BAYER ADALAT – COURT OF FIRST INSTANCE CLARIFIES THE LIMITS OF "CONTINUOUS COMMERCIAL RELATIONS" DOCTRINE.

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On 26 October 2000, the Court of First Instance ("CFI") annulled the European Commission's decision in *Bayer Adalat*. The Commission's decision concerned Bayer's policy of limiting supplies of its product *Adalat* to wholesalers in France and Spain. In view of the existence of wide price differentials, French and Spanish wholesalers had exported large amounts of *Adalat* to the United Kingdom, undermining the viability of sales by Bayer's UK subsidiary and leading to supply shortages in France and Spain. The Commission intervened and ruled that Bayer's policy amounted to an agreement contrary to Article 81(1) of the EC Treaty because it restricted exports. Bayer argued that its policy was unilateral.

One feature of the Commission's decision was the extensive review of various contacts between Bayer and its wholesalers. The Commission held that these contacts indicated the existence of "continuous commercial relations" between these parties, involving the wholesalers' implicit acceptance of Bayer's policy. On its face, the Commission's reasoning was less than convincing. In particular, wholesalers had switched their patterns of ordering in an attempt to circumvent Bayer's policy, not to adhere to it. The Commission nevertheless considered that they had adapted their commercial policy to meet Bayer's objectives. Bayer was fined ?3 million.

Beyond the particular facts, the case raised two major issues. *First*, industry was concerned that the Commission's decision led to a very broad interpretation of the notion of "agreement" that would catch almost any type of behavior under Article 81(1)EC . *Second*, the Commission appeared to be using Article 81 EC infringement proceedings against undertakings as an indirect political instrument to force price harmonization for pharmaceutical products in the various Member States.

The CFI's judgment is essentially in three parts. The first part is a detailed review of the facts and circumstances relied upon by the Commission to show an infringement of Article 81(1) EC. The CFI found a clear policy on the part of Bayer to restrict supplies by delivering to the French and Spanish wholesalers only the quantities necessary to their domestic requirements. However, the Court did *not* find that Bayer had communicated to its wholesalers an express term that they should not export the products in question. Nor had the Commission proved that the wholesalers had expressly or implicitly acquiesced in Bayer's policy. On the contrary, the file contained extensive evidence that the wholesalers *disagreed* with that policy and re-organized their supply systems in order to continue to export. As a consequence, the Commission failed to prove the existence of an agreement to limit exports of *Adalat* between Bayer and its wholesalers.

In the second part, the CFI focuses on what type of conduct should be caught by Article 81(1 EC and emphasizes the limits to the Commission's approach. The CFI found that the Commission cannot re-classify unilateral action of the type concerned here as an "agreement" even if it has effects on parallel trade. The CFI ruled that for an agreement to be present in the sense of Article 81(1) EC, the Commission had to show a *"concurrence of wills between economic operators and the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market*". The simple continuity of commercial relations between wholesalers and a supplier subsequent to the supplier's adoption of a new policy was insufficient in itself to show that wholesalers implicitly accepted that policy, in particular when there is strong evidence that the policy was implemented *against* the wholesalers' wishes. The CFI concluded:

> "*provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example to hinder parallel imports, the implementation of that policy may entail restrictions on competition and trade between Member States*."

In the last part, the CFI makes it clear that the Commission should not be using the rules in the EC Treaty addressed to undertakings to achieve the task of harmonized price regulation in the pharmaceutical sector.

From a practitioner's perspective, there remain difficult issues, which are well set out in the judgment. *First*, the CFI helpfully distinguishes other parallel import case judgments (such as *Sandoz*, *Tipp-Ex*, and *AEG*) on the facts. The process serves to highlight just how careful Bayer must have been in pursuing its unilateral policy of limiting supplies to domestic requirements. This was the dividing line with the previous cases where the manufacturers had gone further and given clear instructions that the products concerned could not be exported.

Second, one reads with interest that there were so-called "bad" internal documents in the case, such as a slide presentation on the parallel imports, which was instrumental in forming Bayer's policy to restrict trade unilaterally if it could. Yet, in this case, it is noteworthy that these documents did not affect the CFI's assessment, precisely because they did not indicate a systematic intent by Bayer to prevent its wholesalers from exporting. In particular, the documents did not show that Bayer monitored the final destination of the products and penalized the wholesalers for exporting. This distinguishes the case from most other cases on parallel imports, in particular in the car industry, where the manufacturers had implemented monitoring and sanctions systems to ensure compliance with their export policy .