

Q&A: WilmerHale's Hartmut Schneider

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As co-chair of this year's ABA Antitrust Section Spring Meeting, Hartmut Schneider has scarce time on his hands as the annual antitrust mega-meet-up creeps closer. He still managed to talk to *GCR*, however, about cross-border procedural issues, how the US agencies can be more efficient, and which lawyers he thinks are "the complete package".

What do you think are the most interesting issues in antitrust right now?

The antitrust/IP interface continues to raise complex questions and will remain in the spotlight for some time. We may, finally, see an emerging international consensus on the availability of injunctive relief for infringement of declared standard-essential patents. But many other questions remain, both in high-tech – patent acquisitions, privateering – and in other areas where antitrust and intellectual property rights intersect, such as pharma.

In addition to IP and antitrust, the US agencies' willingness to litigate mergers offers a wealth of insight into many aspects of merger enforcement, from merger efficiencies (*St Luke's*), to the use of customer affidavits (*Bazaarvoice*), to strategic questions regarding the negotiation of merger remedies (*InBev/Modelo*, *AA/US Airways*). As practitioners we all aim to avoid merger litigation, but when it does happen it is fascinating to watch.

Is there any antitrust litigation you are following closely besides the cases you are working on personally?

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Apart from the FTC's challenge of the *Sysco/US Foods* merger, I have been following *People of the State of New York v Actavis*, the pharmaceutical "product extension" case involving Namenda XR, an Alzheimer's drug. In December, the New York attorney general obtained a preliminary injunction barring Forest Laboratories and its parent company, Actavis, from discontinuing the sale of Namenda XR's predecessor drug, Namenda IR, which is set to face generic competition later this year. The case is currently on appeal to the Second Circuit. Pharmaceutical product extension cases raise many complex questions about the proper role of antitrust in pharmaceutical innovation, and it will be interesting to see the court's views.

What issues are you keeping an eye on internationally? How will they affect the practice of antitrust law?

Procedural convergence and the continued ascent of antitrust enforcers in countries such as Brazil, Korea, India, and China. Antitrust has come a long way towards international substantive convergence, but procedural differences between jurisdictions can still present headaches for business, especially in transnational mergers. Several recently emerging jurisdictions, including Brazil and Korea, have made great strides towards greater predictability of their antitrust investigations, but other agencies still have ground to cover. It will be especially interesting to watch whether India and China can develop their merger review regimes into simpler, more predictable enforcement tools.

If you could give one piece of advice to the DOJ or FTC, what would it be and why?

Develop (even) greater comfort with the principle of diminishing returns in investigative discovery, especially in mergers. I recognise that the agencies must prepare for litigation, and that litigation requires evidence. But I cannot remember a merger where the key documents did not come from the files of employees that everyone quickly agreed should be searched. Why not identify that group, add a few employees for safety, and move on to what the DOJ and FTC do best – analyse the substance of the case? It's more fun that way too.

Whom do you most admire in the antitrust community right now, and why?

Ilene Gotts of Wachtell Lipton and Sharis Pozen of General Electric. I've had the good fortune of working closely with both of them in ABA and other matters, and their commitment not only to their clients, but to the development of antitrust law and to the next generation of antitrust lawyers is simply extraordinary. Each in her own way, Ilene and Sharis represent the complete package of the antitrust lawyer who is collegial by default, firm in substance and always looking to see how they can make a difference for the rest of the antitrust community.

Hartmut Schneider is a US and German-qualified partner at Wilmer Cutler Pickering Hale and Dorr who practises antitrust law before the US agencies and courts. He is Spring Meeting co-chair along with GE's Sharis Pozen.