


The Court of First Instance's Impala Judgment: a Judicial Counter-reformation in EU Merger Control?

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On July 13, 2006, the European Court of First Instance ("CFI") annulled the European Commission's July 2004 decision authorising the creation of the Sony BMG recorded music joint venture.¹ While the annulment of a clearance decision is by no means unprecedented,² the present judgment is extremely significant, not only because of its impact on Sony BMG and other contemplated combinations in the music industry, but because of its likely effects on the way the Commission will handle any contentious merger case in the future. The judgment suggests an expansive interpretation of co-ordinated effects (collective dominance) as a theory of competitive harm, and saddles an already complex and time pressured review process with additional complications. Moreover, the judgment creates the specter of increased ex post intervention against already closed deals, and creates unhealthy incentives for complainants.

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1 Case T-464/04, *Impala*, an international association comprising approximately 2,500 independent music production companies, which had taken part in the procedure before the Commission, brought the appeal. Sony and BMG were admitted as interveners.

2 The CFI annulled a clearance in Case T-156/98, *RJB Mining v Commission* [2001] E.C.R. II-337, and partially annulled clearances in Joined Cases C 68/94 & 30/95, *France v Commission* ("Kali+Salz") [1998] E.C.R. I-1375 and Case T-114/02, *BaByliss v Commission* [2003] E.C.R. II-1279.

After a brief summary of the Commission's 2004 clearance decision and the judgment's principal holdings, we will analyse its consequences for the Sony BMG joint venture itself, for future cases involving co-ordinated effects and for the Commission's merger review process generally.

1. The Commission's 2004 clearance decision

In its decision, the Commission considered whether the reduction in the number of major players (majors) in the recorded music industry from five to four would lead to the strengthening of a pre-existing position of collective dominance, or the creation of such a position.³ While in its statement of objections ("SO"), the Commission had seriously entertained such concerns, it ultimately abandoned them in its final decision, for essentially three reasons.

First, the Commission did not find evidence of parallel pricing behavior in any of the national markets it examined. While the majors' average net wholesale prices appeared to show a "relatively similar price development", the Commission found this not to constitute sufficient evidence of past co-ordination. It examined whether published prices to dealers ("PPDs") may have provided a focal point for co-ordination, but found that apparent parallel movement of average PPDs and net prices masked significant fluctuations of discounts on a customer-by-customer and album-by-album basis. The Commission finally analysed whether the majors' discounts were aligned and sufficiently transparent to allow efficient monitoring of price co-ordination, but found that the majors' discount practices (particularly so-called "campaign discounts") were insufficiently transparent, notwithstanding "permanent interaction with the same customer base" and the weekly market intelligence reports by the parties' respective sales forces.

Secondly, the Commission examined whether the markets for recorded music were characterised by features facilitating co-ordinated behaviour. The Commission found that the relatively heterogeneous nature of the content of recorded music, and the pricing implications of the vastly different and often unpredictable

3 Commission Decision in Case COMP/M.3333, *Sony/BMG*, July 19, 2004.

success of individual albums, make tacit collusion difficult. Similar considerations led the Commission to find that transparency in the recorded music markets is limited despite the publication of weekly hit charts, a stable customer base and the reporting systems set up by the majors. The Commission also found no evidence of any past retaliation against "cheating" (price cutting) majors, for example in the form of "a temporary return to competitive behaviour" or exclusion of the "cheater" from multi-artist compilation album co-operation.

Thirdly, in the absence of any evidence of past co-ordination and market characteristics facilitating co-ordination, the Commission briefly considered whether the merger would lead to the creation (rather than the strengthening) of a position of collective dominance. It observed that while in some oligopolistic markets a reduction in the number of major players from five to four could in fact lead to the creation of a position of collective dominance, there was no suggestion that such a reduction would substantially change anything about the lack of transparency, heterogeneous product characteristics and the lack of retaliatory action in the recorded music markets.

2. The CFI's judgment

The Independent Music Publishers and Labels Association ("Impala") appealed the Commission's decision to the CFI.⁴ In its judgment, delivered two years after the clearance decision, the CFI criticises the Commission's findings on both pre-existing collective dominance and the possible creation of such a position by the majors.

Pre-existing collective dominance

As regards the question of whether the majors enjoyed a pre-existing situation of collective dominance, the CFI sets the tone with a significant obiter dictum. It suggests that the three famous *Airtours* conditions for testing for collective dominance⁵ may also:

4 The European courts have been very generous in granting standing to the merging parties' competitors to challenge clearance decisions, and the Commission did not question Impala's standing before the CFI.

5 The conditions are that: (i) the market must be sufficiently transparent for the undertakings which co-ordinate their conduct to be able to monitor sufficiently whether the rules of co-ordination are being observed; (ii) there must be a deterrent

"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."⁶

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 a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances."⁷

The CFI, however, notes that Impala did not actually plead a theory based on indirect evidence, and went on to examine whether in applying the traditional *Airtours* criteria the decision contained a sufficient statement of reasons or whether the decision was vitiated by a manifest error of assessment. The CFI focused on two points: the significance of campaign discounts for the degree of price transparency and the existence of a retaliation mechanism.

As regards the significance of *campaign discounts* for market transparency, the CFI criticised the Commission's "vague assertions"⁸ as "imprecise, unsupported, and indeed contradicted by other observations in the decision",⁹ and thus insufficiently reasoned. But the court went further, conducting a detailed review of the evidence presented in the SO, the Commission's file, and additional documents lodged by the applicant and the Commission. Among other things, the CFI reproached the Commission for: (i) having relied on materials provided by the parties, such as weekly reports by parties' sales forces,¹⁰ statements of their executives,¹¹ and discount figures¹²; and (ii) for having wrongly assessed the significance of retailers'¹³ and competitors'¹⁴ responses in its market investigation. The CFI claims to have found "a great number of errors" in tables comparing Sony's and BMG's campaign discounts.¹⁵ It reproaches

mechanism in the event of a deviation from those rules; and (iii) the reactions of competitors outside the oligopoly must not be able to jeopardise the results expected from the co-ordination: Case T-342, *Airtours v Commission* [2002] E.C.R. II-2585 at [68].

6 At [252].

7 At [253].

8 At [289].

9 At [320].

10 At [355]–[361].

11 At [389].

12 At [422].

13 At [381]–[387].

14 At [403]–[407].

15 At [425].

the Commission for not having investigated other parties' data,¹⁶ and for "not having demonstrated" that the matrix of possible campaign discount variations was sufficiently complex not to have been understood by an industry professional.¹⁷ It rejects a study drawn up by the companies' economic advisers as "not presenting data that are sufficiently reliable, relevant and comparable", and, in any event, not supporting the conclusions that the Commission drew therefrom.¹⁸ The CFI admonishes the Commission for having failed to carry out a "serious examination" into campaign discounts either before or after the oral hearing,¹⁹ and not even having mentioned campaign discounts in the SO.²⁰

Regarding the requisite retaliation mechanism, the CFI criticised the Commission's reliance on the apparent absence of previous instances of retaliation. The CFI stressed that a demonstrated possibility of retaliation was sufficient; when companies faithfully adopt common behaviour, there is no need to have recourse to sanctions.²¹ In any case, as the CFI further points out, even if the Commission's approach were accepted, lack of evidence of retaliation would be relevant only if no retaliation occurred when the evidence established a breach of the common policy between the oligopolists. Moreover, the Commission was unable to indicate "the slightest step" it may have taken to assess if retaliation had occurred in the past.²²

Creation of collective dominance as a result of the merger

As regards the Commission's conclusion that the transaction would not create a collective dominant position, the CFI criticised the "extremely succinct"²³ analysis as "superficial, indeed purely formal," particularly in the case of a concentration that "raises serious problems".²⁴ In particular, the Commission had failed to examine how the reduction of the number of majors would impact their ability to monitor discounts.²⁵ As for the

existence of deterrent mechanisms, the CFI emphasised that a backward looking analysis of whether past retaliation occurred was even more inadequate in the context of the prospective analysis required to determine whether a transaction will create a position of collective dominance. Moreover, in the SO, the Commission had identified the exclusion from compilation joint ventures as a sufficient deterrent mechanism, whereas the decision contained no explanation as to why such a mechanism would not be effective.²⁶

3. What will happen next with Sony BMG?

Re-examination by the Commission

As a consequence of the judgment the Commission has to re-examine the Sony BMG transaction "in the light of current market conditions".²⁷ To enable this, the parties must update their original notification.²⁸ In complex mergers, the Commission insists on the inclusion of extensive market data before accepting the notification as complete. Sony BMG is also a rare opportunity for the Commission to study the impact of an already consummated merger on market performance in the context of an ongoing procedure, and it is likely to want sufficient data to do so.

The Commission's previous record of re-examining merger cases after annulment should give some encouragement to parties who have to re-notify transactions. In a couple of cases (*Kali+Salz* and *RAG/Saarbergwerke*)²⁹ in which the courts annulled conditional clearance decisions, the Commission subsequently granted unconditional clearances; in another (*SEB/Moulinex*)³⁰ the Commission confirmed its initial unconditional clearance. In *Tetra Laval/Sidel*, the Commission granted conditional first phase clearance after the CFI had

16 At [412]–[413].

17 At [429].

18 At [434].

19 At [398] and [451].

20 At [451].

21 At [466].

22 At [471].

23 At [525].

24 At [528].

25 At [532].

26 At [538].

27 *cf.* Art.10(5) second sub-paragraph of the recast Merger Regulation. While the old Merger Regulation still applies to this case, the Commission has in past cases conducted its re-examination in the light of current market conditions.

28 Certifying that market conditions have not materially changed (*cf.* Art.10(5) third sub-paragraph) would seem to be difficult given the changes in the music industry since the parties originally notified the deal on January 9, 2004.

29 Commission Decision in Case COMP/M.308, *Kali+Salz/MDK/Treuhand*, July 9, 1988 and Commission Decision in Case COMP/ECSC.1350, *RAG/Saarbergwerke/Preussag Anthrazit II*, May 7, 2002.

30 Commission Decision in Case COMP/M.2621, *SEB/Moulinex*, November 11, 2003.

overturned its prohibition decision.³¹ Only in *Schneider/Legrand* did the Commission reopen a phase II investigation upon remand, which led to Schneider finally abandoning the deal.³²

Clearly, the degree to which the judgment in question undermines the Commission's initial decision plays an important role in shaping the extent—and ultimately the outcome—of the Commission's re-examination.³³ This raises the question of whether an appeal of the CFI judgment to the Court of Justice ("ECJ") could sometimes have an impact on the re-examination.

Parallel appeal to the ECJ?

The Commission and Sony and BMG (having intervened in the Commission's support before the CFI)³⁴ could all appeal the judgment to the ECJ. As a matter of principle, the Commission only appeals CFI judgments rarely, even though it did appeal following its defeat in the *Tetra Laval* case. An appeal can be based only on points of law. Given the intensity of the CFI's scrutiny of the Commission's factual assessment, an appeal could possibly in this case be based on the notion that the CFI substituted its own factual assessment for the Commission's and thus overstepped the permissible boundaries of judicial review. Indeed, this was the Commission's argument when it appealed the CFI's judgment overturning its prohibition decision in *Tetra Laval/Sidel*. While the ECJ rejected the Commission's appeal in that case, it did not question that an appeal could be brought on those grounds.³⁵ In so far as the CFI bases its judgment on the Commission's failure to state adequate reasons, an appeal could possibly also question whether the CFI is applying too high a review standard. A failure to state adequate reasons should normally be relatively easy for the CFI to detect, yet the CFI took nearly 50 paragraphs to explain why the

Commission's findings on transparency of discount are on their face insufficient.

An appeal to the ECJ does not have suspensory effect,³⁶ so it does not affect the Commission's re-examination as such. While Sony and BMG could also have applied for interim relief, they would have to demonstrate that the re-examination procedure itself causes them serious and irreparable damage (which appears difficult), or that the judgment largely predetermines the outcome of the Commission's fresh examination (which appears risky). Still, even without interim measures, an appeal can have longer-term strategic advantages in a re-examination scenario. Whatever decision the Commission takes, it could be appealed again to the CFI, either by the merging parties or by a complainant such as Impala. In such a situation, it may make a difference whether the CFI's precedent still stands. Moreover, if the ECJ were to set aside the CFI's judgment reasonably quickly,³⁷ this would restore the original clearance decision and thus deprive the Commission of any competence to re-examine the merger.

Options for the Commission

At the time of writing, it is too early to speculate about the outcome of the Commission's re-examination. No matter how harsh the CFI's criticism, the Commission could well adopt a fresh clearance decision. Clearly, the Commission has to look more closely at the issues of campaign discounts and deterrent mechanisms, but it will also have to square its fresh assessment with some of its statements before the CFI, such as its representation that retaliation by excluding deviators from compilation deals is unattractive because of the sacrifices that the punishing company must endure.³⁸ Much will depend on the results of the Commission's new market investigation, which will likely be more refined now that the CFI's judgment has helped crystallise the pertinent issues.

If the Commission were to adopt a prohibition decision, Art.8(4) of the Merger Regulation gives it wide ranging powers to order dissolution of the Sony BMG

31 Commission Decision in Case COMP/M.2416, *Tetra Laval/Sidel*, January 13, 2003.

32 Initiation of proceedings and abandonment of the planned concentration, Case COMP/M.2283, *Schneider/Legrand II* [2003] O.J. C29/5. For the CFI judgment: Joined Cases T 310/01 & 77/02, *Schneider Electric v Commission* [2002] E.C.R. II-4071 and [2002] E.C.R. II-4201.

33 EC Treaty, Art.233(1) requires the Commission to "take the necessary measures to comply" with the CFI's judgment.

34 Statute of the Court of Justice, Art.56.

35 See Case C-12/03 P, *Commission v Tetra Laval* [2005] E.C.R. I-987 at [38]–[39]. Advocate General Tizzano had actually agreed with the Commission that the CFI had overstepped the limits of judicial review in that case, see opinion of A.G. Tizzano in *Commission v Tetra Laval*, cited above, at [91]–[103].

36 EC, Art.242 and Art.60 of the Statute of the Court of Justice.

37 Under Art.62a of the Rules of Procedure of the Court of Justice, an expedited procedure is "exceptionally" available also before the ECJ when "the particular urgency of the case requires the Court to give its ruling with the minimum of delay".

38 While the CFI disapprovingly notes that this argument contradicted statements in the decision, at [533], it does not reject it as unfounded.

joint venture. The Commission has made use of these powers in the past, namely in cases where the parties had acquired shares in the target companies in the context of public bids³⁹ (*Tetra/Laval*, *Schneider/Legrand*),⁴⁰ or where the companies had closed deals that were not large enough to fall under the Merger Regulation, but were referred to the Commission by national competition authorities⁴¹ (*Kesko/Tuko*, *Blokker/Toys-R-Us*).⁴² The parties could, of course, appeal such a decision along with the preceding prohibition decision.

4. The judgment's impact on future collective dominance cases

While much of the judgment is focused on aspects specific to the music industry, at least its obiter dictum on the "indirect" test of the *Airtours* criteria in the case of a pre-existing position of collective dominance (see above) is clearly of wider significance. In essence, the CFI seems to say that presence of mere indicia of co-ordinated effects may be sufficient for the Commission to conclude that a dominant position already exists. Clearly, this is a significant extension of *Airtours*. The CFI's attempt to distinguish the present case from *Airtours* by drawing a distinction between existing collective dominance and the creation thereof⁴³ is not entirely convincing: in any co-ordinated effects case, the Commission could simply stipulate that a position of collective dominance already exists and then proceed to conduct an "indirect" effects test.

Unfortunately, the CFI sheds little light on the meaning of "signs, manifestations and phenomena inherent in the presence of a collective dominant position" that are to serve as indirect evidence. The example of "close alignment of prices over a long period" is not compelling, as such alignment need not be inconsistent with intense competition.

While it is certainly true that price alignment is more significant when "prices are above the competitive

level",⁴⁴ this does not add much, as the competitive level itself is not easy to establish, unless one has already prejudged the outcome of the analysis.

We must therefore wait for another day to see what CFI meant with its obiter dictum. Clearly, this is an attempt to invite the Commission and/or complainants to explore the limits of the new "indirect test" during the re-examination of *Sony/BMG*, as well as in future cases. By explicitly labelling its statements as obiter, the CFI may have sought to insulate them from an appeal to the ECJ, although the statements arguably underpin the CFI's criticism of the Commission's assessment of the transparency of discounts.

5. The judgment's impact on EC merger control generally

In criticising the Commission's assessment of the transaction, the CFI makes some observations, namely on the role of the SO and on the Commission's fact finding, that will affect the way in which the Commission examines all contentious mergers.

The role of the statement of objections

One of the most problematic aspects of the judgment is the importance it assigns to the SO. The CFI pays lip service to the well-established jurisprudence holding that the SO is only a preparatory document,⁴⁵ and, accordingly, a decision need not explain why it departs from the SO⁴⁶ and such departures alone do not constitute a manifest error of assessment.⁴⁷ But despite such protestations, the judgment makes clear that the "fundamental U-turn in the Commission's position"⁴⁸ after the SO constitutes one of the central grounds for impeaching the Commission's assessment in the decision. According to the Court, the Commission:

"must be in a position to explain (. . .) at least in the context of the proceedings before the Court, its reasons for considering that its provisional findings were incorrect; but above all, the findings set out in the decision must be compatible with the findings of fact made in the statement

39 Merger Regulation, Art.7(2), allows the acquisition of shares under such circumstances, subject to the acquirer not voting them prior to clearance.

40 Commission Decisions in *Tetra Laval/Sidel*, cited above, and in *Schneider Electric/Legrand*, cited above.

41 See the referral procedure under Art.22 of the Merger Regulation.

42 Commission Decision in Case IV/M. 890, *Blokker/Toys "R" Us*, June 26, 1997 and Commission Decision in Case IV/M. 784, *Kesko/Tuko*, November 20, 1996.

43 At [249].

44 At [253].

45 Case 60/81, *IBM v Commission* [1981] E.C.R. 2639.

46 See [284], [285].

47 At [335].

48 At [283].

of objections, in so far as it is not established that the latter findings were incorrect".⁴⁹

Thus, the CFI expects the Commission to be able to "disprove" any findings of fact in the SO that it does not adopt in the decision. The CFI also suggests that the Commission's conclusions in the decision must be supported by the findings of fact in the SO, unless the Commission can disprove those findings before the court.⁵⁰ Where the Commission "suppresses" certain relevant elements contained in the SO that might be inconsistent with its assessment in the final decision, the CFI deems the Commission's decision to be insufficiently reasoned.⁵¹ The CFI even goes as far as to suggest that the Commission should have explained differences in the decision and its SO in the year 2000 in the abortive Time Warner/EMI merger.⁵²

The notion that the Commission has to prove before the CFI that its preliminary findings in the SO were incorrect (rather than the applicant having to demonstrate a manifest error in the Commission's final assessment) breaks new ground on the institutional balance between the Commission and the Community courts. It also stands in contrast to the CFI's insistence in *General Electric* that the Commission is under no obligation to explain even radical departures from previous decisions concerning the same market.⁵³

In any case, the importance the judgment ascribes to the SO fundamentally challenges the existing dynamics in EC merger review. In particular, given the statutory time pressures, the practical reality is that an SO in a merger investigation is often drafted as an advocacy document. The case team does its best to assemble those facts in the file that justify a prohibition absent appropriate commitments. The parties, in turn, submit a written reply (which often focuses on those aspects of the record that undermine the SO) and have the chance to explain their views in an oral hearing. The Commission hierarchy then makes a decision, taking into account the views of other constituencies in DG Comp (the "peer review panel," the Chief Economist, the Legal Service and other Commission services) that act as internal "checks and balances". Accordingly, it is not surprising that the Commission has frequently cleared mergers unconditionally after having issued an

SO—as Sony and BMG pointed out before the CFI, the Commission has done so in 14 out of 62 cases in the last five years.

The CFI's strictures may have many different consequences on the Commission's process, none of which would appear to be an improvement on the existing process. First, the Commission may be less inclined to move away from an SO once it is drafted, regardless of how persuasive the parties' counter-arguments are, because it does not feel able (or willing) to meet the CFI's burden of "demonstrating" that key findings in the SO are incorrect. Given that it is human nature not to admit mistakes, this possibility should not be discarded lightly. However, such a development would fundamentally undermine the Commission's considerable efforts to develop its system of internal "checks and balances" to avoid a dynamic where the internal process becomes irreversible once the case team has started drafting its SO.

Alternatively, the Commission may seek to avoid the formal SO stage altogether, vetting a draft SO internally to see whether it is really strong enough, and "testing" its key arguments with the parties early on in the process. While merging parties would certainly welcome such an earlier engagement with the case team on the merits of the case, the central function of the SO process—providing a degree of transparency vis-à-vis third parties, other Commission services, and the Member States—would be undermined.⁵⁴

Perhaps the best outcome would be that the Commission times the process to allow sufficient time for further investigation after having issued the SO, so as to be able to investigate more thoroughly any counter-arguments the parties have provided. However, there are also no easy solutions in this respect. Issuing the SO at an earlier stage in phase II would be desirable, but may not be realistic given the ever increasing complexity of the Commission's investigations and its current workload, at least without still more extensive pre-notification discussions. Alternatively, the Commission could look for possibilities to "stop the clock" for post-SO investigations, as it did in *Oracle/PeopleSoft*.⁵⁵ Both options, however, would further increase the duration of

49 At [335] see also [410].

50 At [446].

51 At [300].

52 Commission Decision, initiation of proceedings in Case COMP/M.1852, *Time Warner/EMI*, June 14, 2000.

53 Case T-210/01, *General Electric v Commission*, at [513], not yet reported.

54 Similarly, it is conceivable but from a policy perspective not necessarily desirable to limit third parties access to the SO, even though this is possible as a legal matter—see [30] of the Commission Notice of December 13, 2005 on the rules for access to the Commission file in cases pursuant to Arts 81 and 82 of the EC Treaty, Arts 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004.

55 The Commission issued an extensive information request to the parties following the oral hearing, which effectively

the Commission's overall investigation, which is already considerable.

Impact on the Commission's factual investigation

Another striking feature of the CFI's judgment is its criticism of the Commission's reliance on the parties' data. It rebukes the Commission for basing its analysis of discounts only on Sony's and BMG's data,⁵⁶ and for having relied on the presentation of that data by the parties' economists based on a methodology chosen by them, without having ascertained whether that data were "accurate, relevant or objective and representative".⁵⁷

While the CFI recognises that the Commission cannot ascertain in detail the accuracy of all information submitted to it, "it cannot (. . .) go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties".⁵⁸ Moreover, the CFI does not accept the Commission's argument that it can be difficult to obtain—and use in its decision—other parties' data on such issues as discounts, given those parties' confidentiality concerns, on the one hand, and the merging parties' rights of defence on the other.⁵⁹

The CFI's apparent insistence on obtaining reliable data from third parties poses a significant practical problem for the Commission, in particular with respect to the kind of data needed for more sophisticated econometric analysis in a co-ordinated effects case. Experience shows that—unlike the merging parties who are typically willing to comply with any data request in order expedite clearance—third parties have little incentive to provide complete and reliable data sets (which usually involves a substantial effort) on a timely basis. They will be particularly reluctant to do so in a situation where the Commission is investigating co-ordinated effects concerns, as any finding in this respect may limit their own ability to participate in further industry consolidation.

Even when third parties are willing to provide useful data on a timely basis, the Commission's difficulties in using that information are considerable. The relevant data—such as in this case campaign discounts—will

often be of extreme commercial sensitivity, and the companies providing it will understandably insist that it not be made accessible to the merging parties. (Indeed, when the case focuses on co-ordinated effects, making that information accessible to the merging parties would exacerbate the very risks that the Commission is meant to be policing).

However, it is also clear that the Commission cannot issue a prohibition decision or require remedies based on data that it did not make accessible to the merging parties without violating their rights of defence. The Commission has in the recent past attempted to resolve this conundrum by giving access to third parties' confidential data to the merging parties' outside economic advisers in a "clean room" setting. However, the experience with this process seems to have been mixed and it is unclear whether it would be viewed as sufficient to protect the merging parties' rights of defence.

6. The judgment's impact on legal certainty

As outlined above, the CFI imposes a number of requirements on the Commission that will put an additional strain on an already complex and intensive merger procedure. Time will tell to what extent the Commission really makes material changes to its practice as a result of the judgment. Whatever the Commission does, it is clear that, from the merging parties' point of view, there is now less certainty that a clearance decision will be permanent. The parties have little influence on how the Commission runs its investigation, and thus little control over ensuring that the investigation meets the CFI's requirements. Often, if not most of the time, the Commission's concerns are only fully fleshed out in the SO itself, so it is somewhat ironic that the CFI reproaches the merging parties for having submitted important evidence to the Commission "at the last minute," and that the court requires that that evidence "at the very least be particularly reliable, objective, relevant and cogent".⁶⁰ Even if the parties meet this high standard, which is particularly challenging given the very short time-frame during which they must produce their written reply to the SO and prepare for the oral hearing, they still have no control over how thoroughly the Commission drafts its decision after the SO stage.

stopped the clock for six months, Commission Decision in Case COMP/M.3216, *Oracle/PeopleSoft*, October 26, 2004.

⁵⁶ At [412].

⁵⁷ At [415].

⁵⁸ At [415], also [452].

⁵⁹ At [411].

⁶⁰ At [414].

It thus seems evident that there is now a higher risk that a post-clearance court challenge by a third party may lead to the parties having to modify or ultimately even unwind a transaction that they have already closed. Waiting for the CFI to reject an appeal against the clearance decision before closing is clearly not practical, considering that even under its expedited procedure, it took the CFI two years to deliver the present judgment. Moreover, few if any sellers will agree to take on any substantial antitrust risk post-closing.

All this gives considerable leverage to would be complainants, to the point where they may seek commercial concessions or even financial rewards in exchange for not challenging a clearance decision. It is telling that days after the judgment, Impala issued a public "warning" to Bertelsmann not to sell its music publishing business (which was not part of the Sony BMG joint venture) to a trade buyer lest Impala bring a challenge against that transaction⁶¹; and, in an unrelated matter (*Omya/Huber*), a complainant competitor publicly contemplated whether it would challenge the Commission's phase II clearance decision before the CFI.⁶²

7. Conclusion and outlook

Like the CFI's three seminal judgments in 2002—*Airtours*, *Schneider* and *Tetra Laval*—*Impala* will cause much soul searching and reflection within the Commission. In response to the three earlier judgments, the Commission introduced internal reforms that are widely accepted to have improved the general quality of its decision making. The CFI's latest judgment, however, needlessly increases the Commission's burden in contentious merger investigations and threatens both the efficiency and finality of EU merger control. If the CFI's judgment stands, one hopes that the Commission will find ways of amending its procedures that will not turn back the clock to the pre-2002 days, when it sometimes seemed that a prohibition decision was simply the default option in a difficult merger case.

One interesting policy option the Commission might want to explore is whether it can simply forgo adopting clearance decisions altogether, and instead wait for the "clock to run out" and rely on the presumption of Art.10(6) of the Merger Regulation.⁶³ Such a proposition may seem shocking at first, but it should be remembered that this is precisely what the US and Canadian agencies, as well as other competition authorities around the world, do when they simply decide not to challenge a merger in court. Few would argue that, after 15 years of EC merger control, under enforcement is so pervasive a problem that it needs to be policed by forcing the Commission to detail its reasons for not prohibiting a merger or requiring remedies. Indeed, not having to spend time drafting persuasive clearance decisions may free up substantial resources within DG Competition to focus on the more problematic cases. Concerns about a loss of transparency can be addressed by press releases that outline the Commission's reasons for clearing the merger. While a system of "running out the clock" would admittedly limit complainants' ability to seek judicial recourse against agency inaction, this would not necessarily seem to be a bad thing—at least in the USA, one does not hear too many complaints.⁶⁴ The Commission has already taken a step in this direction by introducing its simplified procedure,⁶⁵ and there would not seem to be any fundamental reason not to make "running out the clock" the rule in both phase I and phase II investigations leading to unconditional clearances.

Perhaps the *Impala* judgment will one day join the famous 2002 judgments as not being remembered as a damaging defeat for the Commission, but as a catalyst for further reform of the Commission's merger processes.

61 "Indies rail against music publishing consolidation", Reuters July 20, 2006, available at http://today.reuters.com/investing/financeArticle.aspx?type=mergersNews&storyID=2006-07-20T162614Z_01_L20840560_RTRIDST_0_MEDIA-BMG-IMPALA.XML.

62 "UPDATE 2-EU clears OMYA/Huber deal, rival considers appeal", Reuters July 19, 2006, available at <http://today.reuters.com>

63 The provision states provides that if the Commission fails to act within the prescribed time-limits then, the transaction is "deemed to have been declared compatible with the common market".

64 While one could argue that under a US-type system, complainants can themselves petition the courts to block the merger (which is not an option under the EC regime), such direct challenges are extremely rare.

65 [2005] O.J. C56/32.