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# ECJ in Bayer Allows Pharmaceutical Companies to Increase Profits by Breaking down European Union Cohesion—With Just One Pill

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# ECJ in *Bayer* Allows Pharmaceutical Companies to Increase Profits by Breaking Down European Union Cohesion—With Just One Pill

## I. INTRODUCTION

In Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v. Bayer AG ("*Bayer*")[1], the European Court of Justice ("ECJ") gave "non-dominant" companies[2] the power to restrict the gray-market (parallel) trade[3] of their products between European Union ("EU") member states.[4] On its face, *Bayer* simply pertains to the parallel trade of pharmaceutical products, but its holding could significantly impact trade within the EU.[5] *Bayer* was wrongly

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1. Case C-2/01, Bundesverband der Arzneimittel-Importeure eV and Comm'n v. Bayer AG, 2004 E.C.R. I-23 [hereinafter Bayer].

2. Article 86 of the Treaty Establishing the European Community specifically forbids an "abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . in so far as it may affect trade between Member States." Treaty Establishing the European Community art. 86, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty]. A firm enjoys a dominant position when it has sufficient market share to independently affect market conditions and prevent effective competition for its products. *See* Case 22/76, United Brands Company v. Comm'n, 1978 E.C.R. 207, ¶ 65; Case 85/76, Hoffmann-La Roche and Co. AG v. Comm'n, 1979 E.C.R. 461, ¶ 38.

3. *See* European Association of Euro-Pharmaceutical Companies, *at* http://www.eaepc.org (last visited Oct. 25, 2005), for an example of a non-dominate company. *See also* WIKIPEDIA, at http://en.wikipedia.org/wiki/Grey_market (last visited Oct. 25, 2005) (definition of "grey market"). For the purpose of this Note, wholesalers engage in the gray-market trade purchase goods in countries where they are less expensive, and then import and sell them in countries where they are more expensive. Shubha Ghosh, *Pills, Patents, and Power: State Creation of Gray Markets as a Limit on Patent Rights,* 14 FLA. J. INT'L L. 217, 218 (2002). These wholesalers operate through distribution channels not authorized by the product's manufacturer or official distributor. *Id.* Further, the trade in gray-market goods is not necessarily illegal. *Id.*

4. *See* Bayer, *supra* note 1.

5. *See* Catriona Hatton & Wim Nauwelaerts, *Parallel Trade: Bayer Adalat Decision,* GLOBAL COUNS. MAG., Mar. 1, 2004, *available at* Westlaw, GLOBALCOUNSEL database.

decided because it weakens the EU's economic solidarity by running contrary to the fundamental legal principles of the EU. The holding is also likely to have a harmful impact upon consumers.[6]

This Note will establish that the Court reached a wrong decision in *Bayer* by not recognizing the legal importance of maintaining EU cohesion via promoting free trade within the Union. Part II summarizes the facts behind *Bayer* and the Court's holding. Part III analyzes the legal background of the parallel trade dispute by providing a summary of other ECJ decisions relating to parallel imports. Part IV shows that the legal principles underscoring the creation of the EU provided for the creation of a common market and the elimination of trade barriers between EU member states. This section will further show that since the original legal foundation remains as pertinent today as upon its creation, the Court erred by failing to comprehensively analyze the trade implications of its *Bayer* decision. Part V presents an alternative way for *Bayer* to have been decided. Part VI concludes.

## II. THE CASE

The facts of *Bayer* are similar to those surrounding the current controversy in the United States regarding the importation of lower-cost drugs from Canada into the United States.[7] In *Bayer*, a subsidiary of the Bayer Group manufactured and marketed a cardiovascular drug sold under the brand name of "Adalat"[8] or "Adalate."[9] The price of Adalat varied substantially between EU member states because each state set its own market price.[10] For instance, between 1989 and 1993, the state-set price of Adalat in Spain and France averaged forty percent less than the price fixed in the United Kingdom.[11]

Gray-market wholesale traders capitalized upon these price differences by exporting Adalat to the United Kingdom from

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6. This Note will not address whether the Court of Justice of the European Communities [hereinafter ECJ or European Court of Justice] erroneously rejected the European Commission's argument that an agreement was in existence between Bayer and its distributors, nor whether Bayer occupied a dominate position in the marketplace.

7. *See, e.g.*, United States v. Rx Depot, Inc., 290 F. Supp. 2d 1238 (D. Okla. 2003).

8. The drug will henceforth be referred to as Adalat and the subsidiary will simply be referred to as Bayer.

9. Bayer, *supra* note 1, ¶ 2.

10. *Id.*

11. *Id.*

Spain (beginning in 1989) and France (beginning in 1991).[12] These wholesalers were so successful that Bayer's United Kingdom subsidiary reported a decrease in sales of almost fifty percent between 1989 and 1993.[13] Consequently, by 1991, Bayer created a system of excise duties that penalized wholesalers in France and Spain who exported their products to England, thereby discouraging the importation of low-cost Bayer products from those countries into England.[14]

Bayer's efforts to eliminate these parallel imports did not go unnoticed by the antitrust authorities. On January 10, 1996, the European Commission[15] issued a decision, finding that Bayer violated Article 81(1) (former Article 85(1)) of the EC Treaty[16] by restricting competition and adversely affecting trade between EU states.[17] The Commission held that Bayer's conduct was tantamount to an export ban implicitly incorporated into Bayer's dealings with wholesalers in France and Spain.[18] Thus, the Commission concluded that Bayer's actions limited trade between EU member countries.[19]

The ECJ, however, sided with Bayer and set aside the Commission's decision.[20] The ECJ held that Bayer's policy of reducing exports did not constitute an "agreement" for purposes of Article 81 of the EC Treaty, as Bayer did not make an explicit offer to its distributors to fulfill an anti-competitive goal.[21] Furthermore, the ECJ found that firms *unilaterally* restricting parallel exports could be punished only when the firm occupies a dominant position in the marketplace.[22] Hence, the ECJ concluded

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12. *Id.* ¶ 3.
13. *See id.* ¶ 2.
14. *See id.* ¶ 4.
15. The Commission of the European Communities [hereinafter European Commission] is an executive body of the European Union [hereinafter EU] charged with working to assure an "ever-closer union" of EU member countries. One of its primary functions is to promote the free movement of goods throughout the EU. *See* Peter Ludlow, *The European Commission*, *in* THE NEW EUROPEAN COMMUNITY 85, 85-88, 96 (Robert O. Keohane & Stanley Hoffmann eds., 1991).
16. EC Treaty, *supra* note 2, art. 81(1). EC Treaty, Article 85(1), as cited in Bayer, will be referred to in this note by its current name, Article 81(1).
17. Bayer, *supra* note 1, ¶¶ 3-6.
18. *Id.* ¶¶ 5-10.
19. *Id.*
20. *See id.* ¶ 147.
21. *See id.* ¶ 88.
22. *See id.* ¶ 70.

that Bayer could act independently to restrict the gray-market trade of its products within the EU.[23]

## III. LEGAL BACKGROUND

No international treaty expressly allows or prohibits parallel imports.[24] Thus, under the international law doctrine that permits otherwise non-proscribed conduct,[25] it is necessary to determine whether any state or regional laws restrict gray-market trade.

Article 81(1) sets out the basic rule against anti-competitive behavior in the EU by prohibiting agreements and practices that limit trade.[26] This is the primary tool used to combat non-monopolistic companies that restrict the gray-market trade of their products.[27] The elements to satisfy an Article 81 claim are: (1) the existence of undertakings[28] (2) that collude together and come to an agreement (3) that is intended or has the effect of distorting or restricting competition between EU states, and (4) that actually does affect trade.[29] An agreement must have an *appreciable* effect

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23. *See id.*

24. *See* Catalin Cosovanu, Note, *Piracy, Price Discrimination, and Development: The Software Sector in Eastern Europe and Other Emerging Markets,* 5 COLUM. SCI. & TECH. L. REV. 3, 21-22 (2003).

25. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7).

26. EC TREATY art. 81 ("The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . .").

27. The Court did not apply Article 82 (former Article 86) in this case because the Court ruled that Bayer was not a dominate firm. Bayer, *supra* note 1, ¶ 70. Additionally, it is unclear whether the activities in this case would rise to the level of abusive conduct that article 82 is intended to prevent. Article 82 prohibits "abusive exploitation" by dominate firms; in other words, a dominate firm that oppresses buyers and sellers who have no choice but to deal with the firm (such as by overpricing products). VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 4 (7th ed. 2000). *See* EC Treaty art. 82 ("Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States . . . .").

28. An undertaking is any entity involved in economic activity. Case C-364/92, Sat Fluggesellschaft mbH v. European Organisation for the Safety of Air Navigation, 1994 E.C.R. I-43, ¶ 18 (1994).

29. ALLISON JONES & BRENDA SUFRIN, EC COMPETITION LAW 86 (2001); T. R. OTTERVANGER, ET AL., COMPETITION LAW OF THE EUROPEAN COMMUNITY, THE NETHERLANDS AND BELGIUM 41 (1998).

on trade and competition to be illegal: this requirement is not mandated within the treaty, but is created by case law.[30]

While it was not an issue in *Bayer*, trademark laws can also impact parallel trade because intellectual property laws influence the ability to resell a manufacturer's product.[31] The Trade Mark Directive harmonizes the laws of member states to ensure that safeguards to trademark protection are consistent throughout the EU.[32] On its face, Article 7 of The Trade Mark Directive implies that parallel trade prohibitions are illegal.[33] While European courts generally agree, trade restrictions may nonetheless be permitted.[34] The ECJ has held that Article 7 must be applied in connection with Article 30 of the European Community Treaty[35] which establishes the rules governing the free movement of goods and trade by prohibiting "quantitative restrictions on imports and all measures having equivalent effect."[36] Despite language that is clearly favorable to free trade, trade prohibitions or restrictions may be justified on several grounds, such as the protection of intellectual property rights.[37]

As shown by the decision in *Bayer*, the ECJ evidently agrees with those who suggest that parallel trade restrictions by private firms, particularly in pharmaceutical goods, should be exempted from laws favoring free trade.[38] In fact, *Bayer*'s holding ran

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30. Case 5/69, Völk v. Vervaecke 1969 E.C.R. 295. The Notice on Agreements of Minor Importance does not fall within the meaning of EC Treaty Article 81(1). 1997 O.J. (C 372/13). *See also* OTTERVANGER, *supra* note 29, at 25.

31. Hugh Brett, *Parallel Imports in Europe*, http://scientific.thomson.com/knowtrend/ipmatters/euroiss/8202914/ (last visited Oct. 25, 2005).

32. SHELDON BURSHTEIN, ET AL., THE USE OF ANOTHER'S TRADEMARK: REVIEW OF THE LAW IN THE UNITED STATES, CANADA, AND WESTERN EUROPE 97 (1997).

33. First Council Directive 89/104/EEC of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) art. 7 [hereinafter Trademark Directive] (stating in relevant part that a trademark "shall not entitle the proprietor to prohibit its use in relations to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.").

34. *See generally* Bayer, *supra* note 1 (the ECJ admits that parallel export restrictions by the government are illegal, but holds that similar restrictions by a private firm are illegal *only* if they are imposed by a firm with a dominate position in the marketplace).

35. LORNA WOODS, FREE MOVEMENT OF GOODS AND SERVICES WITHIN THE EUROPEAN COMMUNITY 156-7 (2004).

36. EC Treaty, *supra* note 2, art. 28.

37. EC Treaty, *supra* note 2, art. 30.

38. *See generally* Claude E. Barfield & Mark A. Groombridge, *Parallel Trade in the Pharmaceutical Industry: Implications for Innovation, Consumer Welfare, and Health Policy*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 185 (1999); Shanker A. Singham, *Competition Policy and the Stimulation of Innovation: TRIPS and the Interface between*

contrary to previous case law, as the *Bayer* court took a far more conservative interpretation of what constituted an agreement than had prior courts.[39] While Bayer is the first company to successfully oppose parallel trade in a European court,[40] *Bayer* is not the first case in which European courts allowed an organization's narrow commercial interests to discourage trade between European states.[41]

For example, the Court of First Instance struck down a fine on the automaker Volkswagen for having sent letters to its dealers in Germany, advising them not to sell cars below a recommended price and to offer consumers little or no discounts.[42] *Volkswagen*, like *Bayer*, relates to parallel trade because the European Commission found that Volkswagen's unilateral actions were "particularly liable to have an appreciable effect on trade between Member States."[43] Specifically, the Commission reasoned that Volkswagen's actions would encourage Germans to purchase cars in other countries and import them to Germany, while the price of German car exports would remain uncompetitive elsewhere.[44] Despite the fact that Volkswagen's policy was clearly intended to affect parallel trade, the ECJ found that Volkswagen did not violate any EU laws.[45] Thus, both *Volkswagen* and *Bayer* are viewed by legal experts as examples whereby the EU's ability to prohibit a firm's restrictions on parallel imports was substantially impacted.[46]

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*Competition and Patent Protection in the Pharmaceutical Industry*, 26 BROOK. J. INT'L L. 363, 407 (2000) ("parallel trade has particularly pernicious effects to the pharmaceutical industry.").

39. Sophie Lawrance & Pat Treacy, *Parallel Trade in the Pharma Sector: Where Now for Stock Management*, MONDAQ (June 15, 2005), *available at* 2005 WLNR 9487090.

40. *Research and Markets: The Pharmaceutical Parallel Trade Outlook: Challenges to Pharmaceutical Companies across Europe and the US*, BUSINESS WIRE, Apr. 28, 2004, *available at* Westlaw, BWIRE database.

41. *See* JUKKA SNELL, GOODS AND SERVICES IN EC LAW 146 (2002) ("[A]ctions by a single non-dominant firm or agreements between firms having only an insignificant effect on the market do not fall under competition rules.").

42. Case T-208/01, Volkswagen v. Comm'n (2004), http://europa.eu.int.

43. Case 2001/711/EC, Comm'n Decision of 29 June 2001 Relating to a Proceeding Under Article 81 of the EC Treaty (Case COMP/F-2/36.693 - Volkswagen), 2001 O.J. (L 262) 85, 86.

44. *Id.*

45. Case T-208/01, Volkswagen v. Comm'n (2004), http://europa.eu.int.

46. James Calder, *Supplement to the 2003 Milton Handler Annual Antitrust Review Proceedings*, 2004 COLUM. BUS. L. REV. 379, 398 (2004).

## IV. ANALYSIS

The ECJ reached a flawed result in *Bayer* because it failed to adequately consider the decision's harmful impact on trade within the EU. The holding reaches beyond its immediate effect on Bayer's distribution of products. While EU policymakers have historically sought to create a single market,[47] *Bayer* limits trade between member states and runs contrary to the fundamental principle of European unity and free trade that underlies the EU's creation. In short, the ECJ should have ruled against *Bayer*'s restrictive trade practices because the practices discouraged trade between EU states.

### *A. The Legal Foundation of the EU was to Promote Cohesion, Particularly in Trade, between Member States.*

Some observers[48] suggest that the prevention of war was the primary purpose for the creation of the European Community ("EC").[49] Granted, the desire to reduce international tensions between France and Germany in the post-World War II era led to treaties and inter-European cooperation in the 1940s and 1950s that later resulted in the EU's formation.[50] However, a brief review of the EC's and EU's historical records, including treaties, demonstrates that the promotion of trade was the fundamental reason the EU was formed.

For example, the Dooge Report, prepared by a special commission created to envision the future of the EU, listed the creation of a "homogeneous internal economic area" as a major priority for the then-European Council.[51] The 1987 Single European Act formally adopted this concept, as it was originally

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47. *Green Paper on Vertical Restraints in E.C. Competition Policy*, at exec. sum. p. i, COM (1996) 721 final (Jan. 22, 1997), *available at* http://europa.eu.int/comm/competition/antitrust/96721en_en.pdf.

48. *See* EuroChicago.org, *What is the European Community*, http://www.eurochicago.org/Pages/europe.html (last visited Oct. 25, 2005).

49. These supporters can point to Winston Churchill's famous 1946 speech in which he sought to create a "United States of Europe" that can dwell in "peace, in safety, and in freedom" as being the fundamental reason for the EU's existence. Sir Winston Churchill, Tragedy of Europe, Address at Zurich University (Sept. 19, 1946) (transcript *available at* http://www.alliancefr.be/cd5/contenu/annexe1/churen.htm).

50. *See* TIM BIRTWISTLE, PRINCIPLES OF EUROPEAN UNION LAW 1 (2002).

51. DESMOND DINAN, EUROPE RECAST: A HISTORY OF EUROPEAN UNION 209 (2004).

conceived to promote economic cooperation[52] and solidarity between member states.[53] Likewise, the first goal listed on the Treaty on European Union[54] is "to promote economic and social progress . . . in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union . . . ."[55]

In short, the structure of the EU sought to create a free and single market that would allow easy movement of goods, people, services, and capital.[56] In fact, the primary question during the formation of the European Community was not *whether*, but *how* to create a unified marketplace.[57] Therefore, it is only natural that free trade between EU member states is codified in EU law.

### *B. Regardless of the EU's Historical Background, a Firm Should Not Be Allowed to Restrict Parallel Imports.*

The insinuation[58] that parallel imports should be discouraged by treating them separately from other types of trade is incorrect because European law encourages trade without expressly discriminating between parallel and non-parallel trade. For example, the EC Treaty prohibits "quantitative restrictions" on exports and imports, and "all measures having equivalent effect."[59] This provision, on a *prima facie* basis, prohibits limitations on parallel imports because the restrictions adversely affect trade. European Courts, however, have not consistently reached the same conclusion.

While the ECJ's jurisprudence in this area is still being refined, it is clear that one test of a prohibited trade practice is whether the practice favors the domestic market and has the

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52. BIRTWISTLE, *supra* note 50, at 3.

53. DINAN, *supra* note 51, at 217-218, 225.

54. Commonly referred to as the Maastricht Treaty.

55. EC Treaty, *supra* note 2, art. 2.

56. Case 270/80, Polydor v. Harlequin Record Shop, 1982 E.C.R. 329, 330 (stating that the EEC Treaty is intended to "unite national markets into a single market having the characteristics of a domestic market"); WOODS, *supra* note 35, at 3.

57. DINAN, *supra* note 51, at 207.

58. This is more than an insinuation, as it is the essence of Bayer's argument to the Court that parallel imports should be evaluated differently from other types of imports. *See* Court of First Instance Decision Case T-41/96, Bayer AG v. Commission of the European Communities, 2000 E.C.R. II-03383 ¶¶ 34-41.

59. EC Treaty, *supra* note 2, arts. 28, 29.

object or effect of restricting exports.[60] Parallel trade restrictions meet both elements of this test because they restrict exports from countries with lower prices. In addition, as in *Bayer*, these restrictions allow products to remain less expensive in countries of export, thereby favoring consumers in that country over countries desirous of the gray-market imports.

1. Parallel Trade is Favored from a Policy Perspective.

The EU specifically prohibits gray-market trade bans in some areas.[61] For instance, certain EU regulations restrict parallel trade.[62] EU authorities seek to protect parallel trading[63] because they recognize that it breaks down national barriers and cements a free market for trade.[64]

As part of their efforts to promote free trade throughout the Union, European authorities are expected to continue pursuing policies that are favorable to parallel trading even after the *Bayer* decision.[65] This is because parallel trade is no different from other types of trade where trade restrictions can have "visual and psychological" effects that lead to the partitioning of the marketplace.[66] In other words, *any* and *all* trade restrictions hinder the formation of a single European market where goods can move freely between countries.[67]

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60. Woods, *supra* note 35, at 101.

61. KORAH, *supra* note 27, at 231.

62. Any agreement that hinders parallel imports is not eligible for the streamlined process to exempt the agreement from anti-competition laws. Commission Regulation 240/96 of 31 Jan. 1996 on the Application of Article 85(3) of the Treaty to certain Categories of Technology Transfer Agreements, 1996 O.J. (L 31/2) art. 3(3).

63. *See, e.g.*, *A Stronger European-Based Pharmaceutical Industry for the Benefit of the Patient*, at 15-16 COM (2003) 383 final (Jan. 7, 2003), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0383en01.pdf.

64. Julie S. Nazerali, *Parallel Imports of Pharmaceuticals: A Prescription for Success or a Free Market Overdose*, 19(6) E.C.L.R. 332, 342 (1998). For example, it has been a long-standing practice to purchase medicines in Mediterranean Europe to resell in northern Europe. *Are Drug Firms Standing in the Way of Lower Prices*, Irish Times (June 7, 2005), *available at* Westlaw, IRISHT database.

65. Simon King, *Drug Manufacturers Lose UK Re-Packaging Case*, WORLD MARKETS ANALYSIS, Mar. 8, 2004, *available at* LEXIS, News Library.

66. OTTERVANGER, *supra* note 29.

67. *See* SNELL, *supra* note 41, at 50.

### 2. EU Authorities have Punished Firms that Restrict Parallel Trade.

The *Bayer* and *Volkswagen* cases stand out from traditional EU jurisprudence that disfavors parallel trade restrictions. Since the 1960s, European courts, including the ECJ, have upheld sanctions against firms that suppress free trade within Europe.[68] For instance, Volkswagen was fined for entering into agreements with its dealers in Italy to restrict sales to consumers from other member states.[69] Like Bayer, Volkswagen used supply quotas to accomplish an objective that the Commission labeled as a serious infringement upon EU competition rules, because the quotas partitioned a part of the common market.[70]

Additionally, the ECJ found efforts to prohibit the re-importation of records to be illegal[71] and disallowed distribution agreements structured to control parallel imports.[72] These cases show that the EU authorities are willing to punish firms for restricting parallel trade.

### 3. The Court Reached Its Erroneous Decision by Failing to Properly Analyze Trade Implications.

The ECJ did not reach its decision in *Bayer* because it disagreed with the arguments presented above. Rather, the Court reached its decision because it was preoccupied with analyzing other issues.

Only one paragraph of the 150-paragraph *Bayer* opinion linked parallel trade to European cohesiveness.[73] That paragraph simply recited an argument made by two parties to the case.[74] The Court never addressed the arguments set forward in this Note regarding the impact upon intra-European trade. Instead, the ECJ quickly agreed with Bayer's arguments that gray-market trade restrictions could be banned only if the manufacturer imposing the restrictions had a dominate place in the market,[75] or there was an

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68. R.B. BOUTERSE, COMPETITION AND INTEGRATION-WHAT GOALS COUNT? 1, 1-2 (1994).

69. Case T-62/98, Volkswagen AG v. Comm'n, 2000 E.C.R. II-02707.

70. *Id.*

71. Case 78/70, Deutsche Grammophon v. Metro, 1971 E.C.R. 487, 502.

72. Case C-279/87, Tipp-Ex GmbH & Co. KG v. Comm'n, 1990 E.C.R. I-261.

73. Bayer, *supra* note 1, ¶ 66.

74. *Id.*

75. *Id.* ¶ 70 (restrictions on a dominate firm that seeks to impede trade are prohibited by Article 81).

actual agreement between the parties to ban exports.[76] Much of the ECJ's analysis, therefore, revolved around the meaning of an 'agreement' for purposes of an antitrust violation.[77] Significantly, commentators citing the *Bayer* decision generally reference the case in the context of an antitrust article or discussion.[78]

Furthermore, the ECJ consistently holds that any derogation from a freedom given by a treaty, such as free trade, must be interpreted restrictively.[79] In other words, any parallel trade restrictions should be subject to additional scrutiny because they restrict treaties that support free trade.[80] By contrast, the ECJ seemingly did not analyze this issue with any particular scrutiny. In fact, the Court likely did not even recognize this issue because the ECJ, as illustrated earlier, merely glossed over the impact upon European cohesiveness.

The ECJ's decision is likely a result of the Court failing to consider, even cursorily, the larger European unity aspects of the case.[81] The *Bayer* court does not refute this Note's premise that parallel trade restrictions should be allowed because of the fundamental importance of encouraging European integration.

## V. HOW COULD *BAYER* HAVE BEEN DECIDED? A FIRM'S DOMINANCE IS IRRELEVANT TO THE PARALLEL TRADE ANALYSIS.

Article 81 prohibits agreements between firms and concerted practices.[82] A principle question in *Bayer* was whether an agreement existed.[83] The ECJ ruled there was no agreement.[84]

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76. *Id.* ¶ 68 (restrictions made as a result of an agreement are prohibited by Article 81).

77. *See id.* ¶¶ 39-40.

78. *See, e.g.,* ECONOMIST INTELLIGENCE UNIT, *EU: Antitrust Heads East,* ECONOMIST INTELLIGENCE UNIT EXECUTIVE BRIEFING, April 30, 2004, *available at* 2004 WL 62069251. *See also* Donncadh Woods, *Private Enforcement of Antitrust Rules: Modernization of the EU Rules and the Road Ahead,* 16 LOY. CONSUMER L. REV. 431, 455 n.86 (2004); Calder, *supra* note 46, at 402-406.

79. Woods, *supra* note 35, at 109.

80. See discussion *infra* Part III.

81. Perhaps the Court adheres to the Chicago School of neoclassical economics – i.e. only a limited number of cases should involve antitrust laws. DORIS HILDEBRAND, ECONOMIC ANALYSES OF VERTICAL AGREEMENTS – A SELF ASSESSMENT 11 (2005).

82. EC Treaty, *supra* note 2, art. 81.

83. Bayer, *supra* note 1, ¶ 141.

84. *Id.* ¶ 88 ("The mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, produces the same effect as an export ban does not mean either that the

However, regardless of whether an agreement existed, Bayer's conduct could have been prohibited under Article 81 as a *concerted practice,*[85] because a concerted practice does not depend upon the existence of an agreement.[86] The *Bayer* decision does not analyze this issue at all.

Three essential criteria must be met to find a concerted practice violation of Article 81: the existence of (1) a *concerted practice* between firms which (2) has the object or effect of preventing, restricting, or distorting competition within the common market, and (3) that actually does affect trade.[87] The first element is complex and will be analyzed in the next paragraph. The second element is met because restrictions on conditions of resale and export bans are deemed to reduce competition.[88] The third element is also clearly met, as parallel trade restrictions, by their inherent nature, affect trade between member states.[89] Additionally, the minimum quantity exception for agreements that have only a minor impact upon trade is not satisfied in this case.[90]

A *concerted practice* has been defined by the ECJ as a "form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[91] In short, a concerted practice is mutual cooperation that leads to abnormal market conditions.[92] The three elements that constitute a concerted practice are: (1) a positive contact between firms (2) that involves cooperation contrary to the normal competitive processes (such as removing uncertainty as to the future competitive conduct of an

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manufacturer imposed such a ban or that there was an agreement prohibited by Article 85(1) of the Treaty.").

85. EC TREATY art. 81.

86. MARK FURSE, COMPETITION LAW OF THE UK & EC 114 (2000).

87. OTTERVANGER, *supra* note 29, at 22.

88. *See* INNS OF COURT SCHOOL OF LAW, EC COMPETITION LAW IN PRACTICE 14-17, 19 (2000); D.G. GOYDER, EC COMPETITION LAW 98 (2003) (referring several cases and drawing the conclusion that "export bans are, by their nature, a restriction on competition.").

89. *See id.* at 19.

90. *See supra* note 30. The market share of Adalat exceeds 15 percent, which placed it outside the scope of this exception. Court of First Instance Decision Case T-41/96; Bayer AG v. Commission of the European Communities, 2000 E.C.R. II-03383, ¶ 26.

91. Case 48/69, Imperial Chemical Industries v.Comm'n, 1972 E.C.R. 619, ¶ 64.

92. OTTERVANGER, *supra* note 29, at 23.

undertaking), (3) which has the effect of maintaining or altering the commercial conduct of the firms.[93]

Bayer's conduct met these three elements and is, therefore, a concerted practice. Bayer was in contact with the firms at issue when, at a minimum, it changed its delivery policy and ceased filling large orders from the wholesalers it identified as exporting Adalat to other countries.[94] Additionally, the activities between Bayer and the distributors ran contrary to the normal commercial processes which, through parallel trade, would have resulted in lower prices across Europe.[95] Therefore, this altered the exporting practices of Bayer's distributors. Importantly, the Court found that resellers had accepted their distributor's policies simply through their regular contractual relations; thus, there was more than simple unilateral conduct.[96] Consequently, it should not be necessary to determine if wholesalers benefited from the export ban or if they sought to restrict competition.

A crucial consideration during this analysis is whether competition is restricted.[97] The outcome of the *Bayer* case was, in part, due to Bayer's lack of dominance in the marketplace.[98] This factor has neither influenced the outcome of past cases, nor should it have influenced the *Bayer* case.[99] In fact, it would be incongruous if a firm's activities became illegal only once it succeeded in distorting natural trade practices.[100] Thus, Bayer restricted competition since it sought to reduce gray-market competition with its products.

All elements showing that Bayer engaged in an Article 81 concerted practice have been met. The ECJ should have found a

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93. *See* OTTERVANGER, *supra* note 29, at 22.

94. Bayer, *supra* note 1, ¶¶ 3-8.

95. *Ceteris paribus*, restrictions on competition result in consumers paying higher prices. FURSE, *supra* note 86, at 8. Thus, if Bayer could restrict the gray-market trade in its goods, consumers would inevitably pay higher prices. *See* EUROPEAN ASS'N OF EURO-PHARM. COS., *What is It?*, http://www.eaepc.org/parallel_trade/what_is_it.php?n=2 (last visited Oct. 23, 2005).

96. Case 107/82, Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. Comm'n, 1983 E.C.R. 3151, 3154; *see also* KORAH, *supra* note 27, at 40.

97. SNELL, *supra* note 41, at 51.

98. Bayer, *supra* note 1, ¶ 70 ("[U]nilateral measures taken by private undertakings are subject to restrictions, by virtue of the principles of that Treaty, only if the undertaking in question occupies a dominant position on the market, within the meaning of Article 86 of the Treaty, which is not the case here.").

99. *See* FURSE, *supra* note 86, at 120.

100. *Id.* at 120.

violation of Article 81 and allowed the European Commission to punish Bayer for restricting the gray-market trade in its products.

## VI. CONCLUSION

In summary, the Court's justification for granting a reprieve to non-dominate manufacturers is not supported by treaty laws that have historically promoted intra-European free trade. The Court's focus on the antitrust aspects of this case likely precluded it from closely analyzing the broader trade policy implications discussed in this Note.

In order to ensure that the fundamental principles behind the EU's creation survive in an unadulterated form, it is imperative that the ECJ reverse its holding in *Bayer* and allow the EU to sanction manufacturers—even those that do not have a dominate place in the marketplace—that seek to put their commercial motives over the paramount goal of ensuring full European integration. While this Note did not analyze the consumer policy implications of *Bayer*, it is self-evident that consumers benefit from lower prices when gray-market trade is legal.

This Note presents an alternative way for Bayer's conduct to be restricted. While the Court's analysis focused on whether an agreement existed, the Court should have instead analyzed whether Bayer made a concerted effort to affect the marketplace. Had the Court performed this analysis, it would likely have found reason to prohibit Bayer's restrictions on gray-market trade. Until the ECJ corrects its holding in *Bayer*, European cohesiveness will be weakened.

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