CASE NOTE:

IMPALA v. THE COMMISSION (*SONY/BMG*)

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Case T-464/04, Impala v. Commission, Judgment of July 13, 2006:

Case Note

By

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Introduction

On July 13, 2006, the Court of First Instance (CFI) annulled the European Commission's 2004 decision authorizing the creation of SonyBMG, a joint venture between Bertelsmann and Sony, merging their global recorded music activities. The (unexpected) judgment of the CFI made headlines in the international business press and its importance should not be underestimated. It was the first time the Luxembourg court annulled completely, in such a critical way, a Commission decision authorizing a merger and, thus, endangered a joint venture that had been operating for more than two years. The judgment is widely seen as having a significant psychological impact and could potentially affect the day-to-day handling of many merger cases by the Commission.[1]

This case note focuses on certain interesting legal aspects of the judgment, namely the application of the test for collective dominance by the CFI, the CFI's criticism of the Commission's treatment of the evidence, the standard of review applied by the CFI, and the application of the expedited procedure and the current system of judicial review of merger cases.

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[1] For a short paper dealing with the practical impact of the judgment on merger cases before the Commission, see Herbert Smith, "EC Merger Control Update," *available at* http://www.herbertsmith.com/NR/rdonlyres/96F95EE8-F328-4180-932B-9B62BB1B71C1/2361/ECmergerupdate260706.html.

BACKGROUND: THE COMMISSION'S SONY/BMG DECISION

In January 2004, Sony and Bertelsmann (the parties) notified the proposed concentration (Case Sony/BMG COMP/M.3333[2]) to the Commission under the old Merger Regulation.[3] The proposed concentration consisted of the combination of the parties' respective global recorded music businesses in a joint venture to be called SonyBMG.

It is worth going through the various steps of the administrative procedure before the Commission, as a key feature of the case is the Commission's abrupt change of position at the later stages of the procedure.

It was expected that the case would not be a straightforward one given previous Commission investigations into the music industry, notably in the earlier proposed merger of *Time Warner/EMI* which was abandoned in the face of opposition by the Commission.[4]

At the end of an initial one-month investigation under the timetable of the Old Merger Regulation, the Commission decided that it had serious doubts on the compatibility of the proposed concentration with the common market and opened an in-depth investigation (Phase II) pursuant to Article 6(1)(c) of the Old Merger Regulation. The Commission issued a press release explaining that it was concerned that the

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[2] Case COMP/M.3333, Sony/BMG, 2004 O.J. (C 013) 1, Jan. 9, 2004, *available at* http://ec.europa.eu/comm/competition/mergers/cases/index/m66.html#m_3333.

[3] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (1989 O.J. (L 395) 1), as rectified (1990 O.J. (L 257) 13) and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (1997 O.J. (L 180) 1) [hereinafter "the Old Merger Regulation"].

[4] Case COMP/M.1852, Time Warner/EMI, 2000 O.J. (C 136) 1, May 16, 2000, *available at* http://ec.europa.eu/comm/competition/mergers/cases/index/m37.html#m_1852.

transaction might create or strengthen a collective dominant position of the major record companies in the markets for recorded music.[5] There were also concerns related to the vertical integration of the parent companies in other markets, such as television and music downloading.

On May 24, 2004, the Commission sent a Statement of Objections (SO) to the parties to the concentration, in which it provisionally concluded that the notified operation was incompatible with the common market. The parties replied to the SO and a hearing took place on June 14 and 15, 2004. In their written and oral reply, the parties produced a substantial amount of evidence to rebut the Commission's preliminary conclusions.

By decision of July 19, 2004, in what was seen as a fundamental U-turn in its position, the Commission granted unconditional regulatory approval to the deal, after concluding that it did not have sufficiently strong evidence to oppose it.

A detailed analysis of the decision itself is beyond the scope of this article. It is worth noting, however, that the Commission's public explanation for its decision as this was recorded in a Commission press release the day following adoption of the Decision. Stating clearly that the approval was granted on the basis that there was "insufficient evidence" to prove collective dominance, it explained that it had:

[5] See Commission Press Release IP/04/200 of Dec. 2, 2004. The Commission stated that its in-depth investigation would focus on:

> whether the deal might create or strengthen a collective dominant position between the remaining four major record companies – Universal, SonyBMG, Warner and EMI – in the recording market. The recording market consists of the signing of artists, the actual recording of the songs, the marketing of the artists and their works and the sales of CDs. The remaining four major players would hold approximately 80% of the recording market both on a European level and in most national markets in the European Economic Area. The rest of the market is characterised by a large number of mostly smaller players active on a national level. SonyBMG and Universal alone would account for approximately half of the recorded music market.

> assessed the merger very carefully as it reduces the number of so-called music majors from five to four without, however, giving SonyBMG the number one spot in Europe which continues to he held by Universal. Therefore, the Commission sought to establish whether the deal could create or strengthen a collectively-held dominant position between Sony BMG, Universal, EMI and Warner Music, the other two main players in the music industry.

Despite finding some evidence indicating "a relatively close price parallelism for CDs released by the five majors in some countries as well as certain features that could facilitate tacit collusion," other features of the market such as a deficit in market transparency led the Commission, "on balance," to conclude that:

> the evidence found was not sufficient to demonstrate in a successful way that coordinated pricing behaviour existed in the past and that a reduction from five to four major recording companies would not yet create a collectively held dominant position in the national markets for recorded music in the future.[6]

The Commission was also at pains to indicate that it would "keep a close watch on the music sector as it becomes even more concentrated and would very carefully scrutinise any further major concentration in the industry."

THE ACTION FOR ANNULMENT

Impala, an international association of independent music production companies, which had participated in the procedure before the Commission opposing the proposed concentration, applied to the CFI for annulment of the Commission's decision.[7] It claimed that the Commission committed manifest errors in its assessment by finding that there was no collective dominance in the market for recorded music prior to the merger, that

[6] See Commission Press Release IP/04/959 of Jul. 20, 2004.

[7] See details of the application for annulment in 2005 O.J. (C 6) 46.

the merger would not create a collective dominant position in the market for recorded music, in the market for licenses for online music or in the market for the distribution of online music and that the merger would not lead to the co-ordination of the parties' respective music publishing businesses.

THE CFI JUDGMENT

In a judgment containing very critical language of the Commission's analysis, the CFI upheld Impala's arguments and annulled the Commission's decision. The CFI held that the Commission did not demonstrate to the requisite legal standard either the non-existence of a collective dominant position before the concentration or the absence of a risk that such a position would be created as a result of the concentration. The CFI thought that the Commission had not offered sufficient reasons for its authorization and that it had committed manifest errors in analyzing the evidence before it, which in the CFI's view did not justify the conclusions reached by the Commission.

The CFI examined both whether the Commission was correct in holding that no dominance existed before the merger and whether such dominance would be created after the merger.

In examining the Commission's analysis of whether collective dominance existed before the merger, the CFI analyzed the Commission's reasoning and assessment of the basis of the so-called *Airtours* criteria that the CFI had set out as conditions for collective dominance in its earlier judgment in Airtours v. Commission.[8]

[8] Case T-342/99, Airtours v. Commission, judgment of Jun. 6, 2002 [hereinafter *Airtours*]. In *Airtours*, the CFI had held (at para. 45) that three conditions must be satisfied for collective dominance to be created: First, the market must be sufficiently transparent for the undertakings which coordinate their conduct to be

The CFI focused its examination on whether the Commission had provided sufficient reasoning and whether its analysis was correct that the market was not sufficiently transparent to allow tacit price collusion and that there were not sufficient deterrent mechanisms or retaliatory measures which would discipline deviating undertakings.

With regard to ***market transparency***, the CFI found that the Commission's theory that promotional discounts have the effect of reducing the transparency of the market, to the point of preventing the existence of a collective dominant position, was not supported by a statement of reasons of the requisite legal standard and was vitiated by a manifest error of assessment.

As for the ***retaliatory measures***, the Commission relied on the absence of evidence that such measures had been used in the past, whereas the CFI found that, according to the case law, the mere existence of effective deterrent mechanisms may be sufficient without the need for evidence that the mechanisms had actually been used in the past. The CFI found that both the decision and the file revealed that such credible and effective measures appeared to exist, in particular the possibility of sanctioning a deviating record company by excluding it from compilations. The Commission's examination was found to be, in any event, insufficient.

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able to monitor sufficiently whether the rules of coordination are being observed ("market transparency"). Second, the discipline requires that there be a form of deterrent mechanism in the event of deviant conduct ("deterrent mechanism/retaliation"). Third, the reactions of undertakings which do not participate in the coordination, such as current or future competitors, and also the reactions of customers, should not be able to jeopardize the results expected from the coordination.

Given that these were the two essential grounds on which the Commission concluded that there was no collective dominant position, each of these errors constituted sufficient reason to annul the decision.

The CFI further examined the Commission's analysis on the likelihood of a creation of a collective dominant position following the merger. It found that the Commission's analysis did not satisfy the high standard imposed by the case law and was actually "superficial" and insufficient. Therefore, this part of the Commission's analysis was also vitiated by lack of reasoning and manifest errors of assessment.

In general, the CFI was very critical of the Commission's analysis and use of evidence. The court was particularly critical of the Commission's inability to explain the U-turn in its position between the SO and the final decision. While the CFI accepted that the Commission was entitled to change its view in the final decision, it clearly stated that the Commission should be able to explain, if not in the decision at least in the proceedings before the court, the reasons for changing its view. The CFI was also critical of the Commission's reliance on key data and analyses provided by the parties to the merger without further independent analysis and verification.

COMMENT

Three aspects of the CFI’s judgment merit further attention:

(i) the CFI’s clarification and application of the test for collective dominance;

(ii) (ii) the CFI’s approach on the Commission’s investigation, treatment of the evidence and reasoning; and,

(iii) (iii) the CFI’s application of a heightened standard of review.

Test for (pre-existing) collective dominance

As noted above, the CFI restricted its examination of the case on the basis of whether or not the Commission had correctly applied the so-called *Airtours* criteria.[9]

However, it is interesting to note that the CFI left the door open for a more flexible approach on collective dominance. It noted that the previous case law on collective dominance was concerned with situations of *creation* of collective dominance rather than examination of whether such dominance existed before the merger.[10]

While an assessment of future creation of collective dominance is a prognosis as regards development of competition in the market, determination of pre-existing collective dominance must be accompanied by a series of elements of established facts that show that competition was already impaired. Therefore, the CFI thought that even though the three *Airtours* conditions are still necessary in order to establish collective dominance, in the context of an analysis of pre-existing collective dominance, they may "in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position."[11] In particular:

> 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

[9] The CFI explained that the inter parties principle dictated that it ought to focus on an examination of the pleas raised by the parties rather than apply other criteria of its own motion. Given the applicant had based its line of argument on an incorrect application of the various conditions that must be satisfied in order for there to be a collective dominant position, as defined in *Airtours*, and in particular, the condition relating to market transparency, the CFI focused its analysis on those issues (see *Airtours, supra* note 8, at para 254).

[10] *Id.* at para. 249.

[11] *Id.* at para. 251.

> 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.[12]

The CFI appears to have concluded that, when assessing the existence of collective dominance before the merger, the Commission may also need to address:

> the theory that a finding of a common policy over a long period, together with the presence of a series of other factors characteristic of a collective dominant position, might, in certain circumstances and in the absence of an alternative explanation, suffice to demonstrate the existence of a dominant position, as opposed to the creation of such a position, without its being necessary positively to establish market transparency . . . [13]

Regarding the condition of market transparency, the CFI clarified that on the basis of the *Airtours* case law, sufficient and not total transparency is necessary, the necessary transparency being that:

> which allows each member of the dominant oligopoly to be aware of the conduct of the others in order to ascertain whether or not they are adopting the same course of conduct, that is to say, that it must have the means of knowing whether the other operators are adopting and maintaining the same strategy. Transparency on the market should therefore be sufficient to allow each member of the dominant oligopoly to be aware, sufficiently precisely and immediately, of the development of the conduct on the market of each of the other members. The requisite transparency does not mean that each member may at any moment be aware of every detail of the precise conditions of each sale made by the other members of the oligopoly but must, first, make it possible to identify the terms of the tacit coordination and, second, give rise to a serious risk that deviant conduct of such a type as to jeopardise the tacit coordination will be discovered by the other members of the oligopoly.[14]

Finally, the judgment contains some interesting observations with regard to retaliatory mechanisms. The CFI reiterated previous case law to the effect that there must

[12] *Id.* at para. 252.

[13] *Id.* at para. 254.

[14] *Id.* at para. 440.

be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative. However, the CFI went further and clarified that the mere existence of effective deterrent mechanisms may be sufficient, in principle, since if the members of the oligopoly conform to the common policy, there is no need to resort to the exercise of a sanction and, in fact, the most effective deterrent is that which has not been used.[15] Finally, it is interesting to note that, in the context of an examination of pre-existing collective dominance, according to the CFI, two cumulative elements must be satisfied in order for the fact that no retaliatory measures have been employed to be taken to mean that the condition relating to retaliation is not satisfied, namely proof of deviation from the common course of conduct, without which there is no need to consider the use of retaliatory measures, and then actual proof of the absence of retaliatory measures. The CFI found that in the case at hand, the Commission had not managed to prove this.

The CFI's approach on the Commission's investigation, treatment of the evidence, and reasoning

The judgment contains a number of observations concerning the way the Commission should conduct its investigation, treat evidence, and set out its reasoning. It is notable for the highly critical language the CFI uses when discussing these issues. The following points are of particular interest.

[15] *Id.* at para. 466.

First, the CFI clearly shows that, despite the tight deadlines imposed by the Merger Regulation, the Commission is expected to perform an investigation and gather evidence of high quality. In *Impala*, the CFI criticized the Commission for having included only a very succinct analysis of an essential element of its decision (market transparency), which, moreover, "contained vague assertions, which fail to provide the slightest detail."[16]

Second, the Commission has a duty to examine the facts and cannot rely uncritically on data provided by the parties to the merger. The Court noted that, although:

> the procedure for the control of concentrations does indeed rely to a large extent on trust, as the Commission cannot be required to ascertain on its own the reliability and accuracy of all the information submitted to it, it cannot, on the other hand, go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration, in particular where, as in the present case, those aspects constitute the crucial element on which the decision is based and where the data and assessments submitted by the parties to the concentration are diametrically opposite to the information gathered by the Commission during its investigation and also to the conclusions which it drew from that information.[17]

Third, while the Commission is permitted to change its mind and depart from the facts or reasoning set out in the SO, which is merely a preparatory document, it must show clearly, in the decision, or at least in the proceedings before the Court, why it finally adopted a different approach, if necessary by demonstrating how the previous findings in the SO were incorrect.[18]

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[16] *Id.* at para. 289.

[17] *Id.* at para. 415.

[18] *Id.* at para. 410.

Finally, the essential reasoning for the conclusions reached must be contained in the decision itself. The CFI stressed that:

> 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.[19]

The CFI's standard of review and the standard of proof required in merger cases

Traditionally, the CFI, when reviewing the Commission's decisions in the merger field, has applied a standard of review which has become known as the "manifest error" standard. In essence, this has been taken to mean that the review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by the Merger Regulation is limited to ensuring compliance with the rules governing procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers.[20]

However, a string of judgments in 2002 (in the cases of *Airtours*, *Schneider* and *Tetra Laval*)[21], which all resulted in annulment of Commission prohibition decisions, indicated that the CFI applied a heightened standard of review and required a high standard of proof for the Commission before it could *prohibit* a transaction. In those cases, the CFI closely examined the evidence and assessment of the Commission,

[19] *Id.* at para. 458.

[20] See, for example, the recent Case T-177/04, easyJet v. Commission, judgment of Jul. 4, 2006, at para. 44.

[21] *Airtours*, *supra* note 8; Case T-310/01, *Schneider Electric* v *Commission*, judgment of 22.10.2002 ("*Schneider*"); Case T-5/02 *Tetra Laval* v *Commission*, judgment of 25.10.2002 ("*Tetra Laval*")

including its assessment of complex economic matters, and in several instances concluded that the Commission's evidence was not convincing and did not justify the conclusions reached by the Commission.

The correct standard of review and standard of proof[22] were directly at issue in the *Tetra Laval* appeal before the European Court of Justice (ECJ).[23] It should be recalled that in this case, the CFI had annulled the Commission's prohibition of the merger between Tetra Laval (a dominant player in carton packaging equipment) and Sidel (a leading player in plastic packaging equipment) finding that the Commission had not proven its case that the merger would result in competition problems mainly through conglomerate effects. The Commission had appealed against the CFI's judgment before the ECJ inter alia on the basis that the CFI had applied an erroneous (too harsh) standard of review and that it required a standard of proof for prohibition decisions that was unjustifiably high.[24]

In his Opinion[25] in *Tetra Laval,* Advocate General Tizzano directly addressed the standard of review/standard of proof issue. He thought that the CFI is not entitled to

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[22] The distinction between the standard of review and standard of proof is a delicate one. It can be said that standard of review refers to the standard applied by an appellate court, such as the CFI, that examines the primary assessments of another body deciding at first instance, such as the Commission; while standard of proof refers to the standard that the first body, the Commission in merger cases, must meet before it can reach a lawful decision. For a discussion of this distinction and of the standard of proof and review in merger cases in general, see Bo Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts," *European Competition Journal*, Vol. 1, No. 1, Mar. 2005.

[23] Case C-12/03P, Commission v. Tetra Laval, judgment of Feb. 15, 2005.

[24] See Commission Press Release IP/02/1952 of Dec. 20, 2002. In the press release, the Commission stated:

> The Commission believes that the CFI has imposed a disproportionate standard of proof for merger prohibition decisions. As a result, it has upset the balance between the interests of the merging parties and the protection of consumers, which is provided for in the Merger Regulation. In this respect, the CFI has also exceeded its role, which is to review the administrative decision of the Commission for clear errors of fact or reasoning, and not to substitute its view of the case for that of the Commission.

[25] Case C-12/03P, Commission v. Tetra Laval, Opinion of Advocate General Tizzano of May 25, 2004.

exceed its judicial review role and cannot re-examine a case on the merits or substitute its own view for that of the Commission (which the AG thought the CFI had done in that case).[26] Moreover, AG Tizzano, also suggested that, with regard to the standard of proof, in cases falling within a "grey area,"[27] the Commission ought to lean towards authorizing the merger.[28]

In the final judgment, the ECJ did not address the standard of proof directly. It, nonetheless, tightened the traditional manifest error standard by concluding that the CFI had not erred in scrutinizing the Commission's decision closely. According to the ECJ, whilst the Commission has a margin of discretion with regard to economic matters:

> this does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[29]

The Commission's *Sony/BMG* decision was seen as a good example of the Commission taking seriously this higher burden of proof imposed on it following the 2002 CFI judgments and the ECJ's judgment in *Tetra Laval*. As is apparent from the Commission's press release accompanying the *Sony/BMG* decision,[30] the Commission

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[26] *Id.* at paras. 89 and 91-112, in particular, para. 93.

[27] The "gray area" was defined as:

> in which cases are to be found where it is especially difficult to foresee the effects of the notified transaction and where it is therefore impossible to arrive at a clear distinct conviction that the likelihood that a dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or strengthened.

[28] AG Opinion, *supra* note 25, at paras. 76-7.

[29] *Id.* at para. 39.

[30] Commission Press Release IP/04/959 of Jul. 20, 2004.

felt obliged to clear the merger on the basis that there was insufficient evidence to prohibit it. It is ironic, therefore, that this decision itself has now been annulled for failure to meet the required standard of proof for *authorizing* a merger.

Although the Commission's problems in this case appear to follow to a large extent from its late change of view which may have led to the insufficient and inconsistent reasoning in the decision for authorizing the merger, the CFI's ruling in *Sony/BMG* seems to indicate that the standard of proof incumbent on the Commission as well as the review of the court is similarly high for both prohibition and authorization decisions. This could arguably be seen as being in contrast with the application of a lower standard of review traditionally applied by the CFI in its review of clearance decisions as evidenced, for example, in the recent easyJet v. Commission judgment, where the CFI confirmed the authorization of the *AirFrance/KLM* merger.[31]

A similarly high standard of proof/review for both authorization and prohibition decisions can lead to impossible situations in difficult cases falling within the grey area that AG Tizzano highlighted in his Opinion in *Tetra Laval*. It may for instance be the case that the Commission has not and cannot gather sufficient evidence in its five-month investigation to justify prohibition of a merger but equally the evidence may not be sufficient to "prove," at a high standard, that the merger will not result to competition problems either. It remains to be seen how such issues will be resolved in future cases.

[31] *See*, easyJet v. Commission, *supra* note 20. In this judgment, the CFI reiterated the traditional manifest error standard of review (at para. 44) and concluded that the applicant had failed to demonstrate to the requisite legal standard that the Commission had committed such manifest errors (*see, e.g.*, at para. 74).

Efficacy of the current system of judicial review in merger cases

The *Impala* judgment is also significant in raising, once more, greater awareness in the business and legal communities of the functioning of the current system of judicial review in merger cases. The judgment, which came as a surprise to most observers, was significant in that, by annulling the Commission's clearance decision in its entirety and on grounds undermining to a significant extent the Commission's analysis, it puts in jeopardy a merger that has been operating for more than two years on the basis of an explicit and unconditional Commission authorization decision.

The case highlights the fact that, on annulment, the matter is remitted to the Commission for a fresh examination on the basis of current market conditions as the CFI exercises a judicial review role and is not entitled to re-take a decision on the substance of the case. The Merger Regulation[32] specifies clearly, in Article 10(5), that, following annulment, the Commission must reexamine the case on the basis of current market conditions. The reexamination starts again at the beginning of Phase I. In its reexamination, the Commission is obliged, pursuant to Article 233 EC, to draw the necessary consequences from the Court's judgment.[33] This may mean, in the case at hand, that the Commission could reach a different conclusion and impose conditions or

[32] Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings [hereinafter "the EC Merger Regulation"], 2004 O.J. (L 24) 1. It should be recalled that the *SonyBMG* case was notified and examined under the Old Merger Regulation. The re-examination of that case will also take place under the Old Merger Regulation with its different timing requirements; however, the principle is the same, i.e. that the Commission re-examines the case on the basis of current market conditions and taking into account the Court's judgment.

[33] For a re-examination of a case following annulment, under the Old Merger Regulation, see Commission decision of Jan. 13, 2003 *in* Case COMP/M.2416, Tetra Laval/Sidel, *available at* http://ec.europa.eu/comm/competition/mergers/cases/.

even force the parties to unravel their joint venture which has been lawfully operating for more than two years.[34]

Businesses and their advisers have long complained that the EC system of judicial review is inefficient in that it takes too long for cases to be adjudicated and that also, upon annulment, the case is remitted to the Commission for reexamination.[35] The CFI, acknowledging these concerns, introduced, in 2002, an expedited procedure for urgent cases which has been used extensively in merger cases.[36]

Previously, critics of the current system of judicial review had focused on prohibition cases where speedy adjudication is crucial to protect the merging parties' rights and enable them to keep the deal alive, pending review by the Court. The *Impala* case shows that speedy adjudication is also important for the review of authorization decisions, following appeals by third parties, as legal certainty is crucial for both the merging parties and other concerned players, such as their competitors, suppliers and customers. The judgment shows that obtaining authorization for a deal by the European Commission no longer offers full legal certainty as third parties can successfully overturn a clearance decision and reverse the Commission's original ruling with uncertain and significant consequences. *Impala* was adjudicated under the expedited procedure but due

[34] The case is still pending and it remains to be seen how the Commission will perform its re-examination in the light of current market conditions and the CFI's judgment. It should also be noted that the parties, Bertelsmann and Sony, have appealed the CFI's judgment to the ECJ (Case C-413/06, *Bertelsmann and Sony Corporation of America / Impala*, pending).

[35] For the debate on the operation of the system of judicial review in merger cases see the responses to the Commission's Green Paper on Merger Review in 2002, *available at* http://ec.europa.eu/comm/competition/mergers/review/comments.html.

[36] For a detailed discussion of the application of the expedited procedure since its inception, see Eric Barbier de la Serre, "Accelerated and expedited procedures before the EC Courts: a review of the practice," *Common Market Law Review*, Volume 43, No. 3, June 2006.

to procedural complexities took approximately one year and half to complete.[37] This is not satisfactory in terms of legal certainty and it remains to be seen whether the CFI or the Commission will feel obliged to re-launch the debate on the functioning of the system of judicial review of merger cases.[38]

CONCLUSION

The *Impala* judgment could be seen as marking a continued shift towards closer scrutiny of Commission decisions by the CFI starting with the 2002 annulment cases of Commission prohibition decisions.

The judgment contains significant observations on the test for collective dominance but its implications on merger control may be far wider. It raises the standard of review for authorization decisions and it may thus embolden third parties in being more aggressively involved in merger review proceedings. It could, as a result, lead to the Commission being more cautious, demanding more documents and evidence and conducting longer and more complicated reviews even where it is minded to authorize a

[37] The case was adjudicated in approximately one year and a half, a period longer than previous expedited procedure cases in the field of mergers (e.g. the judgment in Case T-87/05, EDP v. Commission, was handed down in approximately 7 months from the lodging of the appeal), but still significantly shorter than the length of proceedings in competition cases adjudicated under the CFI's normal procedure (which on average last more than 24 months). For statistics on court proceedings, see the Court's Annual Report, *available at* http://curia.europa.eu/en/instit/presentationfr/index.htm.

[38] It is worth noting that the Confederation of British Industry (CBI) has recently re-launched this debate by issuing a paper proposing the reform of the judicial control of merger cases through the creation of a specialized competition court. A House of Lords sub-committee of the Select Committee on the European Union is currently conducting an inquiry into the need for an EU Competition Court, as proposed by the CBI. See CBI Brief of Jun. 15, 2006, *available at* http://www.parliament.uk/documents/upload/CfEEUCOMPETITIONCOURT.pdf#search=%22CBI%20competition%20court%22.

merger. It is, however, simply too soon to draw precise conclusions as to how the case will affect merger control by the Commission and the Community Courts.

An unexpected implication could also be that, by highlighting certain deficiencies in the current system of merger control, in terms of speedy adjudication of merger cases, legal certainty of authorization decisions, and the respective role of the Commission and the Community Courts in this field of law, the *Impala* judgment may lead to a wider debate on the future functioning of merger control in the European Community.

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