

**Is the standard of proof imposed by the Community Courts undermining the efficiency of EC merger control? The Sony BMG joint venture case in perspective.**

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**EUSA Tenth Biennial International Conference**

May 17-19, 2007

Le Centre Sheraton – Montréal, Canada

**Authors**

**Van Rompu Ben** – doctoral researcher at the Institute For European Studies (IES, VUB)  
**Pauwels Caroline** – head of the department of Communication Sciences at the Vrije Universiteit Brussel (VUB) and director of SMIT, a research partner in IBBT (Studies on Media, Information and Telecommunication)

**Biography of the authors:**

Ben Van Rompu is a researcher at the Institute for European Studies in Brussels. He is working on a PhD on the role of non-competition considerations in EC antitrust and merger control in the audiovisual and telecommunications sectors.

Prof. dr. Caroline Pauwels heads the department of communications at the Free University of Brussels and is director of SMIT-IBBT. She lectures national and European communication policy. Her main domain of competence is in the field of European Audiovisual policy-making, entertainment economy and convergence and concentration issues in media industries.

## **Abstract**

On 13 July 2006, the European Court of First Instance (CFI) annulled the European Commission's approval of the merger between the music units of Sony and Bertelsmann. In its *Impala* ruling, the CFI severely criticized the 2004 Commission decision because it found that the evidence relied upon by the Commission was not capable of substantiating its conclusion that the Sony BMG joint venture would not create or strengthen a collective dominant position. This judgment is highly significant for at least two reasons. First of all, it has potential implications for the future shape of the music industry, since the already completed concentration, which reduced the major players from five to four, is now being re-examined by the Commission. Secondly, and more importantly, the CFI judgment raises fundamental questions about the standard of proof incumbent on the European Commission when dealing with merger cases. After the CFI's annulment of three prohibition decisions in 2002 (*Airtours*, *Schneider Electric* and *Tetra Laval*), the Sony BMG decision could in fact be seen as an attempt by the Commission to take into account the high burden of proof imposed on it by the Community Courts. The fact that this decision was annulled for not meeting the requisite legal standard for *authorizing* a merger, is therefore both ironic and challenging because it puts the Commission on a knife-edge.

This paper will address this issue by assessing (1) to what extent the *Impala* judgment has actually raised the standard of proof incumbent on the Commission and, subsequently, (2) whether or not *Impala* - seen together with other recent jurisprudence concerning the required standard of proof in merger control - is imposing a too heavy burden on the Commission. Or, to put it more colloquially, this paper will seek to find out whether or not the CFI is imposing a too high standard of proof that the Commission, due to lack of the necessary resources, perhaps cannot meet.

First, the concept of collective dominance will be explained and an overview will be given of the case law on the assessment of collective dominant positions in EC merger control. Second, the Commission's 2004 clearance decision will be discussed. Where relevant, references will be made to previous merger cases in the music industry. Third, the *Impala* judgment will be summarized. Fourth, the judgment will be analyzed, and this in light of the recent jurisprudence of the Community Courts concerning the standard of proof incumbent on the Commission. On the basis of these findings, an answer to the two research questions will be formulated.

## **Keywords**

EC competition policy, merger control, Sony BMG, *Impala*, Community Courts, standard of proof

## I. Introduction\*

On July 13, 2006, the European Court of First Instance (hereafter: CFI) annulled the European Commission (hereafter: Commission)'s decision authorizing the creation of Sony BMG, a joint venture incorporating the worldwide<sup>1</sup> recorded music businesses of Sony and Bertelsmann. In its 2004 clearance decision, the Commission had concluded that the merger would not create or strengthen a collective dominance position on the part of the majors (Universal, Sony BMG, Warner and EMI).<sup>2</sup> The CFI in *Impala v Commission* (hereafter: *Impala*), however, harshly criticized the decision because it found that the evidence relied upon by the Commission was not capable of substantiating this conclusion.<sup>3</sup>

The *Impala* judgment is highly significant for at least two reasons. First of all, it has potential implications for Sony and Bertelsmann as well as for the overall shape of the music industry, since the already completed concentration, which reduced the major players from five to four, is now being re-examined by the Commission.<sup>4</sup> If the Commission were to prohibit the merger, measures could be imposed on Sony and Bertelsmann to undo the transaction. Secondly, and more importantly, the CFI judgment raises fundamental questions about the standard of proof incumbent on the Commission when dealing with merger cases. The Sony BMG decision indeed should be seen in light of the CFI's consecutive annulment of three prohibition decisions in 2002: *Airtours v Commission* (hereafter: *Airtours*)<sup>5</sup>, *Schneider Electric v Commission* (hereafter: *Schneider*)<sup>6</sup> and *Tetra Laval v Commission* (hereafter: *Tetra Laval I*)<sup>7</sup>. The resoluteness by which the CFI criticized the Commission for its analysis of the evidence and questioned the rigor of its decisions in these judgments was unprecedented. First, in *Airtours*, the CFI found that the decision, "*far from basing its prospective analysis on cogent evidence*", was vitiated by a series of errors of assessment. The Commission had concluded that the proposed merger would create a collective dominance position of three major tour operators on the UK market for short-haul package holidays. The CFI, however, bashed the Commission for reaching this conclusion "*without having proved to the requisite legal standard*" that effective competition on this market would be significantly impeded by the transaction.<sup>8</sup> Likewise, in *Schneider Electric* and *Tetra Laval I*, the CFI annulled the respective decisions because they had failed to provide

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\* The authors would like to thank Karen Donders for her valuable comments.

<sup>1</sup> Except for Japan.

<sup>2</sup> *Sony/BMG* (Case COMP/M. 3333) Commission Decision C(2004) 2815 [2005] OJ L62/30

<sup>3</sup> Case T-464/04 *Independent Music Publishers and Labels Association v Commission* ("Impala") [2006] ECR II-2289

<sup>4</sup> On January 31, 2007 Sony and BMG re-notified the joint venture to the Commission (see [2007] OJ C29/12). Even though both parties brought an appeal against the *Impala* judgment before the ECJ, this proceeding has no suspensory effect (see [2006] OJ C326/25).

<sup>5</sup> CFI Case T-342/99 *Airtours v Commission* [2002] ECR II-2585

<sup>6</sup> CFI Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071

<sup>7</sup> CFI Case T-5/02 *Tetra Laval v Commission* ("Tetra Laval I") [2002] ECR II-4381

<sup>8</sup> *Airtours v Commission*, as note 5 above, at para 294

“sufficiently convincing evidence” for the alleged effects of the merger.<sup>9</sup> The Court even considered the “*errors, omissions and inconsistencies*” it had found in the Commission’s analysis to be “*of undoubted gravity*”.<sup>10</sup> Consequently, the CFI concluded once more that the Commission had committed manifest errors of assessment by prohibiting the notified mergers. The three CFI judgments, which were delivered over a five-month period, gave rise to a flood of criticism of the Commission’s merger analysis and opened a debate about the economic soundness of its decisions.<sup>11</sup> Moreover, they acted a catalyst for a far-reaching reform of EC merger control, as former European Commissioner for competition Mario Monti acknowledged that the judgments exposed significant errors:

*“I believe that, in a certain time, with more hindsight, we will say that these judgments, no matter how painful, came at the right time. Indeed, there are no doubt lessons to be drawn from the judgments: in particular, it is clear that the CFI is now holding us to a very high standard of proof, and this has clear implications for the way in which we conduct our investigations and draft our decisions.”<sup>12</sup>*

In this regard, the detailed economic analysis that was undertaken by the Commission in the Sony BMG case should be seen as characteristic for the more central role that was given to economics thanks to the merger control reform.<sup>13</sup> The new EC Merger Regulation (hereafter: ECMR) clearly recognized the need for a sound economic framework<sup>14</sup>, which resulted in e.g. the publication of the Horizontal Merger Guidelines<sup>15</sup> and the appointment of a Chief Economist and an accompanying team of economists to advance the use of economics in the Commission’s decision-making.<sup>16</sup> The Sony BMG decision could furthermore be seen as an attempt to comply with the strong felt standard of proof imposed on the Commission by the Community Courts. Indeed, while the Commission expressed concerns about the high degree of concentration in the music industry, it concluded that the evidence available was “*not sufficiently strong*” to prove collective dominance and thus approved the merger.<sup>17</sup> The fact that the decision was annulled for not meeting the requisite legal standard for *authorizing* a

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<sup>9</sup> *Schneider Electric v Commission*, as note 6 above, at para 394; *Tetra Laval I*, as note 7 above, at para 336

<sup>10</sup> *Schneider Electric v Commission*, as note 6 above, at para 404

<sup>11</sup> F.E.G. Diaz, “The Reform of European Merger Control: *Quid Novi Sub Sole?*” [2004] 27 World Competition 177-199

<sup>12</sup> M. MONTI, “Merger control in the European Union: a radical reform”, speech given at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002.

<sup>13</sup> G. Aigner, O. Budzinski and A. Christiansen, “The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after Sony/BMG and Impala?” (2006) 2 <<http://ssrn.com/abstract=933548>> accessed 8 May 2007>; S. Baxter and F. Dethmers, “Collective Dominance Under EC Merger Control – After Airtours and the Introduction of Unilateral Effects is There Still a Future for Collective Dominance?” [2006] 27 ECLR 151-152; N. Levy, “Mario Monti’s Legacy in EC Merger Control” [2005] 1 Competition Policy International 123-125

<sup>14</sup> Council Regulation (EC) 139/2003 of 20 January 2004 on the control of concentrations between undertakings (“ECMR”) [2004] OJ L24/1, at recital 28

<sup>15</sup> Commission (EC) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/3

<sup>16</sup> A. Christiansen, “The Reform of EU Merger Control – fundamental reversal or mere refinement?” (2006) <<http://ssrn.com/author=369249>> accessed 8 May 2007>; N. Levy, *l.c.*, 123-125

<sup>17</sup> P. Eberl, “Following an in-depth investigation the Commission approved the creation of the Sony/BMG music recording joint venture on 19 July 2004” (2004) 3 Competition Policy Newsletter 10

merger, is therefore both ironic and challenging because it puts the Commission on a knife-edge.

This paper will address this issue by assessing (1) to what extent the *Impala* judgment has actually raised the standard of proof incumbent on the Commission and, subsequently, (2) whether or not *Impala* - seen together with other recent jurisprudence concerning the required standard of proof in merger control - is imposing a too heavy burden on the Commission. Or, to put it more colloquially, this paper will seek to find out whether or not the CFI is asking a too high standard of proof that the Commission, due to lack of the necessary resources, perhaps cannot meet.

In what follows, first of all, the concept of collective dominance will be explained and an overview will be given of the case law on the assessment of collective dominant positions in EC merger control. Second, the Commission's 2004 clearance decision will be discussed. Where relevant, references will be made to previous merger cases in the music industry. Third, the *Impala* judgment will be summarized. Fourth, the judgment will be analyzed, and this in light of the recent jurisprudence of the Community Courts concerning the standard of proof incumbent on the Commission. On the basis of these findings, an answer to the two research questions will be formulated.

## **II. The assessment of collective dominance in EC merger control**

Both the concept of collective dominance as the Commission's appraisal of a post-merger collective dominant position under the old Merger Regulation (Regulation 4068/89<sup>18</sup>) as well as under the current ECMR has largely been developed by the jurisprudence of the Community Courts. In what follows, a brief overview will be given of this evolution, as this provides the needed framework against which the Commission's analysis of the Sony BMG merger must be held.

### **2.1 The concept of collective dominance**

The concept of collective (or oligopolistic) dominance can be defined in opposition to single-firm dominance, which the ECJ described as:

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<sup>18</sup> Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/13

*“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.*<sup>19</sup>

The obvious difference is that, in the situation of a collective dominant position, the economic strength is collectively held by a small group of firms that have high market shares but are not individually dominant. A collective dominant position can be created or strengthened as a result of a horizontal merger in a concentrated market. This may lead to a significant impediment of competition if the structural changes caused by the merger increase the likelihood of parallel behavior between the remaining undertakings (e.g. on matters such as price, quality or production output).<sup>20</sup> Indeed, in a situation of collective dominance, the parties to the oligopoly may favor to coordinate their behavior - and thus to compete less vigorously - as this will enable them to enjoy higher prices and profits.<sup>21</sup> As such, the legal concept of collective dominance is closely related to the economic concept of collusion.<sup>22</sup> The competing undertakings can either explicitly or tacitly agree to adhere to a common policy, with the understanding that any deviation from this policy would trigger some retaliation. In the case of tacit collusion, this will not amount to an explicit agreement or concerted practice (within the meaning of Article 81 EC): the undertakings will rather act *as if* they were part of a cartel.

## **2.2 Evolution of the legal test for the assessment of collective dominance/coordinated effects**

At the outset, it was unclear whether the old Merger Regulation (Regulation 4068/89) should apply to concentrations leading to the creation or strengthening of a collective dominance position. From a textual point of view this was disputable, as the notion of “collective dominance” was not mentioned in the Regulation. Furthermore, the substantive test in Article 2(3) only referred to single-firm dominance.<sup>23</sup> However, this did not prevent the Commission

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<sup>19</sup> ECJ Case 27/76 *United Brands Company v Commission* [1978] ECR I-207, at para 65

<sup>20</sup> S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell, London, 1999) 149; I. Van Bael and J.-F. Bellis, *Competition Law of the European Community* (4<sup>th</sup> edn Kluwer Law International, The Hague, 2005) 819

<sup>21</sup> A. Jones and B. Sufrin, *EC Competition Law: Text, Cases, and Materials* (Oxford University Press, Oxford 2001) 769; Europe Economics, “Study on Assessment Criteria for Distinguishing between Competitive and Dominant Oligopolies in Merger Control”, Final Report for European Commission DG Enterprise (2001) 2

<sup>22</sup> G. Aigner, O. Budzinski and A. Christiansen, *l.c.*; M. Ivaldo, B. Julien, P. Rey, P. Seabright and J. Tirole, “The Economics of Tacit Collusion”, Final Report for European Commission DG Competition (2003); F. Polverino, “Assessment of Coordinated Effects in Merger Control: between Presumption and Analysis”, SSRN working paper (2006) <http://ssrn.com/abstract=901688> accessed 8 May 2007>

<sup>23</sup> “A concentration which creates or strengthens 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 shall be declared incompatible with the common market”(emphasis added).

from putting into practice its view that the Merger Regulation authorized it to act against collective dominance cases.

The Commission examined oligopolistic markets under the Merger Regulation for the first time in 1992 when investigating a merger between Nestlé and Perrier<sup>24</sup>, both active in the French market for bottled water. Two transactions were notified: the takeover of the French undertaking Source Perrier by the Swiss food giant Nestlé and the agreement between Nestlé and BSN (another major supplier on the French source water market) to sell one of the main sources of Perrier to BSN following the merger. The Commission believed that these transactions would alter the market structure in such a way that a duopolistic dominant position on the French bottled water market would be created. It referred in essence to the high market shares of Nestlé and BSN, to the lack of sufficient competitive counterweight and to the increased dependency of retailers and wholesalers on the range of brands of Nestlé and BSN.<sup>25</sup> Hence, the notified concentration was only deemed compatible with the common market after Nestlé offered substantial divestiture commitments. As anticipated above, the Commission's Decision in *Nestlé/Perrier* triggered a debate about the question whether or not Article 2(3) of the Merger Regulation is applicable to cases of collective dominance. On the one hand, there were the proponents of a literal interpretation of this provision. On the other hand, there were those who followed the Commission's argumentation by stressing that the purpose of the Merger Regulation would be seriously undermined if collective dominance positions were excluded from its scope<sup>26</sup>.

The ECJ, in *France v Commission* (hereafter: *Sali & Kalz*)<sup>27</sup>, clearly favored the Commission's approach, stressing that Article 2 of the Merger Regulation needs to be interpreted by reference to its purpose and general structure.<sup>28</sup> Referring to the preambles of the Regulation, the ECJ consequently held that the purpose of this Regulation would be partially frustrated if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by it.<sup>29</sup> As a result, it was firmly established that the Merger Regulation equally applies to collective dominant positions. The approach to collective dominance since then has evolved considerably.

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<sup>24</sup> *Nestlé/Perrier* (Case IV/M.190) Commission decision of 22 July 1992 [1992] OJ L56/1; M. Clough, "Collective Dominance – The Contribution of The Community Courts" in M. Hoskins and W. Robinson (eds.) *A True European: Essays for Judge David Edward* (Hart Publishing, Portland, 2003) 175-177

<sup>25</sup> *Nestlé/Perrier*, as note 24 above, at para 108

<sup>26</sup> E. Navarro, A. Font, J. Folguera and J. Briones, *Merger Control in the European Union: Law, Economics and Practice* (2<sup>nd</sup> edition, Oxford University Press, Oxford, 2005), 209-210

<sup>27</sup> ECJ Case 30-95 *France and others v Commission ("Kali & Salz")* [1998] ECR I-1375

<sup>28</sup> *Ibid.*, at para 168

<sup>29</sup> *Ibid.*, at para 171

In *Gencor/Lonrho*<sup>30</sup>, the CFI made clear that, in order to substantiate a finding of collective dominance, the Commission is not required to demonstrate the existence of structural links between the undertakings concerned. According to the Court, the existing relationship could simply be one of economic interdependence.<sup>31</sup> The Commission's prohibition decision, appealed by Gencor on this particular ground, was therefore upheld. With this ruling, the CFI not only elucidated its past rulings on the matter<sup>32</sup>, it moreover brought the concept of collective dominance in alignment with economic thinking about tacit collusion.<sup>33</sup>

The next, and undoubtedly the most important milestone in the development of the concept of collective dominance was the CFI judgment in *Airtours*.<sup>34</sup> Airtours, a UK based tour operator and supplier of package holidays, sought to acquire full control over First Choice, one of its competitors. The Commission prohibited the proposed merger because it would create a collective dominant position in the UK market for short-haul foreign package holidays that would significantly distort competition.<sup>35</sup> To substantiate its finding of collective dominance, the Commission primarily referred to the assertions that the merger would lead to a higher degree of market concentration<sup>36</sup>, that it would increase the degree of transparency and interdependence<sup>37</sup> and that it would further marginalize the smaller operators or new entrants<sup>38</sup>. It is striking, however, that the Commission's assessment appeared to be strongly based on the rational incentives that existed for the oligopoly members to behave in an anti-competitive way.<sup>39</sup> In this regard, the Commission clearly stated that: "*it is not a necessary condition of collective dominance for the oligopolists always to behave as if there were one or more explicit agreements (...) between them. It is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act - individually - in ways which will substantially reduce competition between them*".<sup>40</sup> The Commission even went as far as to argue that, because it found that there were strong incentives to collude, the existence of a strict punishment mechanism was not a necessary condition for a finding of

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<sup>30</sup> CFI Case T-102/96 *Gencor v Commission* [1999] ECR II-753

<sup>31</sup> *Ibid.*, at para 276.

<sup>32</sup> The applicant had argued, on the contrary, that the existence of structural links was an essential requirement for findings of collective dominance, hereby referring to the CFI judgment in the *Flat Glass* case (Joined Cases T-68/89, T-77/89 and T-78/89 SIV and Others v Commission [1992] ECR II-1403). The Court stressed, however, that it had only mentioned links of a structural nature in this former judgment by way of example. It thus did not lay down that such links must exist in order for a finding of collective dominance to be made. *Ibid.*, at para 273

<sup>33</sup> J. Cook and C. Kerse, *EC Merger Control* (4<sup>th</sup> edition, Sweet & Maxwell, London, 2005) 219; Europe Economics, *l.c.*, 3-4

<sup>34</sup> CFI Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; S. Baxter and F. Dethmer, *l.c.*; M. Clough, *o.c.*, 180-185

<sup>35</sup> *Airtours/First Choice* (Case IV/M.1524) Commission decision of 22 September 1999 [2000] OJ L93/1

<sup>36</sup> *Ibid.*, at para 169

<sup>37</sup> *Ibid.*, at para 190

<sup>38</sup> *Ibid.*, at para 171

<sup>39</sup> E. Navarro, A. Font, J. Folguera and J. Briones, *o.c.*, 200-201

<sup>40</sup> *Airtours/First Choice*, as note 35 above, at para 54. In *Tetra Laval II*, the ECJ elaborated on this issue by stressing that the Commission, when considering the likelihood of the adoption of certain future conduct, is not only required to take into account the incentives to adopt such conduct but also the factors "liable to reduce, or even eliminate, those incentives". ECJ Case C-12/03 P *Commission v Tetra Laval ("Tetra Laval II")* [2005] ECR I-978, at para 74

collective dominance in this case<sup>41</sup>. It hereby referred to the fact that, in its *Gencor* judgment, the CFI remained silent as regards the relevance of a retaliation mechanism.<sup>42</sup> The CFI took a different stance, however, stressing that any assessment of an alleged collective dominant position must not only view that position statically, but must also consider whether this collusion is sustainable over time.<sup>43</sup> In that context, the Court clarified that the Commission is not obliged to prove that there is a specific retaliation mechanism, but that it must nonetheless establish that deterrent factors exist.<sup>44</sup>

Further elaborating on the substantive test to be used by the Commission, the CFI put forward three conditions that are essential for a finding of collective dominance. First, there must be sufficient market transparency so that each member of the dominant oligopoly has the ability to know the other members' market conduct. This is a requisite for being capable of monitoring whether or not the other members are adopting the common policy. Second, there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy. As already mentioned, this condition furthermore requires that the deterrents are capable of making coordination sustainable over time. Third, the benefits of coordination must not be jeopardized by the action of current and future competitors or consumers.<sup>45</sup> By spelling out these three criteria, the CFI thus gave explicit guidance on the elements the Commission needs to establish before it can reach the conclusion that a merger would result in the creation of a collective dominant position. In the past, the Commission applied a non-binding list of factors as indicators of collective dominance, which made it difficult to predict the outcome of its analysis. Without precluding the Commission from taking into account a wide range of factors, the *Airtours* judgment thus made clear which conditions should attract prominent consideration.<sup>46</sup> That being said, the three conditions still leave ample room for interpretation, as will be demonstrated by the analysis of the *Impala* judgment below.

Two more recent evolutions also need to be highlighted. As explained above, the trilogy of judicial defeats in 2002 acted as a catalyst for a series of reforms that culminated most prominently in the adoption of a revised ECMR in 2004. The Commission's defeat in *Airtours* in particular added fuel to the debate about the articulation and the scope of the dominance test of the old Merger Regulation (cf. *supra*).<sup>47</sup> With a view to ensure legal

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<sup>41</sup> *Airtours/First Choice*, as note 35 above, at para 55; F. Polverino, *l.c.*, 22

<sup>42</sup> *Airtours/First Choice*, as note 35 above, at para 150. Indeed, in *Gencor*, the Court only mentioned that in a situation of collective dominance, each member is aware that highly competitive action on its part “would provoke identical action by the others, so that it would derive no benefit from its initiative” (*Gencor v Commission*, as note 30 above, at para 276). As Polverino argues, this appears only a weak reference to a punishment mechanism (F. Polverino, *l.c.*, 22).

<sup>43</sup> *Airtours v Commission*, as note 5 above, at para 192

<sup>44</sup> *Ibid.*, at para 195

<sup>45</sup> *Ibid.*, at para 62

<sup>46</sup> N. Levy, *l.c.*, 121

<sup>47</sup> See e.g. F.E.G. Diaz, *l.c.*

certainty, the Commission therefore proposed to modify the substantive test for the compatibility assessment of a concentration. From May 1, 2004 on the test has been whether or not a notified concentration would “*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*” (Article 2(2) and (3) ECMR), which is a notable departure from the strong emphasis the old Merger Regulation put on dominance.<sup>48</sup> Of further relevance are the 2004 Horizontal Merger Guidelines<sup>49</sup>, which were also part of the EC merger control reform package. Interestingly, these guidelines replaced the formerly used concepts of collective and single-firm dominance by making a differentiation between, respectively, “coordinated effects” and “non-coordinated effects” instead.<sup>50</sup> Furthermore, it should be noted that the Commission, in the section on coordinated effects, adopted the three-prong *Airtours* test and codified other principles that were set out in the abovementioned jurisprudence. In addition, the guidelines have provided for a more systematic approach by listing relevant factors that the Commission will consider in its assessment (e.g. product homogeneity, customer characteristics and stability of the demand and supply conditions).<sup>51</sup> Even though the Commission has been careful not to establish a rigid set of criteria, more recent decisions have clearly demonstrated the importance it attributes to most, if not all, of the market characteristics mentioned in the Horizontal Merger Guidelines.<sup>52</sup>

### **III. The Sony BMG Commission Decision**

In January 2004, Sony and Bertelsmann notified their plans to merge their recorded music businesses worldwide (except for Japan) to the Commission. The proposed concentration was still assessed under the old merger regulation, Regulation 4064/89.<sup>53</sup> Because the Commission found that the transaction raised serious collective dominance concerns, it decided to initiate an in-depth investigation.<sup>54</sup> This hardly came as a surprise: the Commission had already entertained similar concerns in the context of the 1998 merger between Seagram and Polygram, that reduced the number of majors from six to five, and in the context of the withdrawn EMI/Time Warner merger (cf. *supra*). In the *Seagram/Polygram* case, however, the Commission considered that the concentration would not affect the

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<sup>48</sup> See note 23

<sup>49</sup> Commission (EC) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/3

<sup>50</sup> *Ibid.*, at para 22. The terms “coordinated” and “non-coordinated” effects were first elucidated in the US Horizontal Merger Guidelines.

<sup>51</sup> *Ibid.*, at paras 39-57. These assessment factors are broadly in line with economic literature on tacit collusion. G. Aigner, O. Budzinski and A. Christiansen, *i.c.*, 8

<sup>52</sup> J. Cook and C. Kerse, *o.c.*, 222

<sup>53</sup> Hence, the re-notified Sony BMG merger is again being assessed under the old Merger Regulation (Regulation 4064/89).

<sup>54</sup> Commission press release IP/04/200 of 12 December 2004 “Commission opens in-depth investigation into Sony/Bertelsmann recorded music venture”

European market because of Polygram's limited market presence outside the United States.<sup>55</sup> In Sony BMG, on the contrary, the Commission issued a Statement of Objections that confirmed its initial concerns. Yet, in light of the parties' response to the objections the Commission remarkably changed its position and eventually cleared the merger by a decision of July 19, 2004.<sup>56</sup> After the approval of the merger by competition authorities around the world (e.g. the United States, Australia, Canada, Switzerland, Poland and South Africa)<sup>57</sup>, the Commission thus too gave green light for the creation of Sony BMG, a full function (50-50) joint venture incorporating the parties' activities in the discovery and development of artists (A&R)<sup>58</sup> and in the marketing and sale of sound recordings.

The Commission's assessment focused on the question whether the notified concentration would significantly impede competition as a result of the creation or strengthening of a (collective) dominant position in the markets for physical recorded music (including A&R, promotion, sales and marketing), for licenses for online music and for online music distribution. In addition, the Commission analyzed whether the Sony BMG joint venture would have spillover effects in the music publishing markets.<sup>59</sup>

As regards the possible strengthening of an existing collective dominant position in the recorded music market, the Commission assessed whether coordinated price policy of the majors could be identified. For this purpose, price developments over the last three to four years were considered. The Commission particularly focused on the five largest EU Member States, namely the United Kingdom, France, Germany, Italy and Spain.<sup>60</sup> Firstly, the Commission examined the development of the average wholesale net prices for the top 100 single albums of each major. Even though it believed that these average prices give a representative picture of the major's pricing behavior<sup>61</sup>, the Commission in addition analyzed, secondly, whether any parallelism could have been reached on the basis of list prices, the so-called Published Prices to Dealers (hereafter: PPDs). Thirdly, it considered whether the different major's discounts were aligned and sufficiently transparent to allow efficient monitoring of any coordinated price policy.<sup>62</sup>

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<sup>55</sup> *Seagram/Polygram* (Case IV/M.1219) Commission Decision [1998] OJ C309/8, at paras 26, 29

<sup>56</sup> *Sony/BMG*, as note 2 above

<sup>57</sup> Also the Czech Republic, Hungary, Romania and Mexico. *Impala*, as note 3 above, at para 229

<sup>58</sup> These are the so-called Artist & Repertoire (A&R) activities, in essence the music's industry's research and development.

<sup>59</sup> Music publishing consists mainly of the acquisition by publishers of music rights and their subsequent exploitation. *Ibid.*, at para 40.

<sup>60</sup> The Commission also briefly analyzed the smaller markets in the Netherlands, Sweden, Ireland, Austria, Belgium, Denmark, Finland, Norway, Portugal and Greece. It concluded the market structure in these markets to be comparable to the bigger countries. Consequently, it found that the main conclusions of the assessment of the five largest markets were also valid for the smaller countries. *Ibid.*, at paras 148-153.

<sup>61</sup> *Ibid.*, at para 70.

<sup>62</sup> Two main types of discounts were identified: invoice discounts (file and campaign discounts on the invoice level) and retrospective discounts (discounts on a volume level).

The Commission's economic analysis of price developments in the five main European markets revealed certain indications of coordinated behavior. On the basis of the average net prices, the Commission found some parallelism and a relatively similar price development of the majors in all these Member States.<sup>63</sup> Furthermore, the Commission concluded that PPDs are transparent enough to enable monitoring of other majors' list pricing. The parties had argued to the contrary that they use more than 50 PPDs in the investigated markets (with the exception of Spain).<sup>64</sup> The Commission, however, stressed that the top 5 PPDs of both parties account for the greater part of their total sales. Given the fact that the PPDs are available in the majors' catalogues, it consequently found that they could have been used to align the list prices of the best selling albums.<sup>65</sup> Nevertheless, the Commission repeatedly emphasized that these observations were as such not convincing enough to constitute sufficient evidence of coordinated pricing behavior in the past. In addition, it countered its conclusions on the average net prices and PPDs with the finding that Sony and BMG's discounts were not sufficiently aligned. Even though both undertakings have a system of weekly sale reports, the Commission could not establish that these reports ensured a sufficient degree of transparency of competitors' campaign discounts.<sup>66</sup>

As the assessment of the majors' price development did not yield persuasive evidence of existing collective dominance, the Commission further analyzed whether features facilitating collective dominance characterize the markets for recorded music. Three elements were considered: product homogeneity, market transparency and past retaliatory action. As regards product homogeneity, the market investigation revealed that the way in which albums are priced and marketed on the wholesale level appear to be quite standardized. The Commission believed, however, that the heterogeneity of the content makes tacit collusion difficult since it would require monitoring on the level of individual albums.<sup>67</sup> As regards market transparency, the Commission referred to the publication of weekly hit charts and Sony and BMG's weekly sale reports (which include information on competitors) as devices in the market that might facilitate the monitoring of an agreement. Nevertheless, it concluded that there was not sufficient evidence that the majors had overcome certain deficits as regards the transparency of discounts. In particular, the Commission stressed once more that in relation to campaign discounts, monitoring on album level would be needed.<sup>68</sup> As regards retaliation, the Commission identified two measures that could represent possibilities for retaliation against any "cheating" major: (1) a return to competitive behavior or (2) the exclusion of the deviator

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<sup>63</sup> *Ibid.*, at paras 74-75, 80-81, 88-89, 95-96, 102-103

<sup>64</sup> In the case of Spain, the parties submitted that the amount of PPDs they use is in the range between 20 and 50 (the exact number is not disclosed in the published decision for reasons of confidentiality). *Ibid.*, at para 104

<sup>65</sup> *Ibid.*, at paras 76, 83, 90, 97, 104

<sup>66</sup> *Ibid.*, at para 80, 87, 94, 101, 108

<sup>67</sup> *Ibid.*, at para 110

<sup>68</sup> *Ibid.*, at paras 111-113

from compilation joint ventures (e.g. the refusal to license tracks for the deviator's compilation albums). The Commission found no evidence, however, that such means have been used or threatened in the past.<sup>69</sup> In light of all these considerations, the Commission concluded that – notwithstanding the finding that the recorded music markets display certain features that indicate a conduciveness to collective dominance – there was "*not sufficient evidence to establish that the proposed concentration would lead to a strengthening of an existing collective dominant position*".<sup>70</sup>

The same conclusion was drawn with regard to the possible creation of collective dominance in the market for recorded music. The Commission acknowledged that in some oligopolistic markets a reduction of the players might lead to the creation of a collective dominant position. It stressed, however, that the features of the market remain decisive when making this assessment. Given the fact that no real evidence was found that the reduction of major recording companies from five to four would significantly facilitate transparency and retaliation, the Commission accordingly concluded that the concentration was not likely to create a dominant position - notwithstanding the existence of factors conducive to collusion.<sup>71</sup> Interestingly, the Commission had reached the opposite conclusion in the context of its examination of the merger between EMI and Time Warner in 2000. After opening an in-depth investigation<sup>72</sup>, the Commission preliminary found that this merger would lead to the creation of a collective dominant position in the recorded music market, as the reduction of majors would make an already "very transparent" market even more predictable.<sup>73</sup> A final decision, however, was never taken: the parties withdrew their notification at the end of the second phase investigation.<sup>74</sup> Notwithstanding the fact that precedents do not bind the Commission and that the industry conditions were different four years ago, this inconsistency is certainly remarkable.

In the remaining part of its decision, the Commission briefly addressed additional competition concerns that were raised by third parties. Firstly, it considered whether the concentration would lead to a single dominant position in some national markets (Germany, Netherlands, Belgium, Luxembourg and France) due to the joint venture's vertical relationship to the media interests of Bertelsmann. The Commission found, however, that Sony BMG would not

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<sup>69</sup> *Ibid.*, at paras 114-118

<sup>70</sup> *Ibid.*, at para 154

<sup>71</sup> *Ibid.*, at para 157

<sup>72</sup> Commission press release IP/00/617 of 14 June 2000, "Commission opens full investigation into Time Warner/EMI merger"

<sup>73</sup> V. Rabassa, "The Commission's review of the media merger wave" (2001) 1 Competition Policy Newsletter 49; *Impala*, as note 3 above, at para 331

<sup>74</sup> The fact that EMI and Time Warner gave up the merger was not only due to the Commission's alarming preliminary conclusions, but should also be seen as a concession to enable Time Warner and AOL to merge. H. Ranaivoson, "Cultural Diversity and Competition Policy in the Recording Industry", paper presented at the Fourth International Conference on Cultural Policy Research, 12-16 July 2006, 8

reach the threshold of single dominance, in particular because Universal is an equally strong competitor in these markets.<sup>75</sup> With regard to the online music markets, the Commission, secondly, concluded that there was not sufficient evidence of an existing collective dominant position in the markets for licenses of online music. Moreover, it found it unlikely that such a position would be created since prices are currently in flux as a result of the developing state of the market.<sup>76</sup> It will be interesting to see how the Commission will address this issue in its new Sony BMG decision, since it already indicated that it would take into account the growing sales of online music since 2004.<sup>77</sup> Thirdly, the Commission dismissed the claim that Sony, as a result of the concentration, would obtain a single dominance position on the national markets for the distribution of online music. It mainly argued that the Sony Connect music downloading service currently does not have a share of the market – it was only launched in three EU Member States in July 2004 – whereas other players (e.g. Apple's iTunes) already gained a certain position.<sup>78</sup> Finally, the Commission assessed the risk that the notified transaction would have as its effect the coordination of the activities of Sony's and Bertelsmann's music publishing activities, which were excluded from the scope of the joint venture. It found that, since collecting societies mainly carry out the administration of the publishing rights, there was little room for Sony and Bertelsmann to coordinate. Consequently, the Commission also refuted the concern of possible spillover effects.<sup>79</sup>

#### **IV. The CFI *Impala* judgment**

The Commission's clearance decision was appealed to the CFI by the Independent Music Publishers and Labels Association (Impala), an international trade association representing over 2500 independent record companies and music publishers. The CFI entirely focused on the first two pleas that were put forward by Impala, namely the claim that the Commission made a manifest error of assessment and an error of law by finding that (1) the Sony BMG merger would not strengthen an existing collective dominant position in the market for recorded music and (2) the merger would not create such a position.<sup>80</sup> Both claims were examined in light of the Commission's findings relating to market transparency and the use of retaliation, as the CFI observed that these were the essential grounds for the Decision.<sup>81</sup> What is more, these two elements constitute the most prominent criteria of the *Airtours* test. In its

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<sup>75</sup> *Ibid.*, at paras 163-164

<sup>76</sup> *Ibid.*, at paras 168-170

<sup>77</sup> Commission press release IP/04/200 of 12 December 2004 "Commission opens in-depth investigation into Sony/Bertelsmann recorded music venture"

<sup>78</sup> *Sony/BMG*, as note 2 above, at paras 173-175

<sup>79</sup> *Ibid.*, at paras 179,182

<sup>80</sup> *Ibid.*, at para 31

<sup>81</sup> *Ibid.*, at paras 275-277

judgment, delivered in July 2006, the CFI found both grounds of annulment to be well founded on the basis of the following considerations.

a) The strengthening of a pre-existing collective dominant position

As regards the first plea, the Court first and foremost concluded that the assertion that the markets for recorded music are not sufficiently transparent to permit a collective dominant position “*is not supported by a statement of reasons of the requisite legal standard and is vitiated by a manifest error of assessment*”.<sup>82</sup> The Court not only criticized the Decision for its overall lack of evidence, but also held that the available evidence, as mentioned in the Decision, is not capable of supporting the conclusions that are drawn from them.

Firstly, the CFI preliminary remarked that the section of the Decision dealing with the examination of transparency is surprisingly succinct, as it only contains three recitals.<sup>83</sup> Secondly, on a more substantial level, the Court emphasized that the Commission principally mentioned factors that “*far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent*”.<sup>84</sup> The Court even went as far as to argue that the Commission had underestimated the importance of these factors. In particular, it emphasized that the observed sources of price transparency (e.g. the public nature of PPDs and the limited number of reference prices) are capable of giving rise to a high level of transparency.<sup>85</sup> The Court furthermore dismissed the finding that list prices of albums are rather aligned as a “*prudent conclusion to say the least*” since “*the alignment was in fact very marked*”.<sup>86</sup> Thirdly, and subsequently, the CFI heavily criticized the Commission for countering these sources of transparency with the “*rather limited and unsubstantiated*” assertion that campaign discounts could reduce transparency and make tacit collusion more difficult.<sup>87</sup> As discussed above, the Commission argued that there was no collective dominant position owing to the deficits found in actual transparency. The only element of opacity mentioned in the Decision, however, is the assertion that campaign discounts are less transparent so that price coordination would require further monitoring on the level of individual albums (cf. *supra*). The Court invalidated this reasoning in a forceful manner:

“*Clearly, such vague assertions, which fail to provide the slightest detail of, in particular, the nature of campaign discounts, the circumstances in which such discounts might be applied, their degree of opacity, their size or their impact on*

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<sup>82</sup> *Ibid.*, at para 475

<sup>83</sup> *Ibid.*, at para 289

<sup>84</sup> *Ibid.*, at para 290

<sup>85</sup> *Ibid.*, at para 347

<sup>86</sup> *Ibid.*, at para 299

<sup>87</sup> *Ibid.*, at para 294

*price transparency, cannot support to the requisite legal standard the finding that the market is not sufficiently transparent to allow a collective dominant position*”<sup>88</sup>

*“(T)he few assertions relating to campaign discounts (...), in so far as they are imprecise, unsupported, and indeed contradicted by other observations in the Decision, cannot demonstrate the opacity of the market or even of campaign discounts.”*<sup>89</sup>

Consequently, the CFI maintained that the evidence put forward in the decision could not support the conclusions which the Commission drew from them. It stressed in particular that the findings concerning the degree of opacity and the relevance of campaign discounts are vitiated by a manifest error of assessment. As regards the opacity of campaign discounts, the Court pointed out that the retailer’s responses to the Commission’s market investigation indicate a higher degree of transparency than that referred to in the Decision.<sup>90</sup> Furthermore, it rejected the Commission’s assumption that the criteria according to which campaign discounts are generally granted are so numerous that they render their application opaque. While admitting that the combinations of the criteria increase the hypothetical situations, the Court emphasized that the Commission had failed to demonstrate that the exercise would be excessively difficult for a market professional.<sup>91</sup> As regards the relevance of campaign discounts, the CFI was just as unequivocal in criticizing the Decision. The Court rebuked the Commission for not investigating whether campaign discounts represent a sufficiently significant element of the price of the albums to be capable of eliminating the necessary market transparency.<sup>92</sup>

After a thorough review of the findings relating to market transparency, the CFI briefly examined the Commission’s assessments concerning retaliation. These assessments constitute the second essential ground on which the Commission concluded that there was no collective dominant position. The CFI observed, however, that the Commission was not in a position to indicate the slightest step it had undertaken to substantiate the assertion that no retaliation measures have been used or threatened in the past. Moreover, the Court pointed out that the Commission had not identified any case of a breach of the common pricing policy.<sup>93</sup> Hence, the CFI concluded that the analysis in the Decision relating to retaliation is, like the one

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<sup>88</sup> *Ibid.*, at para 289

<sup>89</sup> *Ibid.*, at para 320

<sup>90</sup> *Ibid.*, at para 375 According to the Court, the retailer’s responses, far from being expressly negative, clearly reveal quite strong transparency in both PPDs and discounts. (385)

<sup>91</sup> *Ibid.*, at para 429

<sup>92</sup> The CFI firmly stated that the Commission “ought at least to have explained in the Decision how, in spite of their minimum real effect on prices and the presence of the numerous factors of transparency identified in the Decision, the campaign discounts were capable of eliminating the sufficient transparency of the market necessary to permit a collective dominant position”. *Ibid.*, at para 457

<sup>93</sup> *Ibid.*, at paras 470-471

relating to market transparency, vitiated by an error of law and a manifest error of assessment.<sup>94</sup>

b) The creation of a collective dominant position

As regards the second plea, the CFI equally found that the Commission's fact-finding and analysis were not capable of supporting its conclusions. The Court stressed that the question whether the Sony BMG merger would create a collective dominant position in the recorded music market raised serious problems, requiring a thorough examination. According to the Court, such an examination was not carried out: the Decision at the most provides observations that are "*superficial, indeed purely formal*".<sup>95</sup> The CFI, for instance, criticized the Commission for not investigating if the merger would enhance market transparency so to permit coordinated behavior.<sup>96</sup> This shortcoming is even more striking in light of the Commission's observations about the EMI/Time Warner merger (cf. *supra*). Concerning the issue of retaliation, the CFI moreover found that the Commission had misinterpreted the condition set out in *Airtours*. In its Decision, the Commission simply referred to the examination it carried out in respect of the existence of a collective dominant position (cf. *supra*). The Court found this reasoning to be erroneous, as the condition is perfectly capable of being satisfied without there having been any retaliatory measures in the past.<sup>97</sup> Since this sheds new light on the evidentiary burden required to satisfy the *Airtours* test, this point will be discussed in more detail in the following section.

In light of all the foregoing considerations, the CFI concluded that inadequate reasoning and a manifest error of assessment vitiated the Decision. Consequently, it found that the Decision had to be declared void.<sup>98</sup>

## V. The standard of proof incumbent on the Commission in EC merger control

The *Impala* judgment raises several fundamental questions concerning the standard of proof in EC merger control that go beyond the facts of the Sony BMG case. These issues therefore deserve closer attention. In what follows, it will be assessed whether or not *Impala* has actually increased the standard of proof incumbent on the Commission, be it directly (as some

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<sup>94</sup> *Ibid.*, at para 473

<sup>95</sup> *Ibid.*, at para 528

<sup>96</sup> *Ibid.*, at para 532

<sup>97</sup> *Ibid.*, at para 537

<sup>98</sup> *Ibid.*, at para 542

have argued<sup>99</sup>) or indirectly (by imposing additional requirements to the merger review process).

At the outset, it is important to distinguish the standard of proof from the, albeit closely related, concept of the burden of proof. Whereas the former refers to the type, amount and probative value of the evidence that is needed to establish something, the latter refers to “*the act of presenting the evidence*” that is needed to satisfy that standard of proof”.<sup>100</sup> In the context of EC merger control, the burden of proof is ultimately on the Commission to establish whether or not a notified merger is compatible with the common market. However, the notifying parties bear an initial evidentiary burden, as they are required to submit a substantial amount of information at the moment of notification.<sup>101</sup>

## **5.1 The standard of proof in EC merger control: general observations**

Even though probability is a matter of judgment and can be applied to varying degrees, the law has sought to define the degree of probability for different types of proceedings. In this regard, a distinction can be made between at least two standards of proof: a “beyond reasonable doubt” standard and a “balance of probabilities” standard.<sup>102</sup> The first standard is the highest and most burdensome standard of proof, typically used in criminal cases. Since it requires compelling evidence to prove that something is certain beyond a reasonable doubt, it is acknowledged that this would not be the most appropriate standard for merger control.<sup>103</sup> The issue in merger cases is whether a merger is likely to have an effect on the relevant market, which requires a prospective analysis and thus inevitably involves a certain amount of judgment.<sup>104</sup> On the basis of the expressions used in the jurisprudence, it indeed appears that the Community Courts rather have the “balance of probabilities” standard in mind in the field of merger control.<sup>105</sup> This more forgiving standard, commonly used in civil cases, has often been expressed as whether it is more likely than not that something has happened or will

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<sup>99</sup> See e.g. G. Aigner, O. Budzinski and A. Christiansen, *I.c.*; Simpson and Thatcher, “The European Court of First Instance Annuls the European Commission’s Decision Approving the SonyBMG Joint Venture” <[www.simpsonthacher.com/content/publications/pub558.pdf](http://www.simpsonthacher.com/content/publications/pub558.pdf)> accessed 8 May 2007>

<sup>100</sup> D. Bailey, “Standard of proof in EC merger proceedings: a common law perspective” [2003] 40 Common Market Law Review 847-849

<sup>101</sup> *Ibid.*, 849; G. Drauz and C. Jones, *EU Competition Law, Volume II: mergers and acquisitions* (Claeys & Casteels, Leuven, 2006) 267

<sup>102</sup> D. Bailey, *I.c.*, 851-854; T. Mueller and P. Charro, “Getting Serious about Evidence: A Transatlantic Perspective on the Role of Courts and the Standards of Judicial Review”, paper presented at the International Bar Association Annual Conference (2005) 6-7 <[http://www.wilmerhale.com/files/Publication/3da351fe-82ec-4551-ad310b5b97ccb82/Presentation/PublicationAttachment/d206aa9a-c8dd-4dfa-a6781081b7dec616/IBA\\_Prague\\_speech\\_Mueller.pdf](http://www.wilmerhale.com/files/Publication/3da351fe-82ec-4551-ad310b5b97ccb82/Presentation/PublicationAttachment/d206aa9a-c8dd-4dfa-a6781081b7dec616/IBA_Prague_speech_Mueller.pdf)> Accessed 8 May 2007>

<sup>103</sup> T. Mueller and P. Charo, *I.c.*, 6. However, the matter is further complicated by the fact that many civil law countries express the standard of proof in terms that would look much like a criminal standard in comparison to common law countries. In Ireland, for instance, breaches of competition law are criminal offences and therefore may be prosecuted quite apart from any civil remedy invoked by private parties. M. Collins, “The Burden and Standard of Proof in Competition Litigation and Problems of Judicial Evaluation” (2004) 1 ERA Forum: *scripta iuris europaei* 70

<sup>104</sup> D. Bailey, *I.c.*, 860

<sup>105</sup> G. Drauz and C. Jones 268-269; L. Prete and A. Nucara, “Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?” (2005) ECLR 2005 692-704

happen.<sup>106</sup> Given the flexibility that is inherent to the “balance of probabilities” standard, however, this still raises the question as to what the actual degree of likelihood is that the Commission’s fact-finding and analysis in merger cases must meet.

Neither the ECRM nor the EC Treaty make any reference to the standard of proof incumbent on the Commission in merger control, so it is necessary to look at the case law of the Community Courts for guidance. At the outset, it must be noted though that a definite and precise standard of proof has yet to be articulated.<sup>107</sup> Indeed, the Courts usually refer to the “requisite legal standard” without explaining how high that standard is.<sup>108</sup> Furthermore, it has been argued that, even though the use of the term “requisite legal standard” has remained consistent over the years, the application of this standard seems to tell a different story.<sup>109</sup> In this section, it will be assessed whether this is true, in particular for *Impala*. In this regard, it is important to keep in mind that the debate about the standard of proof in EC merger control is not new: the issue first and most prominently came to the fore in the context of the Commission’s appeal against the CFI *Tetra Laval I* judgment. This was the only ruling of the 2002 trilogy (*Airtours*, *Schneider* and *Tetra Laval I*) that was appealed by the Commission, despite the fact that the CFI annulled the respective prohibition decision in light of a practically similar standard of proof and with the same intensity of judicial review. The Commission believed that this ruling in particular raised several problems of legal principle.<sup>110</sup> *Inter alia*, it contended that the CFI had made an error in law as to (1) the standard of proof that it is required to satisfy and (2) the scope of the CFI’s power of judicial review.<sup>111</sup> Hence, the ECJ ruling on the appeal is a landmark decision providing explicit guidance on these fundamental issues. Before assessing the implications of *Impala* for the required standard of proof in merger cases, it is therefore indispensable first to discuss the ECJ judgment on this appeal (*Tetra Laval II*) and its wider relevance in light of previous case law.

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<sup>106</sup> D. Bailey, *l.c.*, 852

<sup>107</sup> *Ibid.*, 858

<sup>108</sup> According to Sir Christopher Bellamy, a former president of the CFI, the reason for this must be sought in the different legal traditions of the EC judges. C. Bellamy, “Standards of Proof in Competition Cases”, in *Judicial Enforcement of Competition Law* (proceedings OECD Seminar of 27 November 1997) 105

<sup>109</sup> D. Bailey, *l.c.*

<sup>110</sup> Commission press release IP/02/1952 of 20 December 2002, “Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice”

<sup>111</sup> Albeit closely related to the standard of proof, the issue of judicial review falls outside the scope of this paper. On the impact of *Tetra Laval I* and *II* on the standard of judicial review in the area of merger control, see e.g. M.F. Bay and J. Ruiz Calzado, *l.c.*; L. Prete and A. Nucara, *l.c.*; B. Vesterdorf, “Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement” [2005] 2 *Competition Policy International* 7

## **5.2 *Tetra Laval II* and the standard of proof**

On February 15, 2005 the ECJ delivered its long awaited *Tetra Laval II* judgment, its second ever ruling in the field of merger control.<sup>112</sup> The ECJ upheld the CFI *Tetra Laval I* ruling, which had annulled the Commission prohibition decision.<sup>113</sup> In the context of its plea relating to the standard of proof, the Commission essentially claimed that the CFI, by requiring it to constitute “*convincing evidence*”<sup>114</sup> that a proposed merger “*in all likelihood*”<sup>115</sup> will give rise to significant anti-competitive effects, imposed a disproportionate standard of proof for merger prohibition decisions that is “*impossible to meet in practice*”.<sup>116</sup> It took the view that this test differed substantially, both in degree and in nature, from the requirement to produce ‘cogent and consistent’ evidence, as established by the ECJ in *Kali & Salz*.<sup>117</sup> According to the Commission, the standard of ‘convincing evidence’ was clearly higher, because it eliminated the possibility that another body would be able to reach a different conclusion.<sup>118</sup> Tetra Laval on the other hand, contented that this ground of appeal was nothing more than a “*semantic discussion of the terms used*” that had little to do with the substantive examination carried out by the CFI.<sup>119</sup>

In *Tetra Laval II*, the ECJ discarded the Commission’s arguments by stating that the CFI, in its call for a precise examination supported by ‘convincing evidence’:

“*by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of a decision on a merger*”<sup>120</sup>

Even though it can be argued that a debate about different standards of proof is never purely semantic<sup>121</sup>, the ECJ thus showed that in substance Tetra Laval was right.<sup>122</sup> The use of the term ‘convincing’ on itself can therefore not be seen as a real departure from previous case law. Not in the least because the CFI, in *Tetra Laval I* as well as in *Airtours*, appeared to use

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<sup>112</sup> *Tetra Laval II*, as note 40 above. *Tetra Laval II* is the second ever ECJ ruling in the field of merger control and the first on appeal. M.F. Bay and J. Ruiz Calzado, “Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions” [2005] 28 World Competition 433

<sup>113</sup> Tetra Laval, the worldwide market leader in traditional carton packaging, had notified its plans to acquire Sidel, a French company involved in the design and production of packaging equipment for polyethylene terephthalate (PET) plastic bottles. The Commission prohibited the concentration primarily on the basis of conglomerate concerns. *Tetra Laval/Sidel* (Case COMP/M.2416) Commission Decision [2004] OJ L 43/13

<sup>114</sup> *Tetra Laval I*, as note 7 above, e.g. at paras 155, 162, 223, 256, 281

<sup>115</sup> *Ibid.*, at para 153

<sup>116</sup> Commission press release IP/02/1952, as note 110 above

<sup>117</sup> *Kali & Salz*, as note 27 above, at para 228

<sup>118</sup> *Tetra Laval II*, as note 40 above, at para 27

<sup>119</sup> *Ibid.*, at para 32

<sup>120</sup> *Ibid.*, at para 41

<sup>121</sup> D. Bailey, *l.c.*, 854

<sup>122</sup> M.F. Bay and J. Ruiz Calzado, *l.c.*, 444

the terms ‘cogent’ and ‘convincing’ evidence as synonyms.<sup>123</sup> However, it is useful to take a closer look at the ECJ’s teachings on the standard of proof to see whether they perhaps reveal that the standard has been raised after the *Tetra Laval* judgments, either intentional or not.

As regards factual matters, the ECJ clarified that the evidence relied upon needs to be “*factually accurate, reliable and consistent*”, should contain “*all the information which must be taken into account in order to assess a complex situation*” and must be “*capable of substantiating the conclusions drawn from it*.<sup>124</sup> Moreover, it stated that the Community Courts must verify whether the Commission has closely examined *all* the relevant circumstances.<sup>125</sup> As regards the prospective analysis, the ECJ acknowledged that merger control requires a difficult assessment of the way in which a proposed concentration might alter the factors determining the level of competition on a given market. Since this entails a prediction of events, and not an examination of current or past events (as is the case for antitrust investigations), this analysis needs “*to be carried out with great care*.<sup>126</sup> Furthermore, it makes it necessary “*to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*”.<sup>127</sup> This is an explicit reference to the earlier mentioned “balance of probabilities” standard. It can be noted that the CFI required the Commission to establish the alleged anticompetitive effects “*in all likelihood*” whereas the ECJ only speaks of the need to ascertain the most likely developments.<sup>128</sup> However, arguing that the ECJ intended to mitigate the CFI’s more stringent formulation of the test appears to be ambiguous since the EC highest court obviously did not dispute the test put forward by the CFI.<sup>129</sup> Turning to the specific situation of conglomerate mergers, the ECJ further recognized that the chains of cause and effect following such a merger are particularly dimly discernible and difficult to establish.<sup>130</sup> In light of these uncertainties, the ECJ stressed that the quality of the evidence produced by the Commission is even more important, since that evidence must support its conclusion that, if a prohibition decision were not adopted, the economic development envisaged by it would be plausible.<sup>131</sup>

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<sup>123</sup> In these two judgments, in which the CFI explicitly and repeatedly referred to the principles set out in *Sali & Kalz*, both expressions can be found. See *Tetra Laval I*, as note 7 above, e.g. paras 155, 162 and 328 (‘convincing evidence’) versus para 137 (‘cogent evidence’) and *Airtours v Commission*, as note 5 above, para 63 (‘convincing evidence’) versus para 294 (‘cogent evidence’). *Ibid.*, 445

<sup>124</sup> *Tetra Laval II*, as note 40 above, at para 39

<sup>125</sup> Notwithstanding the value of these clarifications, Prete and Nucara deeply regret that the ECJ did not articulate a more precise and transparent test. See L. Prete and N. Nicara, *l.c.*, 697-699

<sup>126</sup> *Ibid.*, at para 43

<sup>127</sup> *Ibid.*, at para 43 (emphasis added)

<sup>128</sup> *Tetra Laval I*, as note 7 above, at para 153

<sup>129</sup> The A.G. used yet a different expression when stating that the Commission needs to prove the “*very probable*” anticompetitive effects of a notified merger. However, also here it should be emphasized that the test set out by the CFI in *Tetra Laval I* was not questioned by the A.G. (L. Prete and A. Nucara, *l.c.*, 697).

<sup>130</sup> The ECJ explicitly mentioned two specific problems that arise in the case of conglomerate-type concentrations: (1) the assessment of the concentration involves a prospective analysis covering a lengthy period of time and (2) the specific conduct of the merged entity determines to a great extent what effects the concentration has. *Tetra Laval II*, as note 40 above, at para 44

<sup>131</sup> *Ibid.*, at para 44

The way in which the ECJ addressed the issue of the standard of proof in *Tetra Laval II* leads to at least two important observations. First, the fact that the Court was more definite about the evidentiary obligation in the case of conglomerate mergers appears to confirm that the standard of proof may vary according to the type of merger. Unfortunately, the ECJ did not spell out whether, and if so, which other types of mergers would require particularly sound evidence to support the conclusion that the two conditions of Article 2(3) ECMR have been met. Since it only drew attention to the difficulties inherent in proving a leveraging theory, it could be argued that the Court only found a higher standard indispensable for conglomerate (or, arguably, collective dominance<sup>132</sup>) mergers. However, this does not imply that the clarifications made by the ECJ are solely relevant for these types of concentrations. On the contrary, it is clear from the wording of the judgment that the Court first set out principles applicable to merger control in general before considering the specific case of conglomerate mergers.<sup>133</sup> The way in which the ECJ elucidated the required standard of proof, as discussed above, is therefore insightful for all merger cases. Second, it must be observed that the clarifications given by the CFI and the ECJ are not capable of substantiating the view that the Community Courts significantly raised the standard of proof. Indeed, both *Tetra Laval* judgments essentially recapitulate the principle that, were the Commission finds that a concentration would lead to a situation in which effective competition in the common market is significantly impeded, it is incumbent upon it to provide cogent, consistent evidence thereof. This is the standard that was set out by the ECJ in *Sali & Kalz* – a standard that was, although considered to be high, instantly recognized by the Commission in *Price Waterhouse/Coopers & Lybrand*.<sup>134</sup> Unlike the remarkable intensity with which the CFI scrutinized the Commission's substantive assessments<sup>135</sup>, there thus not appears to be anything new about the manner in which the Community Courts - in *Tetra Laval* - specified the quality of the evidence the Commission is required to produce. The CFI, reiterated by the ECJ, simply re-emphasized the need for the Commission to base its findings on solid evidence. Or, as the CFI phrased it recently, it is not enough for the Commission to put forward a series of logical but hypothetical developments (which it fears would have harmful effects for competition):

*"Rather, the onus is on it to carry out a specific analysis of the likely evolution of each market on which it seeks to show that a dominant position would be created or*

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<sup>132</sup> On the other hand, the ECJ did highlight that the analysis of a merger producing a conglomerate effect "is subject to requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance". *Tetra Laval II*, as note 40 above, at para 40

<sup>133</sup> The Court first discussed the required standard of proof in several paragraphs (§ 38-43), hereby explicitly referring to e.g. the prospective analysis "of the kind necessary in merger control" (§ 42), before addressing the difficulties that arise in the case of conglomerate-type concentrations. *Ibid.*, at para 44

<sup>134</sup> *Price Waterhouse/Coopers & Lybrand* (Case IV/M.1016) Commission Decision of 20 May 1998 [1999] OJ L 50, 27

<sup>135</sup> On the relevance of *Tetra Laval II* for the standard of judicial review, see note 111

*strengthened as a result of the merger and to produce convincing evidence to bear out that conclusion.”<sup>136</sup>*

Consequently, the authors conclude that the much discussed semantic difference between the expressions ‘cogent and consistent’ and ‘convincing’ evidence is not reflecting any significant departure from the approach put forward in previous judgments. Nevertheless, the ECJ’s final word on the *Tetra Laval* case remains relevant because of the way in which it clarified certain issues related to the standard of proof. Hence, *Impala* needs to be assessed in light of this jurisprudence. It is important to note, however, that the ECJ – unlike the Advocate General (hereafter: A.G.) - refrained from addressing one important matter, namely the Commission’s argument that the evidentiary obligation required by the CFI effectively created a presumption in favor of the legality of (conglomerate) mergers.<sup>137</sup> In *Tetra Laval I* it was indeed stated that a concentration must be authorized if both conditions laid down in Article 2(3) ECMR are not fulfilled.<sup>138</sup> The *Impala* judgment, in which the CFI annulled not a prohibition but a clearance decision for not meeting the required standard of proof, interestingly challenges this presumption and consequently brings the discussion about the standard of proof required by the Community Courts back to the fore.

### **5.3 *Impala* and the standard of proof: a departure from the past?**

As already indicated, *Impala* addresses several significant issues related to the standard of proof that are of wider relevance for merger control. For this reason, the judgment will have (and already has) important consequences for the Commission’s future handling of complicated merger cases. In what follows, these consequences will be identified and evaluated. First and foremost, it will be observed that *Impala* imposes a symmetrical standard of proof on the Commission for clearance and prohibition decisions. Second, the relevance of *Impala* for the future implementation of the *Airtours* test will be discussed. Third, the implications of *Impala* for the Commission’s investigation process will be examined.

#### **5.3.1 Symmetrical application of the standard of proof**

What the *Impala* judgment first of all (and perhaps most importantly) demonstrates, is that the standard of proof the CFI requires the Commission to satisfy equally applies to prohibition and clearance decisions. This is of great importance for future merger control analysis, as it makes clear that the Commission will always have to make a strong case one way or the

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<sup>136</sup> CFI Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, at para 429

<sup>137</sup> *Tetra Laval I*, as note 7 above, at para 29

<sup>138</sup> *Ibid.*, at para 120. See also CFI Case T-293 *Air France v Commission* [1994] ECR II-323, at para 79

other. Contrary to some commentators<sup>139</sup>, the authors believe that this is a logical and positive development in the case law.

The discussion about the desirability of a symmetrical standard of proof is underpinned by a broader yet closely related issue, namely the question whether there exists (or should exist) a bias against or in favor of the legality of mergers. In *Tetra Laval II*, the Commission submitted that this was not the case, as the compatibility assessments of mergers should be guided by a principle of neutrality. It mainly relied upon the symmetrical nature of the legal requirements laid down by Article 2(2) and (3) ECMR: if a concentration would (or would not) lead to the creation or strengthening of a dominant position as a result of which effective competition is significantly impeded, the Commission is to prohibit (or, respectively, authorize) the concentration.<sup>140</sup> As indicated above, the ECJ unfortunately did not dwell upon this issue in *Tetra Laval II*. A.G. Tizzano did, however, and strongly opposed the Commission's reasoning. Whereas it would be incorrect to take the A.G.'s opinion as a persuasive authority, it is certainly worth considering the two main arguments he put forward.<sup>141</sup> To support his view that the symmetry of the conditions provided for in Article 2(2) and (3) ECMR cannot be absolute, A.G. Tizzano firstly referred to Article 10(6) ECMR. This article stipulates that where the Commission has not taken a decision within the time limits set, the notified merger "*shall be deemed to have been declared compatible with the common market*". According to A.G. Tizanno, this clearly demonstrates that, in the case of uncertainty, the Community legislature preferred to run the risk of authorizing a transaction that is incompatible with the common market.<sup>142</sup> Secondly, he argued that a bias towards authorization is justified because the Commission and the national competition authorities still have the opportunity to intervene *ex post* on the basis of the EC antitrust rules.<sup>143</sup>

Contrary to A.G. Tizanno's view, the authors contend not only that there is no clear legal basis to assume *prima facie* that a merger is lawful, but moreover that such a presumption would go against the underlying rationale of EC merger control. Indeed, the assertion that the ECMR carries an in-built presumption in favor or against mergers is flawed. To start with, there exists no directly applicable prohibition for mergers: unlike cartels (Article 81 EC) or state aid (Article 87 EC), mergers are thus not, as a rule, considered to be incompatible with the common market. Moreover, it must be stressed that, even though the Commission must satisfy both conditions of Article 2(3) ECMR before it can prohibit a merger, the same must

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<sup>139</sup> E.g. G. Aigner, O. Budzinski and A. Christiansen, *l.c.*; M. Collins, *l.c.*; L. Prete and N. Nucara, *l.c.*

<sup>140</sup> A.G. Opinion (Tizzano), *Tetra Laval II*, as note 40 above, at para 67.

<sup>141</sup> E.g. L. Prete and N. Nucara, *l.c.*; A. Weitbrecht, "EU Merger Control in 2006-the Year in Review" [2007] 28 ECLR 125-133

<sup>142</sup> A.G. Opinion (Tizzano), *Tetra Laval II*, as note 40 above, at paras 78-79

<sup>143</sup> *Ibid.*, at para 81

be true of the two conditions of Article 2(2) for clearing a merger.<sup>144</sup> The symmetrical structure of Articles 2(2) and (3) ECMR - and the same can be said for Articles 8(1) and (2) ECMR - therefore logically implies that the evidentiary obligation should be equal. In *General Electric*, the CFI expressly confirmed this by stating – admittedly, somewhat in contrast with its contention in *Tetra Laval I* – that the Commission must not find in favor of a concentration in case of doubt, but rather must always make an actual decision one way or another.<sup>145</sup> This may in turn be understood as reflecting a legislative policy not to weight the scales in favor of the interests of either the merging parties or the consumers.<sup>146</sup> Finally, it must be stressed that A.G. Tizzano's reliance on the text of Article 10(6) ECMR is not convincing. It is certainly true that a merger will be deemed to have been declared compatible if the Commission fails to take a decision within the prescribed deadlines. However, this will only result in an implied decision that still can be appealed.<sup>147</sup> Moreover, it would be wrong to overestimate the importance of Article 10(6) ECMR, as this is mainly an in-built protection for the parties against a Commission's failure to act in time.

In any case, it must be observed that the CFI, in *Impala*, refrained from taking a clear stance in the debate on the alleged presumption in favor of the legality of mergers. It did, however, rightly pointed out that the Commission must conduct its investigation in a robust and unbiased way.<sup>148</sup> Furthermore, *Impala* does make clear – or at least strongly implies - that the standard of proof should be equal for clearance and prohibition decisions. As some authors have argued, this may pose problems for the Commission when it is confronted with ambiguous evidence.<sup>149</sup> A.G. Tizzano spoke in this regard about “grey area” cases where it is difficult to foresee the effects of a notified transaction and, consequently, where it is difficult to arrive at a clear distinct conviction that the merger would or would not lead to the creation or strengthening of a collective dominant position.<sup>150</sup> While it is certainly true that such cases strongly increase the Commission's burden of proof – and indeed make it difficult to meet the required legal standard – it would be wrong, however, to derive from this that the Commission should by default opt for a clearance decision in the case of doubt. Indeed, an unequal standard of proof in favor of clearance may in practice lead to the undue authorization of anti-competitive mergers. This was precisely the fear that was raised in the aftermath of the 2002 *Airtours/Schneider/Tetra Laval I* judgments. It can even be considered that it was in light of this jurisprudence that the Commission – aware of the high standard of

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<sup>144</sup> D. Bailey, *l.c.*, 878

<sup>145</sup> *General Electric*, as note 136 above, at para 61

<sup>146</sup> G. Drauz and C. Jones, *o.c.*, 268-269

<sup>147</sup> E.g. an action action under Art 288 EC for maladministration

<sup>148</sup> R. Brandenburger and T. Janssens, “The Impala judgment: Does EC Merger Control Need to be Fixed or Fine-Tuned?” [2007] 3 Competition Policy International 308

<sup>149</sup> See note 139

<sup>150</sup> A.G. Opinion (Tizzano), *Tetra Laval II*, as note 40 above, at para 76

proof and the intensity of judicial review - concluded that the evidence was “not sufficiently strong” to underpin a prohibition decision in the Sony BMG case.<sup>151</sup> The authors therefore welcome the symmetrical standard of proof, as this will prevent the Commission from opting for a clearance decision to be on the safe side. Consequently, *Impala* rightly confirms that notified transactions must be assessed from a position of neutrality and that the Commission must always take a fully reasoned decision based on sound evidence - a standard that the Sony BMG decision clearly did not meet (cf. *supra*). Nevertheless, it is undeniable that the ambitious symmetrical standard of proof will pose challenges for the Commission in cases of persistent doubt – and some would identify the Sony BMG case as an example of this - where it is difficult to make a strong case either way. Indeed, the Commission cannot take a “grey area” decision. Once the decision to clear or prohibit the merger is taken, the Commission will draft it accordingly in the most convincing way.<sup>152</sup> It has been suggested that the Commission could simply opt for a system of “running out of the clock”, where it would refrain from adopting clearance decisions altogether and rely on Art 10(6) ECMR instead.<sup>153</sup> However, it is doubtful that the Commission will be willing to respond to *Impala* in such a radical way.

### 5.3.2 The *Airtours* test for the establishment of coordinated effects revisited

The *Impala* judgment is furthermore insightful for the standard of proof that the Commission must satisfy in the specific case of an alleged collective dominant position. Indeed, in *Impala* the CFI remarkably departed from the original *Airtours* test. Quite in contrast to the claim that the ruling explicitly raised the standard of proof, the CFI in fact lowered the evidentiary obligation for the finding of an existing collective dominance position. This illustrates that the three *Airtours* conditions are not clear-cut yet. Unfortunately, the same can be said about the CFI’s teachings on this test in *Impala*.

Firstly, the CFI observed that the existing case law on collective dominance was developed in the specific context of the assessment of the possible *creation* of a collective dominant position. It stressed that in this case the Commission is required to carry out a “*delicate prognosis*” as regards the likely development of the market.<sup>154</sup> The appraisal of an *existing* collective dominant position is different, the Court argued, because here the Commission has the clear advantage that it can base its decision on “*a series of elements of established facts*,

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<sup>151</sup> F. Polverino, *l.c.*

<sup>152</sup> D. Bailey, *l.c.*, 448

<sup>153</sup> S.B. Völker and C. O’Daly, “The Court of First Instance’s *Impala* Judgment: a Judicial Counter-reformation in EU Merger Control?” (2006) ECLR 596

<sup>154</sup> Referring to *Sali & Kalz*, the CFI furthermore highlighted that this analysis must consist of a close examination of the circumstances that are relevant for assessing the effects of the concentration on competition in the relevant market. *Impala*, as note 3 above, at para 250

*past or present*".<sup>155</sup> While this appears to be self-evident, it should be noted that the CFI used the distinction to suggest that the *Airtours* conditions could be more easily fulfilled in the case of a preexisting collective dominant position. Most remarkably, the CFI stated that:

*"although the three conditions (...) 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"*<sup>156</sup>

*"Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such cases"*<sup>157</sup>

This deviation from the original *Airtours* test seems to indicate that the CFI wanted to lower the evidentiary threshold for a finding of a collective dominant position. This can be seen as an explicit recognition of the difficulties the Commission may encounter when investigation complex "grey area" collective dominance cases. The CFI even suggested that in the case of the Sony BMG merger, the alignment of prices over the last six years – together with other factors and in the absence of an alternative explanation – might indicate that this alignment is not the result of the normal play of effective competition and thus might suffice to demonstrate the existence of coordinated price behavior.<sup>158</sup> According to some commentators, this provides a bright spot for future intervention on the basis of coordinated effects.<sup>159</sup> It is doubtful, however, that the Commission will actually explore this variation of the *Airtours* test in the context of the reexamination of the merger. Not only because the CFI clearly indicated that its statements were part of an *obiter dictum*, but even more so because the test is far from clear-cut (e.g. the undefined "indicia and items of evidence" or the vague formulation of "appropriate circumstances"). Consequently, the Commission would take a considerable risk when it would choose to establish the *Airtours* conditions indirectly.

Secondly, and more specifically, the CFI indicated that the requirements for the fulfillment of the second *Airtours* condition (the existence of effective deterrent mechanisms) could be different in the context of an assessment of past coordination. The Court did acknowledge

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<sup>155</sup> *Ibid.*, at para250

<sup>156</sup> *Ibid.*, at para 251, emphasis added

<sup>157</sup> *Ibid.*, at para 252, emphasis added

<sup>158</sup> *Ibid.*, at para 253. As we have seen, the Commission did find that the market for recorded music displays certain features that indicate a conduciveness to collective dominance, but eventually cleared the merger because it believed that there was not sufficient evidence to conclude that a collective dominant position would be created or strengthened.

<sup>159</sup> A. Weitbrecht, *l.c.*, 128

that the mere existence of retaliatory measures is in principle sufficient (cf. *supra*).<sup>160</sup> It thus disagreed with the Commission, who took the view that it was necessary to prove that such measures have actually been used in the past. What is more, the CFI considered that the Commission has to satisfy two cumulative elements before it can establish the absence of past retaliatory action: first, there must be proof of deviation from the common policy and second, the Commission must be able to demonstrate the absence of retaliatory measures.<sup>161</sup> By doing so, the CFI put forward two additional criteria that essentially elevate the evidentiary burden for the finding that the retaliation condition is *not* fulfilled. Again, the distinction between the analysis of the post-merger creation and the appraisal of the existence of a collective dominant position, made the CFI apparently feel confident enough to depart from the previous case law. In light of the Sony BMG merger this can be seen as a second straightforward concession to the Commission to make it easier to satisfy the *Airtours* conditions for a finding of collective dominance.

### 5.3.3 Implications of *Impala* for the Commission's investigation

In light of the foregoing, it cannot be argued that *Impala* has significantly raised the standard of proof. While the CFI did make clear that the standard it requires the Commission to satisfy is symmetrical, it has been argued that this is both a logical and welcome clarification. Moreover, the CFI in fact lowered the evidentiary threshold for the finding of an existing collective dominance, arguably in recognition of the criticism that the test was too demanding. Nevertheless, two elements of the judgment do affect the evidentiary burden incumbent on the Commission in a less favorable way: first, the CFI's criticisms as regards the Commission's reliance on the parties' data and second, the importance the CFI ascribed to the Statement of Objections (hereafter: SO).

The way in which the CFI reproached the Commission for basing its findings relating to campaign discounts solely on data relating to - and prepared by - the notifying parties, is a first notable aspect of the *Impala* judgment. As discussed above, the CFI concluded that none of the information available could confirm that campaign discounts rendered the market for recorded music opaque, contrary to what the Commission had contended in its Decision. However, the Court not only criticized the Commission's findings but also overtly questioned the objectivity of the data it had relied upon. The Court stressed in this regard that the assessments inferred from the variations in campaign discounts were only supported by data

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<sup>160</sup> The CFI stressed in this regard that there is no need to sanction if members of the oligopoly confirm with the common policy. Or, in other words, the most effective retaliation mechanism is that which has not been used. *Impala*, as note 3 above, at para 466.

<sup>161</sup> *Ibid.*, at para 469

provided by (the economic advisers of) Sony and BMG.<sup>162</sup> While the CFI acknowledged that the Commission could not ascertain in the slightest detail the reliability of all the information submitted to it, it nevertheless stated that the Commission “*cannot go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration*”.<sup>163</sup>

There are already signs that the Commission is adapting its approach in light of these criticisms. Indeed, recent cases (including the re-examination of the Sony BMG merger) demonstrate that the Commission’s requests for information are becoming more lengthy and demanding.<sup>164</sup> The downside of the CFI’s insistence on obtaining data from third parties, however, is that it adds an additional burden to an already time-constrained and complex merger review process. Moreover, the obtainment of such data is far from self-evident, as experience shows that third parties are generally reluctant to provide complete and reliable data on a timely basis, especially in the context of coordinated effects concerns. This is of course partly due to the fact that the relevant data often is commercially sensitive. The Commission indeed cannot issue a prohibition decision based on data that is not made accessible to the notifying parties without violating their right to reply.<sup>165</sup>

The second problematical aspect of *Impala*, namely the importance that was given to the SO, is even more significant because of the potentially far-reaching procedural (and even substantial) implications it has for the Commission’s future handling of merger cases. The SO is a normal procedural act in a second phase merger procedure that enables the parties to exercise their rights of defense. Article 18(1) ECMR stipulates that undertakings concerned have the right, at every stage of the procedure, to make their views on the Commission’s objections against the concentration.<sup>166</sup> For that reason, the Commission is required to address these objections in writing to the notifying parties.<sup>167</sup> This is done by the issuance of a SO, which sets forth the Commission’s preliminary findings both on the facts and on their legal and economic significance.<sup>168</sup> This is of great importance, as the Commission can only base its decision on objections on which the parties have been able to submit their observations.<sup>169</sup>

There is no formal deadline as regards when the Commission must send the notifying parties

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<sup>162</sup> *Ibid.*, at paras 412, 415, 434

<sup>163</sup> *Ibid.*, at para 415. The CFI found this to be particularly problematical in light of the observation that the alleged opacity constituted the crucial element on which the decision is based.

<sup>164</sup> R. Brandenburger and T. Janssens, *l.c.*, 308

<sup>165</sup> S.B. Völker and C. O’Daly, *l.c.*, 589-595

<sup>166</sup> This right is now further protected by the DG Competition’s Best Practices on the conduct of EC merger proceedings, which stipulates that the notifying parties must be offered a State of Play meeting before the issuing of the SO. This enables them to be informed of the type of objections the Commission may set out in its SO and thus enables them to understand the Commission’s preliminary view on the outcome of the investigation (at para 33(c)).

<sup>167</sup> Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1 Article 13(2)

<sup>168</sup> J. Cook and C. Kerse, *o.c.*, 190

<sup>169</sup> Art. 18(3) ECMR

the SO. Usually it will not be finalized until between six and eight weeks after receipt of the decision initiating the Phase II investigation. There is a recent tendency to issue the SO at the later end of this period – if not beyond.<sup>170</sup> In the SO, the Commission shall set a time limit within which the parties and other involved parties must supply its response in writing (normally two weeks).<sup>171</sup> The written procedure can also be supplemented by formal oral hearings before the Hearing Officer, as requested by the parties in the Sony BMG case.<sup>172</sup>

In its *Impala* judgment, the CFI acknowledged that the SO is a preparatory document containing assessments that are purely provisional. It highlighted, accordingly, that the Commission is not obliged to explain in its final decision any change in its position by comparison with that set out in the SO.<sup>173</sup> This is in line with the case law. In *Aalberg Portland v Commission*, for instance, the ECJ unequivocally stated that the Commission may, and even must, abandon objections that have been shown to be unfounded by the parties.<sup>174</sup> However, a careful reading of the *Impala* judgment makes clear that the CFI attributed a far more important role to the SO, despite all the lip service it paid to the jurisprudence on this matter.<sup>175</sup>

Contrary to its final decision, the Commission had argued in its SO that the notified Sony BMG merger was incompatible with the common market. As explained above, it provisionally concluded that the merger would strengthen a collective dominance position (both in the recorded music market and the wholesale market for online music licenses) and would coordinate the parties' behavior in a way incompatible with Article 81 EC.<sup>176</sup> The CFI not only found this “fundamental U-turn in the Commission’s position” surprising, but also harshly criticized the Commission for not being capable of demonstrating how the previous findings were incorrect. In this regard, the CFI stressed that:

*“unless the entire investigative administrative procedure is to be deprived from the slightest value, the Commission must be able to explain, not in the decision, admittedly, but at least in the context of the proceedings before the Court, its reasons for considering its provisional findings were incorrect”.*<sup>177</sup>

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<sup>170</sup> J. Cook and C. Kerse, *o.c.*, 189-190; E. Navarro, A. Font, J. Folguera and J. Briones, *o.c.*, 383

<sup>171</sup> Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1 Article 13(2)

<sup>172</sup> *Ibid.*, Articles 14-16

<sup>173</sup> *Impala*, as note 3 above, at paras 284-285

<sup>174</sup> ECJ Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213 P, C-217/00 and C-219/00 P *Aalberg Portland and Others v Commission* [2004] ECR I-123, at para. 67

<sup>175</sup> S.B. Völcker and C. Daly, *l.c.*, 593-594

<sup>176</sup> *Impala*, as note 3 above, at para 9

<sup>177</sup> *Ibid.*, at para 335

The CFI thus took the position that, while the Commission is entitled to modify provisional assessments made in the SO, the findings made in the Decision must be compatible with the findings *of fact* made in the SO, in so far as it is not established that these findings were incorrect.<sup>178</sup> It moreover stressed that the investigation into the competition problems essentially takes place before the SO, so that the Commission's objections can only be refuted by "particularly reliable, objective, relevant and cogent" evidence.<sup>179</sup> Consequently, the identified discrepancies between several findings made in the SO and the conclusions drawn from them in the Decision, were deemed to be highly problematic by the Court. The CFI even accused the Commission for having suppressed relevant elements "*on the sole ground that they might not be consistent with its new assessment*".<sup>180</sup> Not in the least because the Commission only changed its initial position - that was based on an investigation lasting five months - in the wake of the arguments put forward by the parties at the hearing, without conducting any new market investigations to (in)validate them.<sup>181</sup>

The extent to which the CFI used the SO as a benchmark for its review of the Decision is unseen and has important consequences beyond the facts of this case. While the authors agree that the Commission must be capable of explaining the reasons for a fundamental change in its position - the Sony BMG decision is indeed highly problematical in this regard - they also believe that the importance the CFI attributed to the SO in *Impala* has swung the pendulum too far. The CFI's approach actually implies that it is not so much the applicant that has to demonstrate a manifest error in the Decision, but it is rather the Commission that has to prove before the Court that its preliminary findings were incorrect.<sup>182</sup> This has set a legal precedent that will make the Commission far more hesitant to reconsider its findings after the issuance of a SO. Given the numerous examples where the Commission had to abandon its initial objections because they were shown to be erroneous, such a dynamic is certainly deplorable.<sup>183</sup> In fact, it would undermine the existing system of internal checks and balances by making the administrative procedure practically irreversible once the Commission starts drafting its SO.<sup>184</sup> These internal checks and balances not only include due process rights (e.g. the right to respond in writing and orally), but also the process of inter-service consultation between the Competition Directorate General and other Commission services (e.g. the Legal Service and other Directorate Generals) as well as the consultative function of

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<sup>178</sup> *Ibid.*, at para 446

<sup>179</sup> *Ibid.*, at para 414

<sup>180</sup> *Ibid.*, para. 300.

<sup>181</sup> *Ibid.*, para. 283, 285.

<sup>182</sup> S.B. Völker and C. Daly, *I.c.*, at para 594

<sup>183</sup> In the context of the proceedings before the CFI, Sony and BMG observed that in the last 5 years the Commission abandoned objections set forth in the SO in 14 of 62 cases. *Impala*, as note x above, at para 228

<sup>184</sup> S.B. Völcker and C. Daly, *I.c.*, 594

the Advisory Committee on concentrations.<sup>185</sup> Furthermore, it would seriously jeopardize the parties' rights of defense, since the parties are only capable of responding properly to the Commission's objections after they have been made clear to them.

The options for the Commission to anticipate these difficulties when it again would find it necessary to fundamentally depart from the objections set out in a SO, appear to be twofold.

On the one hand, the Commission could foresee more time after issuing the SO so that it can investigate the soundness of the parties' observations. This strategy was actually followed in *Ineos/BP Dormagen*, arguably as a direct response to the *Impala* judgment.<sup>186</sup> After examining the parties' response to the SO, the Commission made use of its investigative powers under Article 11 ECMR to request information from competitors in order to assess the validity of the evidence that was submitted. In light of this new evidence, the Commission ultimately decided to clear the proposed merger.<sup>187</sup> This approach has its limits though: because of the mandatory time restrictions governing the adoption of decisions, there is very little room for conducting fresh investigations.<sup>188</sup>

On the other hand, the Commission may choose to simply avoid the formal SO stage. Especially in adversarial "grey area" cases, the Commission could decide to test its main arguments with the parties early on in the process instead. There are indications that the Commission is exploring this scenario as well.<sup>189</sup> However, the obvious drawback of this approach is that it seriously impedes third parties access to the SO and further undercuts the internal checks and balances system.<sup>190</sup>

So whatever path the Commission will prefer to follow - until the ECJ has delivered its judgment on *Impala* and perhaps beyond - it remains to be seen whether this will prove to be a positive procedural change.

## VI. Conclusions

After the annulment of three prohibition decisions in 2002 (*Airtours*, *Schneider* and *Tetra Laval I*), the *Impala* judgment was widely perceived as another crushing defeat for the

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<sup>185</sup> The Advisory Committee consists of representatives of all the competent national competition authorities. The fact that important decisions are taken by the full college of Commissioners can further be seen as an element of the internal checks and balances system. B. Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement" [2005] 2 Competition Policy International 7

<sup>186</sup> *Ineos/BP Dormagen* (Case COMP/M.4094) Commission Decision of 10 August 2006 [2007] OJ L 69, 40. The Decision was taken in August 2006, only a few weeks after the *Impala* judgment. In this case, Ineos (a UK based company active in the production, distribution sales and marketing of chemicals) sought to acquire BP Dormagen Business (a Germany based company active in the production of ethylene oxide and ethylene glycols).

<sup>187</sup> *Ibid.*, at para 4

<sup>188</sup> Somewhat ironically, the CFI explicitly recognized that these time-constraints keep the Commission from extending its investigation. *Ibid.*, at paras 285, 414

<sup>189</sup> For reasons of confidentiality, specific examples of cases are omitted from this paper.

<sup>190</sup> S.B. Völcker and C. O'Daly, *l.c.*, 594

Commission. Moreover, it reignited the debate on the question whether the Community Courts are imposing a too high standard of proof, not in the least because the Commission's Sony BMG decision was representative for the recent economic sophistication of EC merger control and for the Commission's more cautious approach towards prohibition, two direct consequences of the 2002 CFI rulings. The analysis of *Impala* points out, however, that the judgment is in fact a far less bitter pill for the Commission than some observers have argued. Indeed, the analysis first of all did not confirm the assertion that *Impala* has significantly raised the standard of proof. On the contrary, the CFI in fact substantially lowered the evidentiary threshold for establishing an existing collective dominant position (even though its statements on the *Airtours* test are far from unambiguous). This can be seen as a recognition of the fact that the conditions for the finding of collective dominance might be too difficult to meet in practice, especially in complicated "gray area" cases. The fear that this in turn would lead to the undue clearance of anti-competitive mergers, is precisely the reason why the authors welcome *Impala* for clarifying that the standard of proof is equal for clearance and prohibition decisions. If anything, the Sony BMG decision demonstrates the drawbacks of an asymmetrical standard of proof: far from arguing why the merger would not lead to the creation or strengthening of a collective dominant position, the Commission mainly indicated why the evidence was "not sufficient" to underpin a prohibition decision. *Impala* therefore rightly confirms that the Commission cannot opt for a clearance decision to be on the safe side but rather must always take a fully reasoned decision based on sound evidence – a standard the Sony BMG decision clearly did not satisfy. Hopefully, this will also re-establish the legal certainty that a clearance decision will be permanent, as the notifying parties have little control over ensuring that the Commission's analysis can withstand judicial scrutiny.

The implications of *Impala* are not without problems, however. The extent to which the CFI used the SO as a benchmark for its review of the decision is particularly troublesome, as this will make the Commission far more hesitant to reconsider its findings after the issuance of the SO. While the CFI correctly criticized the Commission for not being capable of explaining the fundamental change in its position vis-à-vis the Sony BMG merger, such a dynamic is deplorable. In fact, it seriously undermines the purpose of the SO and, consequently, jeopardizes the parties' right to defense, as they are only capable of properly responding to the Commission's objections after they have been made clear to them. It will therefore be interesting to see how the ECJ will address this issue in its judgment on Sony's and Bertelsmann's appeal against *Impala*. A further problematic aspect of *Impala* is the CFI's insistence on obtaining data from third parties. Indeed, the Commission's more lengthy and demanding information requests in the aftermath of *Impala* already illustrate the additional

burden this adds, both for the Commission and the (third) parties, to the EC merger review process.

Knitting together the threads, it becomes clear that *Impala* will have (and already has) far-reaching practical consequences for the Commission's handling of difficult merger cases. While the authors welcome the symmetrical standard of proof and strongly disagree with the claim that *Impala* has significantly raised the standard of proof – the CFI in fact lowered this standard for the finding of collective dominance – they at the same time fear that *Impala* further complicates an already time-constrained and complex administrative procedure. The Commission will therefore have to find ways to improve the quality of its decision-making in light of the issues raised in *Impala*, at least until the ECJ has delivered its judgment and perhaps beyond. When asked in a 2002 interview whether the Commission has the necessary resources to meet the Community Court's standards, the president of the CFI responded that it did not, but that this could not restrain the Court from striking down flawed decisions.<sup>191</sup> Much has changed in the last five years, however, so hopefully the Commission will be able to enhance the efficiency of EC merger control without a radical reform of the current procedures. In such a scenario, *Impala* may in a certain time be remembered not as a setback but rather as the necessary stimulus for change.

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<sup>191</sup> AJB, "Preuve solide: the cfi raises the bar" (December 2002) In Competition [http://www.linklaters.com/in\\_competition/2\\_00212.htm](http://www.linklaters.com/in_competition/2_00212.htm); J. Quatremér, "Un contrôle des fusions plus intense", *Libération* (7 November 2002) <http://www.liberation.fr/actualite/economie/84210.FR.php>