community (either directly or through affiliated companies acting as its representative) parallel import of that product from one Member State that has authorised it to another should not be treated as placing that product on the market for the first time. Accordingly, the importer need not apply for a fresh marketing authorisation and the product is placed on the market in the country of import under the umbrella of the existing authorisation in the country of export. Moreover, the Court emphasised that Member States may not assume that the products are different and require the importer to produce batch control and other documents to substantiate that the particulars already held by the authority are equally relevant to the import. Based upon this ruling, Member States and the Commission developed policy that allowed parallel import of products with the same active substance and the same therapeutic effects where the entities placing the products on the market in the countries of import and export were related, i.e., they were members, or licensees, of the same group so that the products had a “common origin.” In Smith & Nephew (Case – C-201/94) the same principle was extended to a factual situation where the companies marketing

¹ On 30 December 2003 the Commission issued COM (2003) 839(01) Commission Communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted. The Communication is a useful summary of the ECJ caselaw, and the full text is available at: www.europa.eu.int/comm/internal_market/en/goods/art2830.htm

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in the Member States in question were unrelated, but marketed pursuant to licence agreements with the same licensor. The relevance of a “common origin” has been considered recently by the Advocate General in the Kohlpharma case.

**Facts.** Chinion was a supplier of an active ingredient, “Selegiline.” It supplied two companies: (i) an Italian company called Chiesi which used the active ingredient in its product “Jumex” – under a license agreement, which had the effect of exhausting any patent rights in the active ingredient; (ii) a German company called Orion, which used the active ingredient in its product “Movergan” pursuant to a supply agreement. Kohlpharma sought to import Jumex from Italy into Germany, but the BfArM objected on the basis of no common licensor. Kohlpharma argued that “common origin” was not a necessary condition and what mattered was whether the two products were substantially identical.

**Decision.** Advocate General Tizzano considered two questions: (i) whether a competent authority can refuse to permit parallel importation on the basis that there is no “common origin”; and (ii) whether the importer is required to provide evidence of substantial identicality, or whether the onus is on the competent authority. Taking each question in turn:

(i) AG Tizzano said that there were two conditions to be fulfilled. The first was that the product to be imported must have a marketing authorisation in another Member State. The second was that the product must be substantially identical to a product in the country of import. The AG said that the critical issue was whether there was a third condition, that of “common origin.” He thought there was not, and went on to interpret the decision in Smith & Nephew as not requiring “common origin”; in that case, he said, common origin existed and that was a useful indicator of “substantial identicality” which the importer could pass on to the competent authority. However, in elaborating a test of “substantial identicality” he sought to adopt the same test as that for a generic application, i.e. that the products were “essentially similar.”

(ii) As for the burden of proof, AG Tizzano said it was necessary to consider whether the importer must establish the “substantial identicality” of the two products. He drew a distinction between parallel importers (who dealt in available medicines) and generics companies (who sold products in Member States where the product did not already have a marketing authorisation and where data on safety and quality could not be assumed). He concluded that it was sufficient for the parallel importer to provide the limited information on safety and efficacy which could be ascertained from publicly available information, such as leaflets; where it existed, information on common origin might be helpful to the competent authority. However, the competent authority must satisfy itself as to safety and efficacy from other information at its disposal and, where it had doubts, it could contact the competent authority of the exporting Member State. It was only where serious doubts as to safety or quality remained that the parallel importer must be asked to provide further information.

**Comment.** The AG’s opinion goes well beyond established authority. In our view, the opinion is not consistent with the principles underlying the decision in De Peijper or in Smith & Nephew, which acknowledged the importance of the common origin test but sought to expand it. The AG appears to have sidelined the test as being just one factor which is to be taken into consideration in deciding whether two products are “substantially identical.” The effect of his opinion is to confuse the rules for marketing authorisations for generic “essentially similar” medicinal products with the special derogation for parallel imports. It is precisely because parallel imports satisfy the common origin test that the derogation applies.

The previous decisions were based on the principle that, because of the common origin of the products, the competent authority in the country of import was entitled to assume conformity between the specification for the import and the specification for the domestic product already authorised by it. Where there was the possibility that variants might have been marketed by the same group of companies, the authorisation holder in the country of import could be compelled to supply information to assess whether a different therapeutic effect was likely. If substantial identicality were the only relevant test, a generic company would not need a separate marketing authorisation, but could import its product from a Member State elsewhere in the EU where it was authorised provided it was “essentially similar” to the innovator product in the country of import.

We believe, therefore, that if there is no common origin, the normal authorisation rules should apply.
It is to be hoped that the ECJ will identify these flaws in their judgment, later this year.

*Case - C-112/02 Kohlpharma GmbH v. Germany, Opinion of Advocate General Tizzano (11 September 2003)*

**PARANOVA – WITHDRAWAL OF AUTHORISATIONS**

**Background.** Two recent cases (*Paranova Läkemedel* and *Paranova Oy*) raised questions about the consequences of withdrawing marketing authorisations.

**Facts.** Astra/Hassle held marketing authorisations for Losec capsules, while Paranova and others held parallel import licences. Astra/Hassle requested the withdrawal of its marketing authorisations because they intended to sell Losec in the form of tablets, in place of capsules. The reasons for withdrawal were not connected with the safety of the product. The products had a different pharmaceutical form, but were bioequivalent. The efficacy of the two forms was the same but the tablets had certain practical advantages, including being soluble in water. The only differences were that the capsules contained omeprazole acid as the active ingredient, whilst the tablets contained the magnesium salt of omeprazole acid. The regulatory authorities in Sweden and Finland decided that Paranova’s parallel import licences for the capsules would expire on the same date that the marketing authorisations would cease to be valid since the new Losec tablets had to be considered as a distinct medicinal product with a different active ingredient/form. Paranova and others appealed to the national courts and Article 234 references were made to the ECJ on the interpretation of Articles 28 and 30 EC.

**Decision.** The ECJ held that Article 28 and 30 precluded national legislation which had the effect of cancelling a parallel import licence in circumstances where the holder of a reference marketing authorisation had voluntarily requested its withdrawal. However, the court said that such a rule would not preclude restrictions on the parallel importation of a medicinal product where there was a risk to human health as a result of the continued existence on the market of both products.

**Comment.** This case follows the earlier decision in *Ferring v. Eurim-Pharm* (*Case – C-172/00 (2002)*, see our April 2003 update) when the ECJ held for the first time that the withdrawal of the reference marketing authorisation should not automatically lead to the revocation of the parallel import licence. In each case, the regulatory authority will consider whether there are any safety issues raised by permitting the imports to continue. Here, for example, it was not disputed that the tablets and capsules were bioequivalent. It leaves open the question of whether it would be possible for a parallel import licence to continue if the original product was withdrawn, but not replaced. In theory, the reasoning of the ECJ could be used to support such an argument, since the parallel import is being allowed to continue irrespective of the existence on the market of a new “related” product. As a matter of practice, this approach is unlikely to appeal to the regulators. The case also creates an arbitrary distinction between parallel importers who obtained their authorisations on the day before the originator’s authorisation was withdrawn and those whose application was not yet approved at that date. There seems no logic for the distinction.

*Case - C-15/01 Paranova Läkemedel AB and Others v. Läkemedelsverket, ECJ (8 May 2003); Case - C-113/01 Paranova Oy and Others v. Läkemedelsverket, ECJ (8 May 2003)*

**INTELLECTUAL PROPERTY**

**REPACKAGING – COLOURS & STRIPES**

**Background.** Recent judgments in the EFTA court (*Paranova v. Merck*) and the English High Court (*Glaxo/Boehringer v. Dowelhurst*) have explored the extent to which importers can use colour and design on products which they have repackaged. Both cases highlight the tension between the trade mark owner’s desire to preserve the reputation in its trade mark and prevent others benefiting from its brand investment, and the importer’s desire to maximise any ability it has legitimately to generate a “house-style.”

**PARANOVA V. MERCK**

**Facts.** In *Paranova* the Danish parallel importer had repackaged product in boxes marked with, in particular, vertical or horizontal stripes whose colours varied in accordance with those employed by the original producer. Merck objected to the packaging, and argued that the shape and position of the stripes gave an impression of a Paranova house-style. The Norwegian Supreme Court referred the case to the EFTA court.
Decision. The EFTA court said that the national court must decide if the Paranova packaging design, in its entirety, was liable to damage the reputation of Merck’s trade marks. If that turned out to be the case Merck would have "legitimate reasons" under Article 7(2), Directive 89/104/EEC to oppose Paranova’s use of coloured stripes. The court provided the following additional guidance:

- The national court may take into account circumstances outside of the actual packaging design, e.g., advertisements published by the importer.

- In assessing any risk of confusion that there was a connection between the trade mark owner and the importer, the national court should take into account the level of knowledge of the consumer, in this case doctors and pharmacists, and whether the use of colour was common in the industry, which in this case it was.

- In view of the fact that the importer was obliged to clearly state its own name and the name of the manufacturer, the use of coloured stripes could not alone constitute a “legitimate reason” to oppose the repackaging, as long as the relevant names were adequately stated.

The case has been referred back to the Norwegian court and is listed for a hearing on 27 April 2004.

Case - E-3/02 Paranova AS v. Merck & Co., Inc. and Others, EFTA court (8 July 2003); Norwegian Supreme Court (case number 2002/5082)

GLAXO/BOEHRINGER V. DOWELHURST

Background. In our April 2003 newsletter we discussed both the ECJ judgment in Glaxo/Boehringer (Case – C-143/00), which gave guidance on when repackaging may be opposed, and the implementing judgment of the UK High Court which highlighted a possible distinction between repackaged and relabelled products (Glaxo Group Limited & Others v. Dowelhurst Limited and Swingward Limited, Laddie J. (6 February 2003)). In the UK judgment the judge, Laddie J., held that all repackaging was to be treated as harmful and would only be permitted where it could be shown to inflict the “minimum collateral damage on the [trade mark and] should be as unobtrusive from a trade mark point of view as possible.” The judge considered that at least two forms of packaging satisfied this requirement: imitation packaging and blank packaging.2

On the facts, the judge held that the trade mark owners could object to, in particular, de-branding, i.e., the partial and full removal of the proprietors’ trade marks from the parallel packs; co-branding by the importer; the prominent placement of the repackager’s name on blister packs; and the use of capital letters for the repackager’s name on the side of the boxes. The judge said that if any further guidance was required regarding the defendants’ repackaging the parties should return to the court.3

Facts. The application concentrated on two boxes produced by Swingward, both containing Glaxo products. The boxes featured a pink and white design, black lettering and an equilateral triangle. Glaxo objected to the box design claiming that it was, in effect, a house-style and its use would harm Glaxo’s trade marks. Swingward said that the designs conveyed no trade mark significance and, moreover, the MHRA had encouraged it to use colour for safety reasons. Swingward reported that the MHRA had had concerns about its original black and white cartons because of a perceived danger of dispensing errors. The MHRA had asked Swingward to “consider more appropriate cartons” and had referred it to the MHRA’s Best Practice Guidance of 1 March 2003, which stated that: “Innovative pack design that may incorporate the judicious use of colour is to be encouraged to ensure accurate identification of the medicine.”

2 In both cases the trade mark owner could not object to the inclusion of material on the packaging required by national legislation or ECJ case law, e.g., a notice identifying the repackager (as required by ECJ case law, Bristol-Myers Squibb v. Paranova); the original brand name; the generic name of the active ingredient; and the names and addresses of the manufacturer, Marketing Authorisation Holder, and the importer (which should be no more prominent than that of the manufacturer).

3 On 19 January 2004 the English Court of Appeal heard argument following Laddie J.’s judgment. It is expected that the Court’s judgment will comment on Laddie J.’s finding that the ECJ intended there to be a distinction between repackaging (which is inherently harmful to a trade mark owner’s rights) and relabelling (which, according to Laddie J.’s interpretation, is not); it is arguable whether this distinction was intended to be drawn by the ECJ. The Court’s judgment will also impact on the outcome of Glaxo v. Europharm, which was adjourned in May 2003, pending the disposal of the Glaxo/Boehringer appeal. Case - Glaxo v. Europharm, High Court, Lawrence Collins J. (8 May 03).
Decision. The judge decided that the designs in question did not have any trade mark significance and Glaxo could not object to their use. He said:

"[It is important to consider if the] type of livery used by the importer carries some sort of unnecessary trade mark significance which would have an adverse impact upon the claimant’s trade mark rights. It is not true that any colour used in any way on a box has trade mark significance. It is undoubtedly true that the more sophisticated a design, the more likely it is that it will become known as having some trade mark significance. Simple colour schemes, in my view, do not carry with them automatic trade mark impact."

Comment. It is impossible to predict which colour schemes and designs will have trade mark significance and which will not. In addition, in our view, there is no reason why a simple design cannot be used to identify goods and, therefore, have trade mark significance. Whether this is in fact the case will vary from case to case. It certainly seems to have been the intention of the MHRA to encourage, for example, the use of colour to assist with product identification. At what point such use crosses the line between acceptable and unacceptable use is a question upon which reasonable people may hold differing views. Therefore, we can expect more litigation as importers test how far they can make use of colour and other design features.

"Case - Glaxo Group Limited & Others v. Dowelhurst Limited and Swingward Limited, High Court (Patents Court), Laddie J. (11 July 2003)"

PLACING ON THE MARKET – GLAXO’S AFRICAN EXPERIENCE

Background. Glaxo recently announced that it was to colour drugs intended to be sold in developing countries, e.g., anti-retrovirals used for treating patients who are infected with HIV and may have developed AIDS. Its decision to take this step was preceded by an English case which illustrated some common problems associated with product destined for a developing country.

Facts. Glaxo sold certain pharmaceuticals to various parties at low prices for use in Africa. The drugs were packaged in standard, EMEA approved packaging – there were no stickers, warnings or colour changes which would indicate that the goods were only for sale in Africa. Glaxo sold three batches of the drugs to an independent “middle-man” buyer in France; it passed one batch to a forwarding agent, also in France. There were contractual restrictions on the batch passed to the forwarding agent which prevented the end-user from re-importing the goods into the EEA. However, there was no evidence that the three batches sold to the French middle-man were in any way restricted. All four batches were diverted to a Swiss company, who sold them to the defendant, Dowelhurst. Glaxo sued for trade mark infringement and applied for summary judgment and an absolute injunction on future sales.

Decision. The judge held that the mere transportation of goods through the EEA, or delivery to transit points within the EEA, was not “placing on the market” (Case – C-9/93 IHT v. Ideal Standard). Therefore, in relation to the single batch of goods passed by Glaxo to its forwarding agent the goods had not been placed on the market in the EEA by Glaxo, or with its consent by the forwarding agent. Also, there was no evidence which “unequivocally demonstrated” that Glaxo had consented to the goods being re-exported into the EEA (as required by Case – C-414 to 416/99 Davidoff). As a result, there was no arguable defence to the case for trade mark infringement.

However, in relation to the three batches sold to the French “independent middle-men,” it was arguable that property had passed on delivery and that Glaxo had put the goods on the EEA market, thus exhausting all rights. This was so even if the buyer had contracted not to re-sell the goods within the EEA, which in this case they had not.

The judge gave permission for an appeal, but pointed out that it was ultimately for the ECJ to decide if the proposition is correct that a trade mark owner is considered to put goods on the market within the EEA if he sells them to a buyer and the right of disposal passes to the buyer while the goods are in the EEA, regardless of the presence of any contractual restrictions.

Comment. It is worth noting the similarities between the judge’s findings in relation to the “middle-men” and that of licensees. A licensee or subsidiary company which sells goods into parallel trade exhausts the exclusive rights in the goods, even if they are acting against the IP owner’s wishes. The particular legal environment around the sale is irrelevant.
Case – C-187/80 – Merck v. Stepbar

In terms of the relief granted in relation to the one batch of infringing goods, the judge used his discretion to limit the scope of the injunction so that it would not be a breach where the defendant “believed and had reasonable grounds for believing” that the goods were placed on the market by Glaxo, or with Glaxo’s consent (provided that the goods were bought from a person holding the appropriate distribution authorization). He explained the reason for the limitation as follows: “If ...the Defendants are to be put at risk of...contempt of court - a serious matter in this country - because trade mark owners will not adopt sensible precautions (emphasis added), the result may be said to constitute an unacceptable barrier to trade.” The clear message, therefore, is to ensure goods destined for non-EEA countries are clearly marked or are otherwise identifiable by importers.

Case – Glaxo Group Limited v. Dowelhurst Limited and Richard Taylor (Anti-retrovirals and Africa), High Court of Justice, Chancery Division, Peter Prescott QC (Sitting as a Deputy Judge) (31 July 2003)

ACCESSION DEROGATION – AN EXPORT BAN?

In May of this year 10 new countries join the EU. The Accession Treaty includes some transitional provisions which benefit IP owners. The EAEPC has described the provisions as: “nothing more than an export ban.” While one may disagree with the tone of the rhetoric of the importers’ spokesman, the provision does indeed amount to an exception to the general rule regarding exhaustion of rights in the EEA. The normal rules don’t apply.

The derogation provision says that the IP owner can block the import of product:

- if the product is being exported from one of the relevant EU8 countries into one of the existing EEA countries
- PROVIDED THAT the IP owner is the owner of a patent or Supplementary Protection Certificate in the destination EEA country
- AND the product could not previously have obtained equivalent patent protection in the EU8 exporting country, i.e. at the time the patent/SPC was filed in the EEA country.

Significantly, the provision applies whether consent exists or not. The normal rule of intra community exhaustion does not apply. It does not matter if an IP owner placed the goods on the market in the EU8 country – they can still stop them from being exported from an EU8 country to another EU state.

In addition, the importer must demonstrate to the regulatory authority in the importing country that it has given one month’s notice to the local patent/SPC holder (not a related company) of its intention to import the goods.

This notice provision came from a suggestion by EFPIA (European Federation of Pharmaceutical Industries and Associations) that the patent holder be given a limited period in which to object to the grant of any import licence. It has been suggested that the transitional provisions will “lead to battles over clarification,” both in the national courts and the ECJ (via Article 234 reference). The derogation has direct effect, and the national courts are likely to address any ambiguities on interpretation raised during, in all probability, interim applications by way of Article 234 EC references to the ECJ.

Comment. As we went to print, there had been no publication concerning any firm agreement in the UK, or any other Member State, as to the notification procedure. It has been suggested by some commentators that any notice will need to include the following: information concerning active ingredient, pack size, dose etc; when and

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4 The Accession Treaty was signed in Athens on 16 April 2003. The EFTA countries signed an amended EEA Agreement on 11 November 2003.
5 Scrip, 7th/9th May 2003.
6 By way of comparison, the 1986 accession of Spain and Portugal contained similar provisions in the relevant legislation which meant that products that had been marketed in Spain or Portugal – where there was only protection for process patents – could not be parallel imported into other member states, where there was patent protection, for a period of three years.
7 Czech Republic; Slovak Republic; Hungary; Poland; Slovenia; Latvia; Lithuania; and Estonia – the derogation does not apply to Malta or Cyprus.
8 The Accession states all introduced patent protection for pharmaceuticals between 1991 and 1994.
9 Scrip, as above.
where the trader obtained the product; and when and where he intends to put it on the market. However, we have not seen any suggestion from the MHRA, the Commission or a regulatory authority that a comprehensive notification is required.

It is our understanding that Member States were expecting guidance from the Commission on the subject of the proper form of notice. The MHRA has now developed its own procedure having, we understand, consulted informally with industry groups (including parallel importers). It proposes to require the importer to do the following, and nothing more: provide the date on which the notification was given to the holder or beneficiary of the patent/SPC, treating the marketing authorisation holder as the beneficiary.

Provided that the Agency is satisfied that this obligation has been fulfilled (and the other conditions from grant of a parallel import licence are satisfied) then the approval will be issued. We understand that the MHRA envisage requiring no more because this would be inconsistent with their “light touch” approach to regulation.

The MHRA has communicated its position to the Commission and other Member States but, as far as the MHRA are aware, only Sweden has taken a position and this follows the UK approach.

COMPETITION

BAYER – ECJ REJECTS COMMISSION CASE ON QUANTITY RESTRICTIONS

Background. Almost precisely eight years after the Commission’s decision in Bayer, pharmaceutical companies have now received the final ruling on a critical interpretation of EU competition law – namely whether arrangements to limit parallel trade, devised and implemented unilaterally by pharmaceutical companies, may be characterised under EU law as anti-competitive agreements.

The ECJ has found in favour of Bayer; the Commission decision against Bayer has been definitively annulled. Both the ECJ and the European Court of First Instance (CFI) found there to be no agreement between Bayer and its wholesalers to prohibit parallel exports. Without an agreement, and without a finding of dominance, the matter was beyond the scope of EU competition law, even though Bayer’s unilateral actions were intended to reduce parallel trade in its product Adalat.

The Commission originally held that Bayer had imposed an export ban on its wholesalers, and that such a ban formed an agreement – manifested in the continuous business relations between them. It was essential to the Commission’s case to make this finding; without it, the Commission would be unable to show an agreement between undertakings, the essential element in every action under Article 81.

Bayer admitted that it adopted a new supply policy designed to make it difficult for wholesalers to carry out parallel exports. Its policy was to accept orders from wholesalers only in respect of the volume of product normally sold in their traditional national markets (with a 10% increase for market growth). But it claimed that it planned this policy and carried it out as a unilateral act, not as part of an agreement. It claimed that this conduct could not be characterised as an export ban because Bayer did not actually ban exports (in other words, it did nothing to monitor the actual destination of those products which it did deliver to the wholesalers in question). It did so unilaterally, by restricting the volumes delivered to those wholesalers whose orders had increased beyond the needs of their local markets. The wholesalers made a number of attempts to undermine this – particularly by asking smaller wholesalers to buy the product on their behalf.

Bayer argued that there was no anti-competitive agreement with wholesalers, so Article 81 could not apply. And since it was not dominant in the relevant market, Article 82 could not apply either. Article 82 of the Treaty prohibits dominant undertakings from abusing their dominance insofar as trade between Member States is affected.

Decision. The ECJ confirmed that conduct alone can be the basis of an agreement, even though no express or implicit reference to an agreement is made by either party. But an agreement requires more than the conduct of one party – the other party or parties cannot be passive onlookers. As the Court said: “an agreement cannot be based on...only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others.”

What then is required to establish that conduct amounts to the tacit acceptance of an offer? First,
there needs to be an anti-competitive offer which requires acceptance for it to be activated. The degree of evidence required to prove it will differ according to the differences between the interests of the parties: “it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitutes an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where...such an agreement is not...in the interests of the other party, namely the wholesalers.”

Will tacit acceptance reside in the continuous business relations carried on by the parties following the unilateral action of the manufacturer? No, and the Court has nailed this in a very clear and unambiguous way. The mere concomitant existence of (a) an agreement which is in itself neutral, and (b) a measure restricting competition that has been imposed unilaterally, does not amount to an agreement prohibited by Article 81. The mere fact that an anti-competitive measure adopted by a manufacturer “falls within the context of” continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that an agreement exists.

Comment. Bayer had selected a means of inhibiting parallel imports in pharmaceuticals in a way which did not offend against EU competition law or any single-market regulations. There are some lessons to be learned:

- Bayer maintained very strict discipline in all its documentation and communications: none referred to the concept of export bans; they instead tackled the need to restrict the volume of products to that sufficient to satisfy home markets.
- It did not seek to monitor the final destination market of those products it did supply.
- Volume thresholds for supplies to wholesalers were calculated ex ante and applied systematically.
- Bayer did not seek the agreement of its wholesalers to the new policy.
- The fact that the wholesalers clearly did not support it was very helpful to Bayer in the end; had it tried harder to align the wholesalers, the case may have turned out differently.
- The arrangements were intended to inhibit competition and they did affect trade between Member States; but EU competition law is not all-encompassing in this respect – without an agreement or dominance, Bayer was free to do as it wished.

The Bayer case is now over. But this is not the last word. We expect that the Commission will look to define markets more narrowly as a means using Article 82 of the Treaty to exert closer control over unilateral conduct that has the effect of impeding free movement within the EU.