The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after *Sony/BMG* and *Impala*?

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Abstract

The recent *Impala* Judgment by the CFI on the *Sony/BMG* Decision by the Commission represents the most important ruling on collective dominance since *Airtours*. We review both the Decision and the Judgment and derive implications for the institutional and substantive development of EU Merger Control. Firstly, *Impala* introduces an ambitious symmetric standard of proof for prohibition and clearance decisions by the Commission. While alleviating fears of an increasing number of false positives in the aftermath of *Airtours*, this entails the problem how to deal with cases in which neither the existence, nor the absence of anticompetitive effects can be proven to the required standard. Secondly, *Impala* represents to some extent a comeback of coordinated effects analysis, further précising the conditions for establishing this kind of anticompetitive effects. Thirdly, the ongoing process of increasing the role of third parties in European Merger Control is fuelled. Additionally, and given the characteristics and the development of the music industry, we criticise a lacking in-depth economic analysis of a potential decrease innovation efficiency as well as an increase in foreclosure effects following the merger.

JEL Codes: K21, L41, L13, L82

Keywords: merger control, coordinated effects, standard of proof, music industry, collusion, Impala, Sony/BMG

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A. Introduction

On July 13, 2006, the Court of First Instance (CFI) in *Impala v Commission*[1] annulled the European Commission's *Sony/BMG* Decision.[2] This was a surprising and remarkable development for several reasons.[3] The CFI for the first time reversed an unconditional clearance decision by the Commission under the EC Merger Regulation (ECMR). Secondly, the *Impala* ruling represents the most important collective dominance (or coordinated effects as they are now called) case since *Airtours.* Thirdly, the CFI proceedings were initiated by competitors of the newly created joint venture, namely *The Independent Music Publishers and Labels Association* (*Impala*).[4] Moreover, the original Decision had already been remarkable in itself. For one thing, the Commission opted for an unconditional clearance despite serious initial doubts. Then, the Commission conducted a comprehensive econometric analysis of past coordination, thus providing another application of the quantitative techniques characteristic of the recent "more economic approach".[5] As a corollary, this marks a further step of convergence with the US.[6] Last not least, the case at hand must be seen against the longer-term development of the music industry, which is characterised by increasing concentration, which in turn affected negatively innovation and market access.

In this paper, we offer a comprehensive review of *Sony/BMG* and *Impala*. We not only draw conclusions regarding its contribution to the development of the merger control framework in the EU but also highlight certain blindspots in the competition assessment. The paper is organised as follows. In section B we sketch the economic and legal background of coordinated effects analysis. In section C we turn to the arguments in the underlying

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[1] Case T-464/04, *Impala v Commission*, Judgment of the Court of First Instance, 13/07/2006 (henceforth *Impala*).

[2] Case COMP/M.3333 – *Sony/BMG*, Commission Decision, 19/07/2004 (henceforth *Sony/BMG*).

[3] Despite this, the literature treatment of *Sony/BMG* is rather sparse. Brief analyses can be found in Frances Dethmers, "Collective Dominance under EC Merger Control – After Airtours and the Introduction of Unilateral Effects is there still a Future for Collective Dominance?", E. C. L. R., Vol. 26 (11), 2005, 638-649*;* Katharina Murschitz, "Das Joint Venture (JV) Sony/BMG: Der Versuch einer kritischen Betrachtungsweise", Wettbewerb in Recht und Praxis, Vol. 2/2006, 232-236; Fabio Polverino (2006), "Assessment of Coordinated Effects in Merger Control: between Presumption and Analysis" (May 10, 2006), available at http://ssrn.com/abstract=901688; and from the Commission perspective Peter Eberl, "Following an in-depth Investigation the Commission approved the Creation of the Sony/BMG Music Recording Joint Venture on 19 July 2004", Competition Policy Newsletter, No. 3, 2004, 7-10.

[4] Impala is an international association, incorporated under Belgian law, whose members are 2,500 independent music production companies (judgment, para 1). See also Impala's website at http://www.impalasite.org/.

[5] On the "more economic approach" in EU Merger Control in general see Arndt Christiansen, "The Reform of EU Merger Control - Fundamental Reversal or Mere Refinement?" (April 25, 2006), available at SSRN: http://ssrn.com/abstract=898845; Arndt Christiansen, "The "More Economic Approach" in EU Merger Control", CESifo Forum, 7 (1), Spring 2006, 34-39, available at http://www.cesifo-group.de/link/forum1-06-focus6.pdf.

[6] In the parallel US proceedings the (FTC) had also unconditionally approved the transaction. See FTC Press Release: FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America, July 28, 2004, http://www.ftc.gov/opa/2004/07/sonybmg.htm.

Commission Decision. Section D then deals with the review by the CFI. Section E derives implications for the EU Merger Control framework, while section F provides a link to the industry background. Section G concludes.

B. Collective Dominance: The Economic and Legal Background

1. The Economics of (Tacit) Collusion

From an economic point of view, the goal of merger control is to prevent the build-up of excessive market power, which would give firms the discretion to raise prices above the competitive level or otherwise reduce social welfare, while maximising individual profits.[7] Horizontal mergers towards a monopoly or a monopoly-like situation (quasi-monopoly) represent the prime example. They are generally anticompetitive and welfare-reducing and, thus, should be prohibited.[8]

In addition to this, mergers also potentially reduce welfare by facilitating collusion (*coordinated behaviour*) in oligopolistic markets. Collusive arrangements, however, are inherently unstable as soon as explicit cartelisation is prohibited.[9] Put briefly, the participating firms are in a dilemma between adherence to the terms of coordination, thus collectively maximising profits, and defection, thus reaping high individual short-term profits at the expense of the others.[10] Consequently, mergers in fairly concentrated markets cannot be assumed to regularly create or promote collusive tendencies. Building on this fundamental insight, a voluminous literature on the necessary and sufficient conditions for rational collusive firm behaviour has developed in industrial economics.[11] The preferred tool has been non-cooperative game theory with the central concept of the Nash equilibrium, which is

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[7] See e.g. the early treatment by George J. Stigler, "Monopoly and Oligopoly by Merger", American Economic Review, Vol. 40, P&P, vol. 42 (6), 23-34; Simon Bishop and Mike Walker, "The Economics of EC Competition Law: Concepts, Application and Measurement", London: Sweet & Maxwell, 2002, 253-313.

[8] See inter alia Morton I. Kamien and Israel Zang, "The Limits of Monopolization through Acquisition", Quarterly Journal of Economics, Vol. 105 (2), 1990, 465-99; Joseph Farrell Carl Shapiro, "Horizontal Mergers: An Equilibrium Analysis", American Economic Review, Vol. 80 (1), 1990, 107-126; Mihkel M. Tombak, "Mergers to Monopoly", Journal of Economics & Management Strategy, Vol. 11 (3), 2002, 513-546.

[9] The seminal contribution was George J. Stigler, "A Theory of Oligopoly", Journal of Political Economy, Vol. 72 (1), 1964, 44-61; Alexis Jacquemin and Margaret E. Slade, "Cartels, Collusion, and Horizontal Merger", in: Richard Schmalensee and Robert D. Willig (eds.), Handbook of Industrial Organization, Vol. 1, Amsterdam: North-Holland, 1989, 415-473.

[10] In the social sciences this setting is widely referred as a prisoner's dilemma, the verbal formulation of which goes back to Albert W Tucker, "A Two-Person-Dilemma", unpublished manuscript, Princeton University, 1950. Reprinted in: Eric Rasmusen (Ed.), Readings in Games and Information, Oxford: Blackwell 2001, 7-8.

[11] See the recent surveys of theoretical and empirical work by Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole, "The Economics of Tacit Collusion", Brussels: DG Competition, 2003, available at http://ec.europa.eu/comm/competition/mergers/review/the_economics_of_tacit_collusion_en.pdf; Switgard Feuerstein, "Collusion in Industrial Economics - A Survey", Journal of Industry, Competition and Trade, Vol. 5 (3-4), 2005, 163-198; Margaret C. Levenstein and Valerie Y. Suslow, "What Determines Cartel Success?", Journal of Economic Literature, Vol. 44 (1), 2006, 43-95.

specifically relevant to repeated strategic interactions typical for oligopolistic settings.[12] The research efforts resulted in the specification of a range of market and firm characteristics, which help to mitigate the dilemma structure and are, therefore, conducive to coordinated behaviour. The most important ones are (i) a limited number of competitors, (ii) a high degree of product and cost structure homogeneity, (iii) a high level of market transparency, (iv) significant barriers to entry, and (v) a low probability of detection and legal sanctions. Furthermore, (vi) multi-market contacts, (vii) past experience with coordination, and (viii) a stable economic environment also facilitate collusive behaviour.

The closer a specific merger comes to fulfilling these conditions, the higher is the likelihood of coordinated effects in the post-merger equilibrium. The focus here is not on the feasibility of (illegal) cartel-building (which is the origin of the respective economic literature) but rather on the influence of a merger on the potential for so-called tacit collusion, i. e. coordinated behaviour without explicit agreements. Specific theoretical work in this regard is much rarer and, moreover, has produced somewhat contradictory results.[13] Recently, more applied work outlined sensible policy approaches to coordinated effects in merger control.[14] What has clearly emerged form these efforts is, firstly, the need for a careful case-by-case analysis and, secondly, that the difficult point is to isolate the specific impact of a certain merger.

2. EU Merger Control in Oligopolies Prior to Airtours

The European Commission has taken account of the potential collusive effects of mergers in narrow oligopolies from the very beginning of EU Merger Control.[15] To that end, it drew on the notion of a dominant position "by one or more undertakings" contained in Article 86 of the original EC Treaty[16], since collective dominance was not explicitly mentioned in the

[12] Roger B. Myerson, "Nash Equilibrium and the History of Economic Theory", Journal of Economic Literature, Vol. 37 (3), 1999, 1067-1082.

[13] See for example Olivier Compte, Frédéric Jenny and Patrick Rey, "Capacity Constraints, Merger and Collusion", European Economic Review, Vol. 46 (1), 2002, 1-29; Carl Davidson and Raymond Deneckere, "Horizontal Mergers and Collusive Behavior", International Journal of Industrial Organization, Vol. 2 (1), 1984, 117-132.

[14] Among the most important contributions are Europe Economics, "Assessment criteria for distinguishing between competitive and dominant oligopolies in merger control", Brussels: DG Entreprise and Industry, Enterprise Papers No 6, 2001, available at http://ec.europa.eu/enterprise/library/enterprise-papers/pdf/enterprise_paper_06_2001.pdf; Pierluigi Sabbatini, "How to Simulate the Coordinated Effect of a Merger", Rome: Autorità Garante della Concorrenza e del Mercato, Temi e Problemi, 12, 2006, available at: http://www.agcm.it/temieproblemi.htm; Jonathan B. Baker, "Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws", New York University Law Review, Vol. 77 (1), 2002, 135-203; Andrew R. Dick, "Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects", George Mason Law Review, Vol. 21 (1), 2003, 65-88; Bishop/Walker, cited above, pp. 275-282¸ Stefan Voigt and André Schmidt, "Making European Merger Policy More Predictable", Dordrecht: Springer, 2005, 100-117.

[15] See inter alia Juan F. Briones Alonso, "Ecomomic Assessment of Oligopolies Under the Community Merger Control Regulation", E. C. L. R. Vol. 14 (3), 118-122; Antoine Winckler and Marc Hansen, "Collective Dominance under the EC Merger Control Regulation", C. M. L. R., Vol. 30 (4), 1993, 787-828.

[16] Treaty establishing the European Economic Community, 25/3/1957.

pristine EC Merger Regulation.[17] In the *Nestlé/Perrier* case in 1992[18], the Commission pioneered with the finding that Nestlé and BSN would acquire a *collective dominant position* on the market for bottled source water in France.[19] The Commission referred to a number of theoretically relevant factors such as high post-merger market shares and capacities of Nestlé and BSN, the insufficient competitive counterweight from local mineral and spring waters, the increased dependency of retailers and wholesalers on the brand portfolio of Nestlé and BSN and the absence of effective potential competition. Hence, the concentration was only cleared after Nestlé offered substantial commitments.[20]

Despite this first successful application of the concept, severe uncertainties remained. For example, in the *Kali+Salz/MDK/Treuhand* case in late 1993[21], the Commission expected the creation of a dominant duopoly between the merged entity and the French Société Commerciale des Potasses et de l'Azote (SCPA) on the market for potash outside Germany, thereby referring to a number of factors including the maturity and stability of the market with a homogeneous product, the lack of technological innovation and high transparency.[22] It concentrated, however, on "structural links" arising from pre-existing joint ventures and cooperation agreements and only allowed the transaction after the parties committed themselves to sever all these links.[23] The first outright prohibition decision followed in the *Gencor/Lonrho* case.[24] There, the Commission found that the merged entity together with Amplats, another South African producer, would have acquired a dominant duopoly position in the worldwide markets for Platinum and Rhodium.[25] With regard to the specific case, it based this finding on the homogeneity of the products, high market transparency, increasing homogeneity of suppliers, the tendencies towards anticompetitive parallel behaviour in the past and in particular the removal of the Lonrho Platinum Division (LPD) as a "more active player". Therefore, it rejected the comprehensive commitments offered by the parties.[26] As a general statement the Commission held that collective dominance can be result of "mere

[17] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Official Journal L 395, 30/12/1989, pp. 1-12.
[18] Case IV/M.190 - *Nestlé/Perrier*, Commission Decision, 22/07/1992, (henceforth *Nestlé/Perrier*). See also Wolfgang Kerber, „Der EG-Fusionskontrollfall 'Nestlé/Perrier'", Wirtschaft und Wettbewerb, Vol. 44 (1), 1994, 21-35.
[19] *Nestlé/Perrier,* recitals 108-131.
[20] *Nestlé/Perrier,* recitals 136-138.
[21] Case M.308 - *Kali + Salz/MDK/Treuhand,* Commission Decision, 14/12/1993, (henceforth *Kali + Salz/MDK/Treuhand).*
[22] *Kali + Salz/MDK/Treuhand,* recital 57.
[23] *Kali + Salz/MDK/Treuhand,* recitals 58-68.
[24] Case IV/M.619 - *Gencor/Lonrho,* Commission Decision, 24/04/1996, (henceforth *Gencor/Lonrho*).
[25] *Gencor/Lonrho,* recitals 204-206, 210.
[26] *Gencor/Lonrho,* recitals 215-218.

adaptation by members of the oligopoly to market conditions", so that neither structural links nor explicit collusive agreements were necessary.[27]

The next important step in the development of the concept of collective dominance was the judgement by the Court of Justice in *France v Commission*[28] in 1998, with which it annulled the abovementioned *Kali+Salz* conditional approval decision by the Commission, while explicitly confirming the ECMR's general applicability to collective dominant positions, thus eliminating the associated legal uncertainty.[29] One year later, the CFI in its *Gencor* ruling[30] confirmed this again and consequently upheld the Commission Decision. Moreover, it explicitly referred to the "relationship of interdependence existing between the parties to a tight oligopoly within which […] those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices."[31] This brought the collective dominance concept even closer to the economic interpretation of tacit collusion.

3. Airtours and After: From Collective Dominance to Coordinated Effects

In a second landmark decision in 2002, the CFI in *Airtours v Commission*[32] annulled for the first time a prohibition decision under the ECMR. In 1999, the Commission had prohibited in *Airtours/First Choice*[33] the merger of two UK suppliers of foreign package holidays because it expected the creation of a collective dominant position by the merged entity and its two

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[27] *Gencor/Lonrho*, recital 140.

[28] Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, Judgment of the Court of Justice, 31/03/1998; See also James S. Venit, "Two Steps forward and no Steps back: Economic Analysis and Oligopolistic Dominance after Kali&Salz ", C.M.L.R., Vol. 35 (5), 1998, 1101-1134; Xavier Ruíz Calzado, "Posición dominante colectiva y control de concentraciones: la Sentencia del Tribunal de Justicia de las Comunidades Europeas de 31 de marzo de 1998, en los asuntos acumulados C-68/94 y C-30/95, República Francesa y otros/Comisión [Decisión de 14 de diciembre de 1993, Kali + Salz / MDK/ Treuhand (asunto núm. IV/M.308)]", Anuario de la Competencia 1998, 335-354.

[29] Para 14 of the Summary.

[30] Case T-102/96 *Gencor v Commission*, Judgment of the Court of First Instance, 25/03/1999, (henceforth *Gencor*); See also Cristina Caffarra and Kai-Uwe Kühn, "Joint Dominance: the CFI Judgment on Gencor/Lonrho", E.C.L.R., Vol. 20 (7), 1999, 355-359. Valentine Korah, "Gencor v. Commission: Collective Dominance", in: E.C.L.R., Vol. 20 (6), 1999, 337-341; Antonio F. Bavasso, "Gencor: A Judicial Review of the Commission's Policy and Practice. Many Lights and Some Shadows", World Competition, Vol. 22 (4), 1999, 45-65.

[31] *Gencor*, para 276.

[32] CaseT-342/99 *Airtours v Commission*, Judgment of the Court of First Instance, 06/06/2002, (henceforth *Airtours*).

[33] Case COMP/M.1524 – *Airtours/FirstChoice*, Commission Decision,29/04/1999, (henceforth *Airtours/FirstChoice*); see also Frédéric Jenny, "Oligopoly Theory, Collective Dominance and EU Merger Control: the Airtours/First Choice Decision in Perspective", in: European Commission (ed.), EC Merger Control: Ten Years On, Brussels, 2000, 121-131; Peder Christensen and Valérie Rabassa, "The Airtours Decision: Is there a new Commission Approach to Collective Dominance?", E.C.L.R., Vol. 22 (6), 2001, 227-237; Gunnar Niels, "Collective Dominance: More than just Oligopolistic Interdependence", E.C.L.R., Vol. 22 (5), 2001, 168-172; Massimo Motta, "EC Merger Policy and the Airtours Case", E.C.L.R., Vol. 21 (4), 2000, 199-207.

principal competitors Thomson and Thomas Cook, which it anticipated to constrain the overall capacity in the pre-season. The main reasons for this finding were product homogeneity, low demand growth and low price sensitivity of demand, the increase in transparency, the symmetry between the major operators and the extensive commercial links between them, the weakened ability of the smaller tour operators and of potential entrants to compete and the history of rapid consolidation in the industry.[34] The CFI in 2002 rejected almost all of these findings and harshly criticised the Commission's handling of evidence and analysis in an unprecedented manner as "vitiated by a series of errors of assessment".[35] Moreover, it clarified the general standard for finding of collective dominance by setting out three cumulative conditions.[36] Firstly, the market must be transparent enough to allow for monitoring of the other firms' market conduct. Secondly, coordination must be sustainable, which means that the participants must be deterred from defection by fear of retaliation. Thirdly, the benefits of coordination must not jeopardised by the actions of current or future competitors or by customers. The CFI also made clear that theses conditions require a "prospective analysis" of the specific circumstances of any particular case, thus basing the final decision on "cogent evidence".[37] The judgment was subject to an intense debate of an unparalleled extent.[38] It was widely regarded as a milestone in the development of the collective dominance concept. More specifically, it raised the standard of proof, which the Commission must meet before it can prohibit a transaction.

The Commission in turn accepted these criticisms.[39] It did not appeal the judgement and thenceforth refrained from prohibiting any more concentration on the grounds of collective

[34] *Airtours/FirstChoice*, recitals 87-158.
[35] *Airtours*, para 294.
[36] *Airtours*, para 62.
[37] *Airtours*, paras 63, 294.
[38] Alan Overd, "After the Airtours Appeal", E.C.L.R., Vol. 23 (8), 2002, 375-377; Heiko Haupt, "Collective Dominance under Article 82 EC and EC Merger Control in the Light of the "Airtours" Judgment", E. C. L. R., Vol. 23 (9), 2002, 434-444; Ali Nikpay and Fred Houwen, Tour de force or a Little Local Turbulence? A Heretical View on the "Airtours" Judgment", E.C.L.R., Vol. 24 (5), 2003, 193-202; Sigrid Stroux, "Collective Dominance under the Merger Regulation: A Serious Evidentiary Reprimand for the Commission", E. L. R., Vol. 27 (6), 2002, 736-746; Enrico Adriano Raffaelli, "European Union Competition Policy Subsequent to the Airtours Case", Annual Proceedings of the Fordham Corporate Law Institute 2002, Vol. 29, 2003, 129-143; Ulrich Schwalbe, "Die Airtours/First Choice Entscheidung", in: FIW (ed.), Schwerpunkte des Kartellrechts 2002, 2003, 17 et seq., Malcolm Nicholson and Sarah Cardell, "Airtours v Commission: Collective Dominance Contained?", in: Götz Drauz and Michael Reinolds (eds.), EC Merger Control. A Major Reform in Progress. London: International Bar Association, 2003, 285-301; Francisco Enrique González-Díaz, "Merger Control and Oligopolistic Dominance in the Wake of the Airtours Judgment", in: Götz Drauz and Michael Reinolds (eds.), cited above, 303-322; Frank Montag and Andreas von Bonin, "Collective Dominance in Merger Cases After Airtours", in: Götz Drauz and Michael Reinolds (eds.), cited above, 323-342; Cento Veljanovski, "EC Merger Policy after GE/Honeywell and Airtours", Antitrust Bulletin, Vol. 49 (1), 2004, 153-193; Mark Clough, The Role of Judicial Review in Merger Control, Northwestern Journal of International Law & Business, Vol. 24 (3), 2004, 729-754.
[39] E.g. Mario Monti, "Merger Control in the European Union: A Radical Reform", 7 November 2002, available at http://ec.europa.eu/comm/competition/speeches/; Francisco Enrique Gonzalez Díaz, "Consequences of the

dominance.[40] Moreover, the *Airtours* judgment was one of the driving forces behind the recent far-reaching reform of EU Merger Control. This led first of all to the amendment of the ECMR[41] with the change in the prohibition criterion in Art. 2 ECMR from "market dominance" to "significant impediment to effective competition" (SIEC).[42] Other central innovations were the "more economic approach"[43] and the first-time publication of European Horizontal Merger Guidelines (HMG)[44] in 2004. Therein, the treatment of mergers in oligopolies was refined substantially. To begin with, the differentiation between coordinated effects, which replace the former collective dominance concept, and non-coordinated or unilateral effects was introduced.[45] The HMG section on coordinated effects not only reflects the described case-law up to *Airtours*, but also lays out the analytical approach in a systematic way.[46] The treatment of coordinated effects is divided into four parts, namely the reaching of terms of coordination, the monitoring of deviations, deterrent mechanisms and outsider reactions. For each part the HMG contain a detailed enumeration of relevant assessment factors such as product homogeneity, stability of the economic environment, etc. All this is broadly in line with the economics of tacit collusion outlined above. Regarding evidence the Guidelines include "all available relevant information on the characteristics of the markets concerned, including both structural features and the past behaviour of firms"[47]. Evidence of past coordination is held to be particularly important if the relevant market characteristics have not changed significantly or are unlikely to do so in the near future.[48]

Four Key Merger Judgments", in: Mads Adenas, Michael Hutchings and Philip Marsden (eds.), Current Competition Law, Vol. II, 2004, 297-304.

[40] The Commission did, however, find the risk of coordinated effects in a number of recent cases, thus requiring remedies from the parties. See Weitbrecht 2005, cited above, and Andreas Weitbrecht, EU Merger Control in 2005 – An Overview, E.C.L.R., Vol. 27 (2), 2006, 43-50.

[41] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal of the European Union L 24, 29/01/2004, pp. 1-22

[42] See e.g. Kyriakos Fountoukakos and Stephen A. Ryan, "A New Substantive Test for EU Merger Control", E.C.L.R., Vol. 26 (5), 2005, 277-296; Daniel Zimmer, "Significant Impediment to Effective Competition", ZWeR, Vol. 2 (2), 2004, 250-267.

[43] See references in fn. 5 above.

[44] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, in: Official Journal of the European Union C 31, 05/02/2004, pp. 5-18 (henceforth EU HMG). See also Simon Bishop and Derek Ridyard, Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control, E.C.L.R., Vol. 24 (8), 2003, 357-363; Stefan Voigt and André Schmidt, The Commission's Guidelines on Horizontal Mergers: Improvement or Deterioration?, C.M.L.R., Vol. 41 (6), 2004, 1583-1594.

[45] See Oliver Budzinski and Arndt Christiansen, "Simulating the (Unilateral) Effects of Mergers: Implications of the Oracle/PeopleSoft Case", 15 August 2006, available at SSRN: http://ssrn.com/abstract=924375; Sven B. Völcker, "Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control", E.C.L.R., Vol. 25 (7), 2004, 395-409.

[46] EU HMG, paras 39-57.

[47] EU HMG, para 43.

[48] See also Gavin Robert and Charles Hudson, "Past Co-ordination and the Commission Notice on the Appraisal of Horizontal Mergers", E.C.L.R., Vol. 25 (3), 2004, 163-168.

With the Guidelines approach, EU Merger Control has converged considerably with the practice of coordinated effects analysis by the US authorities, which experienced something like a renaissance recently.[49] Among the noteworthy cases was the Federal Trade Commission (FTC) investigation of the proposed cruise line mergers involving Royal Caribbean Cruises, P&O Princess Cruises and Carnival in 2002, which were, however, not litigated after an in-depth review.[50] Furthermore, in 2003, the Department of Justice (DoJ) blocked the proposed acquisition of Morgan Adhesives by UPM-Kymmene Oyj, because it expected post-merger coordination between the merged entity and the only principal competitor Avery Dennison in the market for pressure-sensitive labelstock.[51] In 2004, the FTC unsuccessfully challenged the acquisition of Triton Coal Company by Arch Coal on the grounds of expected anticompetitive coordination among the remaining coal producers in Wyoming's Southern Powder River Basin.[52] This mixed record of the US agencies at the same time testifies to the principal difficult character of coordinated effects analysis in merger control.

The upshot of the developments on both sides of the Atlantic is a gradual refinement on the conceptual level coupled with an increasing standard for finding of coordinated effects in a particular case. Under the current "more economic approach" in the EU, this implies an increasing reliance on sophisticated economic and econometric evidence.[53]

C. The Commission Decision in *Sony/BMG*

On July 19, 2004, the European Commission cleared the combination of the global recorded music businesses (except for Japan) of Bertelsmann AG and Sony Corporation of America. The new entity, called Sony-BMG, was a 50-50 joint venture embracing so-called Artist and Repertoire (A&R) activities[54] as well as marketing and sale of recorded music. The parties'

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[49] *DoJ/FTC* (1997), Horizontal Merger Guidelines, April 1992 with revisions from April 1997, available at http://www.usdoj.gov/atr/public/guidelines/hmg.pdf, sec. 2.1; *DoJ/FTC* (2006), Commentary on the Horizontal Merger Guidelines, March 2006, available at http://www.usdoj.gov/atr/public/guidelines/215247.pdf, pp. 18-25; Charles A. James, "Rediscovering Coordinated Effects", 13 August 2002, Available at http://www.usdoj.gov/atr/public/speeches/200124.pdf; James F. Rill and Howard Rosenblatt, "Coordinated Interaction and Collective Dominance: A Remarkable Journey towards Convergence", in: Paul Lugard and Leigh Hancher (eds.), On the Merits: Current Issues in Competition Law and Policy: Liber Amicorum Peter Plompen, Antwerp: Intersentia, 2005, pp. 127-156.

[50] See FTC Closes Cruise Line Merger Investigations**,** FTC Press Release , 4 October 2002, available at http://www.ftc.gov/opa/2002/10/cruiselines.htm; Mary T. Coleman, David W. Meyer and David T. Scheffman, "Economic Analyses of Mergers at the FTC: The Cruise Ships Mergers Investigation", Review of Industrial Organization, Vol. 23 (2), 2003, 121-155.

[51] United States v. UPM-Kymmene Oyj, Raflatac, Inc., Bemis Company, Inc. and Morgan Adhesives Company, available at http://www.usdoj.gov/atr/cases/upm-kymmene.htm.

[52] Statement of the Commission in the Matter of Arch Coal, Inc., et al., available at http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf;

[53] See also Yves Botteman, "Mergers, Standard of Proof and Expert Economic Evidence", Journal of Competition Law and Economics, Vol. 2 (1), 2006, 71-100.

[54] A&R comprises the discovery and development of (new) artists. From an economic perspective, it represents the R&D activities in the music industry.

activities in music publishing as well as manufacturing and (physical) distribution of records were not concerned. The Commission opened phase II-proceedings[55] and issued a sharp Statement of Objections, informing the parties of its provisional intention to prohibit the concentration.[56] It altered its position entirely in the further proceedings, albeit at a rather late stage.[57] The in-depth investigation focussed on the question of the creation or strengthening of a collective dominant position in the relevant markets as well as spill-over effects on the parent companies in the already fairly concentrated music industry.

1. The Relevant Markets and Players

In product terms, the Commission defined three separate relevant markets, namely for recorded music, for online music and for music publishing, which is upstream.[58] In geographic respects, the markets were held to be national in scope because of the differing consumer preferences, the national organisation of the record companies and collective rights management as well as price differences.

Table 1

Market shares record companies 2003

Territory	BMG	Sony	Combined	Universal	Warner	EMI	Others
Austria	10-15%	5-10%	**15-20%**	30-35%	10-15%	15-20%	20-25%
Belgium/ Luxembourg	10-15%	10 -15%	**20-25%**	25-30%	5-10%	20-25%	15-20%
Denmark	5-10%	10 -15%	**20-25%**	20-25%	10-15%	40-45%	5-10%
Finland	5-10%	5-10%	**15-20%**	15-20%	10-15%	15-20%	35-40%
France	5-10%	15-20%	**25-30%**	30-35%	10-15%	15-20%	10-15%
Germany	15-20%	10 -15%	**25-30%**	20-25%	10-15%	10-15%	20-25%
Greece	-	10 -15%	**10 -15%**	15-20%	5-10%	35-40%	20-25%
Ireland	10 -15%	15-20%	**30-35%**	25-30%	15-20%	20-25%	0-5%
Italy	15-20%	15-20%	**30-35%**	20-25%	15-20%	15-20%	5-10%
Netherlands	10 -15%	10 -15%	**25-30%**	20-25%	5-10%	15-20%	25-30%
Norway	5-10%	10 -15%	**15-20%**	20-25%	10-15%	20-25%	25-30%
Portugal	5-10%	10 -15%	**15-20%**	15-20%	5-10%	20-25%	35-40%
Spain	10 -15%	10 -15%	**20-25%**	15-20%	20-25%	10 -15%	25-30%
Sweden	10 -15%	10 -15%	**20-25%**	15-20%	10-15%	20-25%	20-25%
UK	10 -15%	5-10%	**20-25%**	25-30%	10-15%	15-20%	15-20%
Total	**10 -15%**	**10 -15%**	**20-25%**	**25-30%**	**10-15%**	**15-20%**	**15-20%**

Source: Case COMP/M.3333 – *Sony/BMG*, Commission Decision 19/07/2004, Table 3

[55] See *Sony/BMG*, recital 2.
[56] The Statement of Objections is not itself publicly available, but it is referred to several times in the Decision and the Judgment.
[57] Even the CFI Judgment later referred to “a fundamental U-turn in the Commission’s position” (para 283).
[58] *Sony/BMG*, recitals 9-45.

The focus of the investigation was then primarily on the marketing of recorded music. Although in the aftermath of the digital revolution production, re-production and distribution costs are almost zero, the global markets for recorded music are dominated by five large record companies (‘majors’), namely Universal Music, Sony Music, EMI, Warner and the Bertelsmann Music Group (BMG). Thus, the *Sony-BMG* joint venture implied a further reduction from five to four global players, while smaller record labels (‘independents’) merely unite 15% to 20% of the market (see also sec. VI below). As table 1 illustrates, in terms of 2003 market shares, *Sony-BMG* would have become the largest undertaking in the industry besides Universal Music, which disposes over the same market share of approximately 25%.[59]

2. Assessment of Collective Dominance in *Sony/BMG*

Accordingly, in *Sony/BMG* the Commission focused on whether the joint venture would create or strengthen a collective dominant position in markets for recorded music, licenses for online music and online music distribution.[60] The investigation included the econometric analysis of price developments in the relevant European markets, aiming to put the *Sony/BMG* Decision on a firm footing by processing “millions of data sets” [61]. The Commission firstly analysed whether during the last three to four years the five majors had coordinated their prices in the main national markets of the United Kingdom, France, Germany, Italy and Spain. For each country, it was examined with the help of the pricing analysis whether any coordination took place concerning average wholesale net prices[62], wholesale list prices – so called PPDs (Published Prices to Dealers) – and discounts of various kinds.[63] The results were similar across countries, although the exact figures sometimes differed. The econometric analysis of the net wholesale prices indicated parallelism in the price development of the five major record companies in all countries studied, yet the Commission considered this insufficiently for establishing price coordination in the past.[64] The major record companies employ more than 100 PPDs, yet already the top 5 PPDs covered more than half (in the UK even more than 85%) of the parties’ sales in all national markets in 2002.[65] Information on these PPDs are published in catalogues and, therefore, transparent to all competitors, so that they could be used as focal points for a coordinated pricing scheme. Again indications for

[59] *Sony/BMG*, recitals 46-48.
[60] Notified in January 2004 the joint venture was reviewed under the old dominance test of Regulation No 4064/89 so that the Decision and the Judgement refer to collective dominance rather than coordinated effects.
[61] Eberl, cited above, p. 10
[62] The Commission analysed wholesale prices for top 100 single albums for each quarter, since these albums make up at least 70% to 80%of total sales. See *Sony/BMG*, recital 71.
[63] *Sony/BMG*, recitals 69-73.
[64] *Sony/BMG*, recitals 75, 82, 89, 96, 103.

alignment of these prices were found for all countries and, thus, price coordination was considered a possibility. Moreover, in all countries transaction net prices were found to be "closely linked" to these PPDs resulting in relatively stable net to gross price ratios over time.[66]

Taken together, the in-depth pricing analysis provided strong hints to coordination in all markets. Yet, this finding was each time trumped by the analysis of discounts.[67] The most important category was invoice discounts and for these the Commission identified fluctuations and differences of 2 to 5 percent points between the discounts granted by Sony and BMG to their top 10 customers. Furthermore, the discounts in general were found to vary over time and from album to album. In particular, the Commission believed the flexible use of campaign discounts and the resulting reduced transparency to undermine a sufficient alignment of invoice discounts. After all, although the Commission found that prices moved in parallel over the last years, it found itself not able to establish existing collective dominance on any of the main markets.[68] The results were broadly similar with regard to the smaller EEA countries such as the Netherlands, Sweden and Ireland, mainly because the market structure was found to be comparable to the bigger countries.[69]

The Commission, therefore, turned to the qualitative analysis of the most important market characteristics: product homogeneity and market transparency.[70] By acknowledging that recorded music represents a heterogeneous product, the Commission adopted the position of Sony-BMG. This refers mainly to the content, whereas the CD album format and the pricing and marketing strategies appear "quite standardized" and, thus, homogenous. On the wholesale level, price differentiation regarding genres or types of albums did not regularly occur. Moreover, there were stable long-term relations between record companies and wholesale distributors.[71] Eventually, weekly hit charts coupled with sales data and more or less public PPDs rendered the market for recorded music rather transparent. Still the perceived heterogeneity of content and variability in campaign discounts were sufficient for the Commission to state a lack of market transparency that ruled out the feasibility of collusion.[72]

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[65] *Sony/BMG*, recitals 76, 83, 90, 97, 104.
[66] *Sony/BMG*, recitals 77, 84, 91, 98, 105.
[67] *Sony/BMG*, recitals 79-80, 85-87, 92-94, 99-101, 106-108.
[68] *Sony/BMG*, recital 109.
[69] *Sony/BMG*, recitals 119-153.
[70] *Sony/BMG*, recitals 109-118.
[71] The Commission even states that this „situation of a limited number of players in the market is conducive to the adoption of cooperative strategies on behalf of the majors and also facilitates the monitoring and information flow" (*Sony/BMG*, recital 112).
[72] *Sony/BMG*, recitals 110, 113.

As the final step, the Commission investigated whether retaliation had taken place in the past, in particular by investigating the major record labels' conduct as to granting mutual licences for hit compilation albums.[73] Because of their importance for business success[74], excluding a defector from such compilation joint ventures would represent a credible threat (constituting an effective retaliation mechanism). Yet, no evidence was found that such retaliation actually took place. Thus, the Commission concluded that there was not sufficient evidence to establish the strengthening of pre-merger dominance.[75] The possibility of creating post-merger collective dominance was also ruled out, again with reference to deficits in transparency, heterogeneous product characteristics and absence of retaliation in the past.[76]

3. Related Competition Issues

By far the largest part of the competitive assessment by the Commission was devoted to the possible strengthening of a collective dominant position in the recorded music markets. In addition, however, a number of related issues were addressed briefly in the Decision. The first one was the creation of single dominance in recorded music markets based on the vertical relationship to Bertelsmann with its strong media linkages in certain EU countries, most notably Germany, the Benelux countries and France.[77] The Commission explicitly referred to concerns raised by "third parties" that Bertelsmann could use its position in television and radio stations to foreclose competitors from promoting their artists and favour Sony-BMG instead. Even though it found that this strategy had indeed been adopted by Bertelsmann in the past, the Commission dismissed the creation of single dominance as not likely.

The same conclusion was drawn with regard to a possible collective dominance of the majors on the wholesale markets for online music licences, which were defined as separate, although related markets.[78] The main reason was the early stage of the development of online music markets, which the Commission considered more significant than the increase in transparency resulting from the reduced number of majors. Again citing concerns by unspecified "third parties" the Commission also briefly dealt with the possible creation of single dominance by Sony in the related markets for the distribution of online music.[79] This argument rested mainly on the large music library owned by Sony-BMG coupled with Sony's activities in music downloading services via its subsidiary Sony Connect. However, the Commission

[73] *Sony/BMG*, recitals 114-118.
[74] These compilation albums make up for 15% to 20% of the overall market for recorded music (*Sony/BMG*, recitals 115).
[75] *Sony/BMG*, recital 154.
[76] *Sony/BMG*, recitals 155-158.
[77] *Sony/BMG*, recitals 159-164.
[78] *Sony/BMG*, recitals 165-170.
[79] *Sony/BMG*, recitals 171-175.

found it "very doubtful" that foreclosing competitors would be a profitable strategy for Sony-BMG and, hence, did not pursue this argument further.

Finally, the investigation looked at spill-over effects from the joint venture on the remaining independent activities of the parent companies Sony and BMG according to Article 2 (4) of the EC Merger Regulation.[80] The focus here was on the music publishing business, which is considered upstream from music recording. The Commission found that, since the main publishing rights are administered and the royalties fixed by the national collecting societies, there was not significant scope for the firms to employ coordinated strategies. Similarly, the possibility that the majors could increasingly bypass the collecting societies, which was put forward by "some third parties", was considered not likely by the Commission.

D. CFI Judgment in *Impala v Commission*

1. Parties to the Trial and Preliminary Issues

As mentioned above, the action was brought by the independents competing with the newly created joint venture, more specifically, by their industry association Impala. The newly created joint venture Sony-BMG as well as the parent companies Bertelsmann AG and Sony Corporation of America (SCA) also participated in the Court proceedings as "interveners" in support of the European Commission in its quest to have Impala's application dismissed as unfounded.[81]

Originally, Impala publicly criticised the Decision because of the disregard of the potential marginalisation of the independents by their foreclosure from retail and radio channels and, more broadly, to the loss of choice and diversity in terms of (new) artists and genres.[82] Presumably, the first of these points appeared in the Commission Decision as the abovementioned concerns by "third parties", which were, however, all rejected with relatively little argumentation. Impala included three of these related issues in its five pleas before the CFI, according to which[83]

(1) the Commission infringed with Article 253 EC and made a manifest error of assessment and an error of law by neither establishing a collective dominant position in the market for recorded music before the merger, nor that this dominant position would be strengthened;

[80] *Sony/BMG*, recitals 176-182.
[81] *Impala*, para 21.
[82] See Impala Press Release, Brussels, 3 November 2004, available at http://www.impalasite.org/docum/04-press/press_0410_1.htm.
[83] *Impala*, para 31.

(2) the Commission infringed with Article 253 EC and made a manifest error of assessment and an error of law by not finding that the merger would lead to collective dominant position in the market for recorded music;

(3) the Commission infringed with Article 2 of the Merger Regulation, since the Commission did not consider that the merger would create or strengthen a collective dominant position in the global market for online music licences;

(4) the Commission infringed with Article 253 EC and made a manifest error of assessment, as the Commission did not believe that Sony would achieve an individual dominant position on the market for online music distribution;

(5) the Commission infringed with Article 81 EC in conjunction with Article 2 (4) of the Merger Regulation and made a manifest error of assessment, since the Commission did not take the view that the merger would not lead to coordination of the music publishing activities of the parties.

The Court, however, concentrated on the first two pleas.[84] Furthermore, the judgment dealt with a minor procedural issue raised by Impala concerning (parts of) the evidence used by the Commission.[85] Impala claimed that they were made available entirely only in the Court proceedings, so that it had no chance of arguing in the administrative proceedings. Hence, they came too late to save the decision on the substance and instead represented an attempt by the Commission to regularise the decision ex post facto. The Court rejected this claim as unfounded.

2. The Core of the Matter: Strengthening or Creation of Collective Dominance

The core of the judgment is in fact the detailed review of the Commission's assessment of the strengthening of an existing collective dominant position by the major record companies. To begin with, the CFI reiterated its position on the appropriate kind of analysis with regard to collective dominance in general. The Court straightened out that it had to be case-specific and backed by solid evidence but at the same time future-oriented and not confined to the analysis of past market behaviour.[86] The Court then subsequently dealt in great detail with the central findings, on which the Commission based the decline of the existence of a pre-merger collective dominant position and, hence, its post-merger strengthening. By far the most important issue was (the lack of) transparency as is already apparent from the extensive space devoted to this matter. The Commission had centred its line of argumentation on the decrease

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[84] *Impala*, paras 542-543.
[85] *Impala*, paras 32-43.

of transparency by discounts, in particular, the campaign discounts granted by the major record companies. The Court first examined whether the Commission met the obligation to state the reasons for its conclusion according to Article 253 EC. It noted at the very outset the rather curious fact that in the Decision section on transparency "all […] factors […], far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent."[87] Moreover, it found the same to follow from the Commission's own analysis of list prices and discounts in the large EU countries.[88] With regard to PPDs, the Court found the Commission's finding of a lack of transparency in contradictory to the facts since it held the alignment to be "in fact very marked."[89] It also rejected the Commission's statements with regard to invoice discounts.[90] Eventually, turning to the decisive element of campaign discounts, the relevant paragraph of the judgment deserves quotation in full: "It should also be observed that the Decision does not state that the market is opaque, or even that it is not sufficiently transparent to allow coordination of prices, but at the most that campaign discounts are less transparent, although the Decision does not provide the slightest information as regards their nature, the circumstances in which they are granted or their actual importance for net prices, or their impact on the transparency of prices."[91] This outspoken criticism, which can only be compared in terms of harshness to the abovementioned *Airtours* judgement in 2002, led the Court to conclude that the Commission's insufficient statement of reasons for the lack of market transparency would in itself suffice to annul the Decision.[92]

The Court nonetheless ("in the interest of completeness") dealt with the other specific points raised by Impala as part of its first plea. Firstly, the Court also retraced the substance of the Commission's transparency analysis and ultimately found "a manifest error of assessment " therein.[93] Inter alia, it found the data relied on by the Commission in its extensive quantitative analyses to be inconsistent. Secondly, it briefly touched upon the issue of product homogeneity.[94] A minor, but interesting point made here is the prima facie contradiction between the heterogeneity in terms of content and the uniformity of pricing. Thirdly, the Court rebuked the Commission's reasoning with regard to deterrence and retaliation. It found fault particularly with the Commission's reliance on the absence of evidence that retaliatory measures had been used in the past. The Court held that the mere existence of an effective

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[86] *Impala*, paras 245-254.
[87] *Impala*, para 290.
[88] The Commission's analysis with regard to the smaller countries was also briefly dealt with and arrived at a similar result. See *Impala*, paras 321-324.
[89] *Impala*, para 299.
[90] *Impala*, para 311.
[91] *Impala*, para 318.
[92] *Impala*, para 325.
[93] *Impala*, paras 327-459.

deterrent mechanism such as the exclusion from compilation joint ventures as cited by the Commission would have sufficed.[95] Taken together, the Court found so many deficiencies in the Commission's analysis on the *existence* of a dominant position that again it would already have been enough to annul the Decision.[96]

The Court then, however, also analysed Impala's second plea regarding the *creation* of collective dominance, again "in the interest of completeness" but without going much into detail.[97] Basically, the claim was that the Commission had failed to carry out a genuinely prospective analysis, which would have to be substantially different from the assessment of past tendencies towards coordination, which necessarily is ex post.[98] The Commission defended itself by stressing that generally the gathered evidence on the current market conditions remained relevant for this analysis and that, therefore, it was only obliged to ascertain whether the concentration brought about any changes in the foreseeable future.[99] Accordingly, it was satisfied with finding that the degree of transparency would not increase to such an extent as to make coordination feasible. The Court, however, disapproved of this finding.

3. Direct Consequences of the Judgment

Most importantly, the annulment means that Sony and Bertelsmann must re-notify their joint venture and that the Commission has to re-assess its compatibility with the ECMR according to Article 10 (5) ECMR.[100] This review must, however, be based on current market conditions, which may differ significantly from the situation in 2004. The Commission will also (at least implicitly) apply the standards of the new SIEC prohibition criterion and the corresponding Guidelines. At most, this re-examination might have the consequence of dismantling the Sony-BMG joint venture, which has been in operation for over two years.

The *Impala* judgement not only made the re-appraisal of the joint venture by the Commission necessary, it also triggered further reactions in the music industry. To begin with, in a press release following the judgement, the plaintiff Impala urged for the outright dissolution of the joint venture as the adequate consequence of the judgement.[101] It furthermore announced its readiness to take action against the contemplated merger between the two other majors EMI

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[94] *Impala*, paras 460-462.
[95] *Impala*, paras 463-474.
[96] *Impala*, para 476.
[97] *Impala*, para 481.
[98] *Impala*, paras 482-498.
[99] *Impala*, paras 499-518.
[100] See Clough, cited above, pp. 751-753.
[101] See Impala press release, Brussels 20/07/2006, available at http://www.impalasite.org/docum/04-press/press_060720.htm.

and Warner Music Group as well as the expected sale of Bertelsmann's music publishing business, if the purchaser was another major. In the meantime, however, Warner Music Group abandoned its intention to combine its recorded music activities with EMI with explicit reference to the *Impala* ruling.[102]

E. Implications for the EU Merger Control Framework

Taken together, the *Impala* judgment must be seen as another serious defeat for the Commission, comparable to the three judgments in 2002. The basic difference is, however, that this time the issue was an (unconditional) clearance decision and not a prohibition. The Commission decision and the CFI judgment together raise a number of interesting issues regarding the development of European Merger Control.

1. Institutional Aspects I: What If There Is no Sufficient Evidence?

The suggestion stands to reason that the Commission's decision on *Sony/BMG* has partly been influenced by the three defeats it faced in front of the CFI since 2002.[103] The Commission inferred from the *Airtours* judgment that the burden of proof concerning the establishment of collective dominance was considerable high.[104] By assembling sufficient economic evidence, it tried to meet these requirements, reflecting the 'more economic approach', especially compared to its *Airtours* investigation. This strong felt burden of proof becomes apparent when Eberl, a member of DG Comp, states that "the evidence available was *not sufficiently strong* to prove collective dominance (…) Nevertheless, the high degree of concentration in the music industry remains a concern and the Commission will continue to closely monitor the development of the music markets" (emphasis added).[105] Thus, the Commission, despite sustained concerns, was not convinced that the found parallel price movements and high market transparency would meet the anticipated burden of proof.

However, the widespread view that *Airtours* reduces the scope for coordinated effects analysis by imposing an (overly) ambitious standard of proof for prohibitions[106], thus demanding the clearance of critical but ambiguous cases, must be qualified in the face of *Impala*. It has become clear now that the standard of proof demanded by the CFI is

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[102] Warner Music Group's Statement Regarding EMI Group plc, 07/27/2006, available at **http://www.wmg.com/news/story.jsp?article=article=31220009**.

[103] See also Polverino, cited above; Kenneth R. Logan, Peter E. Kazanoff, Julissa Reynoso. "Antitrust Developments in the Media and Entertainment Industries", 2004, 07/25/2006, available at http://www.stblaw.com; Murschitz, cited above.

[104] Eberl, cited above, p. 10.

[105] Eberl, cited above, p. 10.

[106] See above section Airtours and After: From Collective Dominance to Coordinated Effects and accompanying literature.

symmetric, i.e. it applies for prohibitions and clearance decisions in the same way.[107] Consequently, in future cases, the Commission must either prove to the required standard that post-merger coordinated effects occur or it must prove to the same standard that post-merger coordinated effects do not occur. Obviously, this incorporates a difficult problem: what if neither merger-specific anticompetitive effects, nor their absence can be proved in a sufficient way?

Since merger control inevitably entails an assessment of effects on competition *in the future* and if foresight is necessarily imperfect (in an indeterministic world), then such cases might occur rather frequently. Therefore, *Sony-BMG* may represent an exemplary case for the future of coordinated effects-based merger control. The Commission then finds itself in the difficult situation that any case with ambiguous evidence is likely to trigger appeal before the courts because of an increased likelihood of annulment decisions. If the Commission prohibits an ambiguous coordinated effects case (or imposes sharp remedies), the merging parties enjoy good prospects of reaching reversal before the courts. And if the Commission clears such a case, competitors, customers or suppliers of the merged entity enjoy considerable prospects of reaching reversal before the courts.

From an economic point of view, however, the symmetry of the standard of proof regarding prohibition and allowance decisions can be expected to contribute to a reduction in type-I mistakes (false positives).[108] If expectably anticompetitive mergers, leading to a collusive post-merger equilibrium, cannot be prohibited or adequately modified merely because the effects cannot be proven according to the required standard of proof, social welfare losses must be expected. On the other hand, starting with the assumptions that (i) (re-) combinations of assets by rational market agents normally increase efficiency and (ii), therefore, enterprises and entrepreneurs have the basic right to freely combine their assets[109], then policy interventions into this type of market activity should be restricted to cases, where losses in social welfare due to anticompetitive effects either outweigh the benefits of the gaining producers (total welfare standard) or unduly exploit the consumers (consumer welfare standard).

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[107] For a like-minded interpretation based on the Tetra Laval judgement see Matteo F. Bay and Javier Ruiz Calzado, “Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions”, World Competition, Vol. 28 (4), 2005, 433-453.

[108] A type I error is said to occur, if a merger with negative welfare effects is wrongly allowed ("false positive"), whereas a type II error denotes an erroneous prohibition of a merger, which would have increased welfare ("false negative"). The terms are, however, used inconsistently in the literature. We follow *A. Mitchell Polinsky and Steven Shavell*, “Legal Error, Litigation, and the Incentive to Obey the Law”, Journal of Law, Economics, & Organization, 5 (1), 1989, 99-108.

[109] This corresponds to the basic presumption of legality of mergers also contained in recital 4 of the ECMR.

Moreover, this reasoning does not solve the problem of ambiguous cases where neither anticompetitive effects nor their absence can be proved sufficiently. Therefore, *Impala* strengthens the necessity of a systematic analysis of the optimal standard of proof, which respects the fundamental characteristics of merger control and the more-economic approach (in particular sophisticated predictive economic evidence).[110]

2. Institutional Aspects II: The Role of Third Parties

Additionally, *Impala* fuels the trend towards an increasing role of third parties in EU merger control proceedings.[111] From an economic point of view, this development entails potentials for an abuse of merger control in order to handicap competitors and improve one's own market position in an anticompetitive way.[112] A competitor of an efficient merger can be induced to challenge this merger before the courts in order to prevent its establishment or in order to impose efficiency-reducing costs (legal uncertainty, time delay, etc.). Given the economics of the industry in question (see section on substantive issues), this does not seem to be too plausible for *Impala* but it nonetheless represents a general problem. One should be aware, however, that Impala most likely did not act in the interest of competition but protected its self-interests in the market.

An increasing role of third parties in merger control proceedings can additionally be linked to the 'protecting competition instead of protecting competitors' debate, which was very vital in the context of the U.S.-EU conflict on the proposed GE-Honeywell merger.[113] The more-economic approach is often understood to redirect European competition policy from

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[110] See Budzinski/Christiansen, cited above, pp. 20-27, for an economic treatment. See on the general discussion Luca Prete and Alessandro Nucara, "Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?", E. C. L. R., Vol. 26 (12), 2005, 692-704; Bay/Calzado, cited above; Bo Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", European Competition Journal, Vol. 1 (1), 2005, 3-33; Botteman, cited above; Alistair Lindsay, The EC Merger Regulation: Substantive Issues, London: Sweet & Maxwell 2006: 66-75.

[111] See generally on the role of third parties in European merger control Michael Kekelekis, "The Rights of Notifying Parties and Third Parties During the Preliminary Investigation Procedures under the ECMR", European Business Law Review, Vol. 14 (4), 2003, 429-444; Themistoklis Giannakopoulos, "The Right to Be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures", World Competition, Vol. 24 (4), 2001, 541-569; Torsten Körber, Die Konkurrentenklage im Fusionskontrollrecht der USA, Deutschlands und der Europaeischen Union, Baden-Baden, Nomos 1996. Prima facie, this represents a minor procedural point. However, it gains some importance because the "more economic approach" in EU Merger Control generally increases the influence and role of the firms in merger proceedings (Christiansen, cited above, 38-41) since they bear at least an "evidentiary burden" with respect to certain defences (Lindsay, cited above).

[112] See William J. Baumol and Janusz A. Ordover, "Use of Antitrust to Subvert Competition", Journal of Law and Economics, Vol. 28, 1985, 247-265; R. Preston McAfee and Nicholas V. Vakkur, "The Strategic Abuse of the Antitrust Laws", Journal of Strategic Management Education, Vol. 2 (1), 2005.

[113] The European competition authorities were accused to pay too much attention to the interests of competitors of merging parties. For a systematic and unbiased treatment of 'protecting competition versus protecting competitors' see Eleanor M. Fox, "We Protect Competition, You Protect Competitors", World Competition, Vol. 26 (2), 2003, 149-165.

allegedly focusing on competitors interests to a strict (consumer) welfare orientation. To some extent, *Impala* points in a different direction.

3. Substantive Aspects: Lessons for Coordinated Effects Analysis

The *Impala* Judgment provides further guidance as to the establishment of coordinated effects (or formerly collective dominance) in the context of EU Merger Control. This goes well beyond the earlier *Airtours* Judgment in several respects. The first important point is the identification of a deterrent mechanism. Contrary to the Commission's reasoning, the CFI held it sufficient to establish the existence of a potential mechanism for deterrence. That is, it did not require the Commission to show instances of actual punishment of deviators in the past. In detail, the Court expressively stated: "The mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction."[114] Hence, the finding of absence of retaliatory action would only be relevant if accompanied by proof of actual deviations from the common course of conduct. Taken together, this is in line with economic thinking and, moreover, clearly lowered the standard of proof for the Commission in this specific respect.

The second and more general point regards the distinction between the ex post analysis of past coordination and the forward-looking assessment of the possibility of post-merger coordinated behaviour. In its decision and in the Court proceedings the Commission confined itself to the first kind of analysis and, thereby, effectively projected the findings into the future in a mechanistic manner. The Court, however, strongly disapproved and called this treatment "extremely succinct"[115]. It expressively added: "It must be stated that these few observations, which are so superficial, indeed purely formal, cannot satisfy the Commission's obligation to carry out a prospective analysis […]".[116] That is, the CFI demanded much more of a detailed and separate analysis of the probable effects of the change in market and firm characteristics, which the merger entails. This is also well in line with economic reasoning. At the same time, it obliges the Commission to fulfil the difficult task of isolating the specific impact of the merger in question, which requires a genuinely future-oriented assessment.

These two points together have the potential to signify a kind of renaissance of coordinated effects analysis in EU Merger Control. While the first one lowers the evidentiary burden faced by the Commission, the second one rightfully calls for a more forward-looking

[114] *Impala*, para 466.
[115] *Impala*, para 525.
[116] *Impala*, para 528.

assessment. A final point must be made. It concerns the impact on predictability that the *Sony/BMG* Decision and the subsequent *Impala* Judgment have. Predictability of the Commission's decisions is an important aspect from an economic point of view, which is also closely connected to legal certainty.[117] Taken together, legal certainty is reduced by the review process at hand, since now even apparently unproblematic approval decisions can be contested. This seems to contradict the rationale underlying the stronger use of sophisticated analyses and of convergence with the US approach typical of the "more economic approach" in EU Merger Control.[118] In fact, this again points to the fundamental, yet largely ignored fact that the new approach with its increasing case-by-case focus does not only affect predictability negatively but also gives third parties more scope to intervene in the proceedings.[119] Put briefly, the introduction of more differentiated criteria coupled with the increasing recourse to quantitative analyses makes the outcome of a case assessment contingent on more factors and, hence, more difficult to predict.

F. Competition in the Music Business: The Industry Background

The merger case at hand has to be viewed against the background of the industry development. As a general tendency, concentration has increased while innovation and access have decreased. Starting in the mid-1960s, the music industry witnessed various mergers and acquisitions, eventually leading to today's narrow oligopolistic structure (see also sec. C).[120] In the past two decades, the concentration process further accelerated, reducing the number of major record companies ('majors') from six to four and, before *Impala*, there were even advanced merger talks going on between Warner and EMI.[121] The ongoing concentration process is also reflected in the most recent sale of Bertelsmann music publishing business to Vivendi, owner of Universal and Universal Music Publishing.[122] The merged entity will

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[117] For a detailed treatment see Voigt and Schmidt, 2005, cited above.

[118] See Roeller, cited above, especially p. 23.

[119] For a more elaborated treatments see Christiansen, cited above, 32-35; Arndt Christiansen and Wolfgang Kerber, "Competition Policy with Optimally Differentiated Rules Instead of 'Per se Rules vs. Rule of Reason'", Journal of Competition Law and Economics, Vol. 2 (2), 2006, 215-244.

[120] See Geoffrey P. Hull, "The Recording Industry", New York: Taylor & Francis, 2004; Eric W. Rothenbuhler and Tom McCourt, "The Economics of the Recording Industry", in: Alison Alexander, James Owers, Albert N. Greco, Rod Carveth, C. Ann Hollifield (eds.), Media Economics – Theory and Practice, 3rd ed., Mahwah, NJ: Erlbaum, 2004, 221-248; Peter J. Alexander, "Entry Barriers, Release Behavior, and Multi-product Firms in the Music Recording Industry", Review of Industrial Organization, Vol. 9 (1), 1994, 85-98; Peter J. Alexander, "The Music Recording Industry", in: James Brock and Walter Adams (eds.), The Structure of American Industry, 11th ed., Englewood Cliffs: Prentice Hall, 2004, 119-139; Eric Rothenbuhler and John Dimmick, "Popular Music: Concentration and Diversity in the Industry, 1974–1980," Journal of Communications, Vol. 32, 1982, 143-149; Oliver D. Raschka, „Digitale Musik - Eine industrieökonomische Analyse der Musikindustrie", OPUS Online-Dissertation, 2006, 09/08/2006, available at http://opus-ho.uni-stuttgart.de/hop/volltexte/2006/141/.

[121] Warner Music Group's Statement Regarding EMI Group plc, 07/27/2006, available at **http://www.wmg.com/news/story.jsp?article=article=31220009**.

[122] Bertelsmann Music Group, press release, 09/06/2006, available at http://www.bertelsmann.de/bertelsmann_corp/wms41/bm/index.php?ci=29.

become the largest music publishing house in the world, increasing its market share from 12% to approximately 20%.[123] Consequently, the Commission stated that it will thoroughly review the deal if the parties notify the acquisition.[124]

In general, the majors share significant similarities. They are all vertically integrated, including music publishing, production, and distribution and, except for EMI, they are all part of a diversified media conglomerate.[125] Vertical integration allows the large record companies to reap profits from various sources, e.g. by cross-promotion in movies, newspapers and magazines or by owning publishing houses, which accrue copyright gains, and to realize synergies in administration functions.[126] Multi-market contacts (e.g. through online music markets, music publishing markets, distribution of records) shape the relations among the major record labels and facilitate potential collusive conduct.[127] In addition, uniform pricing, established monitoring mechanisms and frequent cooperation as to compilation albums are common in the market for recorded music as well.[128] Despite the fall in production prices in the aftermath of the digital revolution and the oversupply of singers and songwriters, significant barriers to entry exist, as economies of scale are apparent in the distribution of CDs. Moreover, mass production facilities and the distribution network, in turn, are dominated by the major record companies. Thus, small, so-called independent record firms depend on their larger rivals when it comes to distributing the produced records among retailers, since no independent distributors are left.[129] Industry sources report that independent labels are often coerced by the majors to sign disadvantageous ‘Pressing & Distribution’ deals, thereby loosing control of their artist repertoire, as the dominant large record companies can ultimately deny access to production and distribution networks.[130]

As to pricing, demand for CDs is highly elastic and the prices consumers finally pay do not only depend on the list prices suggested by record companies but also on the discounts

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[123] Vivendi Group, press release, 09/06/2006, available at http://www.vivendi.com/corp/en/press_2006/20060906_Vivendi_UMG_to_purchase_BMG_Music_Publishing.php; Doreen Carvajal, “Rivals may challenge a proposed Vivendi-Bertelsmann deal”, New York Times, 09/11/2006, available at http://www.nytimes.com/2006/09/07/business/media/07music.html?_r=1&ref=business&oref=slogin.

[124] See Reuters, “EU to look closely at BMG, Vivendi deal if notified, 09/06/2006, available at http://today.reuters.com/news/articleinvesting.aspx?type=mergersNews&storyID=2006-09-06T103233Z_01_BRU004888_RTRIDST_0_MEDIA-BMG-VIVENDI-EU.XML; Carvajal, cited above.

[125] See Rothenbuhler/McCourt, cited above, pp. 231-234 on the conglomerate structure.

[126] Rothenbuhler/McCourt, cited above, pp. 231-232.

[127] See B. Douglas Bernheim and Michael D. Whinston, “Multimarket Contact and Collusive Behaviour”, RAND Journal of Economics, Vol. 21 (1), 1990, 1–26; Nicholas S. Vonortas, “Multimarket Contact and Inter-firm Cooperation in R&D”, Journal of Evolutionary Economics, Vol. 10 (1/2), 2000, 243-271; Christopher M. Snyder and Nicholas S. Vonortas, “Multiproject Contact in Research Joint Ventures - Evidence and Theory”, Journal of Economic Behavior and Organization, Vol. 58, 2005, 459-486.

[128] *Sony/BMG*, paras 154, 157.

[129] Alexander 1994, cited above, p. 91; Rothenbuhler/McCourt, cited above, p. 235.

[130] Alexander 1994, cited above, p. 92; Rothenbuhler/McCourt, cited above, p. 235.

offered by retailers. Especially in the US, large non-music wholesale stores such as Wal-Mart offer CDs with considerable discounts.[131] In 2000, the FTC alleged that the major record companies reacted to these price cuts by threatening retailers to withdraw advertisement expenditures if the retailers continued to advertise discounted CDs.[132] That way the wholesale prices of CDs were kept artificially high between 1995 and 2000. The FTC established that the market structure as well as the high entry barriers, which impede injection of new competition, "gives [them] reason to believe that these programs violate Section 5 of the FTC Act as practices which materially facilitate interdependent conduct". It also found that in the music industry "the respondents can easily monitor the pricing and policies of their competition".[133] Thus, for the US market for recorded music, market transparency was deemed sufficient to allow for coordinated behaviour. The accused majors agreed to pay 143 million dollars and to settle with the antitrust authorities without a trial.[134]

This brief assessment of the competitive situation on global music markets illustrates that we can observe market and firm characteristics, which facilitate collective dominance. The number of competitors is highly limited, a high degree of homogeneity in the cost structure is given and significant barriers to entry exist. The facts gathered by the Commission in *Sony/BMG* and by the FTC decision on advertisement restrictions provide significant hints to a rather high level of market transparency. Furthermore, multi-market contacts facilitating collusive behaviour are present as well. At least in the US also past experience with coordinated effects exist (among virtually the same players).[135] Only product homogeneity remains an ambiguous issue. Individual records are imperfect substitutes since consumer have different tastes for music, which renders the market for recorded music heterogeneous, nevertheless, recorded music is priced uniformly like movies.[136] However, taken together there are clear indications for the possibility of coordinated effects. The Commission, therefore, may have erred in finding their non-existence.

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[131] Alexander 2004, cited above, p. 127.

[132] FTC, "Analysis to Aid Public Comment on the Proposed Consent Order", 2000, 09/11/2006, available at http://www.ftc.gov/os/2000/05/mapanalysis.htm.

[133] FTC 2000, cited above.

[134] Alexander 2004, cited above, p. 134.

[135] In fact, the majors were twice convicted of coordinating practices of some kind by the FTC in recent years. See Robert Pitofsky/Sheila F. Anthony/Mozelle W. Thompson/Orson Swindle/Thomas B. Leary, Statement In the Matter of Sony Music Entertainment, Inc. et al, September 6, 2000, available at http://www.ftc.gov/os/2000/09/musicstatement.htm; FTC Press Release, FTC Finds Vivendi Subsidiaries Violated Antitrust Laws In Distribution of Three Tenors CDS July 28, 2003, available at http://www.ftc.gov/opa/2003/07/vivendi.htm.

[136] Polverino, cited above, p. 29. On uniform pricing in movie theatres albeit the obvious heterogeneity of the offered movies see Barak Y. Orbach and Liran Einav, "Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry", Harvard Law School Discussion Paper No. 337, 2006, 07/25/2006, available at, http://ssrn.com/abstract=871584.

Moreover, the described characteristics of the music industry also affect non-price elements of competition, especially innovations and diversity of offered music are afflicted with increasing concentration. We have already referred to the existence of entry barriers in the music industry due to economies of scale in distribution and the dependence of small record companies on the production and distribution facilities of the major record companies. High sunk costs which arise for promotion of artists and their songs represent further entry barriers, especially sufficient radio representation is regarded as a key prerequisite for sales.[137]. Such high costs for promoting new artists or established stars may significantly raise entry barriers for small record companies and might be used to deny such air time to rivals.[138] Barriers to entry are of considerable relevance as the past has shown that innovations in the music industry are mainly driven by small record companies or industry outsiders.[139] In its analysis of national markets in Europe, the Commission neglected implications for the pace and extent of innovations in the music industry, which is particular puzzling, since a lack of innovative products and artists has been acknowledged by the Commission as one of the reasons for the declining demand in the record music industry.[140] A decrease in the number of competing firms has in the past led to a fall in the number of hit records, implying a decline in the innovation rate of the music industry.[141] The release of new records bears the risk of product cannibalization, especially for major record labels, as these dispose over a roster of successful star artists and, thus, have few incentive to invest in the development of innovative music styles and artists, which would gain popularity and sales at the expenses of already released records.[142] Thus, new releases lead to diminishing returns for existing products. In fact, there is ample evidence from empirical as well as from theoretical studies on the negative relationship between industry concentration and innovation respectively variety in the music industry.[143] If the number of released records falls in the short term due to too high

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[137] Rothenbuhler/McCourt, cited above, pp. 228-229; Alexander 2004, cited above, pp. 128-131.

[138] On entry barriers and these so-called 'payola' payments to radio stations, which are illegal and have been under scrutiny in the US for decades see Alexander 1994,2004, cited above; Rothenbuhler/McCourt, cited above.

[139] Alexander 1994,2004, cited above; Michael Black and Douglas Greer, "Concentration and Non-price Competition in the Recording Industry", Review of Industrial Organization, Vol. 3 (2), 1986, 13-37; Jonathan Gander and Alison Rieple, "Inter-organisational Relationships in the Worldwide Popular Recorded Music Industry", Creativity and Innovation Management, Vol. 11 (4), 2002, 248-254.

[140] *Sony/BMG*, recital 58.

[141] Rothenbuler/Dimmick, cited above.

[142] Black/Greer, cited above, p. 16.

[143] Alexander Belinfante and Richard L. Johnson, "Competition, Pricing and Concentration in the U.S. Recorded Music Industry", Journal of Cultural Economics, Vol. 6 (2), 1982, 11-24; Rothenbuhler/Dimmick, cited above; Richard A. Peterson and David G. Berger, **"**Cycles in Symbol Production: The Case of Popular Music", American Sociological Review, Vol. 40 (2), 1975, 158-173; Alexander 1994, cited above; Peter J. Alexander, "Product Variety and Market Structure: A New Measure and a Simple Test", Journal of Economic Behavior and Organization, Vol. 32 (2), 1997, 207–214; Alan J. Baker, "A Model of Competition and Monopoly in the Record Industry", Journal of Cultural Economics, Vol. 15 (1), 1991, 29-54; Gander/Rieple, cited above, p. 250; Black/Greer, cited above.

concentration within an industry, also the opportunities for new artists become fewer in the long run because of a cutback of the artist roster maintained and acquired by record companies.[144] After all, in a culture-based industry product diversity is a key performance measure, as greater diversity is enhancing consumer welfare by increasing the likelihood that products meet heterogeneous preferences.[145] Conversely, the more homogeneous the record market is, the fewer preferences are met[146], resulting in a likely decline in consumer welfare.

The assessment of the music industry suggests that majors and independents fulfil complementary tasks in the discovery, production and distribution of music. That is, economies of scales, high promotion costs and the need for vast distribution networks favour large, vertically integrated companies, while innovations, i.e. the discovery of new artists and music styles, are better handled by smaller, more creative companies.[147] However, if the concentration process among the majors proceeds, the increasing risk of foreclosure from radio and TV playlists as well as distribution and retail channels reduces the scope for independent firms in the market. Despite its relevance for industry performance, the Commission failed to carry out a profound economic analysis of that matter.[148] Hence, the sophisticated analytical instruments available with the "more economic approach" were applied in a one-sided manner, thus marking a major shortcoming of both the Commission's and the CFI's treatment of the case.

G. Conclusion

Both the recent *Impala* Judgment by the CFI and the underlying Commission Decision in *Sony-BMG* raise a number of points associated with coordinated effects analysis in EU Merger Control. The review of both decisions allows for several conclusions in regard to the future of European Merger Control. Firstly, *Impala* introduces an ambitious symmetric standard of proof for prohibition and clearance decisions by the Commission. While alleviating fears of an increasing number of false positives in the aftermath of *Airtours*, this entails the problem how to deal with cases in which neither the existence, nor the absence of anticompetitive effects can be proven to the required standard. Given the ex ante character of merger control, the occurrence of such cases is not too unlikely. Secondly, *Impala* represents

[144] Black/Greer, cited above, p. 17.
[145] Alexander 2004, cited above, pp. 131-133; Rothenbuhler/Dimmick, cited above; Rothenbuhler/McCourt, cited above.
[146] Peterson/Berger, cited above.
[147] Gander/Rieple, cited above, pp. 249-250.
[148] This is somehow surprising since the Commission stressed the anticompetitive effects on the online music market and the potential for foreclosure of smaller record companies in the context of proposed merger between *Warner Music* and *EMI* in the same markets in 2000 so much that the parties finally abandoned the transaction.

to some extent a comeback of coordinated effects analysis, further specifying the conditions for establishing this kind of anticompetitive effects. Thirdly, the ongoing process of increasing the role of third parties in European Merger Control is fuelled.

While the implications of the Impala judgement are not without problems regarding future coordinated effects cases, a deeper look at the music industry reveals several additional competition concerns. From an economic perspective, there is indication of a decrease in innovation efficiency and of an increased danger of foreclosure effects. Whether these welfare-reducing effects would justify antitrust action against further concentration in the music industry cannot be answered without an in-depth economic analysis. However, it is our critique on *Sony/BMG* and *Impala* that sophisticated economic instruments were only applied to deal with coordinated effects and a comparable treatment of (potentially equally harmful) innovation and foreclosure effects is lacking. Therefore, competition policy has to be aware that further anticompetitive developments in this industry entail the danger of leading towards a sclerotic market, in which sustainable competition patterns might be irreversibly lost.

See Commission opens full investigation into Time Warner/EMI merger, Press Release 00/617, 14 June 2000, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/617.