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The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after *Sony/BMG* and *Impala*?

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Abstract

The recent *Impala* Judgment by the CFI on the *Sony/BMG* Decision by the Commission represents the most important ruling on collective dominance since *Airtours*. We review both the Decision and the Judgment and derive implications for the institutional and substantive development of EU Merger Control. Firstly, *Impala* introduces an ambitious symmetric standard of proof for prohibition and clearance decisions by the Commission. While alleviating fears of an increasing number of false positives in the aftermath of *Airtours*, this entails the problem of how to deal with cases in which neither the existence, nor the absence of anticompetitive effects can be proven to the required standard. Secondly, the ongoing process of increasing the role of third parties in European Merger Control is fuelled. Thirdly, *Impala* has the potential to herald a comeback of coordinated effects analysis, further precisising the conditions for establishing this kind of anticompetitive effect. Additionally, given the characteristics of the music industry, we criticise a lack of in-depth economic analysis of non-price competition issues, such as innovations and product diversity.

JEL Codes: K21, L41, L13, L82

Keywords: merger control, coordinated effects, standard of proof, music industry, collusion, *Impala*, *Sony/BMG*

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A. INTRODUCTION

On July 13, 2006, the Court of First Instance (CFI) in *Impala v Commission*¹ annulled the European Commission's *Sony/BMG* Decision.² This was a surprising and remarkable development for several reasons.³ The CFI for the first time reversed an unconditional clearance decision by the Commission under the EC Merger Regulation (ECMR). Secondly, the *Impala* ruling represents the most important collective dominance (or coordinated effects as they are now termed) case since *Airtours*. Thirdly, the CFI proceedings were initiated by competitors of the newly created joint venture, namely *The Independent Music Publishers and Labels Association (Impala)*.⁴ Moreover, the original Decision had already been remarkable in and of itself. For one thing, the Commission opted for an unconditional clearance despite serious initial doubts. Then, the Commission conducted a comprehensive analysis of past price data, thus providing another application of the quantitative techniques characteristic of the recent "more economic approach".⁵ As a corollary, this marks a further step of convergence with the US.⁶ Last, but not least, the case at hand must be seen in light of the longer-term development of the music industry, which is characterised by increasing concentration, which in turn negatively affected non-price aspects of competition such as innovation and product diversity.

In this paper, we offer a comprehensive review of *Sony/BMG* and *Impala*. We not only draw conclusions regarding its contribution to the development of the merger control framework in the EU but also highlight certain blindspots in the competition assessment. The article is organised as follows. In section B we sketch the economic and legal background of

¹ Case T-464/04, *Impala v Commission*, Judgment of the Court of First Instance, 13/07/2006 (henceforth *Impala*).

² Case COMP/M.3333 – *Sony/BMG*, Commission Decision, 19/07/2004 (henceforth *Sony/BMG*).

³ Despite this, the literature treatment of *Sony/BMG* is rather sparse. Brief analyses can be found in F Dethmers, "Collective Dominance under EC Merger Control - After *Airtours* and the Introduction of Unilateral Effects is there still a Future for Collective Dominance?" (2005) 26 *European Competition Law Review* 638-649; K Murschitz, "Das Joint Venture (JV) *Sony/BMG*: Der Versuch einer kritischen Betrachtungsweise" (2006) 2 *Wettbewerb in Recht und Praxis* 232-236; F Polverino, "Assessment of Coordinated Effects in Merger Control: between Presumption and Analysis" (2006), available at <http://ssrn.com/abstract=901688>; and from the Commission perspective P Eberl, "Following an in-depth Investigation the Commission approved the Creation of the *Sony/BMG* Music Recording Joint Venture on 19 July 2004" (2004) 3 *Competition Policy Newsletter* 7-10.

⁴ *Impala* is an international association, incorporated under Belgian law, whose membership consists 2,500 independent music production companies (judgment, para 1). See also *Impala*'s website at <http://www.impalosite.org/>.

⁵ On the "more economic approach" in EU Merger Control in general see A Christiansen, "The Reform of EU Merger Control - Fundamental Reversal or Mere Refinement?" (2006) available at SSRN: <http://ssrn.com/abstract=898845>; A Christiansen, "The "More Economic Approach" in EU Merger Control" (2006) 7 *CESifo Forum* 34-39, available at <http://www.cesifo-group.de/link/forum1-06-focus6.pdf>.

coordinated effects analysis. In section C we turn to the arguments in the underlying Commission Decision. Section D then deals with the review by the CFI. Section E derives implications for the EU Merger Control framework. Section G concludes.

B. COLLECTIVE DOMINANCE: THE ECONOMIC AND LEGAL BACKGROUND

1. The Economics of (Tacit) Collusion

From an economic point of view, the goal of merger control is to prevent the build-up of excessive market power, which would give firms the discretion to raise prices above the competitive level or otherwise reduce social welfare, while maximising individual profits.⁷

The prohibition of horizontal mergers towards a monopoly or a monopoly-like situation (quasi-monopoly) represents the prime example. Economic theory demonstrates that they are generally anticompetitive and welfare-reducing and, thus, should be banned.⁸

In addition, economic theory shows that mergers may also reduce welfare by facilitating collusion (*coordinated behaviour*) in oligopolistic markets. Collusive arrangements, however, are inherently unstable given that explicit cartelisation by means of legally enforceable contracts is prohibited.⁹ Briefly put, the participating firms face a dilemma between adherence to the terms of coordination, thus collectively maximising profits, and defection, thus reaping high individual short-term profits at the expense of the others.¹⁰ Consequently, mergers in fairly concentrated markets cannot be assumed to regularly create or promote collusive tendencies. Building on this fundamental insight, a voluminous literature on the necessary and sufficient conditions for rational collusive firm behaviour has developed in industrial economics.¹¹ The preferred tool has been non-cooperative game theory with the

⁶ In the parallel US proceedings the (FTC) had also unconditionally approved the transaction. See FTC Press Release: FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America, July 28, 2004, <http://www.ftc.gov/opa/2004/07/sonybmj.htm>.

⁷ See e.g. the early treatment by GJ Stigler, "Monopoly and Oligopoly by Merger" (1950) 40 *American Economic Review* 23-34; S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (London, Sweet & Maxwell, 2002), 253-313.

⁸ See inter alia MI Kamien and I Zang, "The Limits of Monopolization through Acquisition" (1990) 105 *Quarterly Journal of Economics* 465-99; J Farrell and C Shapiro, "Horizontal Mergers: An Equilibrium Analysis" (1990) 80 *American Economic Review* 107-126; MM Tombak, "Mergers to Monopoly" (2002) 11 *Journal of Economics & Management Strategy* 513-546.

⁹ The seminal contribution was GJ Stigler, "A Theory of Oligopoly" (1964) 72 *Journal of Political Economy* 44-61; A Jacquemin and ME Slade, "Cartels, Collusion, and Horizontal Merger" in R Schmalensee and RD Willig (eds.), *Handbook of Industrial Organization, Vol. 1* (Amsterdam, North-Holland, 1989), 415-473.

¹⁰ In the social sciences this setting is widely referred to as a prisoner's dilemma, the verbal formulation of which goes back to AW Tucker, "A Two-Person-Dilemma" (unpublished manuscript, Princeton University, 1950) reprinted in E Rasmusen (ed.), *Readings in Games and Information* (Oxford, Blackwell 2001), 7-8.

¹¹ See the recent surveys of theoretical and empirical work by M Ivaldi, B Jullien, P Rey, P Seabright and J Tirole, *The Economics of Tacit Collusion* (Brussels, DG Competition, 2003), available at http://ec.europa.eu/comm/competition/mergers/review/the_economics_of_tacit_collusion_en.pdf; S Feuerstein,

central concept of the Nash equilibrium, which is specifically relevant to repeated strategic interactions typical for oligopolistic settings.¹² The research efforts resulted in the specification of a range of market and firm characteristics, which help to mitigate the dilemma structure and are, therefore, conducive to coordinated behaviour. The most important ones are (i) a limited number of competitors or, conversely, high shares of market sales and capacities of the firms in question, (ii) a high degree of homogeneity in terms of products and cost structures, (iii) a high level of market transparency, (iv) significant barriers to entry, (v) the absence of significant buyer power and (vi) a low probability of detection and legal sanctions. Furthermore, (vii) multi-market contacts, (viii) past experience with coordination, and (ix) a stable economic environment also make the occurrence of collusive practices more likely.

The closer a specific merger moves firm and industry characteristics into these directions, the higher is the likelihood of coordinated effects in the post-merger equilibrium. It is noteworthy, however, that the focus here is not on the feasibility of (illegal) cartel-building (which was the origin of the respective economic literature). Neither is it on mere parallel behaviour due to the recognition of oligopolistic interdependence.¹³ Rather, the issue is the merger-specific influence on the potential for so-called tacit collusion, i. e. coordinated behaviour without explicit agreements. Specific theoretical work in this regard has to date been much rarer and, moreover, has produced somewhat contradictory results.¹⁴ Recently, however, more applied work outlined sensible policy approaches.¹⁵ What has clearly emerged from these research efforts is, firstly, the need for a careful case-by-case analysis and, secondly, the difficulty in isolating the impact of a specific merger.

“Collusion in Industrial Economics - A Survey” (2005) 5 *Journal of Industry, Competition and Trade* 163-198; MC Levenstein and VY Suslow, “What Determines Cartel Success?” (2006) 44 *Journal of Economic Literature* 43-95.

¹² See RB Myerson, “Nash Equilibrium and the History of Economic Theory” (1999) 37 *Journal of Economic Literature* 1067-1082; DA Yao and S Stark DeSanti, “Game Theory and the Legal Analysis of Tacit Collusion” (1993) 38 *Antitrust Bulletin* 113-141.

¹³ See WB MacLeod, “A Theory of Conscious Parallelism” (1985) 27 *European Economic Review* 25-44; P Buccirossi, “Does Parallel Behavior Provide Some Evidence of Collusion?” (2006) 2 *Review of Law & Economics* 85-102.

¹⁴ See for example O Compte, F Jenny and P Rey, “Capacity Constraints, Merger and Collusion” (2002) 46 *European Economic Review* 1-29; C Davidson and R Deneckere, “Horizontal Mergers and Collusive Behavior” (1984) 2 *International Journal of Industrial Organization* 117-132.

¹⁵ Among the most important contributions are Europe Economics, *Assessment Criteria for Distinguishing between Competitive and Dominant Oligopolies in Merger Control* (Brussels, DG Enterprise and Industry, Enterprise Papers No 6, 2001), available at http://ec.europa.eu/enterprise/library/enterprise-papers/pdf/enterprise_paper_06_2001.pdf; P Sabbatini, *How to Simulate the Coordinated Effect of a Merger* (Rome, Autorità Garante della Concorrenza e del Mercato, Temi e Problemi, 12, 2006), available at: <http://www.agcm.it/temieproblemi.htm>; JB Baker, “Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws” (2002) 77 *New York University Law Review* 135-203; AR Dick, “Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects” (2003) 21 *George Mason Law Review* 65-88; Bishop and Walker, cited above, 275-282; S Voigt and A Schmidt, *Making European Merger Policy More Predictable* (Dordrecht, Springer, 2005), 100-117.

2. EU Merger Control in Oligopolies Prior to Airtours

The European Commission has taken account of the potential collusive effects of mergers in narrow oligopolies from the very beginning of EU Merger Control.¹⁶ In order to make that possible, it drew on the notion of a dominant position “by one or more undertakings” contained in Article 86 of the original EC Treaty¹⁷, since collective dominance was not explicitly mentioned in the pristine EC Merger Regulation.¹⁸ In the *Nestlé/Perrier* case in 1992¹⁹, the Commission pioneered with the finding that Nestlé and BSN would acquire a *collective dominant position* on the market for bottled source water in France.²⁰ The Commission referred to a number of theoretically relevant factors such as high post-merger market shares and capacities of Nestlé and BSN, the insufficient competitive counterweight from local mineral and spring waters, the increased dependency of retailers and wholesalers on the brand portfolio of Nestlé and BSN and the absence of effective potential competition. Hence, the concentration was only cleared after Nestlé offered substantial commitments.²¹

Despite this first successful application of the concept, severe uncertainties remained. For example, in the *Kali+Salz/MDK/Treuhand* case in late 1993²², the Commission expected the creation of a dominant duopoly between the merged entity and the French Société Commerciale des Potasses et de l’Azote (SCPA) on the market for potash outside of Germany, thereby referring to a number of factors including the maturity and stability of the market with a homogeneous product, lack of technological innovation and high transparency.²³ It concentrated, however, on “structural links” arising from pre-existing joint ventures and cooperation agreements and only allowed the transaction after the parties committed themselves to sever all these links.²⁴ The first outright prohibition decision followed in the *Gencor/Lonrho* case in 1996.²⁵ There, the Commission found that the merged entity together with Amplats, another South African producer, would have acquired a

¹⁶ See inter alia JF Briones Alonso, “Economic Assessment of Oligopolies Under the Community Merger Control Regulation” (1993) 14 *European Competition Law Review* 118-122; A Winckler and M Hansen, “Collective Dominance under the EC Merger Control Regulation” (1993) 30 *Common Market Law Review* 787-828.

¹⁷ Treaty establishing the European Economic Community, 25/3/1957.

¹⁸ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Official Journal L 395, 30/12/1989, pp. 1-12.

¹⁹ Case IV/M.190 - *Nestlé/Perrier*, Commission Decision, 22/07/1992, (henceforth *Nestlé/Perrier*). See also W Kerber, „Der EG-Fusionskontrollfall 'Nestlé/Perrier'“ (1994) 44 *Wirtschaft und Wettbewerb* 21-35.

²⁰ *Nestlé/Perrier*, recitals 108-131.

²¹ *Nestlé/Perrier*, recitals 136-138.

²² Case M.308 - *Kali + Salz/MDK/Treuhand*, Commission Decision, 14/12/1993, (henceforth *Kali + Salz/MDK/Treuhand*).

²³ *Kali + Salz/MDK/Treuhand*, recital 57.

²⁴ *Kali + Salz/MDK/Treuhand*, recitals 58-68.

²⁵ Case IV/M.619 - *Gencor/Lonrho*, Commission Decision, 24/04/1996, (henceforth *Gencor/Lonrho*).

dominant duopoly position in the worldwide markets for Platinum and Rhodium.²⁶ With regard to the specific case, it based this finding on the homogeneity of the products, high market transparency, increasing homogeneity of suppliers, the tendencies towards anticompetitive parallel behaviour in the past and in particular the removal of the Lonrho Platinum Division (LPD) as a “more active player”. Therefore, it rejected the comprehensive commitments offered by the parties.²⁷ As a general statement the Commission held that collective dominance can be result of “mere adaptation by members of the oligopoly to market conditions”.²⁸ Hence, unlike in the *Kali+Salz* decision structural links and explicit collusive agreements were no longer deemed necessary.

The next important step in the development of the concept of collective dominance was the judgement by the Court of Justice in *France v Commission*²⁹ in 1998, with which it annulled the aforementioned *Kali+Salz* decision by the Commission, while explicitly confirming the ECMR’s general applicability to collective dominant positions, thus eliminating the associated legal uncertainty.³⁰ One year later, the CFI in its *Gencor* ruling³¹ confirmed this again and consequently upheld the Commission Decision. Moreover, it explicitly referred to the “relationship of interdependence existing between the parties to a tight oligopoly within which [...] those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices.”³² This brought the collective dominance concept even closer to the economic interpretation of tacit collusion.

²⁶ *Gencor/Lonrho*, recitals 204-206, 210.

²⁷ *Gencor/Lonrho*, recitals 215-218.

²⁸ *Gencor/Lonrho*, recital 140.

²⁹ Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, Judgment of the Court of Justice, 31/03/1998; See also JS Venit, “Two Steps forward and no Steps back: Economic Analysis and Oligopolistic Dominance after Kali&Salz” (1998) 35 *Common Market Law Review* 1101-1134; X Ruíz Calzado, “Posición dominante colectiva y control de concentraciones: la Sentencia del Tribunal de Justicia de las Comunidades Europeas de 31 de marzo de 1998, en los asuntos acumulados C-68/94 y C-30/95, República Francesa y otros/Comisión [Decisión de 14 de diciembre de 1993, Kali + Salz / MDK/ Treuhand (asunto núm. IV/M.308)]” (1998) *Anuario de la Competencia* 335-354.

³⁰ Para 14 of the Summary.

³¹ Case T-102/96 *Gencor v Commission*, Judgment of the Court of First Instance, 25/03/1999, (henceforth *Gencor*); See also C Caffarra and K-U Kühn, “Joint Dominance: the CFI Judgment on *Gencor/Lonrho*” (1999) 20 *European Competition Law Review* 355-359; V Korah, “*Gencor v. Commission: Collective Dominance*” (1999) 20 *European Competition Law Review* 337-341; AF Bavasso, “*Gencor: A Judicial Review of the Commission's Policy and Practice. Many Lights and Some Shadows*” (1999) 22 *World Competition* 45-65.

³² *Gencor*, para 276.

3. Airtours and After: From Collective Dominance to Coordinated Effects

In a second landmark decision in 2002, the CFI in *Airtours v Commission*³³ annulled for the first time a prohibition decision under the ECMR. In 1999, the Commission had prohibited in *Airtours/First Choice*³⁴ the merger of two UK suppliers of foreign package holidays, because it expected the creation of a collective dominant position by the merged entity and its two principal competitors Thomson and Thomas Cook, which it anticipated to constrain the overall capacity in the pre-season. The main factors cited in support of this finding were product homogeneity, low demand growth and low price sensitivity of demand, the increase in transparency, the symmetry between the major operators and the extensive commercial links between them, the weakened ability of the smaller tour operators and of potential entrants to compete and the history of rapid consolidation in the industry.³⁵ The CFI, however, rejected almost all of these findings on factual grounds of the specific case. It then harshly criticised the Commission's handling of evidence and analysis in an unprecedented manner as "vitiating by a series of errors of assessment".³⁶

Moreover, the CFI clarified the general standard for finding of collective dominance by setting out three cumulative conditions.³⁷ Firstly, the market must be transparent enough to allow for the monitoring of other firms' market conduct. Secondly, coordination must be sustainable, which means that the participants must be deterred from defection by fear of retaliation. Thirdly, the benefits of coordination must not be jeopardised by the actions of current or future competitors or customers. The CFI also made clear that these conditions require a "prospective analysis" of the specific circumstances of any particular case, thus basing the final decision on "cogent evidence".³⁸ The judgment was subject to an intense debate of an unparalleled extent.³⁹ It was widely regarded as a milestone in the development

³³ Case T-342/99 *Airtours v Commission*, Judgment of the Court of First Instance, 06/06/2002, (henceforth *Airtours*).

³⁴ Case COMP/M.1524 – *Airtours/FirstChoice*, Commission Decision 29/04/1999, (henceforth *Airtours/FirstChoice*); see also F Jenny, "Oligopoly Theory, Collective Dominance and EU Merger Control: the *Airtours/First Choice* Decision in Perspective" in European Commission (ed.), *EC Merger Control: Ten Years On* (Brussels, 2000), 121-131; P Christensen and V Rabassa, "The *Airtours* Decision: Is there a new Commission Approach to Collective Dominance?" (2001) 22 *European Competition Law Review* 227-237; G Niels, "Collective Dominance: More than just Oligopolistic Interdependence" (2001) 22 *European Competition Law Review* 168-172; M Motta, "EC Merger Policy and the *Airtours* Case" (2000) 21 *European Competition Law Review* 199-207.

³⁵ *Airtours/FirstChoice*, recitals 87-158.

³⁶ *Airtours*, para 294.

³⁷ *Airtours*, para 62.

³⁸ *Airtours*, paras 63, 294.

³⁹ A Overd, "After the *Airtours* Appeal" (2002) 23 *European Competition Law Review* 375-377; H Haupt, "Collective Dominance under Article 82 EC and EC Merger Control in the Light of the "*Airtours*" Judgment" (2002) 23 *European Competition Law Review* 434-444; A Nikpay and F Houwen, "Tour de force or a Little Local Turbulence? A Heretical View on the '*Airtours*' Judgment" (2003) 24 *European Competition Law Review* 193-202; S Stroux, "Collective Dominance under the Merger Regulation: A Serious Evidentiary

of the collective dominance concept. More specifically, it raised the standard of proof, which the Commission must meet in order to establish collective dominance.

The Commission in turn accepted these criticisms.⁴⁰ It did not appeal the judgement and thenceforth refrained from prohibiting any more concentration on the grounds of collective dominance.⁴¹ Moreover, the *Airtours* judgment was one of the driving forces behind the recent far-reaching reform of EU Merger Control. This led first of all to the amendment of the ECMR⁴² with the change in the prohibition criterion in Art. 2 ECMR from “market dominance” to “significant impediment to effective competition” (SIEC).⁴³ Other central innovations were the “more economic approach”⁴⁴ and the first-time publication of European Horizontal Merger Guidelines (HMG)⁴⁵ in 2004. Therein, the treatment of mergers in oligopolies was refined substantially. To begin with, the differentiation between coordinated effects, which replace the former collective dominance concept, and non-coordinated or unilateral effects was introduced.⁴⁶ The HMG section on coordinated effects not only reflects the described case-law up to *Airtours*, but also lays out the analytical approach in a systematic

Reprimand for the Commission” (2002) 27 *European Law Review* 736-746; EA Raffaelli, “European Union Competition Policy Subsequent to the *Airtours* Case” (2003) 29 *Annual Proceedings of the Fordham Corporate Law Institute* 129-143; U Schwalbe, “Die *Airtours*/First Choice Entscheidung” in FIW (ed.), *Schwerpunkte des Kartellrechts 2002* (Köln 2003), 17 et seq.; M Nicholson and S Cardell, “*Airtours* v Commission: Collective Dominance Contained?” in G Drauz and M Reynolds (eds.), *EC Merger Control. A Major Reform in Progress* (London, International Bar Association, 2003), 285-301; FE González-Díaz, “Merger Control and Oligopolistic Dominance in the Wake of the *Airtours* Judgment” in G Drauz and M Reynolds (eds.), *ibid*, 303-322; F Montag and A von Bonin, “Collective Dominance in Merger Cases After *Airtours*” in G Drauz and M Reynolds (eds.), *ibid*, 323-342; C Veljanovski, “EC Merger Policy after GE/Honeywell and *Airtours*” (2004) 49 *Antitrust Bulletin* 153-193; M Clough, “The Role of Judicial Review in Merger Control” (2004) 24 *Northwestern Journal of International Law & Business* 729-754.

⁴⁰ E.g. M Monti, “Merger Control in the European Union: A Radical Reform”, 7 November 2002, available at <http://ec.europa.eu/comm/competition/speeches/>; FE Gonzalez Díaz, “Consequences of the Four Key Merger Judgments” in M Adenas, M Hutchings and P Marsden (eds.), *Current Competition Law, Vol. II* (London, BIICL, 2004), 297-304.

⁴¹ The Commission did, however, find the risk of coordinated effects in a number of recent cases, thus requiring remedies from the parties. See Weitbrecht 2005, cited above, and A Weitbrecht, “EU Merger Control in 2005 – An Overview” (2006) 27 *European Competition Law Review* 43-50.

⁴² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal of the European Union L 24, 29/01/2004, pp. 1-22

⁴³ See e.g. K Fountoukakos and S A Ryan, “A New Substantive Test for EU Merger Control” (2005) 26 *European Competition Law Review* 277-296; D Zimmer, “Significant Impediment to Effective Competition” (2004) 2 *ZWeR Journal of Competition Law* 250-267.

⁴⁴ See references in fn. 5 above.

⁴⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, in: Official Journal of the European Union C 31, 05/02/2004, pp. 5-18 (henceforth EU HMG). See also S Bishop and D Ridyard, “Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control” (2003) 24 *European Competition Law Review* 357-363; S Voigt and A Schmidt, “The Commission's Guidelines on Horizontal Mergers: Improvement or Deterioration?” (2004) 41 *Common Market Law Review* 1583-1594.

⁴⁶ See O Budzinski and A Christiansen, “Simulating the (Unilateral) Effects of Mergers: Implications of the Oracle/PeopleSoft Case” (2006) available at SSRN: <http://ssrn.com/abstract=924375>; SB Völcker, “Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control” (2004) 25 *European Competition Law Review* 395-409.

way.⁴⁷ The treatment of coordinated effects is divided into four parts, namely the reaching of terms of coordination, the monitoring of deviations, deterrent mechanisms and outsider reactions. For each part the HMG contain a detailed enumeration of relevant assessment factors, such as product homogeneity, stability of the economic environment, etc. All this is broadly in line with the economics of tacit collusion outlined above. Regarding the evidence, the Guidelines include “all available relevant information on the characteristics of the markets concerned, including both structural features and the past behaviour of firms”⁴⁸. Evidence of past coordination is held to be particularly important if the relevant market characteristics have not changed significantly or are unlikely to do so in the near future.⁴⁹

With the Guidelines approach, EU Merger Control has converged considerably with the practice of coordinated effects analysis by the US authorities, which experienced something like a renaissance recently.⁵⁰ Among the noteworthy cases was the Federal Trade Commission (FTC) investigation of the proposed cruise line mergers involving Royal Caribbean Cruises, P&O Princess Cruises and Carnival in 2002, which were, however, not litigated after an in-depth review.⁵¹ Furthermore, in 2003, the Department of Justice (DoJ) blocked the proposed acquisition of Morgan Adhesives by UPM-Kymmene Oyj, because it expected post-merger coordination between the merged entity and the only principal competitor Avery Dennison in the market for pressure-sensitive labelstock.⁵² In 2004, the FTC unsuccessfully challenged the acquisition of Triton Coal Company by Arch Coal on the grounds of expected anticompetitive coordination among the remaining coal producers in Wyoming’s Southern Powder River Basin.⁵³ This mixed record of the US agencies at the same time testifies to the principal difficulty of proving coordinated effects to the required standard in merger control proceedings.

⁴⁷ EU HMG, paras 39-57.

⁴⁸ EU HMG, para 43.

⁴⁹ See also G Robert and C Hudson, “Past Co-ordination and the Commission Notice on the Appraisal of Horizontal Mergers” (2004) 25 *European Competition Law Review* 163-168.

⁵⁰ *DoJ/FTC* (1997), Horizontal Merger Guidelines, April 1992 with revisions from April 1997, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>, sec. 2.1; *DoJ/FTC* (2006), Commentary on the Horizontal Merger Guidelines, March 2006, available at <http://www.usdoj.gov/atr/public/guidelines/215247.pdf>, pp. 18-25; CA James, “Rediscovering Coordinated Effects” (13 August 2002), available at <http://www.usdoj.gov/atr/public/speeches/200124.pdf>; JF Rill and H Rosenblatt, “Coordinated Interaction and Collective Dominance: A Remarkable Journey towards Convergence” in P Lugard and L Hancher (eds.), *On the Merits: Current Issues in Competition Law and Policy* (Antwerp, Intersentia, 2005), 127-156.

⁵¹ See *FTC Closes Cruise Line Merger Investigations*, FTC Press Release, 4 October 2002, available at <http://www.ftc.gov/opa/2002/10/cruiselines.htm>; MT Coleman, DW Meyer and DT Scheffman, “Economic Analyses of Mergers at the FTC: The Cruise Ships Mergers Investigation” (2003) 23 *Review of Industrial Organization* 121-155.

⁵² *United States v. UPM-Kymmene Oyj, Raflatac, Inc., Bemis Company, Inc. and Morgan Adhesives Company*, available at <http://www.usdoj.gov/atr/cases/upm-kymmene.htm>.

⁵³ Statement of the Commission in the Matter of Arch Coal, Inc., et al., available at <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf>;

The upshot of the developments on both sides of the Atlantic is a gradual refinement on the conceptual level coupled with an increasing standard for the finding of coordinated effects in a particular case. Under the current “more economic approach” in the EU, this implies an increasing reliance on economic arguments and quantitative evidence.⁵⁴

C. THE COMMISSION DECISION IN *SONY/BMG*

On July 19, 2004, the European Commission unconditionally cleared the combination of the global recorded music businesses (excluding Japan) of Bertelsmann AG and Sony Corporation of America. The new entity, called Sony-BMG, was a 50-50 joint venture embracing so-called Artist and Repertoire (A&R) activities⁵⁵ as well as marketing and sale of recorded music. The parties’ activities in music publishing as well as manufacturing and (physical) distribution of records were not included. The clearance decision meant that the Commission gave up at a rather late stage its initial opposition against the transaction.⁵⁶ It had earlier opened phase II-proceedings⁵⁷ and as tardily as May 24, 2004, had issued a sharp Statement of Objections, informing the parties of its provisional intention to prohibit the concentration.⁵⁸ Only after the final hearing of the parties on June 14 and 15, 2004 did the Commission alter its position.⁵⁹

1. The Relevant Markets and Players

In product terms, the Commission defined three separate relevant markets, namely for recorded music, for online music and for the upstream market of music publishing.⁶⁰ In geographic respects, the markets were held to be national in scope because of the differing consumer preferences, the national organisation of the record companies’ subsidiaries and of the collective rights management as well as price differences.

The focus of the investigation was then primarily on the marketing of recorded music. Although in the aftermath of the digital revolution production, re-production and distribution costs are almost zero, the global markets for recorded music are dominated by five large record companies (‘majors’), namely Universal Music, Sony Music, EMI, Warner and the

⁵⁴ See also Y Botteman, “Mergers, Standard of Proof and Expert Economic Evidence” (2006) 2 *Journal of Competition Law and Economics* 71-100.

⁵⁵ A&R comprises the discovery and development of (new) artists. From an economic perspective, it represents the R&D activities in the music industry.

⁵⁶ Thus, the CFI Judgment later referred to “a fundamental U-turn in the Commission’s position” (*Impala*, para 283).

⁵⁷ See *Sony/BMG*, recital 2.

⁵⁸ The Statement of Objections is not itself publicly available, but it is referred to several times in the Decision and the Judgment.

⁵⁹ *Impala*, para 451.

⁶⁰ *Sony/BMG*, recitals 9-45.

Bertelsmann Music Group (BMG). Thus, the *Sony-BMG* joint venture implied a further reduction from five to four global players, while smaller record labels ('independents') merely make up 15% to 20% of the market (see also sec. VI below). As table 1 illustrates, in terms of 2003 market shares, *Sony-BMG* would have become the largest undertaking in the industry besides Universal Music, which disposes over the same market share of approximately 25%.⁶¹

Table 1

Market shares record companies 2003

Territory	BMG	Sony	Combined	Universal	Warner	EMI	Others
Austria	10-15%	5-10%	15-20%	30-35%	10-15%	15-20%	20-25%
Belgium/ Luxembourg	10-15%	10 -15%	20-25%	25-30%	5-10%	20-25%	15-20%
Denmark	5-10%	10 -15%	20-25%	20-25%	10-15%	40-45%	5-10%
Finland	5-10%	5-10%	15-20%	15-20%	10-15%	15-20%	35-40%
France	5-10%	15-20%	25-30%	30-35%	10-15%	15-20%	10-15%
Germany	15-20%	10 -15%	25-30%	20-25%	10-15%	10-15%	20-25%
Greece	-	10 -15%	10 -15%	15-20%	5-10%	35-40%	20-25%
Ireland	10 -15%	15-20%	30-35%	25-30%	15-20%	20-25%	0-5%
Italy	15-20%	15-20%	30-35%	20-25%	15-20%	15-20%	5-10%
Netherlands	10 -15%	10 -15%	25-30%	20-25%	5-10%	15-20%	25-30%
Norway	5-10%	10 -15%	15-20%	20-25%	10-15%	20-25%	25-30%
Portugal	5-10%	10 -15%	15-20%	15-20%	5-10%	20-25%	35-40%
Spain	10 -15%	10 -15%	20-25%	15-20%	20-25%	10 -15%	25-30%
Sweden	10 -15%	10 -15%	20-25%	15-20%	10-15%	20-25%	20-25%
UK	10 -15%	5-10%	20-25%	25-30%	10-15%	15-20%	15-20%
Total	10 -15%	10 -15%	20-25%	25-30%	10-15%	15-20%	15-20%

Source: Case COMP/M.3333 – *Sony/BMG*, Commission Decision 19/07/2004, Table 3

2. Assessment of Collective Dominance in *Sony/BMG*

Accordingly, in *Sony/BMG* the Commission focused on whether the joint venture would create or strengthen a collective dominant position in the markets for recorded music, licenses of online music and online music distribution.⁶² The investigation included the analysis of price developments in the relevant European markets, aiming to put the *Sony/BMG* Decision on a firm footing by processing “millions of data sets”⁶³. The Commission firstly analysed whether the five majors had coordinated their prices in the main national markets of the United Kingdom, France, Germany, Italy and Spain during the last three to four years. For each country, it was examined with the help of the pricing analysis whether any coordination

⁶¹ *Sony/BMG*, recitals 46-48.

⁶² Notified in January 2004 the joint venture was reviewed under the old dominance test of Regulation No 4064/89 so that the Decision and the Judgement refer to collective dominance rather than coordinated effects.

⁶³ Eberl, cited above, 10

took place concerning average wholesale net prices⁶⁴, wholesale list prices – so called PPDs (Published Prices to Dealers) – and discounts of various kinds.⁶⁵ The results were similar across countries, although the exact figures sometimes differed. Net wholesale prices of the five major record companies showed a certain degree of parallelism in all countries studied, yet the Commission considered this insufficiently for establishing price coordination in the past.⁶⁶ The major record companies employ more than 100 PPDs, yet already the top 5 PPDs covered more than half (in the UK even more than 85%) of the parties' sales in all national markets in 2002.⁶⁷ Information on these PPDs are published in catalogues and, therefore, transparent to all competitors, so that they could be used as focal points for a coordinated pricing scheme. Again indications for alignment of these prices were found for all countries and, thus, price coordination was considered a possibility. Moreover, in all countries transaction net prices were found to be “closely linked” to these PPDs resulting in relatively stable net to gross price ratios over time.⁶⁸

Taken together, the in-depth pricing analysis provided strong hints to coordination in all markets. Yet, this finding was trumped each time by the analysis of discounts.⁶⁹ The most important category was invoice discounts and for these the Commission identified fluctuations and differences of 2 to 5 percent points between the discounts granted by Sony and BMG to their top 10 customers. Furthermore, the discounts in general were found to vary over time and from album to album. In particular, the Commission believed the flexible use of campaign discounts and the resulting reduced transparency to undermine a sufficient alignment of invoice discounts. After all, although the Commission found that prices moved in parallel over the last years, it was unable to establish existing collective dominance on any of the main markets.⁷⁰ The results were broadly similar with regard to the smaller EEA countries, such as the Netherlands, Sweden and Ireland, mainly because the market structure was found to be comparable to the bigger countries.⁷¹

The Commission, therefore, turned to the qualitative analysis of the most important market characteristics: product homogeneity and market transparency.⁷² By acknowledging that recorded music represents a heterogeneous product, the Commission adopted the position of

⁶⁴ The Commission analysed wholesale prices for top 100 single albums for each quarter, since these albums make up at least 70% to 80% of total sales. See *Sony/BMG*, recital 71.

⁶⁵ *Sony/BMG*, recitals 69-73.

⁶⁶ *Sony/BMG*, recitals 75, 82, 89, 96, 103.

⁶⁷ *Sony/BMG*, recitals 76, 83, 90, 97, 104.

⁶⁸ *Sony/BMG*, recitals 77, 84, 91, 98, 105.

⁶⁹ *Sony/BMG*, recitals 79-80, 85-87, 92-94, 99-101, 106-108.

⁷⁰ *Sony/BMG*, recital 109.

⁷¹ *Sony/BMG*, recitals 119-153.

⁷² *Sony/BMG*, recitals 109-118.

Sony-BMG. This refers mainly to the content, whereas the CD album format and the pricing and marketing strategies appear “quite standardized” and, thus, homogenous. On the wholesale level, price differentiation regarding genres or types of albums did not regularly occur. Moreover, there were stable long-term relations between record companies and wholesale distributors.⁷³ Eventually, weekly hit charts coupled with sales data and more or less public PPDs rendered the market for recorded music rather transparent. Still the perceived heterogeneity of content and variability in campaign discounts were sufficient for the Commission to find a lack of market transparency, which in turn ruled out the feasibility of collusion.⁷⁴

As the final step, the Commission investigated whether retaliation had taken place in the past, in particular by investigating the major record labels’ conduct as to granting mutual licences for hit compilation albums.⁷⁵ Because of their importance for business success⁷⁶, excluding a defector from such compilation joint ventures would represent a credible threat, thus constituting an effective retaliation mechanism. Yet, no evidence was found that such retaliation actually took place. Thus, the Commission again deemed the evidence insufficient to establish pre-merger coordination.⁷⁷ As a logical consequence, the transaction in question could no longer be held to strengthen existing collective dominance. Likewise, the Commission ruled out rather quickly the creation of post-merger collective dominance, again with reference to the said deficits in transparency, heterogeneous product characteristics and absence of retaliation in the past.⁷⁸

3. Related Competition Issues

In addition to the strengthening or creation of a collective dominant position in the recorded music markets, a number of further concerns were addressed briefly in the Decision. The first one was the creation of single dominance in recorded music markets due to the vertical relationship to Bertelsmann with its strong media linkages in certain EU countries, most notably Germany, the Benelux countries and France.⁷⁹ The Commission explicitly referred to concerns raised by “third parties” that Bertelsmann could use its position in television and radio stations to foreclose competitors from promoting their artists and instead favour Sony-

⁷³ The Commission even states that this „situation of a limited number of players in the market is conducive to the adoption of cooperative strategies on behalf of the majors and also facilitates the monitoring and information flow“ (*Sony/BMG*, recital 112).

⁷⁴ *Sony/BMG*, recitals 110, 113.

⁷⁵ *Sony/BMG*, recitals 114-118.

⁷⁶ These compilation albums make up for 15% to 20% of the overall market for recorded music (*Sony/BMG*, recitals 115).

⁷⁷ *Sony/BMG*, recital 154.

⁷⁸ *Sony/BMG*, recitals 155-158.

BMG. Even though it found that this strategy had indeed been adopted by Bertelsmann in the past, the Commission dismissed the creation of single dominance as unlikely.

The same conclusion was drawn with regard to a collective dominant position of the majors on the wholesale markets for online music licences, which were defined as separate markets from physical distribution.⁸⁰ The main reason was the early stage of the development of online music markets, which the Commission considered more significant than the increase in transparency resulting from the reduced number of majors. Again citing concerns by unspecified “third parties” the Commission also briefly dealt with the possible creation of single dominance by Sony in the related markets for the distribution of online music.⁸¹ This argument rested mainly on the large music library owned by Sony-BMG coupled with Sony’s activities in music downloading services via its subsidiary Sony Connect. However, the Commission found it “very doubtful” that foreclosing competitors would be a profitable strategy for Sony-BMG and, hence, decided not to pursue this argument further.

Finally, the investigation covered spill-over effects from the joint venture on the remaining independent activities of the parent companies Sony and BMG according to Article 2 (4) of the EC Merger Regulation.⁸² The focus here was on the music publishing business, which is considered upstream from music recording. The Commission found that, since the main publishing rights are administered and the royalties fixed by the national collecting societies, there was no significant scope for the firms to employ coordinated strategies. Similarly, the possibility that the majors could increasingly bypass the collecting societies, put forward by “some third parties”, was considered not likely by the Commission.

D. CFI JUDGMENT IN *IMPALA V COMMISSION*

1. Parties to the Trial and Preliminary Issues

The action was brought by the independent record companies competing with the newly created joint venture, more specifically by their industry association Impala. Sony-BMG as well as the parent companies Bertelsmann AG and Sony Corporation of America (SCA) also participated in the Court proceedings as “interveners” in support of the European Commission in its quest to have Impala’s application dismissed as unfounded.⁸³

⁷⁹ *Sony/BMG*, recitals 159-164.

⁸⁰ *Sony/BMG*, recitals 165-170.

⁸¹ *Sony/BMG*, recitals 171-175.

⁸² *Sony/BMG*, recitals 176-182.

⁸³ *Impala*, para 21.

Originally, Impala publicly criticised the Decision because of the disregard of the potential marginalisation of the independents by their foreclosure from retail and radio channels and, more broadly, to the loss of choice and diversity in terms of (new) artists and genres.⁸⁴ Presumably, the first of these points appeared in the Commission Decision as the aforementioned concerns by “third parties”, which were, however, all rejected with relatively little argumentation. Impala included three of these related issues in its five pleas before the CFI, according to which⁸⁵

- (1) the Commission infringed with Article 253 EC and made a manifest error of assessment and an error of law by neither establishing a collective dominant position in the market for recorded music before the merger, nor that this dominant position would be strengthened;
- (2) the Commission infringed with Article 253 EC and made a manifest error of assessment and an error of law by not finding that the merger would lead to collective dominant position in the market for recorded music;
- (3) the Commission infringed with Article 2 of the Merger Regulation, since the Commission did not consider that the merger would create or strengthen a collective dominant position in the global market for online music licences;
- (4) the Commission infringed with Article 253 EC and made a manifest error of assessment, as the Commission did not believe that Sony would achieve an individual dominant position on the market for online music distribution;
- (5) the Commission infringed with Article 81 EC in conjunction with Article 2 (4) of the Merger Regulation and made a manifest error of assessment, since the Commission did not take the view that the merger would not lead to coordination of the music publishing activities of the parties.

The Court, however, concentrated on the first two pleas.⁸⁶ Furthermore, the judgment dealt with a minor procedural issue raised by Impala concerning (parts of) the evidence used by the Commission.⁸⁷ Impala claimed that they were made available entirely in the Court proceedings only, so that it had no chance of arguing in the administrative proceedings. Hence, they came too late to save the decision on the substance and instead represented an

⁸⁴ See Impala Press Release, Brussels, 3 November 2004, available at http://www.impalosite.org/docum/04-press/press_0410_1.htm.

⁸⁵ *Impala*, para 31.

⁸⁶ *Impala*, paras 542-543.

⁸⁷ *Impala*, paras 32-43.

attempt by the Commission to regularise the decision *ex post facto*. The Court rejected this claim as unfounded.

2. The Core of the Matter: Strengthening or Creation of Collective Dominance

The core of the judgment is in fact the detailed review of the Commission's assessment of the strengthening of an existing collective dominant position by the major record companies. To begin with, the CFI reiterated its position on the appropriate kind of analysis with regard to collective dominance in general. The Court straightened out that it had to be case-specific and backed by solid evidence but at the same time future-oriented and not confined to the analysis of past market behaviour.⁸⁸ The Court then subsequently dealt in great detail with the central findings, on which the Commission based the decline of the existence of a pre-merger collective dominant position and, hence, its strengthening post-merger. By far the most important issue was (the lack of) transparency as is already apparent from the extensive space devoted to this matter. The Commission had centred its line of argumentation on the decrease of transparency by discounts, in particular, the campaign discounts granted by the major record companies. The Court first examined the formal issue whether the Commission met the obligation to state the reasons for its conclusion according to Article 253 EC. It noted at the outset the rather curious fact that in the Decision section on transparency "all [...] factors [...], far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent."⁸⁹ Moreover, it found the same to follow from the Commission's own analysis of list prices and discounts in the large EU countries.⁹⁰ With regard to PPDs, the Court found the Commission's finding of a lack of transparency contradictory to the facts since it held the alignment to be "in fact very marked."⁹¹ It also rejected the Commission's statements with regard to invoice discounts.⁹² Eventually, turning to the decisive element of campaign discounts, the relevant paragraph of the judgment deserves quotation in full: "It should also be observed that the Decision does not state that the market is opaque, or even that it is not sufficiently transparent to allow coordination of prices, but at the most that campaign discounts are less transparent, although the Decision does not provide the slightest information as regards their nature, the circumstances in which they are granted or their actual importance for net prices, or their impact on the transparency of prices."⁹³ This outspoken criticism, which can only be compared in terms of harshness to the aforementioned *Airtours*

⁸⁸ *Impala*, paras 245-254.

⁸⁹ *Impala*, para 290.

⁹⁰ The Commission's analysis with regard to the smaller countries was also briefly dealt with and arrived at a similar result. See *Impala*, paras 321-324.

⁹¹ *Impala*, para 299.

⁹² *Impala*, para 311.

judgement in 2002, led the Court to conclude that the Commission's insufficient statement of reasons for finding a lack of market transparency would in itself suffice to annul the Decision.⁹⁴

Furthermore, the Court held that this applied even if the Commission could prove later that the substantive analysis had been correct.⁹⁵ The Court nonetheless ("in the interest of completeness") dealt with the other specific points raised by Impala as part of its first plea. Firstly, the Court also retraced the substance of the Commission's transparency analysis and ultimately found "a manifest error of assessment" therein.⁹⁶ Inter alia, it explicitly stated that the data on campaign discounts underlying the quantitative analyses so emphasised by the Commission "do not appear to be sufficiently consistent, reliable or relevant".⁹⁷ Reasons included the selection of the time span and customer groups and their relevance for the market. Secondly, it briefly touched upon the issue of product homogeneity.⁹⁸ A minor, but interesting point made here is the *prima facie* contradiction between the heterogeneity in terms of content and the uniformity of pricing. Thirdly, the Court rebuked the Commission's reasoning with regard to deterrence and retaliation. It found fault particularly with the Commission's reliance on the observed absence of retaliatory measures in the past. The Court held that the mere existence of an effective deterrent mechanism, such as the exclusion from compilation joint ventures as cited by the Commission, would have sufficed.⁹⁹ Taken together, the Court found so many deficiencies in the Commission's analysis on the *existence* of a dominant position that again it would already have been enough to annul the Decision.¹⁰⁰

The Court then, however, also analysed Impala's second plea regarding the *creation* of collective dominance, again "in the interest of completeness" but without going much into detail.¹⁰¹ Basically, the claim was that the Commission had failed to carry out a genuinely prospective analysis, which would have to be substantially different from the assessment of past tendencies towards coordination, which is necessarily *ex post*.¹⁰² The Commission defended itself by stressing that generally the gathered evidence on the current market conditions remained relevant for this analysis and that, therefore, it was only obliged to

⁹³ *Impala*, para 318.

⁹⁴ *Impala*, para 325.

⁹⁵ *Impala*, para 458 : "In any event, explanations proffered during the proceedings before the Court or, *a fortiori*, checks relating to an essential aspect of the Decision cannot compensate for a lack of investigation at the time of the adoption of the decision and eliminate the manifest error of assessment by which the Decision is thus vitiated, even if that error had no effect on the outcome of the assessment."

⁹⁶ *Impala*, paras 327-459.

⁹⁷ *Impala*, paras 454.

⁹⁸ *Impala*, paras 460-462.

⁹⁹ *Impala*, paras 463-474.

¹⁰⁰ *Impala*, para 476.

¹⁰¹ *Impala*, para 481.

ascertain whether the concentration brought about any changes in the foreseeable future.¹⁰³ Accordingly, it was satisfied with finding that the degree of transparency would not increase to such an extent as to make coordination feasible. The Court, however, disapproved of this finding.

3. Direct Consequences of the Judgment

Most importantly, the annulment means that Sony and Bertelsmann must re-notify their joint venture and that the Commission has to re-assess its compatibility with the ECMR according to Article 10 (5) ECMR.¹⁰⁴ This review must, however, be based on current market conditions, which may differ significantly from the situation in 2004. In addition the Commission will (at least implicitly) apply the standards of the new SIEC prohibition criterion and the corresponding Guidelines. At most, this re-examination might have the consequence of dismantling the Sony-BMG joint venture, which has been in operation for over two years.

The *Impala* judgement not only made the re-appraisal of the joint venture by the Commission necessary, it also triggered further reactions in the music industry. To begin with, in a press release following the judgement, the plaintiff Impala urged for the outright dissolution of the joint venture as the adequate consequence of the judgement.¹⁰⁵ It furthermore announced its readiness to take action against the contemplated merger between the two other majors EMI and Warner Music Group, which the parties later abandoned with explicit reference to the *Impala* ruling.¹⁰⁶ The concentration process continued nonetheless with the sale of Bertelsmann's music publishing business to Vivendi, owner of Universal and Universal Music Publishing.¹⁰⁷ The merged entity will become the largest music publishing house in the world, increasing its market share from 12% to approximately 20%.¹⁰⁸ Consequently, the

¹⁰² *Impala*, paras 482-498.

¹⁰³ *Impala*, paras 499-518.

¹⁰⁴ See Clough, cited above, 751-753.

¹⁰⁵ See Impala press release, Brussels 20/07/2006, available at http://www.impalosite.org/docum/04-press/press_060720.htm.

¹⁰⁶ Warner Music Group's Statement Regarding EMI Group plc, 27/07/2006, available at <http://www.wmg.com/news/story.jsp?article=article=31220009>.

¹⁰⁷ Bertelsmann Music Group, press release, 06/09/2006, available at http://www.bertelsmann.de/bertelsmann_corp/wms41/bm/index.php?ci=29.

¹⁰⁸ Vivendi Group, press release, 06/09/2006, available at http://www.vivendi.com/corp/en/press_2006/20060906_Vivendi_UMG_to_purchase_BMG_Music_Publishing.php; Doreen Carvajal, "Rivals may challenge a proposed Vivendi-Bertelsmann deal", *New York Times*, 11/09/2006, available at http://www.nytimes.com/2006/09/07/business/media/07music.html?_r=1&ref=business&oref=slogin.

Commission stated that it will thoroughly review the deal if the parties notify the acquisition.¹⁰⁹

E. IMPLICATIONS FOR THE EU MERGER CONTROL FRAMEWORK

Taken together, the *Impala* judgment must be seen as another serious defeat for the Commission, comparable only to the three judgments in 2002. The basic difference is, however, that the underlying decision was an unconditional clearance and not a prohibition. This raises a number of interesting issues regarding the development of EU Merger Control.

1. Institutional Aspects I: What If There Is No Sufficient Evidence?

The suggestion stands to reason that the Commission's decision on *Sony/BMG* has partly been influenced by the three defeats it faced in front of the CFI since 2002.¹¹⁰ The Commission inferred from the *Airtours* judgment that the burden of proof concerning the establishment of collective dominance was considerably high.¹¹¹ By assembling sufficient economic evidence, it tried to meet these requirements, reflecting the 'more economic approach', especially compared to its *Airtours* investigation. This strong felt burden of proof becomes apparent when Eberl, a member of DG Comp, states that "the evidence available was *not sufficiently strong* to prove collective dominance (...) Nevertheless, the high degree of concentration in the music industry remains a concern and the Commission will continue to closely monitor the development of the music markets" (emphasis added).¹¹² Thus, the Commission, despite sustained concerns, was not convinced that the found parallel price movements and high market transparency would meet the anticipated burden of proof.

However, the widespread view that *Airtours* reduces the scope for coordinated effects analysis by imposing an (overly) ambitious standard of proof for prohibitions¹¹³, thus demanding the clearance of critical but ambiguous cases, must be qualified in the face of *Impala*. It has now become clear that the standard of proof demanded by the CFI is symmetric, i.e. it applies for prohibitions and clearance decisions in the same way.¹¹⁴ Consequently, in future cases, the Commission must either prove to the required standard that

¹⁰⁹ See Reuters, "EU to look closely at BMG, Vivendi deal if notified", 06/09/2006, available at http://today.reuters.com/news/articleinvesting.aspx?type=mergersNews&storyID=2006-09-06T103233Z_01_BRU004888_RTRIDST_0_MEDIA-BMG-VIVENDI-EU.XML; Carvajal, cited above.

¹¹⁰ See also Polverino, cited above; KR Logan, PE Kazanoff and J Reynoso. "Antitrust Developments in the Media and Entertainment Industries" (2004) available at <http://www.stblaw.com>; Murschitz, cited above.

¹¹¹ Eberl, cited above, 10.

¹¹² Eberl, cited above, 10.

¹¹³ See above section *Airtours* and *After: From Collective Dominance to Coordinated Effects* and accompanying literature.

post-merger coordinated effects are likely to occur or it must prove to the same standard that this is unlikely. Obviously, this incorporates a difficult problem: what if neither merger-specific anticompetitive effects, nor their absence can be proved in a sufficient way?

Since merger control inevitably entails an assessment of effects on competition *in the future* and if foresight is necessarily imperfect (in an indeterministic world), then such cases might occur rather frequently. Therefore, *Sony-BMG* may represent an exemplary case for the future of coordinated effects-based merger control. The Commission then finds itself in the difficult situation that any case with ambiguous evidence is likely to trigger appeal before the courts because of an increased likelihood of annulment decisions. If the Commission prohibits an ambiguous coordinated effects case (or imposes sharp remedies), the merging parties enjoy good prospects of reaching reversal before the courts. And if the Commission clears such a case, competitors, customers or suppliers of the merged entity enjoy considerable prospects of reaching reversal before the courts.

From an economic point of view, however, the symmetry of the standard of proof regarding prohibition and allowance decisions can be expected to contribute to a reduction in type-I errors (false positives).¹¹⁵ If expectably anticompetitive mergers, leading to a collusive post-merger equilibrium, cannot be prohibited or adequately modified merely because the effects cannot be proven according to the required standard of proof, social welfare losses must be expected. On the other hand, starting with the assumptions that (i) (re-) combinations of assets by rational market agents normally increase efficiency and (ii), therefore, enterprises and entrepreneurs have the basic right to freely combine their assets¹¹⁶, then policy interventions into this type of market activity should be restricted to cases, where losses in social welfare due to anticompetitive effects either outweigh the benefits of the gaining producers (total welfare standard) or unduly exploit the consumers (consumer welfare standard).

Moreover, this reasoning does not solve the problem of ambiguous cases where neither anticompetitive effects nor their absence can be proved sufficiently. Therefore, *Impala* strengthens the necessity of a systematic analysis of the optimal standard of proof, which

¹¹⁴ For a similar conclusion based on the Tetra Laval judgement by the ECJ see MF Bay and J Ruiz Calzado, "Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions" (2005) 28 *World Competition* 433-453.

¹¹⁵ A type I error is said to occur, if a merger with negative welfare effects is wrongly allowed ("false positive"), whereas a type II error denotes an erroneous prohibition of a merger, which would have increased welfare ("false negative"). These terms are, however, used inconsistently in the literature. We follow AM Polinsky and S Shavell, "Legal Error, Litigation, and the Incentive to Obey the Law" (1989) 5 *Journal of Law, Economics, & Organization* 99-108.

¹¹⁶ This corresponds to the basic presumption of legality of mergers also contained in recital 4 of the ECMR.

respects the fundamental characteristics of merger control and the more-economic approach (in particular sophisticated predictive economic evidence).¹¹⁷

2. Institutional Aspects II: The Increasing Involvement of Third Parties

Additionally, *Sony/BMG* and *Impala* fuel the trend towards an increasing role of third parties in EU Merger Control proceedings and Court review, respectively.¹¹⁸ In addition to the welcome potential for the correction of erroneous decisions (see above), there also is a downside to this development. From a competition point of view, it entails (increased) potentials for a strategic abuse of the merger control rules with the aim of constraining rivals and at the same time improving one's own market position in an anticompetitive way.¹¹⁹ To begin with a competitor of an efficient merger, which was correctly cleared by the competition authority, may be induced to challenge this merger before the courts in order to prevent its consummation or in order to impose efficiency-reducing costs (legal uncertainty, time delay, etc.). Given the economics of the industry in question, this does not seem to be too plausible for *Impala* but it nonetheless represents a general problem. One should be aware, however, that even the plaintiff *Impala* most likely did not act impartially in the interest of competition. Rather, it can be expected to be motivated by its self-interests in the market. The same applies *mutatis mutandis* to the merging parties, who in the case at hand apparently influenced the course of the administrative proceedings at the Commission to a great extent. In detail, they not only provided the Commission with the empirical data on discounts, which formed the basis for the decisive quantitative analyses, but they also seemed to have influenced their interpretation substantially.¹²⁰ The review by the Court revealed, however, that doubts remain as to the selectivity of these data and, more importantly, to their correct

¹¹⁷ See Budzinski and Christiansen, cited above, 20-27, for an economic treatment. See on the general discussion L Prete and A Nucara, "Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after *Tetra Laval*?" (2005) 26 *European Competition Law Review* 692-704; Bay and Calzado, cited above; B Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts" (2005) 1 *European Competition Journal* 3-33; Botteman, cited above; A Lindsay, *The EC Merger Regulation: Substantive Issues* (London, Sweet & Maxwell 2006), 66-75.

¹¹⁸ See generally on the role of third parties in European merger control M Kekelekis, "The Rights of Notifying Parties and Third Parties During the Preliminary Investigation Procedures under the ECMR" (2003) 14 *European Business Law Review* 429-444; T Giannakopoulos, "The Right to Be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures" (2001) 24 *World Competition* 541-569; T Körber, *Die Konkurrentenklage im Fusionskontrollrecht der USA, Deutschlands und der Europäischen Union* (Baden-Baden, Nomos, 1996). *Prima facie*, this represents a minor procedural point. However, it gains some importance because the "more economic approach" in EU Merger Control generally increases the influence and role of the firms in merger proceedings (Christiansen, cited above, 38-41) since they bear at least an "evidentiary burden" with respect to certain defences (Lindsay, cited above).

¹¹⁹ See generally WJ Baumol and JA Ordovery, "Use of Antitrust to Subvert Competition" (1985) 28 *Journal of Law and Economics* 247-265; RP McAfee and NV Vakkur, "The Strategic Abuse of the Antitrust Laws" (2005) 2 *Journal of Strategic Management Education*; and with regard to EU Merger Control D Neven, R Nuttall and P Seabright, *Mergers in Daylight. The Economics and Politics of European Merger Control* (London, CEPR, 1993), 163-213.

interpretation. The Court, therefore, explicitly criticises the Commission for its uncritical treatment of the tables produced by the parties and emphasises that “the possibility arises that they may be affected by material errors, which, in the present case, even a cursory examination can reveal”.¹²¹

Finally, an increasing role of third parties in merger control proceedings can be linked to the ‘protecting competition instead of protecting competitors’ debate, which was very vital in the context of the U.S.-EU conflict on the proposed GE-Honeywell merger.¹²² The current move towards a “more economic approach” is often understood as redirecting European competition policy away from allegedly focusing on competitors’ interests to a strict (consumer) welfare orientation. To some extent, *Impala* points in a different direction.

3. Substantive Aspects I: Lessons for Coordinated Effects Analysis

The *Impala* Judgment provides further guidance as to the establishment of coordinated effects in the context of EU Merger Control. This goes well beyond the earlier *Airtours* Judgment in several respects. The first two closely related points concern the significance of parallel movements found in past prices and discounts and, more broadly, the quantitative analyses so emphasised by the Commission with regard to the case at hand. Concerning the first point, the Commission itself was anxious in the Court proceedings to point out that price alignments even of a considerable degree generally do not suffice to establish coordination, because they may still be consistent with competitive behaviour.¹²³ The Court, however, laid a slightly different emphasis and did not dismiss this as acceptable evidence: “Close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.”¹²⁴ As regards the empirical analyses in the case at hand, the Court disagreed with the Commission and at least did not accept the Commission’s interpretation of the evidence as ruling out pre-merger coordinated behaviour.¹²⁵ One might even conjecture that, on the contrary, the Court deemed the evidence collected by the

¹²⁰ *Impala*, paras 419-435.

¹²¹ *Impala*, para 426.

¹²² The European competition authorities were accused of paying too much attention to the interests of competitors of merging parties. For a systematic and unbiased treatment of ‘protecting competition versus protecting competitors’ see EM Fox, “We Protect Competition, You Protect Competitors” (2003) 26 *World Competition* 149-165.

¹²³ *Impala*, paras 196, 210.

¹²⁴ *Impala*, para 252.

¹²⁵ *Impala*, paras 307, 311 and 320.

Commission already sufficient to establish past coordination. In any case, the Court appeared to demand a somewhat lower standard of proof than the Commission anticipated. From an economic point of view this might again support the aforementioned expectation of a reduction type-I errors (see sec. E.1.). However, it is important to keep in mind that parallel pricing as such is not a reliable proof for collusion.¹²⁶

A second important point concerns the identification of a deterrent mechanism. Contrary to the Commission's reasoning, the CFI held it sufficient to establish the existence of a potential mechanism for deterrence. That is, it did not require the Commission to show instances of actual punishment of deviators in the past. In detail, the Court expressly stated: "The mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction."¹²⁷ Hence, the finding of absence of retaliatory action would only be relevant if accompanied by proof of actual deviations from the common course of conduct. Taken together, this is in line with economic thinking and, moreover, clearly lowered the standard of proof for the Commission in this specific respect.

A third and more general point regards the distinction between the ex post analysis of past coordination and the forward-looking assessment of the likelihood of post-merger coordinated behaviour. In its decision and in the Court proceedings the Commission largely confined itself to the first kind of analysis and, thereby, effectively projected the findings into the future in a mechanistic manner. The Court, however, strongly disapproved and called this treatment "extremely succinct"¹²⁸. It expressly added: "It must be stated that these few observations, which are so superficial, indeed purely formal, cannot satisfy the Commission's obligation to carry out a prospective analysis [...]".¹²⁹ That is, the CFI demanded much more of a detailed and separate analysis of the probable effects of the change in market and firm characteristics, which the merger entails. This is also well in line with economic reasoning. At the same time, it obliges the Commission to fulfil the difficult task of isolating the specific impact of the merger in question, which requires a genuinely future-oriented assessment. These three points together may herald a kind of renaissance of coordinated effects analysis in EU Merger Control. While the first ones lower the proof burden faced by the Commission, the last one rightfully calls for a more forward-looking assessment.

¹²⁶ See Buccrossi, cited above; Macleod, cited above.

¹²⁷ *Impala*, para 466.

¹²⁸ *Impala*, para 525.

¹²⁹ *Impala*, para 528.

The final point concerns the impact on predictability by the *Sony/BMG* Decision and the subsequent *Impala* Judgment. From an economic point of view predictability of the merger control decisions is an important formal characteristic of the regime, which is also closely connected to legal certainty.¹³⁰ Legal certainty is, however, reduced by the reviewed case, since (i) during the original proceedings the Commission apparently altered its position entirely at a late stage and (ii) an unconditional approval decisions was subsequently annulled by the CFI at the request of competitors. These two complete turnarounds in the assessment threaten to reduce the predictability of case outcomes at least in close cases of collective dominance. This effect contradicts the rationale underlying the stronger use of sophisticated analyses and of convergence with the US approach typical of the “more economic approach” in EU Merger Control.¹³¹ In fact, this (again) points to the fundamental, yet largely ignored fact that the new approach with its increasing case-by-case focus does not only affect predictability negatively but also gives third parties more scope to intervene in the proceedings.¹³² Briefly put, the introduction of more differentiated criteria coupled with the increasing recourse to quantitative analyses makes the outcome of a case assessment contingent on more factors and, hence, more difficult to predict.

4. Substantive Aspects II: Reaching Beyond Price Competition

The combination of (great parts of) the music businesses of Sony and BMG contribute to the long-term concentration process in the industry starting in the mid-1960s, which eventually lead to the present narrow oligopolistic structure.¹³³ This concentration process also led to the partitioning of the market between the (now four) major record companies on one side and the independents on the other. In short, the majors among them dominate production and the distribution networks. In addition to scale economies inherent to these activities, high sunk costs occur for the large-scale promotion of artists and their songs.¹³⁴ In particular, sufficient radio representation is regarded as a key prerequisite for sales. Taken together this results in

¹³⁰ For a detailed treatment see Voigt and Schmidt, 2005, cited above.

¹³¹ See L-H Röller, “Economic Analysis and Competition Policy Enforcement in Europe”, in PAG van Bergeijk and E Kloosterhuis (eds.), *Modelling European Mergers. Theory, Competition Policy and Case Studies* (Cheltenham, Edward Elgar, 2005), 11-24, 23.

¹³² For a more elaborated treatments see Christiansen, cited above, 32-35; A Christiansen and W Kerber, “Competition Policy with Optimally Differentiated Rules Instead of 'Per se Rules vs. Rule of Reason'” (2006) 2 *Journal of Competition Law and Economics* 215-244.

¹³³ See on the industry background GP Hull, *The Recording Industry* (New York, Taylor & Francis, 2004); EW Rothenbuhler and T McCourt, “The Economics of the Recording Industry” in A Alexander, J Owers, AN Greco, R Carveth and CA Hollifield (eds.), *Media Economics – Theory and Practice* (3rd ed., Mahwah, NJ, Erlbaum, 2004), 221-248; PJ Alexander, “The Music Recording Industry” in J Brock and W Adams (eds.), *The Structure of American Industry* (11th ed., Englewood Cliffs, Prentice Hall, 2004), 119-139; OD Raschka, *Digitale Musik - Eine industrieökonomische Analyse der Musikindustrie* (OPUS Online-Dissertation, 2006, available at <http://opus-ho.uni-stuttgart.de/hop/volltexte/2006/141/>).

¹³⁴ Rothenbuhler and McCourt, cited above, 228-229; Alexander 2004, cited above, 128-131.

the protection of the majors' position by significant entry barriers. As a corollary, the small independent record firms depend on their larger rivals when it comes to distributing the produced records among retailers, since no independent distributors remain.¹³⁵ Industry sources report that independent labels are often coerced by the majors to sign disadvantageous 'Pressing & Distribution' deals, thereby losing control of their artist repertoire, as the dominant large record companies can ultimately deny access to production and distribution networks.¹³⁶

In addition to possible coordination on prices, the rising industry concentration, therefore, threatens to affect adversely non-price elements of competition, such as the rate of innovations and product diversity.¹³⁷ Past experience indicates that innovations in the music industry are mainly driven by small record companies or industry outsiders.¹³⁸ For the major record labels the release of new records bears the risk of product cannibalization, as they dispose over a roster of successful star artists and, thus, have few incentive to invest in the development of innovative music styles and artists, which would gain popularity and sales at the expenses of already released records.¹³⁹ Put differently, new releases lead to diminishing returns for existing products. In fact, several empirical as well as theoretical studies demonstrate a negative relationship between industry concentration and innovation respectively variety in the music industry.¹⁴⁰ If the number of released records falls in the short term due to too high concentration within an industry, then the opportunities for new artists also become fewer in the long run because of a cutback of the artist roster maintained and acquired by record companies. After all, in a culture-based industry product diversity is a key performance measure, as greater diversity is enhancing consumer welfare by increasing the likelihood that products meet heterogeneous preferences. Conversely, the more

¹³⁵ See on the relation between independent and major record labels PJ Alexander, "Entry Barriers, Release Behavior, and Multi-product Firms in the Music Recording Industry" (1994) 9 *Review of Industrial Organization* 85-98; Rothenbuhler and McCourt, cited above.

¹³⁶ Alexander 1994, cited above, 92; Rothenbuhler and McCourt, cited above, 235.

¹³⁷ See on non-price competition in the music industry Alexander 1994, cited above; PJ Alexander, "Product Variety and Market Structure: A New Measure and a Simple Test" (1997) 32 *Journal of Economic Behavior and Organization* 207-214; AJ Baker, "A Model of Competition and Monopoly in the Record Industry" (1991) 15 *Journal of Cultural Economics* 29-54; A Belinfante and RL Johnson, "Competition, Pricing and Concentration in the U.S. Recorded Music Industry" (1982) 6 *Journal of Cultural Economics* 11-24; M Black and D Greer, "Concentration and Non-price Competition in the Recording Industry" (1986) 3 *Review of Industrial Organization* 13-37; RA Peterson and DG Berger, "Cycles in Symbol Production: The Case of Popular Music" (1975) 40 *American Sociological Review* 158-173; E Rothenbuhler and J Dimmick, "Popular Music: Concentration and Diversity in the Industry, 1974-1980" (1982) 32 *Journal of Communications* 143-149; J Gander and A Rieple, "Inter-organisational Relationships in the Worldwide Popular Recorded Music Industry" (2002) 11 *Creativity and Innovation Management* 248-254.

¹³⁸ Alexander 1994, 2004, cited above; Black and Greer, cited above; Gander and Rieple, cited above.

¹³⁹ Black and Greer, cited above, 16.

¹⁴⁰ Belinfante and Johnson, cited above; Rothenbuhler and Dimmick, cited above; Peterson and Berger, cited above; Alexander 1994, 1997 cited above; Baker, cited above; Gander and Rieple, cited above; Black and Greer, cited above.

homogeneous the record industry is, the fewer preferences are met, resulting in a decline in consumer welfare.

In its competition assessment the Commission neglected these implications for the pace and extent of innovations in the music industry and the resulting loss of product diversity. This is particular puzzling, since it simultaneously acknowledged the lack of innovative products and artists as one of the reasons for the declining demand in the record music industry.¹⁴¹ Moreover, it had stressed the anticompetitive effects on the online music market and the potential for foreclosure of smaller record companies in the context of the proposed merger between *Warner Music* and *EMI* in the same markets in 2000, so that the parties finally abandoned the transaction.¹⁴² Despite its relevance for industry performance, however, the Commission in *Sony-BMG* failed to carry out a profound economic analysis of the effects on non-price competition. Consequently, the same applies to the review by the CFI. Hence, the sophisticated analytical instruments available with the “more economic approach” were applied in a one-sided manner, thus marking a major shortcoming of the case assessment.

F. CONCLUSION

Both the recent *Impala* Judgment by the CFI and the underlying Commission Decision in *Sony-BMG* raise a number of points associated with coordinated effects analysis in EU Merger Control and even beyond. Firstly, *Impala* introduces an ambitious symmetric standard of proof for prohibition and clearance decisions by the Commission. While alleviating fears of an increasing number of false positives in the aftermath of *Airtours*, this entails the problem how to deal with cases in which neither the existence, nor the absence of anticompetitive effects can be proven to the required standard. Given the ex ante character of merger control, the occurrence of such cases is not too unlikely. Secondly, the ongoing process of increasing the role of third parties in European Merger Control is fuelled. Thirdly, *Impala* may herald a comeback of coordinated effects analysis, further specifying the conditions for establishing this kind of anticompetitive effects. However, we criticise *Sony/BMG* and *Impala* for applying sophisticated economic instruments only to deal with coordinated effects, while a comparable treatment of possible adverse effects on non-price competition is lacking. Therefore, competition policy has to be aware that further anticompetitive developments in this industry entail the danger of leading towards a sclerotic market, in which sustainable competition patterns might be irreversibly lost.

¹⁴¹ *Sony/BMG*, recital 58.

¹⁴² See Commission opens full investigation into Time Warner/EMI merger, Press Release 00/617, 14 June 2000, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/617>.