Germany:
German Comments on Recent U.S. Supreme Court Cases

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GERMANY

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Executive Summary

The recent U.S. Supreme Court decisions Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Leegin Creative Leather Products, Inc. v. PSKS Inc, Bell-Atlantic Corp. v. Twombly., and Credit Suisse First Boston Ltd. v. Billing have not as yet been discussed in German judicial decisions. A European antitrust lawyer, however, discussed the Leegin case, up to and including the oral arguments before the U.S. Supreme Court, in a legal periodical and he predicts that repercussions in German and European antitrust law will follow the decision of the U.S. Supreme Court. This sentiment has been reiterated by a trade publication of the German food industry in an article that was written after the U.S. Supreme Court's Leegin decision. The Credit Suisse decision, on the other hand, was mentioned in German and Swiss newspaper articles primarily because of the involvement of German and Swiss banks.

I. Overview

The German courts have not as yet had opportunity to discuss the recent U.S. Supreme Court decisions in Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,[1] Leegin Creative Leather Products, Inc. v. PSKS Inc.,[2] Bell-Atlantic Corp. v, Twombly,[3] and Credit Suisse First Boston Ltd. v.Billing,[4] nor have these decisions been discussed, as yet, in the legal literature. It is quite likely, however, that these cases will be noticed in future German court decisions and legal writing.

This is particularly true for the decision in the Leegin case which has been analyzed in a German legal periodical, up to and including the oral arguments before the U.S. Supreme Court, and which according to pre- and post-decision comments is expected to have repercussion in German and European antitrust law. The Credit Suisse decision, on the other hand, has been described in German and Swiss newspapers mostly because of the involvement of Swiss and German parent companies and their avoidance of treble damages by the decision's holding that antitrust law was not applicable.

II. The Leegin Case

In the June 2007 issue of the renowned German periodical on international commercial law, RECHT DER INTERNATIONALEN WIRTSCHAFT, the German and European antitrust lawyer Boris Karsten published an article entitled "Turning Away from a *Per Se* Prohibition of Vertical Minimum and Fixed Price Agreements in U.S. Antitrust Law? Comments to Leegin Creative Leather Products, Inc. v. PSKS Inc., Prior to its Decision by the U.S. Supreme Court."[5] In this article, the author gives a comprehensive

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[1] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

[2] Leegin Creative Leather Products, Inc. v. PSKS Inc., 127 S. Ct. 2705 (2007).

[3] Bell-Atlantic Corp. v, Twombly, 127 S. Ct. 1955 (2007).

[4] Credit Suisse First Boston Ltd. v.Billing, 127 S. Ct. 2383 (2007).

[5] B. Karsten, *Abkehr vom Per-se-Verbot vertikaler Mindest- und Festpreisvereinbarungen im U.S. Kartellrecht? Anmerkungen zu dem Verfahren Leegin Creative Leather Products Inc. v. PSKS Inc. vor dem U.S. Supreme Court*, 53 RECHT DER INTERNATIONALEN WIRTSCHAFT 419 (2007).

picture of the Leegin case at the trial and appellate level and of the legal question before the U.S. Supreme Court. This is followed by an analysis of the potential economic advantages and detriments of vertical minimum price restraints and of the development of U.S. antitrust law on vertical agreements. The author then describes the briefs of parties and *amici curiae* in the case, and the course of the oral hearing before the Court on March 26, 2007. From the totality of these events, the author draws the conclusion that the U.S. Supreme Court decision might eliminate the *per se* prohibition of minimum resale price agreements and that this might lead to changes in European and German antitrust law.

Analyzing the oral hearing before the U.S. Supreme Court, the author expresses some surprise at the apparent division of views among the Justices, as portrayed by their questions. According to the author, this was unexpected after the press coverage prior to the hearing. Whereas some of the Justices, through their questions, indicated skepticism about abandoning the *per se* rule, others among them, in particular Justice Scalia, seemed more favorably inclined toward a future rule of reason approach. On the other hand, Justices Ginsburg, Stevens, Souter, and Breyer were portrayed as asking questions that showed their concern about the possibility of achieving the effects of horizontal price agreements through vertical minimum price restraints, and thus circumventing the clear-cut prohibition of horizontal price agreements.

The author also relates that the Justices discussed the writing of economists on the issue, as well as the question as to whether the Court should stand by precedent and leave the resolution of the issue to the legislature. Also mentioned were Chief Justice Robert's questions concerning the industry's reliance on the current practice and the response by Justices Alito and Souter that the industry had not submitted any *amicus curiae* brief, thus showing a lack of concern about abandoning the *per se* rule. Justice Scalia's questions relating to "free riding" and product quality were also described, as well as Justice Kennedy's remarks referring to the lack of case by case evaluation in a *per se* prohibition. Based on the course of the oral hearing, the author predicted the likelihood of a split decision in which a narrow majority would reject the *per se* prohibition and replace it with a rule of reason approach.

On the possible repercussions of the Leegin decision for European and German law, the author predicted that the Leegin decision, regardless of its outcome, would lead German and European policy makers to re-think the current strict prohibition of vertical minimum price agreements. The author sees an analogy to the changes in European Union [EU] and German law that were occasioned by State Oil Co. v. Khan.[6] Between December 1999 and April 2004, the European Commission issued three regulations that apply a rule of reason approach to certain maximum resale price agreements by providing block exemptions for certain specifically defined agreements.[7] In July 2005, Germany made the EU block exemptions directly applicable to agreements made on the German market.[8]

The EU block exemptions on maximum resale price agreements were a departure from the otherwise prevailing European and, also, German policy that amounted to a *per se* prohibition of pricing agreements, a policy that still prevails unmitigated for minimum resale price agreements.[9] In Europe, however, the time also seems ripe for a new look at vertical minimum price agreements, and, according to Mr. Karsten, the European Court of Justice might not be opposed, in principle, to new considerations in this matter, because it already had held in 1985, in the Binon v. AMP decision,[10] that pricing agreements

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[6] State Oil Co. v. Khan, 522 U.S. 3 (1997).

[7] Commission Regulation (EC) No 2790/1999 on the Application of Article 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, Dec. 22, 1999, OFFICIAL JOURNAL OF THE EUROPEAN UNION [OJ] (L 336) 23 (1999); Commission Regulation (EC) No 1400/2002 on the Application of Article 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, Jun. 31, 2002, OJ (L203) 30 (2002); Commission Regulation (EC) No 772/2004 on the Application of Article 81 (3) of the Treaty to Categories of Technology Transfer Agreements, Apr. 27, 2004, OJ (L 24) 1 (2004).

[8] Gesetz gegen Wettbewerbsbeschränkungen, repromulgated July 15, 2005, BUNDESGESETZBLATT I at 2114.

[9] Karsten *supra* note 5, at 432.

[10] European Court of Justice, Case 243/83, Binon v. AMP, Jul. 3, 1985, E.C.R 2015 (1985).

could be subjected to a rule of reason examination. Moreover, in 2006 in the Glaxo Smith Kline v. Commission decision,[11] the Court of First Instance of the European Communities made broad statements on an economic approach to antitrust cases, to better serve the interests of the consumer.

On July 13, 2007, LEBENSMITTEL ZEITUNG, a German trade publication of the food industry, published an article entitled "Movement in Pricing Agreement Matters; the U.S. Supreme Court Rules that Resale Price Restraints May at Times be Permissible."[12] The article gives a brief summary of the Leegin decision of the U.S. Supreme Court. It calls the decision sensational and predicts stepped-up discussions of the issue in European law. In addition, the article points out that German producers might now be able to get permission from the U.S. antitrust authorities to execute minimum resale price agreements with their buyers in the United States.

III. The Credit Suisse Decision

On June 19, 2007 he Swiss Press Service SCHWEIZERISCHE DEPESCHEN AGENTUR carried a short article entitled "U.S. Court Stalls Antitrust Suits against Investment Banks."[13] Following a brief description of the Credit Suisse decision, the article concludes that the involved investment banks have reason to celebrate the decision. In addition, the article quoted a spokesperson of Credit Suisse as expressing satisfaction with the decision and Attorney John Mitnick, counsel for Deutsche Bank, as being of the opinion that the decision brings predictability on a matter in which antitrust suits had jeopardized the ability of the market to raise investment capital.

On June 20, 2007, the renowned German newspaper FRANKFURTER ALLGEMEINE ZEITUNG brought a short description of the case and its decision of the U.S. Supreme Court that is entitled "Wall-Street Banks Escape Antitrust Suits."[14] The article pointed out that an antitrust proceeding could have led to treble damages and that subsidiaries of Credit Suisse and Deutsche Bank no longer need to fear such lawsuits for their questionable securities underwriting practices in the late 1990's.

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[11] Court of First Instance of the European Communities, Case T-169/01, Sept. 27, 2006, *available at* the Courts' official website at http://curia.europa.eu/en/content/juris/index.htm.

[12] C. Eggers, *Bewegung in Sachen Preisbindung; US Supreme Court erklaert Presibindung der zweiten Hand unter Umständen für zulässig*, LEBERNSMITTEL ZEITUNG 24 (Jul. 13, 2007) available at LEXIS/library NEWS/fileZEITNG.

[13] *US-Gericht bremst Karetellklagen gegen Emissionsbanken*, SDA-BASISDIENST-DEUTSCH, available at LEXIS/library NEWS/fileZEITNG.

[14] *Wall-Street Banken entgehen Kartellklagen*, FRANKFURTER ALLGEMEINE ZEITUNG 21 (June 20, 2007).