

Antitrust and Competition



2006 Annual Report

2006 was an extraordinary year for WilmerHale's global antitrust and competition practice, but also a sad one. In December, we marked the passing of **Karlheinz Quack**, who was the founder of our German antitrust practice and one of Germany's most distinguished lawyers.

Karlheinz began his career in Berlin in 1954. His admission to the bar in the 1950s coincided with the adoption of the German Antitrust Code, and over the next 50 years, he helped shape German antitrust law and practice and led his firm to nationwide esteem. In 2002, Karlheinz and his team in Berlin, including his son **Ulrich Quack**, merged with Wilmer, Cutler & Pickering, the firm that subsequently became WilmerHale.

In addition to his law practice, Karlheinz was deeply dedicated to teaching and public service. He taught corporate and antitrust law at the Free University of Berlin and Humboldt University, where he played a very active role in rebuilding the school's Faculty of Law after the German re-unification. From 1971 to 1981, Karlheinz served as president of the Berlin Bar, and from 1981 to 1992 he was president of the German Association for Intellectual Property Rights and Copyright. For his commitment to public service, Berlin awarded him its highest honor: the *Ernst-Reuter-Medaille*.

As much as we will miss Karlheinz's comradeship and leadership, the practice that he helped create is now stronger than ever. We continue to achieve terrific results for our clients and to earn recognition as one of the foremost antitrust and competition practices in the world.

This year, our the US partner **William Kolasky** was recognized in the Legal Media 2006 Guide, *Best of the Best*, as one of the top 16 antitrust lawyers in the world. Another partner, **Douglas Melamed**, was recognized by

Chambers as one of the four leading antitrust lawyers in Washington. In addition, we were selected as one of eight finalists for Chambers' prestigious Global Competition Firm of the Year.

Fourteen of our partners, five in the United States and nine in Europe, were selected for Global Competition Review's *International Who's Who of Competition Lawyers and Economists*. We were selected as a "practice area of excellence" in PLC's Global 50 and 14 of our lawyers, five in the United States and nine in Europe, achieved individual recognition.

Recommended lawyers include:

- In Brussels: John Ratliff; Claus Dieter Ehlermann; Christian Duvernoy; Sven Voelcker; Yves Van Gerven; Marco Bronckers; Frederic Louis
- In Berlin: Ulrich Quack; Stefan Ohlhoff; Jan Heithecker
- In London: Suyong Kim
- In Boston: Jim Burling; Michelle Miller
- In Washington: William Kolasky; Douglas Melamed; Thomas Mueller; Robert Bell; Jim Lowe

We are honored to have received these accolades, as they serve as an indicator of the results we achieve for our clients. During the course of 2006, we secured merger clearance from the antitrust and competition authorities for some of the year's largest and most complex transactions, and we continue to win important victories and secure favorable outcomes for our clients in many of the highest profile antitrust actions and investigations in both the United States and Europe. Highlighted below are some of our most important achievements in 2006.

Mergers

In 2006, we secured antitrust clearance for more than 45 mergers, with a total market value well in excess of \$50 billion. These transactions included:

Linde AG/BOC Group

We represented Linde AG in obtaining clearance from the Federal Trade Commission and the European Commission for its \$14.9 billion acquisition of the BOC Group. The deal created the world's largest industrial gases company and was one of the biggest cross-border acquisitions ever by a German company. To secure clearance for a complex transaction in a concentrated industry with a history of antitrust enforcement, we fielded a team that included lawyers in our Berlin, Washington, London and Brussels offices.

Lucent/Alcatel

We represented Lucent in securing antitrust clearance from the European Commission for its \$13 billion merger with Alcatel and in securing CFIUS clearance in the United States. Together with co-counsel Wachtell Lipton, we also represented Lucent before the US Department of Justice and in multiple other jurisdictions.

Verizon/MCI

Our team represented Verizon Communications Inc. in securing Justice Department clearance for its \$8.5 billion acquisition of MCI, subject to very limited divestitures of local fiber-optic network facilities in eight metropolitan areas. The deal created the second largest telecommunications company in the United States.

TUI/CP Ships

We successfully represented our German client TUI in its \$2 billion acquisition of the Canadian company CP Ships, which involved filings in the European Union, United States and multiple other jurisdictions.

LSG/Gate Gourmet

We succeeded in securing first-phase clearance by the European Commission of the joint venture formed between LSG SKY Chefs (a subsidiary of Lufthansa) and Gate Gourmet in France. This is one of the very few cases in which the Commission cleared a “3-to-2” merger in Phase I.

Hospira/Mayne Pharma

In January 2007, we secured antitrust clearance from the FTC for the \$2 billion merger of our client Mayne

Pharma with Hospira, creating the world's largest generic injectable drug manufacturer. We negotiated a consent order requiring the divestiture of just five drugs (with revenues that were not material) in near record time—less than four months from notification.

Thule/Pewag Snow Chains (Intervention for RUD Kettenfabrik)

For RUD Kettenfabrik, a world leader in the snow chain industry, we successfully intervened in the European Commission's Phase II investigation of Swedish car equipment manufacturer Thule's acquisition of Austrian snow chain producer Pewag. This transaction would have combined RUD's main competitors. After the European Commission's statement of objection, Thule withdrew its notification of the acquisition of Pewag. This was one of only two EC merger filings in 2006 that ultimately failed in Phase II.

Cartel Investigations

We continued to expand our transatlantic cartel practice in 2006 and acted for clients in several major international cartel investigations, including:

Air Cargo

We represented a major European carrier in a broad-ranging investigation into allegations of price-fixing in the international air cargo sector. Our lawyers obtained conditional amnesty for our client from the US Department of Justice, the European Commission and in other jurisdictions, which also enabled us to negotiate an early settlement of the more than 80 pending US class actions. This is the first such settlement dealing with the complex and novel legal issues regarding the Antitrust Criminal Penalty Enhancement and Reform Act—the recently enacted US statute that limits the US civil damages exposure of an amnesty recipient.

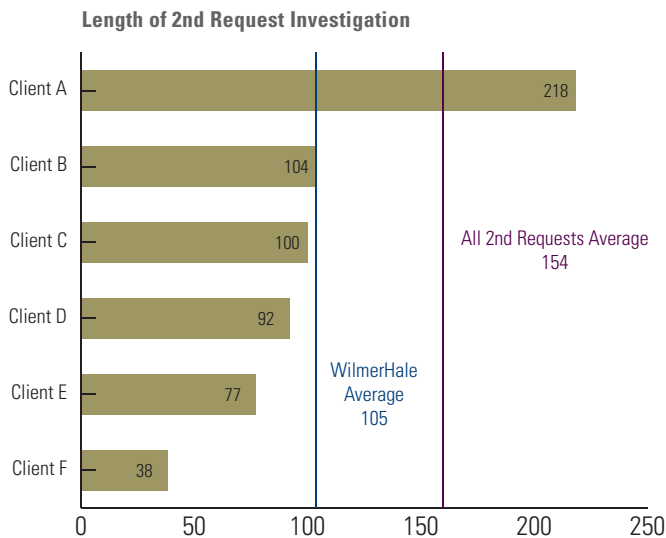
Parcel Tankers

We represented a major Norwegian chemical parcel tanker carrier in an investigation by the United States and European Union of an alleged global cartel among chemical parcel tanker companies to allocate customers. Based in part on our cooperation, the Justice Department, for the first time in history, revoked the amnesty of one of the other alleged co-conspirators. For the same client, we advised in defending against follow-on damage claims and won a precedent-setting victory in the Second Circuit, holding that the antitrust damage claims by

direct purchasers were within the scope of the arbitration clauses in the parties' charter agreements. We also won a second precedent-setting victory in the Southern District of New York, reversing an arbitration panel's construction of a broad arbitration clause as permitting class arbitration. An appeal from this decision is currently pending in the Second Circuit.

Industrial Tubes and Copper Tubes

In cartel proceedings before the European Commission, we assisted a major European copper producer in obtaining fine reductions of some 70 percent. We are currently defending the company and its US affiliates in several related treble damage class actions brought by direct and indirect purchasers in the US federal courts in Tennessee and California.



Other Government Antitrust Investigations

In addition to cartel investigations, we also regularly represent clients in other governmental investigations into abuse of dominance or other alleged antitrust misconduct and into broader sectoral inquiries. Our currently pending matters include:

Red Hat/Microsoft

We represented Red Hat, a leading open-source software (Linux) company, in support of the European Commission in its proceedings against Microsoft. Red Hat intervened in its own right as an interested third party in support of the Commission in the remedy

proceedings and the oral hearing that took place in March 2006. Subsequently, the Commission decided to impose a fine of €280.5 million on Microsoft for its continuing failure to comply with the disclosure remedies imposed in the Commission's 2004 decision.

Flogas

We advised Flogas in the UK Competition Commission's ongoing market investigation into the supply of LPG in bulk to domestic customers. The two-year investigation under the Enterprise Act will result in simplifications to the process of switching suppliers.

Antitrust Litigation

Our antitrust litigation practice is continuing to grow, as we build an ever-stronger track record of achieving successful outcomes for our clients. We are currently representing clients in more than 100 antitrust actions, including many of the largest private class actions now pending, such as:

Europe

Deutsche Telekom AG/Arcor

We are defending DTAG against a €223 million damages claim brought by its competitor Arcor AG & Co KG in Germany in 2006 based on allegations that DTAG violated competition law with respect to its local loop pricing. We also continue to represent DTAG before the EC Court of First Instance in its appeal of the European Commission's Article 82 EC decision on which Arcor's damage action is based.

Welsh Water

We represent Welsh Water in proceedings before the UK Competition Appeal Tribunal, intervening in support of the water regulator Ofwat, which had found that Welsh Water did not abuse a dominant position in its proposal for an access price to a water supply system serving a large industrial customer. The outcome of the case and any subsequent appeals will be critical in determining the future basis of competition in the water industry in England and Wales.

Austrian Banks

The firm continues to represent Raiffeisen Zentralbank Österreich AG (RZB) in its ongoing appeal against the €30 million fine imposed by the European Commission. This case raises significant legal issues, such as the

interpretation of the notion of "restraint of trade" and the calculation of fines in the case of cooperatives.

Nomura/State Aid for Czech Banks

We represent Nomura before the European Court of First Instance in its challenge of the Commission's rejection of Nomura's complaint against €10 billion in aid (representing 15% of Czech GDP) provided by the Czech State to Czech bank CSOB in connection with its takeover of the business of rival Czech bank IPB (formerly owned by Nomura). This case raises novel issues concerning the degree of control of pre-accession aid in the new Member States under the Accession Treaty.

EnBW/German Emission Trading Scheme

We represent the major German energy producer EnBW Energie Baden-Württemberg AG in its challenge before the Court of First Instance of the Commission's approval of the German allocation system for greenhouse gas emission trading certificates. At issue are violations of state aid rules and other legal obligations by the German allocation system, which was adopted in 2004 in the context of the introduction of the Community-wide emission trading system for Kyoto-protocol greenhouse gases.

United States

Braintree Laboratories, Inc. v. Schwarz Pharma, inc. (D.Del.)

At trial in US District Court for the District of Delaware, we defended Braintree Laboratories, a branded pharmaceutical company, against a generic competitor's Sherman Act Section 1 counterclaim to a Hatch-Waxman Act patent infringement suit that was filed and withdrawn.

US Philips Corporation v. ITC

In 2005, we secured an important win in the US Court of Appeals for the Federal Circuit for our client Philips Electronics, persuading the court that package licenses used by Philips and two licensing partners to license the patents covering the basic technology for CD-R and CD-RW discs did not involve improper "tying" of essential and non-essential patents under either the per se rule or rule of reason analysis adopted by the Commission. The decision clarifies an area of the law at the intersection of patent law and antitrust that is of great importance

to high-technology companies, who increasingly rely on package licenses as an efficient means to make technologies available to the market. The Supreme Court declined to review the decision in June 2006.

Reading International v. Oaktree Capital Management

In January 2007, we secured a victory for our client Regal, the largest motion picture theater chain in the United States, winning summary judgment against damage claims by a rival movie theater in New York City alleging that Regal had conspired with the major motion picture distributors to deny the plaintiff access to major films.

Currency Conversion Fee Antitrust Litigation

We represented a major credit card bank in a class action alleging that Visa and MasterCard and their member banks have conspired to fix the fees paid by consumers for converting foreign purchases into US dollars. After more than four years of litigation, we negotiated a favorable settlement on behalf of our client this past year. The settlement was featured in *The American Lawyer's* October 2006 issue.

Insurance Brokerage Antitrust Multidistrict Litigation

We are representing one of the leading US insurance carriers in defending against a massive antitrust and RICO class action filed against most of the country's leading insurance carriers and brokers in the wake of Elliott Spitzer's investigation of Marsh McLennan and other major insurance brokers. Our lawyers have been playing a lead role in the joint defense effort. We secured an important victory in the case in October 2006, when the court ruled that the plaintiffs had not pleaded their antitrust and RICO claims with sufficient particularity and indicated that it would dismiss those claims unless the plaintiffs are able to cure these defects.

Rambus

We represent Rambus in path-breaking litigation brought by the Federal Trade Commission alleging standard-setting abuses. This litigation, which has been pending for more than four years, is one of the largest in FTC history and is the first case to deal with the antitrust implications of failures to disclose patent interests to a standard setting organization.

Cephalon/Provigil Settlements

For Cephalon, one of the world's fastest-growing biopharmaceutical companies, we are serving as counsel

in multiple antitrust lawsuits and a related FTC investigation challenging patent litigation settlements between Cephalon and four companies seeking FDA approval to market generic versions of Cephalon's leading pharmaceutical product, Provigil. In addition, we are defending Cephalon in a separate antitrust suit brought by another generic manufacturer, who claims that the settlements prevented it from obtaining FDA approval for its generic version of Provigil.

IPO Fee Antitrust Litigation

We represent a major investment bank in a class action alleging that underwriters of initial public offerings have conspired to fix the fees paid by issuers for their services. Previously, the district court denied plaintiffs' motion for class certification, and plaintiffs have now appealed that decision to the Second Circuit.

Wuxi Multimedia v. N.V. Philips

For our client Philips, we secured an important victory when US District Judge Dana Sabraw dismissed with prejudice a proposed class action lawsuit by two Chinese companies against a DVD patent licensing program administered by Philips. The court granted Philips' motion (jointly filed with co-defendants Sony, Pioneer and LG) in all respects, ruling for Philips on all nine counts of the complaint.

In re Microsoft Corporation

We successfully represented the European Commission against Microsoft's attempt to use US courts to circumvent EU confidentiality rules in the Commission's investigation as to whether Microsoft had complied with its disclosure obligations. In connection with those proceedings, Microsoft sought subpoenas from federal courts in Massachusetts, New York and California to obtain documents from Novell, IBM, Oracle and Sun concerning, among other things, communications between these companies and the Commission. The relevant US courts dismissed Microsoft's actions.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation

Our team is representing a major MasterCard issuer in defending against a massive, multidistrict antitrust class action filed on behalf of merchants against Visa, MasterCard and the major payment card issuers alleging that the interchange fees charged by Visa and MasterCard

for processing credit card transactions are unlawful.

IPO Allocation Antitrust Litigation

For a major investment bank, we are acting as counsel in a major antitrust class action alleging that underwriters have conspired to impose certain anticompetitive charges on investors in exchange for allocations in so-called "hot" IPOs. The district court granted defendants' motion to dismiss on implied immunity grounds in 2004, but that decision was reversed in 2005 by the Second Circuit. In 2006, we persuaded the Supreme Court to review the Second Circuit's decision, and the Solicitor General has now filed an amicus brief arguing in favor of reversal. In a related securities class action, we obtained a landmark decision from the Second Circuit in December denying the plaintiffs motion for class certification.

Personnel

As our practice expands, we continue to add additional lawyers to better service our clients and assist them in meeting their key business objectives.

In 2007, for the second consecutive year, we promoted one of our talented counsel in Berlin to partner, **Jan Heithecker**. Jan practices German national and EU antitrust and merger control law as well as European state aid law. *Chambers Global 2006* listed Jan as one of its "up and coming" competition lawyers in Germany, writing that, "Newcomer Jan Heithecker drew applause from clients for being a 'savvy, creative and responsive younger lawyer' [and for] his excellent relationship with the antitrust authorities." Following **Stefan Ohlhoff's** promotion in January 2006, Jan's promotion further strengthens the Berlin group (led by **Ulrich Quack**), which works in close cooperation with our Brussels German practice group (led by **Claus-Dieter Ehlermann** and **Sven Voelcker**) on national, international and EU matters.

To further service the transatlantic needs of our clients, two German-qualified counsel from our Berlin office, **Hartmut Schneider** and **Ruediger Schuett**, have relocated to our Washington office and requalified as US lawyers. Their presence in Washington will further strengthen the integration between our US and European offices and our ability to continue to achieve outstanding results for our clients.

In the United States, we promoted two experienced antitrust litigators to partner: **Bob Trenchard** in our New York office and **Jonathan Cedarbaum** in Washington. Bob has extensive antitrust litigation experience, having represented a major Japanese trading company in the Copper Futures Antitrust Litigation and

a major US insurance carrier in the Insurance Brokerage Antitrust Litigation. Jonathan, who is also a member of our Supreme Court and Appellate Litigation practice, has successfully represented clients in several IP-related antitrust cases.

For full details of the WilmerHale Antitrust and Competition Department, see our website (http://www.wilmerhale.com/antitrust_and_competition/).

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