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European Merger Review: Tightening Control While Expanding Third Party Power

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I. Introduction

On July 13, 2006, the European Court of First Instance (“CFI”) set a historic precedent and put a temporary end to the creation of the second-largest music company in the world.¹ Disrupting this creation of a musical powerhouse required the coordination of several governmental bodies within the European Union. The European Commission (“Commission”) is responsible for enforcing Articles 81 and 82 of the Treaty Establishing the European Community (“EC Treaty”) that prevent unfair competition and abuse of a dominant position² within the

¹ Oliver Bretz, *Opinion Merger Hopefuls Should Take Note of Sony-BMG Debacle*, THE LAWYER, July 24, 2006, at 8.

² According to Article 82 of the EC Treaty, abuse of a dominant position occurs if: it “affect[s] trade between Member States,” imposes an “unfair trading condition” (including unfair prices), limits “production, markets or technical development[s] to the prejudice of consumers,” applies conditions that are skewed towards other trading parties

community market.³ After the Commission has cleared or rejected a merger, a complaint may be lodged in the CFI where a review will be conducted of the Commission's decision; the CFI will subsequently annul the decision if it finds the reasons were not "sustainable."⁴ Since this process is typically a formality, the July decision in *Independent Music Publishers and Labels Association ("Impala") v. Commission*⁵ marked an unexpected precedent as the first time the CFI annulled a merger that had received clearance by the Commission.⁶ Even more surprising than the annulment, the party who caused the shutdown was Impala, a third party association of small, independent music production companies.⁷ The decision by the CFI reinforced the image of David and Goliath, as the relatively unknown third party was able to take down the music behemoth: Sony BMG. This groundbreaking decision brought attention to the increasing power within the European Union of third parties to stop, or at least substantially hinder, the process of merger review.

However, third parties are not the only ones unhappy with the European merger process. The decision demonstrated the CFI's preference for a more comprehensive approach to merger review from the Commission, and no one was more surprised than the previous European Competition Commissioner, Mario Monti, who had just "revamp[ed]" his merger-review process after three of his decisions to block major mergers in 2002 were reversed.⁸ The CFI's ruling was to be a test-run for the new rules, and has now

to place them at a competitive advantage, or makes "the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." Consolidated version of the Treaty Establishing the European Community, Dec. 24, 2002 O.J. (C 325) [hereinafter EC Treaty].

³ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 1064 (Oxford University Press, 3d ed. 2003). This power is granted by Article 85 of the EC Treaty. *Id.* The Commission may become aware of a violation of either of these articles by either investigation, if the parties notified an agreement to the Commission, or if an aggrieved party complains. *Id.* at 1064-1068.

⁴ *Id.* at 1071.

⁵ Case T-464/04, *Indep. Music Publishers and Labels Ass'n v. Comm'n*, 2006 ECJ CELEX LEXIS 359, (2006).

⁶ Bretz, *supra* note 1.

⁷ *Id.*

⁸ *Let's Try That Again*, *ECONOMIST*, July 22, 2006.

“cast doubt on his overhaul,” sending the signal that perhaps the rules still need to be adjusted or a more comprehensive review should take place.⁹

This Note will explore the facts and holding of *Independent Music Publishers and Labels Association (“Impala”) v. Commission*,¹⁰ in Part II. Part III will examine background law, and Part IV will provide an analysis of the court’s opinion. Finally, this Note will conclude that the Commission should employ a merger review process that would parallel the process used by the United States, thereby making it more difficult for third parties to bring actions against merger clearances, and restraining third parties’ ability to clog the judicial system.

II. Statement of the Case

A. Facts

On January 9, 2004, two media giants, Bertelsmann AG (“Bertelsmann”) and Sony Corporation of America (“Sony”), requested permission from the European Commission¹¹ to merge their “global recorded music businesses” to form an enterprise operated under the name Sony BMG.¹² In order to determine the reaction to the merger within the music industry, the Commission sent out questionnaires to several industry competitors and “players” in the market.¹³ Impala, consisting of 2,500 independent music production companies, submitted to the Commission reasons why the merger would disrupt trade between the Member

⁹ *Id.*

¹⁰ Case T-464/04,

¹¹ According to the EU Merger Regulation, the Commission is entitled to “exclusive jurisdiction over ‘concentrations’ having a “Community dimension.” Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 STAN. J.L. BUS. & FIN. 327, 340 (2006) (citing Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 13, amended by Council Regulation 1310/97 of June 30, 1997, 1998 O.J. (L 180) 1, amended by Council Regulation 139/2004 of January 20, 2004, 2004 O.J. (L 24/1) 1). Additionally, even some “M&A transactions involving undertakings based outside the EC are nonetheless covered if they have sufficient turnover within more than one Member State.” *Id.*

¹² Case T-464/04, ¶¶ 1-5.

¹³ *Id.* ¶ 7.

States and should be considered “incompatible with the common market.”¹⁴ Impala claimed this incompatibility arose because the merger would result in detrimental effects on the market including hindering market access and limiting consumer choice.¹⁵ By May 24, 2004, the Commission notified the parties to the agreement that they agreed with Impala, and determined that the merger was “incompatible with the common market... since it would strengthen a collective dominant position in the recorded music market and in the wholesale market for licenses for online music and would coordinate the parent companies’ behavior in a way incompatible with Article 81 EC.”¹⁶

Typically, collective dominance arises when a concentration (synonymous with merger) creates a “dominant position between the parties to the concentration and another party on that market;”¹⁷ it is usually used to catch “oligopolistic collusion.”¹⁸ In order to determine whether such collusion or “collective dominance” might take place, the Commission must project whether the merger would allow the companies to control the recorded music market by acting “independently” of both other market participants and consumers.¹⁹ Due to objections from both Sony and Bertelsmann, the parties came together before a Hearing Officer and after hearing the arguments, the Commission determined that the creation of Sony BMG would not be anti-competitive and gave the merger clearance to proceed.²⁰ On July 19, 2004, the Commission officially announced its final decision

¹⁴ *Id.* According to Article 81 of the EC Treaty, any agreement that may “affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market” are considered to be “incompatible with the common market.” CRAIG & DE BURCA, *supra* note 3 at 938.

¹⁵ Case T-464/04, ¶ 7.

¹⁶ Case T-464/04, *Indep. Music Publishers and Labels Ass’n v. Comm’n*, 2006 ECJ CELEX LEXIS 359, ¶¶ 8-9 (2006). “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. . .” EC Treaty art. 81(1).

¹⁷ CRAIG & DE BURCA, *supra* note 3 at 1051.

¹⁸ *Id.* at 1053.

¹⁹ *Id.*

²⁰ Case T-464/04, ¶¶ 10-11 (2006).

that the concentration *was* compatible with the market, and there was no collective dominance.²¹ The Commission reached this decision by an analysis of the similarity of products available, the transparency of pricing in the market, and whether there were barriers to entry or other market constraints.²² Impala claimed the decision did not meet the requisite legal standard since it was based upon faulty reasoning and incorrect data,²³ and brought the action before the CFI requesting an expedited procedure²⁴ which was granted on January 24, 2005.²⁵

B. Review of Commission Decisions

The Commission has been granted wide discretion in decisions that require economic forecasting and assessments, which requires Community Courts (including the CFI and ECJ) to give merger clearances by the Commission particular deference due to their inherently “economic nature.”²⁶ However, the Commission cannot be seen as omnipotent in deciding upon mergers, and the Court of Justice limited this discretion by holding that despite a wide “margin of discretion with regard to economic matters,” the Community Courts must evaluate whether the Commission used all of the necessary and most reliable data to support the underlying conclusion.²⁷ Therefore, the current standard of deference is for the CFI to determine whether the Commission’s conclusion of no collective dominance was “vitiating by a manifest

²¹ *Id.* (emphasis added).

²² Case T-464/04, ¶ 243.

²³ *Id.* ¶ 31 (emphasis added).

²⁴ *Id.* ¶ 14. A system of hearing appeals in the CFI, “adopting written procedures but with a full oral hearing. . . [t]he benefit of the expedited procedure, however, is that a judgment can be produced within eight to ten months from the original Commission decision rather than the two to three year period previously experienced.” D.G. GOYDER, *EC COMPETITION LAW* 393 (F.G. Jacobs ed., Oxford University Press 2004).

²⁵ Case T-464/04, ¶¶ 13-19.

²⁶ Case T-464/04, *Indep. Music Publishers and Labels Ass’n v. Comm’n*, 2006 ECJ CELEX LEXIS 359, ¶ 327 (2006). (citing *Joined Cases C-68/94 and C-30/95, France and Others v. Comm’n* (“Kali and Salz”), 1998 E.C.R. I-1375, ¶¶ 223-224 (1998); *Case C-12/03, Comm’n v. Tetra Laval*, 2005 E.C.R. I-987, ¶ 38 (2005)).

²⁷ *Id.* ¶ 328 (citing *Case C-12/03 Comm’n v. Tetra Laval*, 2005 E.C.R. I-987, ¶ 39 (2005)).

error.”²⁸

C. Holding

It is through this standard that the Court of First Instance must determine whether the merger would meet the three conditions that create collective dominance:

First, the market must be sufficiently transparent for the undertakings which coordinate their conduct to be able to monitor sufficiently whether the rules of coordination are being observed. Second, the discipline requires that there be a form of deterrent mechanism in the event of deviant conduct. Third, the reactions of undertakings which do not participate in the coordination, such as current or future competitors, and also the reactions of customers, should not be able to jeopardize the results expected from the coordination.²⁹

Transparency occurs when price changes can be seen and quickly adapted to by competitors.³⁰ The music industry is particularly transparent in the European Union due to the publication of “weekly hit charts” that list the bestselling albums and the corresponding prices which “greatly facilitates” the ability of competitors to monitor the pricing of others in the industry.³¹ Additionally, there is a very small “number of players in the market,”³² and Sony and BMG had set up a process whereby they would receive weekly reports on competitors pricing.³³ Due to these obvious factors, the CFI criticized the Commission for not supporting its decision with “statements of the requisite legal standard” and for not evaluating all of the relevant information in determining there was not sufficient transparency in the recorded music industry to create collective dominance.³⁴ In its historic precedent, the court agreed with Impala and determined that the creation of Sony BMG would lead to a loss in revenues for

²⁸ *Id.* ¶ 329.

²⁹ *Id.* ¶ 247 (citing T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585, ¶ 63 (2002)).

³⁰ CRAIG & DE BURCA, *supra* note 3 at 943.

³¹ Case T-464/04, ¶ 349.

³² *Id.* ¶ 351.

³³ *Id.* ¶ 352.

³⁴ *Id.* ¶ 459.

recording artists due to the inevitable price hike in CD prices as the competition tightened within the market.³⁵ The ultimate holding was not that the merger would never be allowed, but that the Commission, after being “told off for not doing its homework properly,”³⁶ must re-examine the deal since they had not “substantiated” the case.³⁷

III. Background Law

A. Adverse Commission Rulings

The most recent litigation that led to the CFI overturning the Sony BMG merger began during the “2002 crisis” in the Commission.³⁸ Three of the Commission’s decisions to block mergers were overturned by the CFI in a matter of five months,³⁹ and Commissioner Monti was subsequently pressured to make changes in both the procedural and substantive process of merger review.⁴⁰ The CFI left little unsaid in their successive decisions as they issued “severe criticisms”⁴¹ of the Commission’s work.⁴² After sequential evidence that their system was not only not working but under attack, the Commission instituted several changes to increase the checks and balances within the system including increasing the ability of third parties to view the file and have a greater say in the merger review process.⁴³ After so many overturned and berated decisions, 2003 was “widely regarded as

³⁵ Joe Kirwin, *Citing Faulty Analysis, EU Court Vacates EC’s 2004 Approval of Sony-BMG Merger*, INT’L BUS. AND FIN. DAILY, July 14, 2006.

³⁶ *Let’s Try That Again*, *supra* note 8.

³⁷ *Music Mergers*, FIN. TIMES LIMITED (London), July 14, 2006, at 16.

³⁸ GOYDER, *supra* note 24, at 394.

³⁹ *Id.*; see also Paul Betts, *Court Challenge to Music Merger: Court Edict Puts Record Industry in a Spin*, FIN. TIMES LIMITED (London), July 14, 2006, at 22 (“[T]he Luxembourg court had already dealt the Commission three embarrassing blows by annulling its decision to block the Schneider-Legrand merger, the Tetra Laval-Sidel deal and the Airtours-First Choice Holidays merger.”).

⁴⁰ GOYDER, *supra* note 24 at 394; see also *Let’s Try That Again*, *supra* note 8 (noting that due to the previous three reversals Mario Monti had to “revamp” the previous merger-review process).

⁴¹ GOYDER, *supra* note 24 at 394-396.

⁴² *Id.*

⁴³ *Id.*

the low point in the more than [ten] years [that] the Commission has had antitrust regulatory powers in the single market...."⁴⁴

The first, and most critical, decision that began the 2002 Commission crisis is *Airtours v. Commission*.⁴⁵ In this decision, Airtours, a British tour operator, alerted the Commission of its anticipated acquisition of another U.K. tour operator, First Choice, but the Commission warned the merger would create a collective dominant position in the "UK short-haul foreign package holiday market" between the merged companies and another tour operator that was not a party to the transaction.⁴⁶ Although the merger would have left three of the travel companies holding eighty percent of the market, the CFI overturned the Commission by "severely criticiz[ing] the quality of the Commission's economic reasoning"⁴⁷ and determined the merger could go forward as originally planned since they had incorrectly analyzed the market.⁴⁸

The second in the trio of Commission disappointments came during *Schneider v. Commission*,⁴⁹ one of the first cases to implement the CFI's new procedure of hearing certain appeals on an expedited basis (the method subsequently used in *Impala*).⁵⁰ After analyzing the market for electrical equipment in Europe, the Commission denied the merger claiming the "concentration was incompatible with the common market."⁵¹ However, the CFI found the Commission's analysis of the electrical equipment market inadequate,⁵² and that due to several errors, including the misapplication of regulations, the Commission was once again overturned and the merger was allowed.⁵³

⁴⁴ Kirwin, *supra* note 35.

⁴⁵ Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585.

⁴⁶ F.O. W. VOGELAAR, *THE EUROPEAN COMPETITION RULES: LANDMARK CASES OF THE EUROPEAN COURTS AND THE COMMISSION* 279 (Europa Law Publ'g 2004); *see* GOYDER, *supra* note 24, at 367, 392.

⁴⁷ GOYDER, *supra* note 24, at 367.

⁴⁸ *Id.*

⁴⁹ Case T-310/01, *Schneider Elec. v. Comm'n*, 2002 E.C.R. II-4071.

⁵⁰ GOYDER, *supra* note 24, at 393.

⁵¹ *Schneider*, 2002 E.C.R. II-4071, at 4080.

⁵² GOYDER, *supra* note 24, at 393.

⁵³ *Schneider*, 2002 E.C.R. II-4071.

The third blow to the Commission came in *Tetra Laval BV v. Commission*.⁵⁴ Tetra Laval, a manufacturer of food cartons, proposed a merger with Sidel, a manufacturer of plastic bottles, but the Commission declared it incompatible since Tetra could use its market position to force “mixed bundling” onto their customers by requiring them to buy their plastic requirements only from Sidel.⁵⁵ However, the CFI determined that the Commission’s determination “fell far short” of establishing that the merger should not be allowed on the basis of possible dominance.⁵⁶

B. Third Party Weight

In addition to the precedent leading up to the CFI’s propensity to overturn the Commission, there is also important case law preceding the current weight given to third parties and their ability to throw substantial roadblocks into the merger review process. It is difficult to identify a clear progression in this area since, as some sources have noted, although other areas of European law are clearly defined, the European Union is missing “complete transparency with respect to submissions by the merging parties’ competitors and the extent to which they will be permitted to participate in the process.”⁵⁷

Historically, the European Court of Justice (“ECJ”) has exercised broad discretion in determining who has standing to bring an action in cases that arise under Articles 81 and 82 of the EC Treaty regulating competition.⁵⁸ This discretion is regulated by the European Economic Community (“EEC”) Council Regulation 17, Article 3(2)⁵⁹ which states, “a Member State, or

⁵⁴ Case T-5/02, *Tetra Laval BV v. Comm’n*, 2002 E.C.R. II-4382.

⁵⁵ GOYDER, *supra* note 24, at 393. According to this theory, Tetra would give discounts to those packagers on “future carton purchases, on condition that they also acquired their plastic bottle machinery from Sidel.” *Id.*

⁵⁶ *Id.*; see also VOGELAAR, *supra* note 46, at 274-275 (discussing the CFI’s decision to overturn the Commission).

⁵⁷ Fisher, *supra* note 11, at 337 (2006); see also Pieter Kalbfleisch, *European Merger Control: A Case of Second Mover Advantage?*, in *MODELLING EUROPEAN MERGERS* 27, 28 (Peter A.G. van Bergeijk et al. eds., Edward Elgar Publishing, Inc., 2005) (noting that the case law for competition policy, especially in Europe, is not very well developed since it is a comparably new topic within commercial law).

⁵⁸ CRAIG & DE BÚRCA, *supra* note 3, at 506.

⁵⁹ European Economic Community Council Regulation 17/62, First Regulation

any natural or legal person who claims to have a legitimate interest, can make an application to the Commission, putting forward evidence of a breach of Articles 81 and 82."⁶⁰

This definition of who could bring an application was put to the test in *Metro-SB-Großmärkte GmbH & Co KG v. Commission*.⁶¹ Metro, a third party, brought an action against SABA when SABA refused to recognize them as a wholesaler for distribution of electronic equipment.⁶² The Commission had previously ruled that SABA's distribution system did not violate Article 85, but Metro filed an action in order to annul the decision.⁶³ Although there was initially a question of whether a third party would have standing and "could claim to be individually concerned by a decision addressed to another,"⁶⁴ the ECJ determined that:

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86⁶⁵ that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with wholly or in part, to institute proceedings in order to protect their legitimate interests. In those circumstances the applicant must be considered to be directly and individually concerned....⁶⁶

In a case similar to *Impala*, the CFI in *Bureau Européen des Unions des Consommateurs (BEUC) v. Commission*⁶⁷ took Article

Implementing Article 85 and 86 of the Treaty, 1962 O.J. (013). It is important to note that this regulation now governs Articles 81 and 82 due to the renumbering of the Treaty of Amsterdam (ToA).

⁶⁰ CRAIG & DE BÚRCA, *supra* note 3, at 506.

⁶¹ Case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Comm'n*, 1977 E.C.R. 1875; *see also* Cases 228, 229/82, *Ford Werke AG v. Comm'n*, 1984 E.C.R. 1129; Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel v. Comm'n*, 1995 E.C.R. II-1247 (noting other situations in which the complaint was allowed standing).

⁶² *Metro-SB-Großmärkte*, 1977 E.C.R. 1875 ¶ 8.

⁶³ CRAIG & DE BÚRCA, *supra* note 3, at 506. Due to the ToA, the original Article 85 became Article 81. *Id.*

⁶⁴ *Id.*

⁶⁵ Note ToA renumbering: Arts. 85 and 86 are currently Arts. 81 and 82.

⁶⁶ CRAIG & DE BÚRCA, *supra* note 3, at 507.

⁶⁷ Case T-37/92, *Bureau Européen des Unions des Consommateurs v. Comm'n*,

3 of Regulation 17 one step further.⁶⁸ Here, British and Japanese motor manufacturers entered into an agreement that would “restrict[...] the export of Japanese cars to the United Kingdom to 11% of the total annual car sales in that country.”⁶⁹ Two non-profit groups instituted to protect consumer interests submitted a complaint to the Commission regarding the proposed restriction.⁷⁰ The Commission did not allow the complaint, but upon a complaint filed by the non-profits, the CFI annulled the Commission’s decision and ordered the Commission to pay the costs of the action.⁷¹

One of the most surprising decisions in European competition law came in 2003 when the Commission blocked the proposed merger between General Electric (GE) and Honeywell in *General Electric v. Commission*.⁷² This case served as an important illustrator of third party power in the European Union versus the United States in the administration of antitrust laws and was the first time the Commission enjoined a U.S. merger after it had been cleared by the United States Department of Justice (DOJ).⁷³ The two companies filed a joint action to request the CFI to annul the Commission decision,⁷⁴ but the CFI upheld the merger prohibition despite its criticism of the Commission’s analysis of the market for containing “manifest errors of assessment.”⁷⁵ The case served a more important function than just a further illustration of the CFI’s trend towards criticizing the Commission. In one of its most

1994 E.C.R. II-285.

⁶⁸ CRAIG & DE BURCA, *supra* note 3, at 507.

⁶⁹ Case T-37/92, ¶ 2.

⁷⁰ *Id.* ¶ 1.

⁷¹ *Id.* ¶¶ 77-78.

⁷² Case T-210/01, *Gen. Elec. v. Comm’n*, 2005 ECJ CELEX LEXIS 690 (2005).

⁷³ George Stephanov Georgiev, *Recent Development, Bridging the Divide? The European Court of First Instance Judgment in GE/Honeywell*, 31 YALE J. INT’L L. 518, 518 (2006).

⁷⁴ *Id.*

⁷⁵ *Id.* Specifically, the Commission found that due to GE’s financial power the merger with Honeywell could lead to “a dominant position in the market for corporate jet aircraft engines and for small gas marine gas turbines.” The CFI found fault with several aspects of the Commission’s analysis but noted that “the finding of firm dominance, is ‘part of a complex economic assessment’ to be performed by the Commission and is entitled to deference.” *Id.* at 520.

debated decisions, the Commission demonstrated that they value the opinion of third parties above even the ruling of the United States government.⁷⁶

IV. Significance of the Case

A combination of both the CFI's successive rejection of the Commission's antitrust policies⁷⁷ and the new inclination towards third party influence led to the *Impala* decision. The case broke new ground as the first instance in which the CFI annulled a merger clearance by the Commission,⁷⁸ and the ruling became even more significant because the unprecedented action was filed in the CFI by a third party. The decision represents the growing problem of the rapidly increasing third party power within the European antitrust procedures and foretells a problem that could eventually prove detrimental to the speed and efficiency of the European court systems.⁷⁹

A. Third Party Power

One of the most undesirable consequences of this decision is the possibility that due to the success of the third party underdog and the "humiliating" language of the decision,⁸⁰ there will now be an unprecedented increase in competitor challenges to Commission clearance decisions.⁸¹ This berating language and the influence of third parties can be seen in the CFI's description of the Commission's decision as a "cursory examination"⁸² and in the CFI's reprimand that the Commission's observations "appreciably departed" from the Court's analysis.⁸³ The merger was described

⁷⁶ Fisher, *supra* note 11, at 361-362.

⁷⁷ Some lawyers found that after the "revamping" by former competition commissioner it was more difficult to block mergers and seemed to say, "if in doubt, allow the merger to go ahead." Paul Meller & Jeff Leeds, *Merger of Sony-BMG Units is Rejected by Court in Europe*, N.Y. TIMES, July 14, 2006, at C2.

⁷⁸ Bretz, *supra* note 1, at 8.

⁷⁹ Fisher, *supra* note 11, at 337.

⁸⁰ Kirwin, *supra* note 35.

⁸¹ Bretz, *supra* note 1, at 8.

⁸² Case T-464/04, *Indep. Music Publishers and Labels Ass'n v. Comm'n*, 2006 ECJ CELEX LEXIS 359, ¶ 426 (2006); Steven Zeitchik & Phil Gallo, *Wall of Sound*, DAILY VARIETY, July 14, 2006, at 1.

⁸³ Case T-464/04 at ¶ 553.

as not only “vitiating by a manifest error of assessment,”⁸⁴ but as missing vital economic “relevant data” that is necessary to fully understand the market.⁸⁵ The CFI also disapproved of the fact that the Commission only used three points to support its decision that there was no collective dominance, and the court proceeded to list several more factors that should have been considered as leading to price coordination.⁸⁶ By using this harsh language, the CFI demonstrated that the Commission must raise its standards for merger clearances and that initial complaints by third parties should be given a substantial amount of weight since they will be given such deferential treatment by the CFI after the merger review process.

The most unfortunate effect from this decision could come from third party competitors who see this as an opportunity to slow down a merger that would actually be in the best interest of the market.⁸⁷ In examining the effect excessive third party power may have on the potential to discourage future mergers and on the worldwide economy, the CFI should take to heart the words of Douglas Jay. As the President of the Board of Trade in 1964, he cautioned that although some mergers could “stifle competition,” it should also be remembered “what mergers can in certain cases do to achieve greater strength for our economy at home and abroad.”⁸⁸

Third party competitors can easily bring an action in the CFI “as a tactic to disrupt pro-competitive mergers.”⁸⁹ An excessive number of actions filed would not only lead to a reduced incentive to merge, but could also increase the cost to the Commission’s

⁸⁴ *Id.* ¶ 459.

⁸⁵ *Id.*

⁸⁶ Susan Butler, *Legal Matters: Will Euro Court Undo Sony BMG?*, BILLBOARD MAG., July 29, 2006, at 2. These factors included the “publication of weekly hit charts,” Case T-464/04, ¶ 349, the “long term stable relationships between retailers and all majors,” *id.* ¶ 350, the “limited numbers of players on the market”, *id.* ¶ 351, and the “monitoring of the retail market.” *Id.* ¶ 352.

⁸⁷ Fisher, *supra* note 11, at 337.

⁸⁸ James Fairburn, *The Evolution of Merger Policy in Britain*, in EUROPEAN MERGERS AND MERGER POLICY 239, 241 (Matthew Bishop & John Kay eds., Oxford University Press 1993) (citing Douglas Jay, reprinted in the 1978 Green Paper).

⁸⁹ Bretz, *supra* note 1.

“merger control process”⁹⁰ that has historically been commended for providing a rather concrete decision in a reasonable amount of time.⁹¹ By not providing available standards and clear decision making processes regarding complaints submitted by competitors,⁹² third parties have an incentive to file more actions because it is best to err on the side of possibly slowing down a merger rather than attempting to spend excessive time wading through murky rules. As a policy consideration, the CFI should consider the effects its decisions are having on pro-competitive behavior; competitors are being given “an unparalleled opportunity to abuse the process by delaying the transaction through protests or other submissions... in effect, holding the transaction hostage. Sometimes the delay itself will kill that merger....”⁹³

The prospect of third parties gaining this advantage is particularly troublesome now, as European mergers are more popular and profitable than ever.⁹⁴ Similarly, the mergers are growing to be an important indicator of a united Europe and the Member States’ efforts to “create a single market.”⁹⁵ The interference of third parties in the system could cause substantial slowdowns in not only the economic efficiency of individual countries, but also in the unification of the European antitrust system. This case has important ramifications in markets that spread beyond the music industry, specifically those in “mature,

⁹⁰ *Id.*

⁹¹ *Id.* The costs could be increased if a “judicially nervous Commission” determined that it is necessary for “in-depth reviews of mergers in complex or complainant-rich markets, even though they are appropriate for clearance at their first phase.” *Id.* “Competition lawyers predict that to avoid another embarrassing reversal in court, the commission will demand far more data from merging parties, placing a greater burden on companies and possibly prolonging merger talks.” *Let’s Try that Again, supra* note 8, at 61.

⁹² Fisher, *supra* note 11, at 337.

⁹³ *Id.*

⁹⁴ *To the Barricades*, *ECONOMIST*, Mar. 4, 2006. “A European merger wave has been gathering momentum since last year, when firms came out of a period of tough restructuring. Strong corporate profits in 2004 encouraged companies to make acquisitions – particularly since credit was cheap and plentiful. By the end of 2005 the value of European deals that year had reached almost € 1 trillion, a volume not seen since the technology bubble of 2000.” *Id.*

⁹⁵ *Id.*

highly concentrated industries.”⁹⁶ The court clearly indicated its intent to continue harshly examining the Commission’s merger review process, as the CFI’s description of the Commission’s performance as a “cursory examination”⁹⁷ brings to mind a teacher with a student who must be closely watched after refusing to properly do her homework. Furthermore, the court encouraged third party complaints by ordering the Commission to pay three quarters of Impala’s legal costs.⁹⁸ According to one source, the decision came down to nothing more than incorrect wording to support its position, despite coherent and valid arguments by the Commission.⁹⁹ The Impala decision has already succeeded in sending signals to potential third party protestors that seem to invite more actions. Impala itself indicated through its president, Patrick Zelnick, that this result had been achieved when he noted that “the group would be emboldened for another fight.”¹⁰⁰ These signals could be dangerous signs of encouragement to competitors to file complaints for a system that takes pride in its efficient and “strict timetable.”¹⁰¹

B. Effect on Timetable

However, despite the possible encouragement the court may have inadvertently sent to third party competitors by its decision, many competition experts think that Impala may actually have stepped on the court’s toes by requesting an expedited procedure and then taking more than double the typical length of time for an expedited procedure.¹⁰² The decision came down approximately a

⁹⁶ *Let’s Try That Again*, *supra* note 8, at 61. These industries include those similar to aerospace and commodities. *Id.* However, the move also serves as a warning to the potential merger between Warner Music Group and the EMI Group that may “be scared off by the ruling.” Zeitchik & Gallo, *supra* note 80, at 2.

⁹⁷ Case T-464/04, *Indep. Music Publishers and Labels Ass’n v. Comm’n*, 2006 ECJ CELEX LEXIS 359, ¶ 426 (2006); *see also* CRAIG & DE BURCA, *supra* note 3, at 1078 (warning that “the intensity of the review process has increased since the task has been allocated to the CFI, and a number of high-profile decisions have been overturned on the facts”).

⁹⁸ Case T-464/04 ¶ 554.

⁹⁹ Meller & Leeds, *supra* note 77.

¹⁰⁰ Zeitchik & Gallo, *supra* note 80, at 2.

¹⁰¹ Meller & Leeds, *supra* note 75.

¹⁰² Renee Cordes, *Impala Wins a Battle but Pays a Price*, July 17, 2006, DAILY

year and a half after the complaint was filed, and the typical time frame for an expedited procedure is under nine months.¹⁰³ In fact, some of the attorneys involved with the case anticipate that the court will set much firmer deadlines with future parties who request expedited relief.¹⁰⁴ This could serve as an advantage to future merging companies whose potential third party rivals may stop and think before filing an action in the CFI if they know it is unlikely to be approved for an expedited procedure. Without the expedited procedure, a third party competitor has a greater financial incentive not to file a complaint just to slow or prevent the merger since it would require more time and money.

C. Benefits

In considering the effects of the *Impala* ruling, it is important to note that third party involvement in the merger process has benefits as well, and should not be phased out altogether. The European system of allowing third parties a voice takes into consideration that although mergers can be beneficial to economies,¹⁰⁵ there can be detriments as well.¹⁰⁶ The proposed mergers that legitimately have anti-competitive effects should be restrained, and it would be extremely dangerous, “to adopt a generalized stance either pro or anti mergers *per se*.”¹⁰⁷ The European system is also efficient in the sense that, if anything, the permissibility of third parties to bring complaints brings even more concerns than usual to the forefront before the merger is allowed. It is important to allow these concerned parties to bring

DEAL; Case T-464/04, *Indep. Music Publishers and Labels Ass'n v. Comm'n*, 2006 ECJ CELEX LEXIS 359, ¶ 546 (July 13, 2006).

¹⁰³ Cordes, *supra* note 102.

¹⁰⁴ *Id.*

¹⁰⁵ Mergers generally have three main benefits: (1) Mergers allow previously small companies to joined forces in order to reduce costs by “exploit[ing] economies of scale and scope; (2) “Efficiency can be increased by replacing poor management through a competitive market for corporate control;” and finally (3) “Merger can enable two companies that are performing poorly against foreign rivals to form a ‘national champion’ able to compete internationally.” Matthew Bishop, *European or National? The Community's New Merger Regulation*, in *EUROPEAN MERGERS AND MERGER POLICY* 294, 295 (Matthew Mishop & John Kay eds., Oxford University Press 1993).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

an action since it is easier to stop mergers that have the *potential* to be anti-competitive, rather than penalizing this behavior once it proves to be true.¹⁰⁸

V. Conclusion

Impala has cast a new uncertainty over mergers within the European Union through unclear guidelines that have the potential to substantially increase third party competitor complaints. The problems with this uncertainty are reflected by the statement of then U.K. Trade Minister, John Redwood who noted in September 1990 that in order for the market to run efficiently it is critical that companies be able to discern what party has the power to “determin[e] the fate of [its] mergers.”¹⁰⁹ By muddying the waters of merger review, the European Union is blatantly disregarding the opportune position of “second mover advantage” they occupy in competition policy.¹¹⁰ In order to benefit from developing competition policies after many foreign countries and the individual European states, the European Union should consider implementing policies that mirror the most successful aspects of countries such as the United States.

In 2002, then Commissioner Monti specifically proclaimed that the “U.S.-Style prosecutorial regime, whereby the Commission might seek to challenge a proposed merger before the European courts”¹¹¹ is not well suited for the European Union.¹¹² The merger review process utilized by the European Union has been labeled a “front end” system since the Commission acts as a competition administrative body to make the primary decision in the case compared to the U.S. “back-end” method of judicial

¹⁰⁸ *See id.*

¹⁰⁹ Bishop, *supra* note 109, at 294.

¹¹⁰ Kalbfleisch, *supra* note 57, at 29. The second mover advantage occurs since the EU has been able to develop their policies after seeing the developments of other individual European countries as well as foreign countries in their development of competition policy. *Id.*

¹¹¹ Mario Monti, European Competition Comm’r, Review of the EC Merger Regulation – Roadmap for the reform project, Address at Conference on Reform of European Merger Control before British Chamber of Commerce (June 4, 2002) http://www.abanet.org/intlaw/committees/business_regulation/antitrust/eucompetitionparisi.pdf.

¹¹² *Id.*

involvement.¹¹³ Monti bolstered his statement that the U.S. approach would not work in the European Union by stating the current “front-end” method has two inherent benefits not found elsewhere: first, it generates a “swift”¹¹⁴ response (typically by the end of a month, but not usually longer than five months) and is “remarkably transparent: every notification results in a published and fully reasoned decision.”¹¹⁵

However, these reasons are inaccurate if the Commission continues to value speed over accuracy. Currently, the Commission has been almost consistently overturned by the CFI rendering a longer, rather than “swifter” process since the parties not only receive an inappropriate judgment at the front end but are then subjected to a further review by the CFI. The second benefit, transparency, has also been questioned.¹¹⁶ Although the decisions are publicly reported, the third party complaints submitted by competitors are not always available for full public disclosure due to a concern over the release of confidential information.¹¹⁷ The third party competitors also possess an unclear amount of power in the merger review process which creates a distinctly un-transparent process with an unpredictable result.¹¹⁸ During one hearing, representatives from the merging parties’ competitor were able to participate in the Commission hearing, question the competitors’ witnesses, and examine the proposed remedies.¹¹⁹ This type of unforeseen participation by a party with a clear vested interest in stopping the merger makes it difficult for parties to anticipate the type of review they will receive and from whom they will be receiving it.

Additionally, Monti’s words should be viewed in light of the fact that he, in the same speech, indicated his “healthy skepticism”

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.,* Fisher, *supra* note 11, at 337.

¹¹⁷ *Id.* n.34.

¹¹⁸ *See Id.* at 337.

¹¹⁹ *Id.* at n.35 (citing U.S. Dep’t of Justice, Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust 56 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm>).

of mergers.¹²⁰ Although Monti did not go so far as to state that mergers should be discouraged as a general rule,¹²¹ his speech indicated that if faced with a choice, he would prefer a system with more stringent regulations at the cost of preventing even some valid mergers rather than risk looser regulations that allowed mergers that may have anti-competitive effects.¹²² In light of the recent *Impala* holding, it is possible that his recent reforms involving increasing power for third parties have succeeded in creating a system that does err on the side of deterring even valid mergers.

A. *United States Contrast*

The U.S. system of merger clearance avoids similar problems by third parties through clear procedural guidelines. In the United States, the companies must go to either the Department of Justice (DOJ) or the Federal Trade Commission (FTC) in order to receive clearance for a merger.¹²³ Unlike the Commission, the DOJ or FTC is not required to give the rationale for its decision, and third parties are not allowed to appeal the decision.¹²⁴ Third parties are only permitted to voice their opposition by bringing an entirely new action in the courts.¹²⁵ Since the DOJ or FTC does not publish a list of reasons for its decision, the third party must start from scratch to prove to the court that the merger will impede competition.¹²⁶ This process serves as an advantage to the U.S.

¹²⁰ Monti, *supra* note 111, at 7.

¹²¹ *Id.* at 6-7 (citing *From Merger to Misery*, FIN. TIMES UK, 25 April 2002 [noting mergers create little value]).

¹²² "So, while it seems clear that some mergers do create value and lead to efficiencies, many others - some believe more than half of all mergers - fail to deliver and indeed destroy value. Perhaps without going so far as a recent editorial comment in the 'Financial Times', which indicated that 'mergers create little value' and 'shareholders consistently fail to restrain management from empire building' and concluded from this that 'far fewer mergers should occur', in my view it is appropriate to maintain a touch of 'healthy scepticism' with regard to efficiency claims, particularly in relation to transactions which appear to present competition problems." *Id.* at 7 (citing *From Merger to Misery*, FIN. TIMES UK, 25 April 2002).

¹²³ Butler, *supra* note 86.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

system by weeding out third party competitors who do not have a legitimate complaint and possibly want to simply stall the merger for their own pecuniary gain. The daunting financial burden of bringing the case to court is much greater than any small gain received by stalling the merger and ensures that only genuine complaints will be brought into the court system. Alternatively, in the Commission, third parties are able to block a merger without proving the anticompetitive effects in an adjudicative setting.¹²⁷

While the U.S. has taken a more cautionary approach to competitor complaints realizing they operate under “skewed incentives,”¹²⁸ the EU typically allows these parties to have a voice as long as “sufficient interest” in the outcome can be demonstrated.¹²⁹

For this reason, the European system has been criticized for valuing competitors’ complaints over an objective investigation into the possible detrimental effects on the market.¹³⁰ In general, one of the biggest complaints made in the European merger review process is the Commission’s predilection for allowing the parties who have an obvious interest in preventing the merger to carry so much control in the decision.¹³¹

Additionally, as the global marketplace continues to grow, it will become more important for the United States and the European Union to have similar, although not necessarily identical, systems in order to ensure predictability and uniformity in global merger decisions. The different roles played by the courts, the different time tables, and most importantly, the different roles played by third parties could create barriers to

¹²⁷ Fisher, *supra* note 11, at 333.

¹²⁸ *Id.* at 362.

¹²⁹ *Id.* at 361.

¹³⁰ *Id.* at 335 (citing *Competition Policy Should be Focused on Consumers*, THE INDEP. (London), July 5, 2001, at 3 (“Where US law is based on protecting consumers, EU competition policy focuses primarily on protecting competitor companies.”)); *No Time for Protectionism*, BUS. WK., July 23, 2001, at 98 (“The EU’s focus on competitors rather than consumers makes the Bush Administration suspicious.”); Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN’S L. REV. 583, 586 n.15 (2002) (asserting that “the principal area of divergence between European and American antitrust law is the EU’s apparent willingness to protect competitors rather than the competitive process”).

¹³¹ See Fisher, *supra* note 11, at 361-362.

international mergers that may have political as well as economic ramifications. The *GE/Honeywell* decision provided a glimpse of the disastrous consequences that can result when countries have different expectations of mergers and pro-competitive behavior.¹³² Although there are many lessons to be learned from both systems, the European Union should employ a merger system that parallels the United States' method of dealing with third party attacks in order to separate the legitimate claims from those merely intended to postpone a merger by clogging the system of European efficiency. If a change is not made, then the very characteristics that Commissioner Monti heralded as the benefits of the European system, transparency and efficiency, will be obliterated by the CFI's propensity to encourage objections by competitors who will be more than happy to take advantage of the chink in the armor of merging companies.

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¹³² Georgiev, *supra* note 73, at 520-21.

