

Friday, April 10th

Bertelsmann AG/Sony Corporation of America, Commission decision

(NB: The highlighted sections represent notes by Val Korah)

1. In 2004, contrary to its original, strongly worded statement of objections (SO), the Commission approved the concentration of the global recorded music business of Bertelsmann AG and Sony Corporation of America into three newly created companies to be operated under the name Sony BMG.

2. IMPALA, an association of independent music production companies, appealed to the CFI which in 2006 annulled the decision on the grounds that it was vitiated by manifest errors of assessment and was inadequately reasoned. The CFI referred the merger back to the Commission to appraise it under Regulation 17, the procedural regulation in force at the time of the original notification.

3. The parties to the merger appealed from the CFI's judgement to the ECJ, but since the appeal did not have suspensory effect, they filed an updated notification to the Commission. The Commission cleared the merger for a second time in 2007 stating why it no longer considered that it would lead to a collective dominant position.

JUDGMENT OF ECJ in *IMPALA*

Bertelsmann AG/Sony Corporation of America v Independent Music Publishers and Labels Association (Impala I), Commission & Sony BMG Music Entertainment BV intervening.

Grand Chamber

Case C-413/06 P, 10 July 2008, [2008] ECR I-0000. not yet available in ECR

4. By a judgment in 2008, the Grand Chamber of the ECJ quashed the judgment of the CFI. Nevertheless, it rejected the argument by the merging firms that there is a general presumption that a notified concentration is compatible with the common market, which

would result in the standard of proof required of the Commission being lower than a decision prohibiting a merger or clearing it subject to commitments.

5. The ECJ objected to the CFI having treated specified conclusions in the SO as being established, since the SO was only a preliminary procedural document and not evidence.

Judgment of ECJ

The first ground of appeal, alleging an error of law in that the Court of First Instance relied on the statement of objections as a benchmark for its review of the substance of the contested decision

– The judgment under appeal

55 In a number of passages in the judgment under appeal, among others, in paragraphs 379, 424 and 446, the Court of First Instance referred to the statement of objections in order to support its reasoning, both as regards the plea alleging inadequate reasoning in the contested decision and as regards the argument alleging manifest errors of assessment which vitiated that decision.

56 In its examination of the plea alleging insufficient reasoning in the contested decision, the Court of First Instance observed in particular as follows:

“282 The Court must examine, first of all, the impact of the circumstance, emphasised by [Impala], that the Commission had concluded emphatically in the statement of objections that the concentration was incompatible with the common market on the ground, in particular, that a collective dominant position existed before the proposed concentration and that the market for recorded music was transparent and particularly conducive to coordination.

283 This fundamental U-turn in the Commission’s position may indeed appear surprising, particularly in view of the late stage at which it was made. ...”

– Findings of the Court

The ECJ explained that the right to a fair hearing is a principle of Community law and that the undertaking concerned must be afforded the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law. (Para 61)

The ECJ continued that the SO is a procedural and preparatory document delimiting the scope of the administrative procedure. It is inherent in its nature 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. The Commission must take into account the factors emerging from the whole of the administrative procedure, either to abandon such objections as have been shown to have been unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the SO does not prevent the Commission from altering its standpoint in favour of the undertakings concerned. (Para 63).

The Commission is not obliged to maintain the factual or legal assessments set out in the SO nor to explain any departures from such provisional assessments. (Paras 64 and 65).

The effective exercise of the rights of defence requires that the arguments of the parties to a proposed concentration be taken into account for the control of concentrations in the same way as the arguments of parties affected by proceedings under Art 81 and Art 82EC. (Para 66)

While in the context of the control of concentrations the Commission has a margin of assessment with regard to economic matters and review by the CFI is limited to establishing the factual accuracy of evidence relied on and establishing the absence of a manifest error of assessment, nevertheless the correctness, completeness and reliability of the facts on which a decision is based may be the subject of judicial review. (Para 69)

In this case the CFI had treated “findings of fact made previously” in the SO as more reliable and more conclusive than the findings in the contested decision itself. (Para 71)

The approach of the Commission excluded the possibility that the Commission’s evaluation might change radically in the light of new elements introduced by the parties in their reply to the SO. With the possible exception of non-controversial and incontestable

elements, it should not be assumed that assessments made in a SO cannot be modified in the light of replies to such a statement. Furthermore, in this case, the CFI had categorised as findings of fact, certain complex assessments which could not in any event be considered as findings of fact that could not be modified. (Para 75)

In conclusion to its answer to the first ground of appeal the ECJ explained that...

76 In those circumstances, it must be held that the Court of First Instance committed an error of law in so far as, in its examination of the line of argument alleging the existence of manifest errors of assessment, it treated certain elements in the statement of objections as being established, without demonstrating the reasons for which, notwithstanding the final position adopted by the Commission in the contested decision, those elements should be considered as being established beyond dispute.

77 None the less, that error is not of itself capable of undermining the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that “the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it”. Consequently, it is not of itself capable of leading to the setting aside of the judgment under appeal. Further grounds of appeal thus fall to be examined.

The ECJ also objected that the CFI had committed an error in requiring the Commission to apply particularly demanding evidence and arguments from the parties in reply to the SO and in finding that the lack of additional market investigations after the SO had been sent and the adoption of the arguments in defence amounting to an unlawful delegation of the investigation to the parties to the merger.

The second ground of appeal, together with the first part of the third ground, alleging errors of law in that the Court of First Instance required the Commission to undertake new market investigations following the response to the statement of objections and applied an unduly high standard of proof to the evidence submitted in response to the statement of objections

– **The judgment under appeal**

(78-81) The CFI had held in para 414 that the parties to a merger should not (in view of the strict time limits in operation) be allowed to present complex evidential responses to

the Commission at the last minute, as the Commission would not have sufficient time to undertake a full investigations in response. Therefore late information should be particularly “reliable, objective, relevant and cogent”. It objected to various ways in which the Commission had failed to undertake fresh market investigations in response to data and assessments provided by the parties to the concentration. The appellants, in their second ground of appeal, objected to this finding.

80 In addition, in a number of places in the judgment under appeal, among others in paragraphs 398, 428 and 451, the Court of First Instance stated that the Commission did not, following the response of the parties to the concentration to the statement of objections, carry out any new market investigations in order to test the validity of its altered assessment of the proposed concentration. ...

– **Findings of the Court**

87 It is necessary at the outset to reject Impala’s argument set out in paragraph 86 of this judgment that paragraph 414 of the judgment under appeal refers to a hypothetical situation. Such an interpretation of that paragraph is refuted by its very wording, which makes it clear that the observations of the Court of First Instance that are criticised in the first part of the third ground of appeal referred to the procedure leading to the adoption of the contested decision.

88 Next, as is clear from paragraphs 61 and 62 of this judgment, compliance with the rights of the 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.

89 ... the notifying parties cannot, as a rule, be criticised for putting forward certain – potentially decisive – arguments, facts or evidence only in their arguments in reply to the statement of objections. It is only with that statement that the parties to the concentration can obtain detailed indications as to the reservations of the Commission in relation to their proposed concentration and as to the arguments and evidence on which it relies in that regard. ...

90 Furthermore, as is apparent from paragraph 49 of this judgment, the need for speed which characterises the general scheme of the Regulation requires the Commission to comply with strict time-limits for the adoption of the final decision.

91 ..., having regard in particular to the time constraints which arise by virtue of the procedural time-limits laid down by the Regulation, the Commission cannot, in principle, be required, in every individual case, to send, following communication of the objections and after hearing the undertakings concerned, requests for extensive information to numerous economic operators shortly before transmitting its draft decision to the Advisory Committee on concentrations, pursuant to Article 19 of the Regulation.

92 In addition, as the Commission observes, the reply to the statement of objections may concentrate on the elements which the notifying parties consider to be crucial to the outcome of the formal proceedings. Such elements may not have been regarded as crucial in the statement of objections. A failure to take those elements into account may be a component of the parties' criticisms of the Commission's preliminary assessment. Having regard to the requirements of the rights of the defence, the arguments of the notifying parties submitted in reply to the statement of objections cannot be subject to more demanding standards as to their probative value and their cogency than those imposed in relation to the arguments of competitors, customers and other third parties questioned by the Commission in the course of the administrative procedure or in the light of information provided by the notifying undertakings at a previous stage of the Commission's investigation.

93 Furthermore, when the Commission examines in its decision the arguments in defence submitted by the notifying undertakings and takes the opportunity to reconsider its provisional findings in the statement of objections, with a view to possibly departing from them, it does not "delegate" the investigation to those undertakings. ...

94 It is true that the Commission is required to examine carefully the arguments of the parties to the concentration as regards their exactitude, completeness and cogency and to disregard them where justified doubts arise. It is also true that, under Article 3(1) of the Implementing Regulation, the notification of the proposed concentration must contain information that is correct and complete and that, in accordance with Article 11 of the Regulation, the notifying parties are bound to provide a response to any requests for information by the Commission which is complete, correct and submitted within the periods laid down, failing which, where the information in question was requested by decision, the Commission may, by virtue of Articles 14 and 15 of the Regulation, impose fines and periodic penalty payments. None the less, it remains the case that the Commission must, at the stage of the reply to the statement of objections, if it is not to undermine the rights of the

defence of the notifying parties, apply the same criteria as those applied for the purposes of the examination of the arguments of third parties or those adopted at an earlier stage of its investigation, while being entitled to draw the appropriate consequences in the event that it should transpire at a very advanced stage of the procedure that the notification concerned does not comply with the requirements of Article 3(1) of the Implementing Regulation.

95 It follows that the Court of First Instance committed an error of law, first, in requiring, in essence, that the Commission apply particularly demanding requirements as regards the probative character of the evidence and arguments put forward by the notifying parties in reply to the statement of objections and, secondly, in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the appellants' arguments in defence amounted to an unlawful delegation of the investigation to the parties to the concentration.

96 Nevertheless, that error of law does not vitiate the whole of the judgment under appeal, in particular that part of it which relates to the inadequacies of reasoning in the contested decision and the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that "the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it." Further grounds of appeal thus fall to be examined.

...

The ECJ continued:

102 The Court of First Instance therefore committed an error of law in relying, as a basis for the annulment of the contested decision, on documents submitted by Impala on a confidential basis, since the Commission itself could not have used them for the purposes of adopting that decision by reason of their confidential nature.

103 Without it being necessary to adjudicate on the question whether the taking into account of those documents could have had an impact on the outcome of the examination by the Court of First Instance of the arguments relating to manifest errors of assessment on the Commission's part, it need only be stated that the error of law identified in the seventh ground of appeal is not, in any event, capable of invalidating the finding of the Court of First Instance in paragraph 325 of the judgment under appeal that, in substance, the contested

decision should be annulled on the ground of its inadequate reasoning. Further grounds of appeal thus fall to be examined.

The fifth ground of appeal, alleging an error of law in that the Court of First Instance misconstrued the relevant legal criteria applying to the creation or strengthening of a collective dominant position

- **The judgment under appeal. . .**
- **Findings of the Court**

The ECJ confirmed that the question whether the CFI applied the correct legal standard is a question of law and therefore the second and third specific criticisms were amenable to judicial review on appeal.

The appellants argued that the CFI had committed an error of law by inferring transparency of discounts from their impact on average net prices. The Court rejected this argument on the ground that it did not relate to the relevance of a particular element relied upon in order to establish that a collective dominant position existed but sought a reappraisal of the facts which fell, in principle outside the jurisdiction of the Court on appeal. (Para 118).

With regard to the other alleged errors of law, the Court continued;

119 As regards the merits of this ground of appeal, it should be noted at the outset that the Court has already held, in substance, that the concept of a collective dominant position is included in that of “dominant position” within the meaning of Article 2 of the Regulation (see, to that effect, *Kali & Salz*, paragraphs 166 and 178). In that regard, the existence of an agreement or of other links in law between the undertakings concerned is not essential to a finding of a collective dominant position. Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question (see Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECR I-1365, paragraph 45).

120 In the case of an alleged creation or strengthening of a collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it will lead to a situation in

which effective competition in the relevant market is significantly impeded by the undertakings which are parties to the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market (see *Kali & Salz*, paragraph 221) in order to profit from a situation of collective economic strength, without actual or potential competitors, let alone customers or consumers, being able to react effectively.

121 Such correlative factors include, in particular, the relationship of interdependence existing between the parties to a tight oligopoly within which, on a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct on the market in such a way as to maximise their joint profits by increasing prices, reducing output, the choice or quality of goods and services, diminishing innovation or otherwise influencing parameters of competition. In such a context, each operator is aware that highly competitive action on its part would provoke a reaction on the part of the others, so that it would derive no benefit from its initiative.

122 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

123 Such 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 the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist

for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking 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. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

124 The conditions laid down by the Court of First Instance in paragraph 62 of its judgment in *Airtours v Commission*, which that court concluded, in paragraph 254 of the judgment under appeal, should be applied in the dispute before it, are not incompatible with the criteria set out in the preceding paragraph of this judgment.

125 In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.

126 In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.

127 As regards the present case, the appellants submit that, even though the Court of First Instance stated in paragraph 254 of the judgment under appeal that it was following

the approach adopted in its judgment in *Airtours v Commission*, in practice, it committed an error of law in inferring the existence of a sufficient degree of transparency from a number of factors which were not, however, relevant to a finding of an existing collective dominant position. In that context, the appellants object in particular to the fact that the Court of First Instance indicated in paragraph 251 of the judgment under appeal that the conditions laid down in paragraph 62 of the judgment in *Airtours v Commission* could “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”.

128 In this regard, as the Commission observed at the hearing, objection cannot be taken to paragraph 251 of itself, since it constitutes a general statement which reflects the Court of First Instance’s liberty of assessment of different items of evidence. It is settled case-law that it is, in principle, for the Court of First Instance alone to assess the value to be attached to the items of evidence adduced before it (see, inter alia, Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-237/98 P *Dorsch Consult v Council and Commission* [2000] ECR I-4549, paragraph 50).

129 Similarly, the investigation of a pre-existing collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself. However, as is apparent from paragraph 125 of this judgment, it is essential that such an investigation be carried out with care and, above all, that it should adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances.

130 In the present case, the Court of First Instance, before which Impala raised arguments relating, in particular, to the parts of the contested decision relating to market transparency, did not carry out its analysis of those parts by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit coordination.

131 It is true that the Court of First Instance referred in paragraph 420 of the judgment under appeal to the possibility of a “known set of rules” governing the grant of discounts by the majors. However – as the appellants rightly submit in the context of the second specific criticism mentioned in paragraph 113 of this judgment, which relates to the question whether certain discount variations established by the Commission in the contested

decision were liable to call into question the possibility of adequate monitoring of mutual compliance with the terms of any tacit coordination there may have been – the Court of First Instance was content to rely, in paragraphs 427 to 429 of the judgment under appeal, on unsupported assertions relating to a hypothetical industry professional. In paragraph 428 of the judgment, the Court of First Instance itself acknowledged that Impala, the applicant before that court, “admittedly did not explain precisely what those various rules governing the grant of campaign discounts are”.

132 It must be pointed out in that regard that Impala represents undertakings which, even if they are not members of the oligopoly formed by the majors, are active on the same markets. In those circumstances, it is clear that the Court of First Instance disregarded the fact that the burden of proof was on Impala in relation to the purported qualities of such a hypothetical “industry professional”.

133 In the light of the above and without there being any need to adopt a position on the third specific criticism mentioned in paragraph 113 of this judgment, it must be held that, in misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of a collective dominant position, the Court of First Instance committed an error of law.

134 That error vitiates the part of the judgment under appeal which concerns the examination by the Court of First Instance of the arguments relating to the manifest errors of assessment committed by the Commission, including the finding of that court in paragraph 377 of the judgment under appeal. However, it is not, of itself, capable of invalidating that court’s finding in paragraph 325 of the judgment under appeal that, in substance, the contested decision had to be annulled because it was inadequately reasoned. Further grounds of appeal thus fall to be examined.

The fourth ground of appeal, alleging an error of law in that the Court of First Instance exceeded the scope of its role in carrying out judicial review

– **The judgment under appeal**

135 In a number of paragraphs in the judgment under appeal, for example, in paragraphs 347 and 361, the Court of First Instance used expressions such as “a high level of transparency of prices” and “a high degree of transparency on the market”. Moreover, in

paragraph 299 of the judgment under appeal, the Court of First Instance described the finding in the contested decision that list prices were “rather aligned” as being “a prudent conclusion to say the least, as the alignment was in fact very marked”. In paragraph 307 of the judgment, the Court of First Instance held that “the variation in the general levels of invoice discounts applied by the parties to the concentration, as referred to at recital 78 to the [contested decision], is very low”. In paragraph 317 of the judgment under appeal, the Court of First Instance inferred from the contested decision that “campaign discounts have only a limited impact on prices”.

136 In paragraph 425 of the judgment under appeal, the Court of First Instance stated, as regards the contested decision that “the calculation of the differential between minimum and maximum discounts by customer ... made for each of the parties to the concentration was carried out incorrectly”. In paragraph 427 of the judgment, the Court of First Instance stated that the data supplied by the parties to the concentration were “of doubtful relevance”.

137 In paragraph 434 of the judgment under appeal, the Court of First Instance held, in particular, as follows:

“... the study drawn up by the economic advisers to the parties to the concentration does not present data that are sufficiently reliable, relevant and comparable ... While it is indeed probable that the different types of retailer (supermarkets, independents, specialist chains, etc.) apply different mark-up policies, and that there are differences within each category of operators, and even differences for each individual operator, according to the types of album or their degree of success, it is very unlikely, on the other hand, and the study contains no data in that regard, that a retailer will apply a different sales policy for the same type of album. ...”

– **Findings of the Court**

143 It is necessary at the outset to reject Impala’s argument alleging the inadmissibility of the fourth ground of appeal. Contrary to what Impala contends, by this ground, the appellants do not merely challenge the assessment of the facts at first instance, but invoke questions of law which are admissible on appeal.

144 As regards the substance, it should first of all be noted that the Commission has a margin of assessment with regard to economic matters for the purposes of the application of the substantive rules of the Regulation, in particular Article 2. It follows that the review by the Community judicature of a Commission decision relating to concentrations is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment (see *Kali & Salz*, paragraphs 223 and 224, and *Commission v Tetra Laval*, paragraph 38).

145 That being so, while the Court of First Instance must not substitute its own economic assessment for that of the Commission for the purposes of applying the substantive rules of the Regulation, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature establish, among other things, 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 (see, to that effect, *Commission v Tetra Laval*, paragraph 39, and *Spain v Lenzing*, paragraphs 56 and 57).

146 Accordingly, as regards the present case, in so far as the Court of First Instance carried out an in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it, it acted in conformity with the requirements of the case-law set out in paragraphs 144 and 145 of this judgment.

147 Nevertheless, that finding is not, of itself, sufficient to reject the fourth ground of appeal. As well as the question whether the Court of First Instance exceeded the scope of its role in carrying out judicial review as regards the intensity of its review of the factual basis of the contested decision, the appellants also maintain, as is mentioned in paragraph 139 of this judgment, that, in examining the factors underpinning the contested decision, the Court of First Instance itself committed manifest errors of assessment and fundamentally misconstrued the evidence before it.

148 The latter claims overlap partially with other grounds put forward in this appeal, namely, in the first place, the first, second and seventh grounds, together with the first part of the third ground, relating to the manner in which the Court of First Instance dealt with some of the evidence before it and, in the second place, the fifth ground, alleging that the

Court of First Instance misconstrued the legal criteria applying to a collective dominant position.

149 It is sufficient to hold in that respect, as is apparent from paragraphs 95, 102 and 133 of this judgment, that, in its examination of the line of argument based on the existence of manifest errors of assessment, the Court of First Instance committed errors of law in relation to both the manner in which some of the evidence was dealt with and the legal criteria applying to a collective dominant position arising from tacit coordination.

150 Consequently, without it being necessary to adjudicate either on the appellants' claims alleging distortion of the evidence or on the question whether the Court of First Instance in fact substituted its own economic assessment in the judgment under appeal for that of the Commission, it must be held that at least that part of the judgment under appeal dealing with the examination of the arguments alleging the existence of manifest errors of assessment is vitiated by errors of law. As regards that part of the judgment under appeal which concerns the inadequate reasoning of the contested decision, it remains necessary to address the sixth ground of appeal.

The sixth ground of appeal, alleging an error of law in that the Court of First Instance applied an incorrect standard of reasoning as regards decisions approving a concentration

– **The judgment under appeal**

151 In paragraphs 255 to 276 of the judgment under appeal, the Court of First Instance summarised the relevant elements of the contested decision for the purpose of examining the first plea raised before it. Paragraph 275 of the judgment reads as follows:

“It follows from the foregoing that [it] was on the basis of product homogeneity, market transparency and also the use of retaliation that the Commission concluded that there was no collective dominant position.”

152 In the judgment under appeal, the Court of First Instance reviewed various sections of the contested decision in order to determine whether it contained reasoning which was adequate to make a finding of a lack of transparency of the market in question, and its reply in each case decided the issue in the negative.

153 The Court of First Instance first of all examined the section of the contested decision which dealt specifically with market transparency. ...

After quoting much of the CFI's reasoning, the ECJ added ...

166 It is clear from settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-42/01 *Portugal v Commission* [2004] ECR I-6079, paragraph 66; and Case C-390/06 *Nuova Agricast* [2008] ECR I-0000, paragraph 79).

167 The institution which adopted the measure is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections (Joined Cases C-465/02 and C-466/02 *Germany and Denmark v Commission* [2005] ECR I-9115, "*Feta*", paragraph 106). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see Case 16/65 *Schwarze* [1965] ECR 877, 888, and Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 16). Thus, the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration (see, to that effect, *Commission v Sytraval and Brink's France*, paragraph 64). Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to

examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations.

168 It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 8(2) of the Regulation the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

169 In that regard, while it is true that the Commission is not obliged, in the statement of reasons for decisions adopted under the Regulation, to take a position on all the information and arguments relied on before it, including those which are plainly of secondary importance to the appraisal it is required to undertake, it none the less remains the case that it is required to set out the facts and the legal considerations having decisive importance in the context of the decision. The reasoning must in addition be logical and must not disclose any internal contradictions (see to that effect, by way of analogy, Case 13/60 *Geitling and Others v High Authority* [1962] ECR 83, 117; Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 78; Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, paragraph 26; and Case 28/87 *Arendt v Parliament* [1988] ECR 2633, paragraphs 7 and 8).

170 It is in the light of these principles that the objections raised by the appellants under the sixth ground of appeal should be examined.

The appellants argued that a Commission decision approving a concentration cannot be annulled on the ground of inadequate reasoning. Their argument interpreted Article 10(6) of the Regulation (which deems a concentration to be compatible with the market if the Commission does not make a decision within the time limits) to mean that a finding of inadequate reasoning on the part of the Commission was tantamount to their having not taken a decision at all. Therefore the concentration should be deemed to have been approved.

The ECJ noted that the operation of Articles 253 and 230 EC made it an imperative procedural requirement that an inadequate statement of reasons should be grounds for an

appeal. Secondary law such as the Merger Regulation should be interpreted consistently with the Treaty. Therefore Article 10(6) did not constitute an exception to the general rule.

The Court further noted that the purpose of the statement of reasons is to allow the persons concerned to ascertain the reasons for the measure taken, and to allow the Community judicature to review the decision. Although it was unfortunate that it appeared from the Commission's decision that there was insufficient evidence against transparency, the CFI was wrong to find that there was inadequate reasoning.

In the context of the industry, it was not necessary for the Commission to spell out a detailed description of each of the factors underpinning the contested decision, such as the nature of the discounts given.

182 The appellants' sixth ground of appeal should therefore be upheld, without it being necessary to adjudicate on the objections referred to in paragraphs 158, 159 and 161 of this judgment.

183 Having regard to the above considerations, the present appeal must be declared to be well founded. . . .

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of 13 July 2006 in Case T-464/04 *Impala v Commission*;**
2. **Refers the case back to the Court of First Instance of the European Communities;**

Notes and questions on *IMPALA*

1. Note the right of a third party to appeal against a decision clearing a merger. Compare third party rights against a decision under article 81(3). See Case book chapter 2.
2. (Points 1 and 3). If the Commission is not clear whether to condemn a merger when the deadline for its decision under stage II is almost up, what should it do? The ECJ held that there is no presumption of guilt or of innocence. As a result of the judgment of the CFI, the Commission became hesitant to send an

SO until it was virtually certain that it could establish the infringements listed in it. This created problems for the parties who were told the case against them only at a late stage.

3. What tone does the ECJ set with this judgment; pro- merger, neutral or anti-merger? Give reasons.
4. (Point 56 {282}). Is a statement of objections a conclusion or statement of issues? (Points 61, 88 & 90-94, 102& 105). Note the importance attached to the fundamental rights of the addressee of a decision.
5. (Point 56, {283}). Are you surprised at the short time left to the Commission to consider the reply to its statement of objections? Give reasons.
6. (Points 61, 63 & 66). Does the judgment of the ECJ apply only to mergers or also to decisions adopted under articles 81 or 82? (Point 69)
7. (Point 55 & 69). Article 230 of the EC Treaty enables the ECJ to review the legality of acts of the Community Institutions on more than one ground:
 - lack of competence,
 - infringement of an essential procedural requirement,
 - infringement of this Treaty or of any rule of law relating to its application,
 - or misuse of powers.

Is the ECJ right to imply that the plaintiff must show manifest error? Was this the only ground alleged by the parties?

8. (Points 66, 90, 91 & 167). Note the multiple references to the speed required to meet the deadlines imposed by the merger regulations. The ECJ recognised that there was little time for the Commission to prepare a decision and put it to the competitors of the merging firms after answering the response to the SO. It seems to have understood the practical difficulty of defending a merger. In fact, the Commission's decision took longer than any other as the Commission was able to stop the clock by asking for more evidence. The appeals took longer still.
9. (Points 69 & 144 – 155). Is this the same standard as allowed for the Commission? Compare *Tetra Laval v. Commission*, C-12/03, Case book p 640 *et seq.*
10. (Point 76). What is the difference between error of law and manifest error of appraisal? Craig, EU Administrative Law, OUP, 2006, p.446 *et seq.*

11. (Point 87). This seems to be a reference to the rule that the ECJ should not consider hypothetical questions under article 234, *Foglio v. Novello II*, [1981] ECR 3045. Paragraphs 10 - 13.
12. (Point 93). Note that in *Microsoft*, the CFI objected to delegation by the Commission of its powers to the monitoring trustee. Does this objection apply to the appointment of a monitoring trustee offered by the parties to a merger to assess whether divestiture has been sufficient?
13. (Point 94). The Court seems to be setting a high bar for the Commission in future cases. The ECJ is very concerned to protect the rights of the defence which it considers is a fundamental principle of the Community. Until they receive the SO the parties are in no position to respond to it or even prepare their response.
14. (Points 104 & 119 *et seq*). See Case Book on collective dominant position. P. 106-111 & 618-645.
15. (Points 117-118 & 143). The ECJ has jurisdiction to decide only questions of law, not of fact, but the standard for finding collective dominance is not a question of fact. Under a system of judicial review, however, the ECJ may not substitute its own appraisal for that of the decision challenged.
16. (Point 120). A “correlative factor” is a link. Note that the Commission goes back to an old judgment of the ECJ rather than relying just on the CFI in *Airtours*. Why?
17. (Point 122). Note that this merger was appraised under the former merger regulation.
18. (Points 122- 134). Can it still be argued that economic analysis is not necessary to apply the concept of a collective dominant position? Do you think the Full Court explained the economic theory well?
19. (Points 123-133). Does the ECJ go further than the CFI had gone in *Airtours* para 62? Note the rejection of mechanical application. Transparency is to be considered, not on its own, but in relation to tacit collusion. Is this the first time that the ECJ has confirmed the conditions specified by the CFI in *Airtours*. Note that the language was not identical
20. (Points 127 and 135). state that at para 251 & 252 of the decision, the Commission noted that the circumstances in question included in particular a close alignment of prices over a period. Would parallel conduct on its own

have sufficed to establish collective dominance on its own? See the previous decisions on alignment such as *Woodpulp*. (C89/85) [1993] ECR [1993] I 1307, para 71 (not in Case Book).

21. (Point 129). What elements have been considered indicative of the presence or likelihood of tacit coordination between competitors?
22. Note that the Grand chamber speaks of “the presence or likelihood” of tacit collusion, not of “capability, tendency” etc. This differs from some other recent cases. Give an example.
23. (Point 131). Does *IMPALA* apply only to mergers or also to Article 82. Does the Grand Chamber overrule *British Airways*?
24. Points 132, 144-147). Note the standard and onus of proof is on the person alleging a significant lessening of competition Is it similar to what was said in earlier cases? See *Microsoft* in CFI at para. 688. Does this result in the CFI having no jurisdiction to substitute its own decision for that of the Commission?
25. (Points 166-167 & 181). Note that the Court is entitled and required to consider procedural but not substantive matters on its own initiative.
26. Do you think that the matters set out at 166 are appropriate?
27. (Points 189 – 190). The first set of proceedings by the Commission took far longer than expected. The Commission had to stop the clock on the basis that the parties had not given it certain information requested. Then the parties waited 2 years for the CFI and had to manage a second procedure by the Commission. Now it has to defend two cases in the CFI based on the merger of the same parties but at different times and in different market conditions. Since the Commission has twice cleared the merger, can the situation be settled so as to avoid the need for a second judgment from the CFI?
28. (Conclusion). Note how different the tone of this judgment is from *Microsoft*. It reads coherently as if all 13 judges were in agreement.
29. Does this reduce the value of *Microsoft* as a precedent?
30. The writing indicates familiarity with economic theory and with the difficulties parties suffer when defending a merger in a short time frame. Is it unusual for the ECJ to do so?
31. This is one of the few cases where the ECJ has overruled the CFI and its Advocate General in a competition case. Is this a sign that it intends to take a

more active role in complex competition cases, at least when
fundamental issues arise, such as fundamental rights of defence?