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## I. INTRODUCTION

On April 2, 2009, the European Court of Justice ("ECJ") issued its decision in the *Wanadoo* case.[1] This judgment is just the last of a series of developments in the field of predatory pricing on both sides of the Atlantic.

In the United States, beginning with the *Matsushita* decision in 1986, the Supreme Court has required plaintiffs in predatory pricing cases to meet stringent conditions to prevail on their claims.[2] As a result, in the United States, predatory pricing cases have become "rarely tried and even more rarely successful," to paraphrase Matsushita. The Supreme Court's point of view appears to have been motivated by a concern with the chilling effects on price competition that "false positives" in predatory pricing cases would have, combined with a strong skepticism, from both a theoretical and practical point of view, about whether predatory pricing is a rational business strategy. More recently, in September 2008, the U.S. Department of Justice ("DOJ") published a report on single-firm conduct under Section 2 of the Sherman Act ("Monopolization Report") which dedicates a chapter to price predation.[3] In the report, the DOJ takes a skeptical view regarding the rationality and frequency of predatory pricing, much in line with the U.S. Supreme Court's view.

The European Union ("EU") has generally followed a different path with regard to predatory pricing. The traditional EU case law on predatory pricing, based on the *AKZO* case, has set a substantially lower bar to prevail on a predatory pricing claim than has the U.S. Supreme Court. For example, under EU case law, a price could be found to be predatory, even if it were above average variable cost ("AVC"), where the defendant had a "plan to eliminate a competitor."[4] This stood in contrast to the United States, where generally a price above AVC is lawful without condition. In the recent decision in *Wanadoo*, the ECJ largely opted to continue along the lines of the previous case law.

This raises the question: When it comes to predatory pricing, is the EU from Venus, and the United States from Mars? The answer is not as simple as it may seem.

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[1] Case C-202/07 P *France Télécom v Commission* [2009] not yet reported ["*Wanadoo*, ECJ"].

[2] Matsushita v. Zenith Ratio, 475 U.S. 574, 582 (1986).

[3] U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008) ["Monopolization Report"], available at http://www.usdoj.gov/atr/public/reports/236681.pdf (last visited on January 7, 2009), at 59-75.

[4] Case C-62/86 *AKZO Chemie v. Commission* [1991] ECR I-3359, paragraphs 71-72.

Despite the DOJ's Monopolization Report, some degree of convergence is taking place at the level of the enforcement agencies. However, whether convergence at the agency level has any effect remains to be seen, given the divergence that exists at the level of the courts.

In Section 2 below, we will first examine the *Wanadoo* case in more detail. Section 3 will show that the *Wanadoo* judgment is just one of a series of important developments on predatory pricing. Our goal in Section 4 is to analyze whether general inferences can be drawn from these developments.

## II. THE *WANADOO* CASE

### *A. Background*

Wanadoo, a subsidiary of the telephone incumbent France Télécom, is a provider of high-speed Internet access. During 2001 and 2002, Wanadoo charged low prices for the provision of asymmetric digital subscriber line ("ADSL") services to residential customers in France. Wanadoo's market share first increased from 50 percent to 72 percent in August 2002, but then dropped to 63.6 percent in October 2002. The share of its closest competitor was about 8 percent. During the period at issue, one rival exited the market, while some competitors increased their market shares.

In September 2001, the European Commission ("Commission") launched an investigation into Wanadoo's practices. In its decision of July 16, 2003, the Commission found that Wanadoo charged prices that did not cover variable costs (from March to August 2001) and full costs (from August 2001 to October 2002), and followed a plan to "pre-empt" competition in the high-speed Internet access market.[5] In the Commission's view, customer acquisition costs (such as advertising, marketing activities, or special offers) needed to be considered as variable costs. Although not directly related to each sales unit, the Commission found there to be a sufficient correlation between these costs and the sales generated. Recognizing that it was reasonable for Wanadoo not to aim for instant profit, the Commission spread the costs of acquiring customers over a period of 48 months.

Finding that Wanadoo's prices were below costs (even after adjustment), the Commission held Wanadoo's conduct to be an abuse of its dominant position, and imposed a fine.

Wanadoo challenged the Commission decision before the Court of First Instance ("CFI"). In its judgment of January 30, 2007, the CFI upheld the Commission decision in its entirety.[6] The court found that the Commission was right to spread the costs of

[5] Case COMP/38.233 – *Wanadoo Interactive* [2003], available at http://ec.europa.eu/competition/antitrust/cases/decisions/38233/en.pdf (last visited on April 21, 2009) ["*Wanadoo*, Commission"].

[6] Case T-339/04 *France Télécom v Commission* [2007] ECR II-521 ["*Wanadoo*, CFI"].

acquiring clients over 48 months, and rejected Wanadoo's argument that a different method (based on discounted cash flows) should have been used. The CFI also dismissed Wanadoo's claim that its low prices were only meant to "meet the competition."

Moreover, the CFI examined the applicant's claim that the Commission had failed to prove that competitors would be excluded and recoupment would have been possible. The court held that according to the AKZO-test the Commission must prove a plan to eliminate "on the basis of sound and convincing evidence" if prices are below average total cost but above AVC. The CFI found that the Commission's evidence was sufficient, as the case file contained many internal Wanadoo documents that showed the company's intention was to "pre-empt" the market. The CFI dryly noted that proof of recoupment was not a pre-condition for a finding of predatory pricing. Finally, the CFI also dismissed Wanadoo's arguments that economies of scale and learning effects in a new, dynamic market could justify its pricing below cost.

### *B. The ECJ Judgment*

The ECJ rejected Wanadoo's appeal brought against the CFI judgment. Many of the appellant's arguments were rejected as inadmissible on procedural grounds. The only issue where the ECJ replied from a substantive viewpoint concerned the recoupment criterion.

The ECJ first made reference to the "classic" judgments on Article 82 EC. By repeating the mantra that the existence of a dominant position means that "competition is already weakened" and that this is different from "normal competition," the court once more showed its skepticism towards dominant companies. In the ECJ's view, this situation of "weakened competition" gives the dominant company "a special responsibility not to allow its behaviour to impair genuine undistorted competition."[7]

Then, the ECJ turned to predatory pricing. Its verdict was clear: "[D]emonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing."[8] The reasons for this assertion are less clear-cut. First, the ECJ held that the proof of recoupment is "dispensed" where prices are below AVC, the lower of the AKZO-test's two-pronged thresholds for predatory pricing. Then, the court stated as follows:

> "the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned from reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further

[7] *Wanadoo*, ECJ, *supra* note 1, paragraph 105.
[8] *Id.*, paragraph 113.

reduced and customers suffer loss as a result of the limitation of the choices available to them."[9]

The ECJ held that Wanadoo's pricing strategy would lead to the elimination of rivals "with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market."[10] But the court was silent as to how this "profiting" would materialize from the predator's perspective.

The ECJ still tried to see the positive side of a recoupment analysis. It found that the Commission, for its part, can of course assess the existence of a recoupment possibility to strengthen its case. And the ECJ gave some interesting examples of how this could be done. First, it found that the possibility to recoup may help assist the Commission in rejecting attempts to justify below-cost prices put forward by defendants. Second, the showing of a recoupment possibility can help prove that the dominant company had a "plan to eliminate" rivals.

## III. RECENT PREDATORY PRICING DEVELOPMENTS

The ECJ's Wanadoo decision is not the only recent development in the field of predatory pricing. Just a few weeks before the ECJ decision, the U.S. Supreme Court examined predatory pricing claims in the *linkLine* case.[11] Prior to that, the antitrust agencies in the United States and the EU issued guidance on their respective enforcement policies with regard to single-firm conduct, including on predatory pricing.[12]

### *A. The linkLine Judgment*

The U.S. Supreme Court's decision in *linkLine* was issued on February 25, 2009. That case pitted a number of companies of the AT&T group ("AT&T") against four independent Internet service providers ("ISPs").

AT&T owns a large part of the telephone infrastructure in California, and controls the "last mile" connecting private and personal premises to the telephone

[9] *Id.*, paragraph 112.
[10] *Id.*, paragraph 107.
[11] Pacific Bell Telephone v. linkLine Communications, 555 U.S. __ (2009).
[12] In January 2009, the Competition Bureau of Canada published the Updated Enforcement Guidelines on the Abuse of Dominance Provisions of the Canadian Competition Act in draft form, for public consultation. *See* Competition Bureau Canada, *Draft Updated Enforcement Guidelines – The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, available at http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf (last visited on April 11, 2009). Similar to their U.S. and EU equivalents, these guidelines provide a comprehensive overview of the Canadian competition agency's enforcement policy for single-firm conduct. However, the Competition Bureau does not disclose too much information on the specifics of its approach towards predatory pricing. This is mainly because the agency had adopted more precise guidance on predatory pricing in a separate document –the Predatory Pricing Enforcement Guidelines– in July 2008. *See* Competition Bureau Canada, *Enforcement Guidelines – Predatory Pricing*, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Predatory_Pricing_Guidelines-e.pdf/$file/Predatory_Pricing_Guidelines-e.pdf (last visited on April 11, 2009).

network. The four ISPs compete with AT&T in the provision of retail digital subscriber line ("DSL") services. However, as they do not own all the facilities needed to provide this service, the ISPs lease DSL transport services from AT&T.

In their complaint to the District Court, the ISPs alleged that AT&T refused to deal with them, denied them access to essential facilities, and engaged in a "price squeeze." The District Court held that AT&T had no antitrust duty to deal with the plaintiffs, but denied AT&T's motion to dismiss with respect to the price squeeze claims. The Court of Appeals upheld the District Court's denial of the motion to dismiss these claims.

The Supreme Court did not agree. Although there were considerable doubts as to whether the case was moot—as the plaintiffs' claim seemed to have been abandoned or changed unrecognizably—the Supreme Court reversed the Court of Appeals' decision. The Supreme Court essentially held that price squeeze claims should be assessed under two existing categories –refusal to deal and predatory pricing– rather than under a separate theory of antitrust harm. Clearly, the Supreme Court found that the plaintiffs' claims could not succeed under the refusal to deal arguments. As the court explained, if a firm has no antitrust duty to deal with its competitors, it has no duty to deal under commercially advantageous terms and conditions either.

The Supreme Court then turned to the predatory pricing part of the plaintiffs' claim. In that regard, the court essentially repeated its findings in the *Brooke Group* case: The alleged predator's prices must be below an appropriate measure of its rival's costs, and there must be a dangerous probability that it can recoup its "investment" in below-cost prices.[13] In addition, the court continued with straight-forward language: "[T]he Sherman Act does not prohibit—indeed, it encourages—aggressive price competition at the retail level, as long as the prices being charged are not predatory."[14]

At the end of the judgment, the Supreme Court made another interesting remark:

> "[I]f AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market."[15]

### *B. The Commission's Article 82 Guidance*

A few months earlier, in December 2008, the Commission issued its formal guidance document on enforcement priorities under Article 82 EC ("Article 82 Guidance" or "Guidance").[16] The Article 82 Guidance provides new thinking on the

[13] *See* Brooke Group v. Brown & Williams Tobacco, 509 U.S. 209, 222-224 (1993).
[14] *linkLine*, *supra* note 11, at 14-15 (emphasis in original).
[15] *Id.*, at 16-17.
[16] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings ["Article 82 Guidance"], available at http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf (last visited on February 17, 2009).

Commission's approach to Article 82 EC cases. In particular, the Commission now officially espouses an economic approach, and adheres to the "equally efficient competitor" test.

For predatory pricing cases, the Commission also proposes a new test. According to the Guidance, the Commission will generally intervene where

> "a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term, so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm."[17]

In this new framework, the Commission essentially proposes to follow a "sacrifice" test. Prices below average avoidable cost ("AAC") will in most cases be viewed as a clear indication of sacrifice.[18] But in the Commission's view the concept of sacrifice also includes conduct that leads in the short term to net revenues lower than could have been expected from a reasonable alternative conduct.

According to the Guidance, normally only pricing below long-run average incremental costs ("LRAIC") is capable of excluding equally efficient competitors from the market. Thus, the Commission proposes to use AAC and LRAIC as relevant benchmarks, but does not clearly indicate how these two benchmarks relate to each other or when they are used.

The Guidance also contains a sub-section on "anticompetitive foreclosure" of predatory pricing. Although it does not frame the discussion in these terms, the Commission looks at various forms of recoupment of the investment in predation made by the predator. The Commission mentions the possibilities of increasing prices after the rival's exit, deterring market entry, and "disciplining" rivals (which may refrain from competing vigorously and instead follow the predator's price leadership). In addition, the Commission recognizes the possibility for the dominant company to acquire a reputation for predatory conduct (which would in turn deter entry or discipline rivals' conduct in other markets or later in time).

However, in spite of the relative detail of these recoupment possibilities, the Commission uses a broad formula for the requirement to show consumer harm. It suffices that the predator "is likely to be in a position to benefit from the sacrifice," and proof of overall profits is not required.[19] This seems to imply that the Commission is ultimately not under an obligation to prove concrete possibilities of recoupment.

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[17] *Id.*, paragraph 63 (references and footnotes omitted).

[18] This applies both for all or part of the alleged predator's output –*i.e.*, its sales in the entire market or only the incremental sales.

[19] Article 82 Guidance, *supra* note 16, paragraph 70.

### *C. The DOJ's Monopolization Report*

Two months earlier, in September 2008, the DOJ issued the Monopolization Report. While acknowledging that certain market characteristics may contribute to potentially successful predatory pricing—for example where information is imperfect or the predator engages in "reputation-effect" predation—the Monopolization Report generally takes a skeptical view as to the rationality and frequency of predatory pricing.

The report sets out the DOJ's understanding of a sound approach to predatory pricing. First, above-cost pricing should be *per se* legal. Second, in its attempt to find a sound and workable measure of incremental cost that can be used as a benchmark, the DOJ opts for AAC.[20] Third, the report maintains that recoupment is a constitutive criterion for predatory pricing, as a valuable screen to identify implausible claims. Importantly, the DOJ also states that it may consider both "in-market and out-of-the-market effects" when assessing recoupment, opening the door to actions claiming that recoupment takes the form of the acquisition of a reputation as a predator. Finally, the DOJ expresses its willingness to consider possible defenses to below-cost pricing if pro-competitive effects are shown in a persuasive way. While rejecting the "meeting the competition defense," the DOJ recognizes the pro-competitive impact of certain kinds of conduct such as promotional pricing, network effects, and learning-by-doing.

On the day of publication of the Monopolization Report, several commissioners at the Federal Trade Commission ("FTC") criticized it.[21] With respect to predatory pricing, the commissioners took issue with the DOJ's proposals to use AAC as the relevant benchmark and to allow an efficiency defense even in a setting where there is existing monopoly power.

## IV. TRANSATLANTIC TRENDS TO BE DISCERNED

As discussed, the *Wanadoo* case is just the last in a series of developments in the field of predatory pricing in the United States and the EU. In our view, it may be possible to discern two broad trends on an international level.

Importantly, while our analysis focuses on predatory pricing, we believe that it may be possible to apply the findings to single-firm conduct policy more generally. Indeed, to our minds, recoupment is a good proxy for consumer harm. We believe that, to the extent that a given enforcement policy requires a showing of recoupment, such policy takes an effects-based approach.

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[20] The report also examines the question of whether opportunity costs should be taken into account, but rejects that possibility in the end.

[21] For the statement of commissioners Harbour, Leibowitz and Rosch, *see* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf (last visited on April 2, 2009). *See*, also, statement by former FTC chairman William E. Kovacic, available at http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf (last visited on April 2, 2009).

### *A. Convergence at the Level of the Enforcement Agencies?*

At the outset, we asked whether the EU was from Venus and the United States from Mars, given the generally stringent conditions required to show predatory pricing in the United States as compared to the EU. We believe that the recent events indicate that some degree of convergence has occurred between the enforcement agencies in the two jurisdictions.[22]

In particular, the Commission seems to have raised the bar for predatory pricing claims, while evincing a stronger skepticism toward such claims and recognizing the dangers of chilling competition through "false positives."[23] As described above, the Commission's Article 82 Guidance lays out an approach that is more effects-based than that established in the EU case law, including *Wanadoo*. Specifically, the Commission now appears to accept that the showing of a practice's foreclosure effects and consumer harm is necessary, with certain limits. For example, Commissioner Kroes stated:

> "Competition on the merits by firms which are dominant should not be discouraged or undermined, even if it may hurt competitors. An effective competitive process may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market. So be it."[24]

In the Article 82 Guidance, the Commission proposes to rely on qualitative and, where possible and appropriate, quantitative evidence to identify likely consumer harm. This approach in principle represents progress over the Commission's past practice.[25]

In the United States, on the other hand, the DOJ under the new Obama administration is widely predicted to be substantially more active and aggressive in pursuing what it views to be anticompetitive conduct than it was under the Bush administration. Indeed, the current DOJ effectively renounced the Monopolization

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[22] Under the Bush Administration, FTC commissioners stated that they will "look around the world for additional perspectives on dominant firm conduct…" *See* statement of commissioners Harbour, Leibowitz and Rosch, *supra* note 21, at 11. Similarly, the DOJ's Assistant Attorney General in the Obama Administration said that the DOJ would continue its "efforts to work with [] international colleagues" in the area of single firm conduct. *See* Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, Speech at the United States Chamber of Commerce on May 12, 2009, available at http://www.usdoj.gov/atr/public/speeches/245777.htm (last visited on May 19, 2009).

[23] To be sure, the convergence is far from complete. For example, in the Commission's view, it is sufficient that the contested conduct *is likely* to lead to anticompetitive foreclosure. In addition, the Commission states that it "will *normally* intervene" only in cases where convincing evidence suggests that there will likely be foreclosure. Article 82 Guidance, *supra* note 16, paragraph 20. This shows that the doors to bring cases in other circumstances are not entirely closed.

[24] Neelie Kroes, *The European Commission's enforcement priorities as regards exclusionary abuses of dominance – current thinking*, Competition Law International 4, 5 (October 2008).

[25] Adrian Emch, *Frequent Flyer Programmes under Article 82 EC - Is the Sky the Only Limit?*, World Competition 645-673 (2007), note 82.

Report.[26] Accordingly, there are good reasons to think that a new DOJ approach to predatory pricing will include liberalizing the conditions under which the DOJ will seek to pursue predatory pricing claims, so that its approach may end up looking more like that of the Commission.[27] The FTC under the Bush administration was already more aggressive than the DOJ, as demonstrated by several commissioners' criticism of the Monopolization Report and in particular their suggestion that AAC may not always be the appropriate cost benchmark. With the change in the administration and the chairmanship of the FTC, the FTC is expected to become even more aggressive.[28]

Of course, convergence at the level of the enforcement agencies means very little if the rather large divergence between the courts in the EU and United States remains. For example, the FTC has been convinced as to the anticompetitive effect of "reverse payments" in pharmaceutical patent infringement litigation, but has been rebuffed on several occasions by the courts.[29] If the DOJ or FTC were to bring predatory pricing actions under an approach that is inconsistent with *Brooke Group*, they may well similarly run aground.

### *B. Persistent Divergence at the Level of the Courts?*

In the *Wanadoo* and *linkLine* cases, the ECJ and the U.S. Supreme Court reached decisions that starkly differ, in both tone and substance. The striking thing is that, although the legal claims differed, the factual background of these two cases was rather similar. Indeed, in both cases, the exclusion of rivals in DSL services retail markets was alleged. Although there are limits to the degree to which the legal findings can be compared, the factual similarity puts the spotlight on the different legal solutions reached.

The ECJ's and the Supreme Court's stances seem to be two extremes. The ECJ appears to reflect a skeptical view of dominant firms, is more concerned with "false negatives" than "false positives," and takes a form-based approach. The U.S. Supreme Court, on the other hand, reflects a skeptical view of predatory pricing, is more concerned with "false positives" than "false negatives," and takes an effects-based approach.

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[26] *See* Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, Speech at the Center for American Progress on May 11, 2009, available at http://www.usdoj.gov/atr/public/speeches/245711.htm (last visited on May 19, 2009).

[27] Simply by way of illustration, a recent publication of the new DOJ chief economist Carl Shapiro suggests a certain degree of skepticism towards the recoupment criterion. *See* Louis Kaplow and Carl Shapiro, *Antitrust*, in HANDBOOK OF LAW AND ECONOMICS (EDS. A. MITCHELL POLINSKY & STEVEN SHAVELL) 1202 (2007).

[28] The new FTC Chairman Leibowitz was one of the commissioners who criticized the DOJ Monopolization Report.

[29] Reverse payments are also one of the key issues in the Commission's ongoing inquiry into the EU's pharmaceutical sector. *See* DG Competition Staff Working Paper, *Pharmaceutical Sector Inquiry*, November 28, 2008, available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf (last visited on April 21, 2009).

In *Wanadoo*, the ECJ clearly showed that it does not intend to rely heavily on an economics-based approach, but rather continues its reliance on traditional, formalistic case law. For example, in its view, recoupment is not a prerequisite to a successful predatory pricing claim. Perhaps even more striking are the court's explanations of why a showing of recoupment is not necessary. In the extreme, its language suggests that the elimination of a competitor is bad for consumers even if prices do not go up.[30] Some might say that this is protecting competitors, rather than protecting competition.

The ECJ's findings in *Wanadoo* suggest that, as a showing of recoupment is not necessary, an examination of consumer harm is not required either. These findings would not come as a surprise. Already in the recent *British Airways* case, the ECJ explicitly stated that it is not necessary for the Commission to show a direct impact on consumers. To the contrary, the Commission would be entitled to look at the "effective competitive structure" to assess whether consumers are harmed.[31] This finding was all the more striking, as the company found to be engaging in abusive discounting lost market share during the period at issue.

In contrast to the ECJ's position in *Wanadoo,* the *linkLine* case underscores the U.S. Supreme Court's approach. For example, the Supreme Court hinted that, since a company is under no antitrust duty to deal, it could lawfully engage in a price squeeze as well. A refusal to deal and predatory pricing would, in the end, achieve the same result. As the refusal to deal would be legal, it would only make sense for the pricing conduct to be legal too. This is truly an effects-based analysis. This statement of the Supreme Court is all the more interesting, as it was not necessary for the resolution of the case at hand. This fact, together with the Supreme Court reaching a unanimous decision in *linkLine*, point towards a Supreme Court that for the foreseeable future will continue to be more concerned with "false positives" and will continue to take an effects-based approach.

Whether the gap between the Supreme Court and the ECJ will remain also depends on the latter's treatment of future cases involving the Commission's new approach. It will be interesting to see whether the ECJ will scrutinize future Article 82 EC cases in light of the Commission's professed effects-based approach (taking into account the Commission's arguments in the specific case, in particular, and the statements in the Article 82 Guidance, in general), or whether it will simply refer to the traditional case law with its low burden of proof for a conduct's actual effects.

## V. CONCLUSION

While the enforcement agencies in the EU and United States, respectively, appear to be converging toward a common approach that is effects-based and concerned with

[30] *Wanadoo*, ECJ, *supra* note 1, paragraph 112.
[31] Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraphs 106-107.

the chilling effects of "false positives," the substantial divergence between the courts in the two respective jurisdictions remains. Thus, as a practical matter, companies may have to continue to take very different approaches to pricing in the EU and United States if they seek to avoid incurring liability under allegations of predatory pricing.