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I. INTRODUCTION

On July 10, 2008, the European Court of Justice (“ECJ”) gave judgment¹ setting aside a ruling of the European Court of First Instance (“CFI”) in an appeal brought by Impala,³ a third-party complainant, against the clearance of the SonyBMG joint venture by the European Commission (“Commission”) in August 2004.⁴ The CFI’s judgment was the first (and so far, the only) time the CFI had overturned an unconditional merger clearance decision under the EC Merger Regulation.⁵

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¹ Case C-413/06 P, Bertelsmann AG and Sony Corporation of America v. Impala (not yet reported) [hereinafter *Impala II*] (ECJ judgment of Jul. 10, 2008) [hereinafter “Judgment”], available at <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919289C19060413&doc=T&ouvert=T&seance=ARRET>.

² Case T-464/04, Independent Music Publishers and Labels Association (Impala) v. Commission, 2006 E.C.R. II-2289 [hereinafter *Impala*] (judgment of Jul. 13, 2008) [hereinafter “CFI Judgment”]. For further detail on the CFI’s judgment and its potential implications, see R. Brandenburger & T. Janssens, *The Impala Judgment: Does EC Merger Control Need to Be Fixed or Fine-Tuned?*, 3(1) COMPETITION POL’Y INT’L 301 (2007).

³ See *Impala*, *supra* note 2.

⁴ Commission Decision 2005/188/EC of 19 July 2004, Case COMP/M. 3333 — Sony/BMG, 2005 O.J. (L 62) 33 [hereinafter “Commission Decision”].

⁵ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1 (the Commission’s decision in *SonyBMG* was decided under an earlier version of the regulation: Council Regulation (EEC) No. 4064/89 of 21 December 1989, 1989 O.J. (L 395) 1 (corrected version at 1990 O.J. (L 257) 13). In 2001, the CFI annulled the unconditional

As the ECJ Advocate General noted, the appeal presented the EU's highest court with an opportunity to develop its case law in the field of merger control, in particular with regard to the extent of investigation and reasoning required of the Commission when it approves a merger transaction.⁶ Merger cases are only rarely considered by the ECJ and this judgment, which was delivered by a Grand Chamber of 13 judges, has emphasized a number of important procedural safeguards for parties to mergers, which had been called into question by the CFI's earlier ruling.

II. BACKGROUND

The procedural history of this case is somewhat convoluted. In its judgment of July 2006, the CFI annulled the Commission's decision approving the creation of the SonyBMG joint venture. The Commission had originally cleared the joint venture, after an in-depth "phase II" investigation, in July 2004, and shortly afterwards the transaction closed and the joint venture started to operate. During its investigation, the Commission had issued a Statement of Objections ("SO") expressing its concerns that the joint venture would facilitate tacit collusion among SonyBMG and its major competitors. However, the Commission cleared the transaction, following the submission of further evidence from the parties in response to the SO.

The Commission's clearance decision was appealed to the CFI by a third party, the trade association Impala, and the CFI annulled the Commission's clearance on the grounds of inadequate reasoning and manifest errors of assessment. The result of the

clearance of a merger under the European Coal and Steel Community Treaty in Case T-156/98, *RJB Mining v. Commission*, 2001 E.C.R. II-337.

⁶ Opinion of Advocate General Kokott of 13 December 2007, *Impala II*, *supra* note 1, at para. 1. Although critical of some aspects of the CFI's judgment, the Advocate General had proposed to dismiss the appeal.

CFI's judgment was that, although the SonyBMG joint venture had been operational since August 2004,⁷ the Commission was required to reinvestigate the transaction. The Commission re-approved the formation of SonyBMG after a further lengthy and detailed phase II investigation, which the Commission described as "one of the most thorough analyses of complex information ever undertaken ... in a merger procedure,"⁸ in October 2007 (i.e., some three years after the transaction had completed and the joint venture had been in operation).

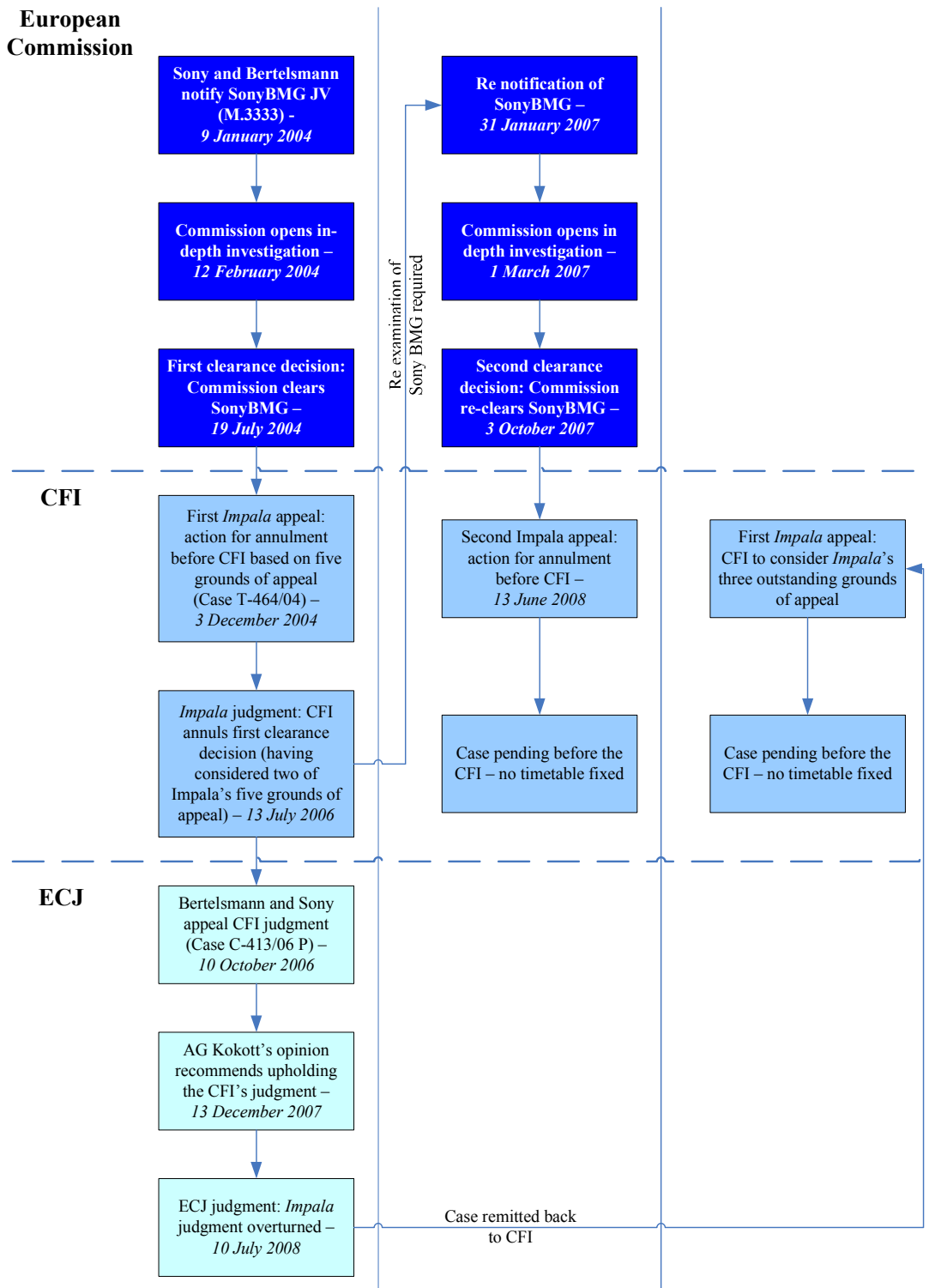
In parallel to the SonyBMG reinvestigation by the Commission, Sony and Bertelsmann appealed the CFI's judgment to the ECJ on points of law. The ECJ's judgment on that appeal reversed the CFI's judgment, and was handed down on July 10, 2008. In the meanwhile, Impala has also appealed the second Commission clearance decision to the CFI. That appeal remains pending before the CFI at the time of writing.⁹ Figure 1 illustrates the procedural history of the SonyBMG joint venture.

⁷ Actions before the CFI and ECJ do not have a suspensory effect (see first sentence of Article 242 of the EC Treaty). Suspension can be obtained by way of interim relief, which was not sought in this case.

⁸ Press Release IP/07/1437, European Commission, Mergers: Commission confirms approval of recorded music joint venture between Sony and Bertelsmann after reassessment subsequent to Court decision (Oct. 3, 2007).

⁹ See Press Release, Impala, IMPALA appeals EC authorisation of SonyBMG merger without remedies for a second time (Jun. 16, 2008), available at <http://www.impalamusic.org/>.

Figure 1. The procedural history of the SonyBMG joint venture



The main issues the ECJ considered were:

- (a) the standard of proof applicable to European Commission merger clearance decisions;
- (b) the nature and role of the SO in merger investigations;
- (c) the extent of the Commission's duty to give reasons in merger decisions;
- (d) the intensity of the review to which the Commission's merger decisions are subject; and
- (e) the legal test applicable to coordinated effects.

The following section discusses each of these issues in turn.

III. PRINCIPAL ISSUES CONSIDERED BY THE ECJ

A. A Neutral European Mergers Regime

The appellants, Bertelsmann and Sony, considered that, in annulling the Commission's decision, the CFI had applied an incorrect and excessive standard of proof with regard to merger clearance decisions. They argued that the standard of proof for Commission decisions prohibiting mergers is higher than the standard of proof for clearance decisions. They submitted that a higher standard of proof for prohibition decisions is required as such decisions represent a serious limitation on commercial freedom. The appellants also argued that the standard of proof for clearance decisions is impliedly affected by Article 10(6) of the EC Merger Regulation, which provides that a notified merger is deemed to have been cleared if the Commission does not take a decision within the time limits specified in the Regulation.¹⁰

¹⁰ In *Tetra Laval*, Advocate General Tizzano had said there was a presumption under the EC Merger Regulation that mergers are compatible with the common market: "[I]n the case of uncertainty as to whether or not the transaction is compatible with the common market, the interest of the undertakings seeking to make the merger must prevail." Opinion of Advocate General Tizzano of 25 May 2004, Case C-12/03 P, *Commission v. Tetra Laval*, 2005 E.C.R. I-987 [hereinafter *Tetra Laval*], at para. 79. According to

The ECJ rejected Bertelsmann and Sony's submissions, and the Court clarified that the EC Merger Regulation regime is neutral in relation to mergers. The ECJ referred to the structure of Articles 2(2) and 2(3) of the Regulation, which in their current version provide:

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.¹¹

On their face, Articles 2(2) and 2(3), taken together, require the Commission to issue one of two possible declarations: either a declaration that a notified merger is compatible with the common market (i.e., a "clearance"), or a declaration that the merger is incompatible with the common market (i.e., a "prohibition"). The ECJ noted that there is nothing in these provisions stating that the EC Merger Regulation "imposes different standards of proof to decisions clearing mergers, on the one hand, and decisions prohibiting mergers, on the other."¹² Accordingly, the standard required for a clearance

Advocate General Tizzano, by stipulating, in Article 10(6) of the EC Merger Regulation, that a merger must be deemed to be authorized if the Commission does not make a decision in good time, the EU legislature has demonstrated, as a matter of fact, that it considers that the interests of merging parties must prevail in the case of uncertainty. The ECJ did not, however, address this question in its *Tetra Laval* judgment.

¹¹ As the original notification of the SonyBMG joint venture was made prior to May 1, 2004, when the revised EC Merger Regulation entered into force, the ECJ's judgment relates to the previous EC Merger Regulation. Although the substantive test under Article 2 was modified (from a "dominance" test to a "significant impediment to effective competition" test), its structure has remained unchanged. Accordingly, the ECJ's judgment on this issue is relevant to the application of the revised EC Merger Regulation as well.

¹² Judgment, *supra* note 1, at para. 46.

decision is the same as that required for a prohibition. Both types of decision must be reasoned and both must be supported by evidence.¹³

In other words, the ECJ held that, in effect, the EC regime is neutral with regard to merger transactions. There is no general presumption in favor of mergers under the EC Merger Regulation and, equally, no presumption against them.¹⁴ In conducting a prospective analysis of how a merger might affect competition in the future, the Commission is required to “envisage various chains of cause and effect with a view to ascertaining which of them is most likely.”¹⁵ However the Commission decides, both clearance and prohibition decisions “must be supported by a sufficiently cogent and consistent body of evidence.”¹⁶ The ECJ also ruled that the standard is not raised in cases where the Commission is considering issues of coordinated effects.¹⁷ The complexity of a theory of competitive harm is a factor that must be taken into account when assessing the *plausibility* of potential consequences of a merger, and whether or not adverse effects are *likely*. Complexity of itself, however, does not affect the standard of proof that is required.¹⁸

The ECJ also ruled that the standard of proof is not affected by the deemed clearance provisions of Article 10(6), as that provision is simply an expression of the

¹³ For further discussion of the standards expected of the Commission in this regard, *see* Section III.C *infra*.

¹⁴ Judgment, *supra* note 1, at para. 48.

¹⁵ *Id.* at para. 47. This formulation had already been used by the ECJ in its review of a merger prohibition decision (*see Tetra Laval, supra* note 10, at para. 43).

¹⁶ Judgment, *supra* note 1, at para. 50. The ECJ also referred to its earlier case law in this regard, *see* Joined Cases C-68/94 & C-30/95, *France and Others v. Commission (Kali & Salz)*, 1998 E.C.R. I-1375 [hereinafter *Kali & Salz*], at para. 228.

¹⁷ *See* Section III.E *infra*.

¹⁸ Judgment, *supra* note 1, at para. 51.

need for speed in merger reviews, and is an exception to the “general scheme” of the EC Merger Regulation, which requires the Commission to rule expressly on transactions that are notified to it.¹⁹

B. The Role of the Statement of Objections

The CFI’s judgment in 2006 had caused some concern as it appeared to suggest that an SO contains definitive conclusions, rather than provisional findings, by the Commission.²⁰ The CFI’s judgment pointed out many inconsistencies between the Commission’s eventual clearance decision and the Commission’s earlier SO (and described the Commission as having therefore engaged in a “fundamental U-turn”).²¹ Accordingly, the CFI seemed to suggest that the Commission’s SO in effect constitutes a benchmark for its final decision. At the very least, the CFI’s judgment implied that, if the Commission expresses its SO in strongly adversarial terms, as it did in the *SonyBMG* decision, a subsequent reversal of its position in the final decision would be complicated. Interestingly, since the CFI’s judgment in 2006, the Commission has not issued an SO in about one-third of the merger cases it has cleared following a phase II investigation.

Of course, as its very name indicates, an SO will, by its nature, set out potential “objections” to a proposed merger. Nonetheless, previous case law in other contexts (such as investigations under Articles 81 and 82) had always emphasized the preliminary nature of an SO and a significant number of mergers have been cleared over the years

¹⁹ *Id.* at para. 49.

²⁰ An SO is the formal document in which the Commission sets out its concerns about a merger during an in-depth, phase II investigation. Merging parties have the opportunity to respond in writing and, if they wish, also in an oral hearing.

²¹ CFI Judgment, *supra* note 2, at para. 283.

notwithstanding that the Commission had issued an SO setting out significant potential objections to the merger. Indeed, the EC Merger Regulation provides for the Commission to put potential objections to merging parties and for the parties to have an opportunity to respond. In particular, Article 18(3) of the EC Merger Regulation provides:

The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of defence shall be fully respected in the proceedings.²²

In that light, the CFI's harsh criticism of the Commission was noteworthy. For example, the CFI referred to various matters discussed in the SO and found that it contained "not so much an assessment by the Commission, that might be modified, but, rather, a finding of fact resulting from its investigation."²³ The CFI even went so far as to say that in deciding to approve a merger to which the Commission had earlier issued an SO, the Commission "cannot suppress certain relevant elements on the sole ground that they might not be consistent with its new assessment."²⁴

In overruling the CFI, the ECJ's judgment resoundingly reiterates that the SO is a preliminary document, to which the parties will be given an opportunity to comment and respond, and which accordingly does not set out "findings". Throughout the section of its judgment dealing with this issue,²⁵ the ECJ emphasized fairness recalling that the right to

²² The Implementing Regulation also contains detailed provisions requiring the Commission to issue an SO and providing for the merging parties to be given an opportunity to respond to it, and to have their rights of defence respected. (*see, in particular*, Articles 11 and 13 of Commission Regulation (EC) No. 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 133) 1 [hereinafter "Implementing Regulation"]).

²³ CFI Judgment, *supra* note 2, at para. 379.

²⁴ *Id.* at para. 300.

²⁵ Judgment, *supra* note 1, at paras. 61-77.

a fair hearing is a fundamental principle of Community law.²⁶ The ECJ held that Article 18(3) of the EC Merger Regulation, quoted in the preceding paragraph, is an emanation of those fundamental principles in the specific context of merger control.²⁷

In holding that the contents of the SO cannot prevent the Commission from later altering its standpoint and deciding to approve a merger, the ECJ ruled that it is

inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact.²⁸

Contrary to the position suggested by the CFI, the ECJ ruled that the Commission, in its final decision, is not obliged to explain any differences with respect to its assessments as set out in the SO. Instead, the Commission must base its final decision on its assessment of all the evidence at the time its investigation is closed.²⁹ Therefore, in referring in its ruling to “findings of fact made previously” in the SO,³⁰ the CFI had erroneously treated the SO as stating definitive conclusions rather than recording provisional issues.³¹

The ECJ’s judgment is to be welcomed in clarifying this important aspect of phase II merger investigations. Merging parties should be encouraged by the fact that their right to respond to the Commission’s SO and their rights of defence have been

²⁶ The ECJ recalled its earlier seminal case law from the 1970s and 1980s in the antitrust context on these issues, including Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 E.C.R. 1063, at para. 15 and Joined Cases 100/80 to 103/80, *Musique diffusion française and Others v. Commission*, 1983 E.C.R. 1825, at para. 10. *See* Judgment, *supra* note 1, at para. 61.

²⁷ Judgment, *supra* note 1, at para. 62.

²⁸ *Id.* at 63. *See also*, in the antitrust context, Joined Cases 142/84 & 156/84, *British American Tobacco and Reynolds Industries v. Commission*, 1986 E.C.R. 1899, at paras. 13 & 14.

²⁹ Judgment, *supra* note 1, at paras. 64 & 65.

³⁰ CFI Judgment, *supra* note 2, at para. 410.

³¹ Judgment, *supra* note 1, at paras. 73 & 74.

underscored by the EU's highest court. Moreover, the Commission should now have more confidence to take new evidence into account and in adopting clearance decisions, notwithstanding any doubts or reservations it expressed in its SO.³²

C. Enhanced Rights of Defence for Parties in Merger Investigations

Merging parties will take comfort from further passages of the ECJ's judgment which went on to consider the practicalities of the Commission's procedures following the issuing of an SO. The CFI had held that any further evidence provided by merging parties in response to an SO would have to be "particularly reliable, objective, relevant and cogent" and potentially tested with third parties before it could be accepted by the Commission. The CFI said:

[T]he time-constraints also have the effect that the parties to the concentration cannot wait until the last minute before submitting evidence to the Commission with a view to refuting objections raised at the proper time by the Commission, since the Commission would then no longer be in a position to carry out the necessary investigations.³³

This approach placed a potentially heavy burden on the merging parties and the Commission, in particular, the requirement for the Commission to market test further evidence provided by the merging parties in response to the SO. In many cases, the first time the merging parties are fully able to understand the Commission's concerns, and the evidence on which they are based, is on receiving the Commission's SO. The practical effectiveness of merging parties' ability to challenge these concerns and to adduce further

³² The ECJ's ruling may have a wider implication as it may be helpful to parties involved in EC antitrust proceedings who, increasingly, face requests for discovery of a Commission SO from claimants in damages actions hoping to use material from the SO to exert pressure on the defendant to settle any damages claim quickly. The ECJ's emphasis on the provisional nature of an SO and stress on the fact that an SO contains no actual "findings" may assist in resisting such discovery requests.

³³ CFI Judgment, *supra* note 2, at para. 415.

evidence seeking to demonstrate that a concern is misplaced was therefore limited under the CFI's approach. In practice, the time limits in the EC Merger Regulation would not easily accommodate a further market testing of evidence, leaving the Commission in a difficult position if it received persuasive evidence from merging parties in response to an SO.

The Commission joined Bertelsmann and Sony in appealing these aspects of the CFI's judgment. In considering these issues, the ECJ again strongly emphasizes merging parties' rights of defence, stating that "compliance with the rights of defence prior to the adoption of any decision which may impact adversely on the undertakings concerned is imperative in procedures for the control of concentrations."³⁴

The ECJ also made clear that merging parties cannot be criticized for putting forward potentially decisive arguments, facts or evidence at the stage of responding to the SO.³⁵ Consistent with the merging parties' rights of defence, evidence and arguments submitted in response to the SO are not submitted "late" or out of time, but at the very time envisaged for that purpose in the EC Merger Regulation.³⁶ Furthermore, the need for speed in merger control proceedings means that the Commission cannot be required, in every case, to market test information provided in response to an SO with "numerous economic operators."³⁷

In considering the CFI's suggestion that evidence submitted by parties in response to an SO is subject to a test of being "particularly reliable, objective, relevant and

³⁴ Judgment, *supra* note 1, at para. 88.

³⁵ *Id.* at para. 89.

³⁶ *Id.*

³⁷ *Id.* at para. 91.

cogent,” the ECJ held that evidence submitted by merging parties should not be subject to more demanding standards than those imposed in relation to the arguments of competitors, customers and other third parties.³⁸

The ECJ also emphasized the Commission’s ability to alter its provisional views if its reservations about a merger were adequately assuaged by the merging parties. Specifically, the ECJ held that, if the Commission reconsiders the issues, in light of all of the evidence before it at the end of its investigation, the Commission does not “delegate” the investigation to the parties (as the CFI had suggested³⁹). The ECJ noted that Articles 14 and 15 of the EC Merger Regulation provide for the imposition of fines and periodic penalty payments if merging parties submit incorrect or misleading information and that a merger clearance decision can be revoked if it is found to have been based on incorrect information.⁴⁰ These provisions mean that evidence from the merging parties can form part of the totality of the evidence to be assessed by the Commission without requiring further verification in a market-testing procedure.

Finally, in a further clarification of Commission procedure, the ECJ ruled that the Commission cannot base a merger decision on objections on which the merging parties have not been given an opportunity to comment. Therefore, confidential material from third parties, which has not been disclosed to the merging parties, cannot be relied on.⁴¹

These aspects of the ECJ's judgment provide useful clarity for merging parties, third parties, and the Commission in setting out procedures that are designed to be

³⁸ *Id.* at para. 92.

³⁹ CFI Judgment, *supra* note 2, at para. 415.

⁴⁰ Judgment, *supra* note 1, at para. 93.

⁴¹ *Id.* at para. 101.

workable and to give merging parties an adequate opportunity to “defend” their merger. The CFI’s judgment had created some risk that the Commission’s investigations would become opaque and uncertain, in particular reducing the use of SOs to set out the nature of the Commission’s reservations about a merger. The ECJ’s judgment should steer the Commission in the opposite direction.

D. Clearer Standards for the European Commission

The ECJ’s judgment also sets out clearer standards for the Commission in merger investigations. As noted above, the CFI’s judgment had been heavily critical of the Commission, the procedure it had followed, and the reasoning in its decision.⁴² Although the ECJ emphasized that neither it, nor the CFI, would shrink from reviewing the “correctness, completeness and reliability of the facts” on which a merger decision is based⁴³ and nor would it refrain from reviewing the Commission’s interpretation of information of an economic nature,⁴⁴ the practical effect of the ECJ’s judgment is to provide a degree of margin for the Commission in recording the reasoning for its decisions. This appears to bring the Community Courts’ approach to the review of mergers back in line with that in other competition cases. In their review of complex economic assessments in Article 81 and 82 cases, the Courts already allow the Commission significant discretion.

Bertelsmann and Sony advanced their appeal on the, arguably somewhat optimistic, basis that Commission merger clearance decisions can never be set aside by

⁴² See also Brandenburger & Janssens (2007), *supra* note 2.

⁴³ Judgment, *supra* note 1, at para. 69.

⁴⁴ *Id.* at para. 145.

the CFI for lack of reasoning. The appellants based this submission on Article 10(6) of the EC Merger Regulation, which, as stated earlier, provides for the deemed clearance of any merger on which the Commission has not ruled within the time periods set out in the EC Merger Regulation. This argument was not accepted by the ECJ, which reiterated its established case law to the effect that a Commission decision (in all fields of its activity) must disclose in a clear and unequivocal fashion the reasoning followed in such a way as to enable any persons concerned by the decision to ascertain the reasons for the measure and to enable the courts to exercise their powers of review.⁴⁵

However, the ECJ made clear that the standard expected of Commission decisions depends on the circumstances of the case and that it is not necessary for the Commission's reasoning to go into each and every relevant fact and point of law.⁴⁶ It is also not necessary to discuss secondary issues or to anticipate potential objections.⁴⁷ The degree of precision of the reasons given must be weighed against practical realities and the time and technical facilities available.⁴⁸ With regard to merger control specifically, the ECJ noted "the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations."⁴⁹

The ECJ, in contrast to the approach suggested to it by the Advocate General, accordingly reversed the CFI's ruling that the Commission had not adequately reasoned

⁴⁵ *Id.* at para. 166. *See also* Case C-367/95 P, *Commission v. Sytraval and Brink's France*, 1998 E.C.R. I-1719, at para. 63; Case C-42/01, *Portugal v. Commission*, 2004 E.C.R. I-6079, at para. 66; and Case C-390/06, *Nuova Agricast* (not yet reported) (ECJ judgment of Apr. 15, 2008), at para. 79.

⁴⁶ Judgment, *supra* note 1, at para. 166.

⁴⁷ *Id.* at para. 167.

⁴⁸ *Id.*

⁴⁹ *Id.*

its clearance decision. A major part of the CFI's criticisms were based on the fact that the Commission's decision made a number of comments apparently adverse to the merger, and set out only briefly the reasons for the clearance. The remarkably reluctant tone of the Commission's original clearance was commented on by the ECJ's Advocate General who said:

Simply put, in a merger control decision which to a large extent reads as if it were a prohibition decision, it is essential that a sufficiently precise explanation is given of the considerations on the basis of which the matter ultimately turns, even for informed readers who are familiar with the market.⁵⁰

The ECJ agreed with the Advocate General that the way in which the Commission had expressed itself was "unfortunate", and there was a "certain imbalance" in the presentation of the reasoning.⁵¹ However, in light of the specific context, in particular the time limits in merger control proceedings, the ECJ held that the Commission's reasoning in its decision was adequate.⁵² The ECJ ruled that the decision did contain sufficient reasoning to allow the third-party complainant, Impala, to bring its challenge before the CFI, and that the CFI had been sufficiently aware of the Commission's reasons in order to analyze them in its judgment. It would therefore be "unreasonable in that regard to require, as did the Court of First Instance ... a detailed description of each of the factors underpinning the contested decision."⁵³

The ECJ's judgment should give the Commission a degree of confidence that the EU's highest court will not subject its decisions to excessively high standards with

⁵⁰ Opinion of Advocate General Kokott, *Impala II*, *supra* note 1, at para. 124.

⁵¹ Judgment, *supra* note 1, at para. 179.

⁵² *Id.*

⁵³ Judgment, *supra* note 1, at paras. 180 & 181.

respect to information gathering. Since the CFI's judgment in 2006, the Commission has "stopped the clock" in its review period in order to obtain further evidence from merging parties in a significant proportion of its phase II investigations.⁵⁴ As many merging parties, and indeed third parties, know, it can be very time-consuming and burdensome to respond to extensive Commission requests for information in merger cases.

E. A Degree of Clarity Restored in Coordinated Effects Cases

The coordinated effects theory (formerly referred to as "collective dominance" or, sometimes, "oligopolistic dominance") has been the subject of much debate, among lawyers, economists, and regulators in recent years. In particular, the CFI's well-known judgment quashing the Commission's merger prohibition decision in *Airtours v. Commission*⁵⁵ has been much discussed. *Airtours* was not appealed by the Commission from the CFI to the ECJ, and the Bertelsmann and Sony appeal presented a rare opportunity for the ECJ to consider these issues.

It will be recalled that, in *Airtours*, the CFI set out three conditions, each of which must be satisfied, where it is possible for firms to reach a common understanding on the terms of coordination, before the Commission can make a finding of coordinated effects:

- (a) the market must exhibit a sufficient degree of transparency and coordinating firms must have the ability to monitor each others' behavior and whether or not they are adopting a common policy;
- (b) there must be an incentive not to depart from the common policy on the market and some sort of credible deterrent mechanism if deviation is detected; and

⁵⁴ In 2008 alone, this has occurred in the following merger cases: Case COMP/M.4799, OMV/MOL; Case COMP/M.4854, Tom Tom/TeleAtlas; Case COMP/M.4874, Itema Holding/BarcoVision; Case COMP/M.4919, Statoil/ConocoPhillips; Case COMP/M.4989, ALO/MX; and Case COMP/M.5047, Rewe/Adeg.

⁵⁵ Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585 [hereinafter *Airtours*].

- (c) the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardize the results expected from the common policy.⁵⁶

In its *Impala* judgment, the CFI found manifest errors in the Commission's assessment of coordinated effects. In particular, the CFI found that the Commission had incorrectly relied on evidence pointing to varying levels of discounts to establish that the market was not sufficiently transparent to permit coordinated effects to arise. With regard to the *Airtours* tests, listed in the preceding paragraph, the CFI judgment stated:

[A]lthough the three conditions defined by the Court of First Instance in *Airtours v Commission*, which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, 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.⁵⁷

Before the ECJ, the appellants argued that this formulation amounted to a “watered down” test for coordinated effects, improperly allowing transparency to be inferred from a number of matters which, as a matter of law, are not sufficient to establish the required degree of transparency for coordinated effects. In considering these issues, the ECJ did not take *Airtours* as its starting point, but rather its own earlier judgment in the earlier case of *Kali & Salz*.⁵⁸ Having reviewed its earlier case law, the formulation of the legal test applicable to coordinated effects set out by the ECJ in its judgment was:

- (a) tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work and, in particular, of

⁵⁶ *Airtours, id.*, at paras. 61 & 62. These requirements are now found at paragraph 41 of the Commission's Horizontal Merger Guidelines (*see* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5).

⁵⁷ CFI Judgment, *supra* note 2, at para. 251.

⁵⁸ *See Kali & Salz, supra* note 16.

- the parameters that lend themselves to being a focal point of the proposed coordination;
- (b) tacit coordination must be sustainable and the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. There must therefore be sufficient market transparency for each firm concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving;
 - (c) a credible deterrent mechanism must exist; and
 - (d) the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardize the results expected from the coordination.⁵⁹

It is not entirely clear why the ECJ expressed itself in a slightly different manner to the CFI in *Airtours*, although it will be apparent that the criteria referred to by the ECJ and the *Airtours* criteria are similar. This appears to be the view of the ECJ itself, which added at the end of its analysis that the *Airtours* criteria “are not incompatible with the criteria” that the ECJ itself set out in the judgment.⁶⁰

Both *Airtours* and the ECJ’s conditions require the elements that economists regard as necessary for coordinated effects, i.e., the ability to form a common understanding or perception, internal stability (from the ability to monitor others and a credible deterrent mechanism), and external stability (an absence of reactions from customers or other firms that would undermine attempted coordination). The CFI’s reference to a “very mixed series of indicia” had caused some uncertainty as to whether the CFI was, indeed, intending to dilute the *Airtours* criteria, as suggested by

⁵⁹ Judgment, *supra* note 1, at para. 123.

⁶⁰ *Id.* at para. 124.

Bertelsmann and Sony. The ECJ did not explicitly overrule this statement,⁶¹ but emphasized that coordinated effects cases must be conducted with care and be based on plausible hypotheses.⁶² This will provide some comfort as the *Airtours* criteria at least have the benefit of setting out a degree of legal certainty based on sound economics.

The ECJ also emphasized that, in applying the criteria for the assessment of coordinated effects, “it is necessary to avoid a mechanical approach involving separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.”⁶³ Presumably, in this somewhat cryptic passage, the ECJ is warning that where it is possible for firms to reach a common understanding, a mechanistic satisfaction of each of the three *Airtours* conditions is insufficient to prove coordinated effects and that the Commission must be able to show that its theory is plausible in the overall economic context.

IV. CONCLUSION

The ECJ’s judgment is an important ruling for merging parties, emphasizing their rights of defence and clarifying the provisional nature of an SO. The Commission, too, can take some messages from the ruling. In particular, it should feel more confident that it will not be subject to harsh criticism for “changing its mind” and clearing a merger after having issued an SO. However, it remains to be seen whether, as a result, the Commission will adopt a more relaxed approach in relation to SOs and issue less

⁶¹ *Id.* at para. 128.

⁶² *Id.* at paras. 126 & 129.

⁶³ *Id.* at para. 125.

extensive information requests in the context of phase II merger investigations than it has recently been doing.

With regard to the substantive test, the ECJ's effective endorsement of the *Airtours* criteria for coordinated effects also provides a welcome development.

* * *

This important judgment does not, however, bring the various proceedings surrounding the creation of SonyBMG in 2004 to an end. The CFI's judgment considered only two of Impala's five grounds of appeal. Although the ECJ has set aside the CFI's judgment on the two grounds that it did consider, it has remitted the case back to the CFI to deal with the three outstanding grounds in further proceedings. In addition, Impala has recently appealed the Commission's second clearance decision. That appeal has yet to be heard by the CFI (see Figure 1).

In light of these lengthy and continuing judicial proceedings, some may well question whether they do not highlight a wider problem with the system of judicial review proceedings in the European Union, in particular the length of time that merger appeal proceedings can take and the wide scope for third parties to bring appeals.