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IMPALA V. COMMISSION: CHANGING THE TUNE OF EUROPEAN COMPETITION LAW

ELENA VRANAS-LIVERIS*

INTRODUCTION

On July 13, 2006, the European Union's Court of First Instance (CFI) made history in *Impala v. Commission*,¹ through which it annulled the 2004 decision of the European Commission (the "Commission") which cleared the merger between music industry majors Sony and Bertelsmann AG. The merger created the world's second largest recorded music company, SonyBMG, which comprised one-quarter of the global music market.²

This judgment is worthy of discussion at numerous levels, having internal ramifications for the EU, as well as global ramifications for merger control law generally. Internally, *Impala* marks the first time that the CFI reversed a Commission merger clearance decision and thus it raises many questions regarding the EU structurally. The decision raises questions regarding the extent of the CFI's control over the Commission, particularly over the Commission's merger review process, and whether the CFI's control has changed over the years. Externally, *Impala* creates significant concern for practitioners in light of the fact that the judgment potentially dismantled³ a joint venture that had already been successfully operating for two years.⁴ One accordingly asks whether *Impala* represents a considerable

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1. Case T-464/04, *Impala v. Comm'n*, 2006 E.C.R. II-2289.

2. Leo Cendrowicz, *Sony, BMG Pursue Merger on Two Fronts*, BILLBOARD, Oct. 28, 2006, at 25 (quoting statistic from Nielsen SoundScan).

3. Following the *Impala* decision, the Commission had the opportunity to reexamine the merger using the CFI's standards, and under these new standards, found it acceptable. See Press Release, European Union, *Mergers: Commission Confirms Approval of Recorded Music Joint Venture Between Sony and Bertelsmann After Re-Assessment Subsequent to Court Decision* (Oct. 3, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1437>. Further, the merging parties had the opportunity to appeal the decision to the European Court of Justice. It is for these reasons that I stress that the merger was *potentially* dismantled.

4. *The European Court of First Instance Annuls the European Commission's Decision Approving the SonyBMG Joint Venture*, MEMOS (Simpson Thacher & Bartlett, New York, N.Y.), July 18,

change in European merger control policy that may in turn affect the global economy. In particular, one must consider whether mergers will generally be more difficult to form under European law and whether outside forces such as third-party competitors will have a more active role in the Commission's merger review process. This comment explores these questions with a view of obtaining a better understanding of the effect of *Impala* on the future of merger control law both in the EU and throughout the world.

Part I of this comment outlines the background necessary to understand the changing role of the CFI and the impact of *Impala* on merger control law. This section begins by detailing the history of the CFI. It then discusses European merger control law doctrinally, as established in the European Merger Regulation and Article 82 of the Treaty Establishing the European Community (the "Treaty"). The section concludes by examining the case law that shaped the *Impala* decision, particularly *Schneider Electric SA v. Commission*,⁵ *Tetra Laval v. Commission*,⁶ and *Airtours v. Commission*⁷ (the "Merger Trio"⁸). In each of these 2002 cases, the CFI annulled a Commission decision prohibiting a disputed merger. Notably, the Merger Trio was the first set of cases in which the CFI annulled the Commission's merger decisions, although as we have now seen through *Impala*, it was not the last. Part II presents the facts of *Impala* and evaluates the legal analysis the CFI used to reach its conclusion. Part III discusses the implications of *Impala* for the role of the CFI. Specifically, this section demonstrates how the CFI has dramatically changed its role within the European Union through its greater use of judicial discretion, consequently becoming a force which the Commission cannot simply take for granted as it may have done in years past. Part IV then discusses the implications of *Impala* for merger control policy generally. Particularly, this comment argues that *Impala* has heightened the standard for merger clearance decisions and has encouraged third-party involvement in European competition law.

2006, at 1 [hereinafter *The CFI Annuls the EC's Decision*], available at <http://www.simpsonthacher.com/content/publications/pub558.pdf>.

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

6. Case T-5/02, *Tetra-Laval BV v. Comm'n*, 2002 E.C.R. II-4381.

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

8. This term was first used to describe this set of cases by Professor Gerber in David J. Gerber, *Courts as Economic Experts in European Merger Law*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 475 (Barry E. Hawk ed., 2004).

I. BACKGROUND

In order to obtain a comprehensive understanding of the importance of *Impala* both within the EU and globally, one must first have basic knowledge of the European justice system. One must also be familiar with the European merger control law which governs the judgment, as well as the relevant case law leading up to the judgment. In the first section of the comment, we examine the basic framework that is necessary to evaluate the CFI's judgment in *Impala*.

A. *The Court of First Instance Prior to the Merger Trio and Impala*

The European Union is a fascinating political and economic system, dependent on the synchronized functioning of its supranational and inter-governmental institutions. Throughout the history of the EU, the institutions have taken on rather defined roles, creating order and predictability. However, one must recognize that the EU is still a dynamic political and economic entity—one in which change sometimes leads to the advancement of the Union, and sometimes to its weakening. It is thus of serious interest to identify and evaluate changes within the institutions as the Union advances, towards a better understanding of the EU internally, and of any consequent global effects. For this reason, we now examine the original role of the CFI within the EU so we can later discuss how this role has changed in light of *Impala*.

Today, it is the task of both the European Court of Justice (ECJ) and the CFI to ensure, through interpretation and application of the Treaty, that “the law is observed.”⁹ The Treaty may be regarded as the constitution of the European Union, the “legal text from which all other rules derive.”¹⁰ This awesome responsibility of ensuring that the law is observed was not, however, always held by the CFI.

Upon conception of the European Economic Community (EEC) in 1957, the ECJ was the sole court responsible for enforcing EEC laws, and it played an extremely active role in shaping European competition law.¹¹ As the Community expanded in the 1970s, however, the growing workload of

9. Treaty Establishing the European Community, Nov. 10, 1997, art. 220, 1997 O.J. (C340) [hereinafter EC Treaty]; P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 106 (8th ed. 2004). Article 225 of the EC Treaty further provides that “unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice . . . shall apply to the Court of First Instance.”

10. MATHIJSEN, *supra* note 9, at 107.

11. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 351–53 (1998).

the ECJ created great concern.¹² The concern continued into the 1980s as the ECJ became particularly busy after the 1987 passage of the Single European Act (SEA), through which the ECJ gained the responsibility of hearing cases relating to the single market planned for 1992.¹³ The goal of achieving the single market, after all, led to a wave of mergers, acquisitions, and joint ventures as firms attempted to become "European."¹⁴ The justice system was increasingly burdened such that by 1988, it took the ECJ eighteen months to respond to a request from a national court for a preliminary ruling and twenty-four months to deal with a direct action.¹⁵ Moreover, the quality of decisions arguably decreased because the ECJ became reluctant to carry out detailed investigations into factual background in light of its increased caseload.¹⁶ As a result, the member states provided in Article 11 of the SEA for a court of first instance to be attached to the ECJ. In 1988, the Council of the European Union (the "Council") adopted the decision which formally established the CFI,¹⁷ and the CFI began hearing cases in October 1989.¹⁸

At its inception, therefore, the CFI was a type of subsidiary court created to ease the ECJ's workload by handling the spillover cases,¹⁹ specifically the less important cases dealing with competition issues, actions brought against the Commission under the European Coal and Steel Community Treaty, and disputes between European Union institutions and their staff.²⁰ Originally the Council only conferred limited jurisdiction upon the CFI, but through decisions in 1993²¹ and 1994,²² the Council transferred all jurisdiction allowable under the Treaty to the CFI, which includes jurisdiction to hear all direct actions brought by natural and legal persons.²³ The CFI is therefore the first court to review the legality of acts adopted by the

12. ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 14 (1999).

13. *Id.* The SEA's main objective, as now established in Article 14(2) of the EC Treaty, was to complete the single market which was defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."

14. GERBER, *supra* note 11, at 369-70.

15. ARNULL, *supra* note 12, at 14.

16. *Id.*

17. *Id.*

18. *Id.* at 15.

19. *Id.* at 16 (noting that although the quality of CFI judgments is high and the CFI has "improv[ed] judicial review of complex facts," it has not had the original intended effect of creating a more speedy justice system).

20. *Id.* at 15.

21. Council Decision 93/350, art. 1, 1993 O.J. (L 144) 21, 22 (Euratom).

22. Council Decision 94/149, 1994 O.J. (L 66) 29.

23. EC Treaty art. 230.

institutions or the European Central Bank,²⁴ which includes reviewing any acts of the Commission. Any action for annulment of Commission decisions, including merger decisions, brought by a natural or legal person accordingly also commences in the CFI.

The Treaty of Nice, signed in 2001, subsequently provided that the CFI would no longer be “attached” to the ECJ, but rather would continue as an independent institution of the EU,²⁵ and further, that judicial panels could be attached to it to exercise this judicial competence.²⁶ Despite this independence, all judgments of the CFI are subject to appeal to the ECJ, though only on issues of law.²⁷ In practice, however, appeals from the CFI to the ECJ have been fairly infrequent, with the result that the CFI has garnered much more power than the ECJ in areas of law which first come before it, including competition law.²⁸ Nonetheless, up until the Merger Trio, even the CFI’s “power” in merger control was rather dismal compared to that of the Commission. Until the Merger Trio, the CFI never effectively exercised leadership in competition law, perhaps under the realization that, in theory, it was not the only judicial voice that could be heard on the subject.²⁹

As the judicial role in merger control law narrowed in the late 1980s and 1990s, the Commission took on a stronger role in shaping competition policy without paying much deference to the courts.³⁰ Indeed, until the Merger Trio in 2002, the Commission almost exclusively controlled European competition law. It is for this reason that the Merger Trio and ultimately *Impala* are so significant in illustrating a new wave of leadership in this area of law.

B. European Merger Control Law

The objective of European competition law is to ensure that “competition in the internal market is not distorted.”³¹ The Commission plays a key

24. MATHIJSSEN, *supra* note 9, at 140 (citing EC Treaty arts. 225, 230).

25. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001, art. 2(26), 2001 O.J. (C 80) (now EC Treaty art. 220) (declaring that “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that . . . the law is observed”) (emphasis added).

26. *Id.*

27. ARNULL, *supra* note 12, at 14.

28. *Id.*

29. GERBER, *supra* note 11, at 375.

30. *Id.* at 375–76.

31. MATHIJSSEN, *supra* note 9, at 243–44; see also EC Treaty art. 3(1)(g).

role in enforcing competition law,³² seeking to “ensure that markets function properly and, ultimately, that [the] consumers do not suffer as a result of having to pay higher prices or being offered poor choice.”³³ In this section, we will look at the codified merger law which has been adopted towards achieving these goals.

European merger control law revolves around Regulation 4064/89 (the “Merger Regulation”³⁴) which was adopted by the Council in 1989, and considerably amended by the Council in 2004³⁵ as a result of the Merger Trio, which is discussed below. Prior to the adoption of the Merger Regulation, mergers were regulated solely by Articles 81 and 82 of the Treaty. Standing alone, however, these articles proved insufficient for merger regulation,³⁶ and thus the Commission actively called for specific legislation on merger control. The resulting Merger Regulation provided that “concentrations,” including mergers and acquisitions, as well as joint ventures,³⁷ which have a “community dimension,”³⁸ are subject to Community (as

32. See Council Regulation 17, 1959–1962 O.J. SPEC. ED. 87 (establishing the procedures that the Commission follows in order to implement European competition policy).

33. Mario Monti, *Keynote Address: Merger Control in the European Union—a Radical Reform, in EC MERGER CONTROL: A MAJOR REFORM IN PROGRESS* 5, 6 (Götz Drauz & Michael Reynolds eds., 2003). This consumer-oriented policy of the Commission is especially characteristic of the “economic approach” movement that began in the 1990s and has since shaped much of European competition law. This movement focuses on the use of economic models and quantitative analysis in deciding cases and enacting legislation. The Commission’s decision to clear the SonyBMG merger and the CFI’s judgment to annul this decision illustrate the importance of the “economic approach” movement today, as both relied on economic arguments and quantitative evidence to come to their conclusions. Although the particulars of the “economic approach” movement are outside the scope of this comment, it is an extremely important and controversial topic that is worthy of discussion. For an overview of the “economic approach” movement in European competition law, see ECON. ADVISORY GROUP ON COMPETITION POL’Y, AN ECONOMIC APPROACH TO ARTICLE 82 (2005), available at http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf; Neelie Kroes, European Comm’r for Competition Pol’y, Address at the GCLC/College of Europe Conference: The Refined Economic Approach in State Aid Law: A Policy Prospective (Sept. 21, 2006), available at http://ec.europa.eu/commission_barroso/kroes/speeches_en.html; Mario Monti, European Comm’r for Competition, Address at the UNICE Conference on Competition Policy Reform (May 11, 2000), available at http://ec.europa.eu/comm/competition/speeches/text/sp2000_009_en.html; European Comm’n, Directorate General for Competition: Mission Statement, <http://ec.europa.eu/dgs/competition/mission/> (last visited May 3, 2008).

34. Commission Regulation 4064/89, 1990 O.J. (L 257) 14 [hereinafter Merger Regulation].

35. Council Regulation 139/2004, 2004 O.J. (L 24) 1 [hereinafter 2004 Merger Regulation]. For a useful overview, see JOHN J. PARISI, A SIMPLE GUIDE TO THE EC MERGER REGULATION (2007), available at <http://www.ftc.gov/bc/international/docs/ECMergerRegSimpleGuide.pdf>.

36. See ARNULL, *supra* note 12, at 446–48 (noting that Article 82 applied only where there was a pre-existing dominant position to be abused, and Article 81 could not necessarily be applied to all mergers).

37. For purposes of clarity, all types of concentration will be referred to as “mergers” throughout this comment.

38. A merger has a community dimension when it exceeds the thresholds provided by Article 1 of the Merger Regulation: five billion euro and 250 million euro of sales within the EU, unless more than

opposed to national) regulation.³⁹ A concentration occurs when two or more previously independent undertakings merge, or where one or more persons or undertakings, already in control of one or more undertakings, acquire control of one or more other undertakings.⁴⁰ In these instances, the merger must be reported to the Commission *prior* to implementation. Under the Merger Regulation, applicable to the Merger Trio and *Impala*,⁴¹ the Commission thereafter may prohibit the merger where it “creates or strengthens a dominant position.”⁴² Only after the Commission clears a merger may it properly be implemented.

In deciding competition cases where there is a question of a dominant position in the market, as was the issue in *Impala*, the judiciary is also guided by Article 82 of the Treaty. The primary goal of Article 82, as is the goal of the Merger Regulation, is to promote competition in order to protect consumers, not necessarily competitors.⁴³ Article 82 provides: “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.”⁴⁴

As we have seen, the concept of dominance arises both under the Merger Regulation and Article 82, and thus calls for further attention. Dominance under European law is “a position of economic strength which enables [an undertaking] to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.”⁴⁵ To make this determination, a court must analyze a business in relation to its “relevant product [or] service market” and “relevant geo-

two-thirds of each party’s sales within the EU are from the same Member State. These thresholds will be reviewed before July 1, 2009.

39. GERBER, *supra* note 11, at 379.

40. Merger Regulation, *supra* note 34, art. 3.

41. The Merger Regulation is applicable to all merger agreements signed before May 1, 2004. See Press Release, European Union, Mergers: Commission Opens In-Depth Investigation Into Sony/BMG Recorded Music Joint-Venture (Mar. 1, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/272>.

42. Merger Regulation, *supra* note 34, art. 2(3). Under the 2004 Merger Regulation, this dominance test was changed such that the Commission could prohibit a merger where it would “significantly impede effective competition, in the common market or in a substantial part of it,” retaining dominance as a factor in this test. 2004 Merger Regulation, *supra* note 35, art. 2(3).

43. EC Treaty art. 82.

44. *Id.*

45. Case T-210/01, Gen. Elec. v. Comm’n, 2005 E.C.R. II-5575, ¶ 114; see Case 85/76, Hoffmann-LaRoche & Co. AG v. Comm’n, 1979 E.C.R. 461, ¶ 4.

graphic market.”⁴⁶ The ECJ has defined a relevant market as one in which “there can be effective competition between the products[] which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as the specific use of the product is concerned.”⁴⁷ Collective dominance occurs when two or more undertakings present themselves or act as a collective body in the relevant market.⁴⁸ Abuse of a collective dominant position “does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of the collective dominant position.”⁴⁹ In light of the above, defining the relevant market is undoubtedly a crucial factual inquiry in competition law, one that has provided the CFI with significant control due to its position as the ultimate judicial fact-finder in competition cases.

Nevertheless, the Commission has maintained tremendous power under the Merger Regulation and under Article 82, because all mergers must first be reported to and decided upon by the Commission. Furthermore, with the increase in proposed mergers,⁵⁰ the Commission has gained an expertise in competition law, which for many years has perhaps given the Commission a false sense of infallibility. The decisions of the Commission, however, are subject to judicial review.⁵¹ Under Article 230 of the Treaty, a decision may be annulled by the ECJ or the CFI “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of [the] Treaty or of any rule of law relating to its application, or misuse of powers.”⁵² As this comment illustrates, the CFI in particular has recently taken an aggressive role in reviewing the Commission’s merger control decisions and consequently shaping European merger control law.

46. MATHIJSEN, *supra* note 9, at 245.

47. *Id.* (quoting Case 31/80, *L’Oreal v. DeNieuwe AMCK*, 1980 E.C.R. 3775).

48. *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, ¶44 (Dec. 2005), available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf> (citations omitted).

49. *Id.* ¶ 74 (citations omitted).

50. See VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 307 (7th ed. 2000) (noting that in 1989, the Commission dealt with approximately fifty to sixty notifications per year, but by 1999 nearly 300 mergers were reported to the Commission).

51. Merger Regulation, *supra* note 34, art. 21(1); see also Mark Clough, *The Role of Judicial Review in Merger Control*, 24 *NW. J. INT’L L. & BUS.* 729, 732 (2004) (arguing that judicial review is ultimately the “only effective available method of holding the Commission accountable” for its decisions).

52. EC Treaty art. 230.

C. The Merger Trio

The CFI first demonstrated its increasing power in competition law opposite the Commission in a series of three judgments: *Schneider Electric SA v. Commission*,⁵³ *Tetra Laval v. Commission*,⁵⁴ and *Airtours v. Commission*,⁵⁵ each of which annulled a Commission decision prohibiting a proposed merger.⁵⁶ Until these 2002 judgments, the CFI had left the merger control decisions of the Commission virtually untouched. It came as a rather stinging surprise, therefore, when the CFI attacked the Commission in all three cases for lack of transparency and erroneous economic reasoning,⁵⁷ finding that the Commission committed manifest errors of assessment and of law. These judgments raised significant questions about how the Commission should evaluate mergers, particularly with regard to the standard of proof and the level of economic analysis that the Commission must use to properly justify its decisions. On the other hand, questions were also raised as to the validity of the CFI's assumed role as an economic expert,⁵⁸ particularly in its criticisms of the Commission over proper economic analysis.

Factually, *Schneider Electric* dealt with Schneider Electric's acquisition of the French company Legrand, which would have resulted in combined market shares in the electrical equipment sector ranging between 40% and 90%, with the effect that the French company would become the world's largest manufacturer of low-voltage electrical equipment.⁵⁹ On October 10, 2001, the Commission ordered that the companies separate, even though at the time Schneider had already acquired approximately 98% of Legrand.⁶⁰

Similarly, in *Tetra Laval*, the Commission ordered that Tetra Laval, a carton packaging manufacturer, split from Sidel, a leading manufacturer of polyethylene terephthalite (PET) packaging equipment, even though Tetra Laval had already acquired approximately 95% of Sidel.⁶¹ The Commission found the merger incompatible with the Common Market because it

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

54. Case T-5/02, *Tetra-Laval BV v. Comm'n*, 2002 E.C.R. II-4381.

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

56. Gerber, *supra* note 8, at 475.

57. See *id.* for a more detailed discussion of the CFI's economic analysis of the Merger Trio.

58. *Id.*

59. Press Release, European Union, Commission Prohibits Acquisition of Control of Legrand by Schneider Electric (Oct. 10, 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1393>.

60. *Id.*

61. Case T-5/02, *Tetra-Laval BV v. Comm'n*, 2002 E.C.R. II-4381, ¶ 11.

would allow the new entity to use its dominant position in the carton packaging market to gain a dominant position in the PET packaging market.⁶² Additionally, the merger would reinforce Tetra Laval's dominant position in the carton packaging market by eliminating the competitive constraint that existed between the carton and PET packaging markets.⁶³

The CFI annulled both decisions, noting problems with the Commission's factual findings and economic analysis. In *Schneider Electric*, after closely reviewing the Commission's market definition, the CFI found that the Commission's assessment was fraught with inconsistencies because the Commission oscillated between defining the market at narrower product and national levels, and at the broader European level.⁶⁴ It is especially striking that the CFI based its ruling on concerns of flawed economic analysis while outwardly maintaining that it owed deference to the expertise of the Commission in evaluating economic issues, which it viewed as being rooted in the very structure of the EU institutions.⁶⁵ The CFI noted in *Tetra Laval* that "the substantive rules of the [Merger] Regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature."⁶⁶ This tension between the CFI's role as an economic expert and the CFI's deference to the Commission's economic expertise seems to indicate that the CFI was not ready to openly challenge the Commission's leadership in the area of competition law; nonetheless, the CFI began to mark its influence in the area. The CFI's confidence in its power over merger control law was further illustrated in *Tetra Laval* through the assertion of a new standard of proof under which the Commission, in order to prohibit a merger, was required to provide "convincing evidence" to support its findings that a merger would harm competition.⁶⁷

Airtours is the most significant case of the Merger Trio because it "clarified the Commission's evidentiary burden" in merger control cases,⁶⁸ particularly in situations involving oligopolistic markets where there are concerns of collective dominance—an issue which also played a part in the *Impala* decision. In *Airtours*, the Commission prohibited the merger be-

62. *Id.* ¶ 143.

63. *Id.*

64. Case T-310/01, *Schneider Electric SA v. Comm'n*, 2002 E.C.R. II-4071, ¶¶ 48, 148-49.

65. Gerber, *supra* note 8, at 481-83.

66. *Tetra-Laval*, 2002 E.C.R. II-4381, ¶ 119.

67. *Id.* ¶¶ 155, 254.

68. Oliver Bretz, *Merger Hopfuls Should Take Note of Sony-BMG Debacle*, THE LAWYER (London), July 24, 2006, at 8. *But see* Yves Botteman, *Mergers, Standard of Proof and Expert Economic Evidence*, 2 J. COMP. L. & ECON. 71, 72 (2006) (arguing that the standard of proof is still "ill defined").

tween the British tour operators Airtours and First Choice, because it would lead to a collective dominant position in the UK short-distance foreign package vacation market.⁶⁹

The CFI's judgment annulling the Commission's decision both shaped the current understanding of collective dominance and created a "[h]eavy burden on the Commission to 'reason'" its merger decisions.⁷⁰ First, *Airtours* established a framework for analyzing collective dominance that European law had been lacking, providing that the following factors are decisive in determining whether a collective dominant position exists: (1) market transparency, which is the ability of each member of a dominant oligopoly to be aware of the conduct of the others in order to check whether or not they are adopting a common policy in the market; (2) possibility of retaliation, which involves the existence of mechanisms to deter possible deviation by members of the dominant oligopoly from the common policy, in turn creating an incentive for the members of the oligopoly not to depart from the common policy; and (3) inability of current and future competitors and consumers to jeopardize the common policy.⁷¹ Second, *Airtours* signified that the Commission categorically needed to improve its reasoning in merger decisions. After determining that the Commission did not prove the requisite legal standard of collective dominance, the CFI rebuked the Commission, stating that "the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created."⁷²

The Merger Trio created great uncertainty regarding the European merger control process and the role of the CFI in shaping competition law. For some observers, *Airtours* was a turning point in competition law which demonstrated a decline in the Commission's ability to prohibit mergers,⁷³ while for others, *Airtours* had a rather limited impact on the Commission's decision-making abilities, requiring only greater clarity and precision of assessment, but not infringing on the Commission's use of its economic expertise.⁷⁴ In any case, it is unquestionable that the Merger Trio sparked

69. Commission Decision, 2000 O.J. (L 93) 1, ¶ 194.

70. F.O.W. VOGELAAR ASSISTED BY MARIËTTA SCHUERMAN, *THE EUROPEAN COMPETITION RULES 279* (2004).

71. Case T-342/99, *Airtours PLC v. Comm'n*, 2002 E.C.R. II-2585, ¶ 62.

72. *Id.* ¶ 294.

73. E.g., John Kay, *A Missing Element: The Airtours Case Showed How EU Merger Proceedings Fail To Give Consumers a Voice*, *FIN. TIMES*, June 18, 2002, at 17.

74. E.g., Frank Montag & Andreas von Bonin, *Collective Dominance in Merger Cases after Airtours*, in *EC MERGER CONTROL: A MAJOR REFORM IN PROGRESS*, *supra* note 33, at 323, 325.

the Commission to introduce change in European competition law. The embarrassing reversals of the Merger Trio forced the Commission, under the leadership of then-Commissioner for Competition Mario Monti and his Director General for Competition Philip Lowe, to improve its merger review process, particularly in the area of economic analysis. These reforms included, among others, the creation within the Commission of “devil’s advocate panels,” or peer review panels which challenge the conclusions reached by a particular case’s review team, and the addition of a chief competition economist supported by a staff of professional economists.⁷⁵ Furthermore, as mentioned above, the Commission spent years revising the Merger Regulation, which culminated in a new regulation being adopted in 2004. The 2004 Merger Regulation includes, among other changes, a more flexible timetable for review, simplified procedures of referral from the Commission to national legislatures, stronger fact-finding powers in the Commission, and most importantly, a new substantive test for merger clearance.⁷⁶

Impala was thus decided after the Commission had devoted several years to reforming the decision-making process in merger control law. This fact highlights the assertiveness of the CFI in deciding *Impala*. This was not a situation where the CFI reprimanded the Commission in 2002 and then returned to the shadows in fear that it had overstepped its authority; rather, the CFI never stopped garnering strength. And by 2006, through *Impala*, the CFI took a commanding leadership role in merger control law by maintaining that the Commission’s attempt at reform was insufficient. It is in light of this dynamic background that we explore the *Impala* judgment and its substantial effect on European competition law.

II. *IMPALA V. COMMISSION*

With the necessary background, we now explore *Impala* in greater depth. This section provides an overview of *Impala v. Commission* by illustrating the facts that brought rise to the CFI’s judgment, from the Commission’s clearance decision to the appeal by the Independent Music Publishers and Labels Association (“Impala”) to the CFI. We then look at the CFI’s holding, which entailed that the Commission made a “manifest error of assessment,” namely in concluding that the merger between Sony and Bertelsmann did not constitute a collective dominant position.

75. William Kolasky, GE/Honeywell: *Narrowing, but Not Closing, the Gap*, ANTITRUST, Spring 2006, at 69; see also EC MERGER CONTROL: A MAJOR REFORM IN PROGRESS, *supra* note 33.

76. 2004 Merger Regulation, *supra* note 35.

A. Facts

On July 19, 2004, after a five-month review of the proposed merger, the Commission approved the joint venture of Sony and Bertelsmann which created SonyBMG.⁷⁷ As a result, SonyBMG became the second largest recorded music company in the world and was part of a market consisting of four majors representing approximately 80% of global sales.⁷⁸ Accordingly, the primary issue that the Commission faced during the review was whether SonyBMG, along with the other three major record labels, or “majors”—EMI, Universal, and Warner—would gain collective dominance in the European recorded music market. The Commission permitted the merger because it found that there was insufficient evidence that the merger would lead to a collective dominant position, as defined in *Airtours*, for the four resulting major recorded music companies.⁷⁹ Specifically, the Commission believed that the price transparency necessary for tacit coordination was not present in the recorded music market in light of the fact that the majors offered heavy discounting off list prices to large retailers.⁸⁰ Furthermore, the Commission found that the majors lacked the retaliatory mechanisms necessary to punish firms for deviating from any tacit coordination.⁸¹

On December 3, 2004, Impala, an international association whose members include 2500 independent music production companies, responded by appealing the Commission’s merger clearance decision to the CFI.⁸²

B. Holding

To annul all or a portion of a merger decision by the Commission, the CFI must find that the Commission made a “manifest error of assessment.”⁸³ In its evaluation of whether the Commission made a manifest error of assessment, the CFI applied the test for collective dominance as set forth in *Airtours* and discussed above.⁸⁴

77. Commission Decision, 2005 O.J. (L 62) 30.

78. Bretz, *supra* note 68, at 8.

79. Commission Decision, 2005 O.J. (L 62) 30, 31.

80. *Id.* ¶¶ 15–24.

81. *Id.* ¶ 23.

82. Case T-464/04, *Impala v. Comm’n*, 2006 E.C.R. II-2289, ¶ 1.

83. See Case T-210/01, *Gen. Elec. v. Comm’n*, 2005 E.C.R. II-5575, ¶ 60 (“[T]he Community judicature’s power of review is restricted to verifying that the facts relied on are accurate and that there has been no manifest error of assessment.”) (citations omitted).

84. *Impala*, 2006 E.C.R. II-2289, ¶ 247.

After examining the *Airtours* factors, the CFI held that the Commission did not properly demonstrate the non-existence of a collective dominant position before the merger or the absence of risk that a collective dominant position would occur after the merger.⁸⁵ Specifically, the CFI found that lack of transparency was not sufficiently supported by the Commission's theory that promotional discounts reduce transparency of the market.⁸⁶ Also, the CFI found that it was not enough to rely on the absence of evidence that retaliatory measures had been used in the past in order to show that there was no possibility of a dominant position.⁸⁷ The CFI further suggested that there may have existed retaliatory mechanisms, including the ability to exclude a major from compilation albums, in the event that the major deviated from the common policy.⁸⁸

The CFI's judgment was groundbreaking in that it entailed a comprehensive review of the evidence relied upon by the Commission, specifically the Commission's economic findings. As stated above, for instance, the CFI did not accept at face value the Commission's economic theories regarding when market transparency and retaliatory mechanisms existed.⁸⁹ Prior to the Merger Trio, the CFI almost certainly would have deferred to the Commission's economic expertise and accepted these theories, leading to a judgment aligned with the Commission's clearance decision. In *Impala*, however, the CFI embraced the concept, first asserted in the Merger Trio case, that the Commission is susceptible to improper decision making. The CFI further extended the authority it had asserted in the Merger Trio by reviewing the case *de novo*. In effect, the CFI gave no deference to the Commission's expertise, either in general economic matters or in its specific knowledge of the evidence generated through the merger review. It is also noteworthy that the CFI held that approvals of the SonyBMG merger by competition authorities outside of the EU, including in the U.S., were irrelevant to its analysis.⁹⁰ Thus, the CFI even more manifestly expressed that it would rely upon only its own analysis of the evidence in deciding the case.

In light of the striking position taken by the CFI in *Impala*, we begin to explore what *Impala* suggests about the changing role of the CFI within

85. *Id.* ¶¶ 289–459.

86. *Id.*

87. *Id.* ¶¶ 463–73.

88. *Id.* ¶ 467.

89. *Id.* ¶¶ 289–473.

90. *Id.* ¶ 478.

the EU, and just how much *Impala* has affected, or will affect, merger control law worldwide.

III. IMPLICATIONS FOR THE COURT OF FIRST INSTANCE

Impala represents a major change in the role of the CFI since it was first created in 1988 to help the ECJ handle its caseload. This shift in role, however, should come as no surprise. The CFI's role in the European Union did not first change in *Impala*, nor during the Merger Trio; rather, the CFI's role has been evolving almost from the time of its creation. The Merger Trio and *Impala* act as kind of indicators of the CFI's continuously morphing role.

In the very least, the analysis of this change may begin by acknowledging that the CFI's role is certainly no longer confined to helping the ECJ expedite the review process, as is apparent from the CFI's own burgeoning caseload. On the contrary, by the end of 1998, the ECJ was working more slowly than it was prior to the establishment of the CFI.⁹¹ Changes now need to be made to enable the CFI to cope with its own increasing workload.⁹² After recognizing that the CFI's role has changed to some extent, we now explore how the CFI's role changed and what the scope of that role currently is.

To a significant degree, the CFI's role was altered by forces outside of the CFI itself, namely other EU institutions. The Treaty states that “[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty.”⁹³ Therefore, the CFI acts appropriately so long as it acts within the powers conferred upon it by the other institutions—and it has done just this. First, the Council extended the CFI's judicial role by expanding its jurisdiction through decisions in 1993⁹⁴ and 1994.⁹⁵ Perhaps most importantly, the CFI could thereafter exercise jurisdiction over any review of the legality of acts adopted by the institutions or the European Central Bank.⁹⁶ This expanded jurisdiction empowered the CFI within the institutional structure of the EU because it caused the CFI to be a kind of “equal” to the

91. ARNULL, *supra* note 12, at 16. *But see* Bo Vesterdorf, *The Court of First Instance of the European Communities After Two Full Years in Operation*, 29 COMMON MKT. L. REV. 897, 903–04 (1992) (describing that the CFI significantly reduced the caseload of the ECJ in the first two years of its establishment and that the ECJ's continued increase in overall work is in spite of the CFI).

92. ARNULL, *supra* note 12, at 16–17; *see also* Amendments to the Rules of Procedure of the Court of Justice, 2000 O.J. (L 322) 1 (enacted by the CFI in order to expedite proceedings).

93. EC Treaty art. 7(1).

94. Council Decision 93/350, art. 1, 1993 O.J. (L 144) 21 (Euratom).

95. Council Decision 94/149, 1994 O.J. (L 66) 29.

96. EC Treaty arts. 225, 230.

other institutions (though still a lesser equal because the CFI was attached to the ECJ), able to check, or even restrain, the other institutions—in theory. Later, through the Treaty of Nice, the Member States further empowered the CFI structurally by detaching it from the ECJ altogether.⁹⁷ As a completely independent body, the CFI could decide cases largely based on its own standards, and thus could significantly shape European law, separate from the ECJ—in theory.

Additionally, the ECJ has expanded the judicial review of the CFI, stating that the CFI is not only entitled to examine “whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”⁹⁸ This last factor gives the CFI significant discretion in shaping each case before it, as well as the power to shape whole areas of law, as demonstrated by *Impala*, because the CFI is not bound to accept evidentiary conclusions made by the other institutions, even despite respective expertise—in theory.

Therefore, since its inception, the other institutions have continuously been expanding the CFI’s role, not limiting it. Nonetheless, the CFI did not embrace its expanding role until the Merger Trio and ultimately *Impala*; hence the qualification that this expansion was merely in theory.

Irrespective of whether the CFI embraced the new influence that came with these changes, the CFI began to acquire a distinct expertise in competition law, which acted to further change its role. Much of the CFI’s expertise in competition law resulted from the CFI’s increasing separation from the ECJ. Doctrinally it is important to note that although decisions of the CFI may be appealed to the ECJ, the ECJ may only review questions of law,⁹⁹ allowing the CFI to be the ultimate decider of fact. In competition cases, this distinction becomes critical. Identifying the relevant market, which is central to any merger control judgment, is largely a question of fact. Therefore, when the CFI prohibits a merger based on its conclusion that the relevant market is lacking competition, as it did in *Impala*, the ECJ can do very little (unless, of course, the ECJ finds a problem with the CFI’s relevant legal analysis). Furthermore, competition cases are rarely appealed to the ECJ in the first place, which has naturally emboldened the CFI. This rareness of appeal may be a result of procedural obstacles and the fact that

97. See *supra* note 25 and accompanying text.

98. *Comm’n v. Tetra Laval*, 2005 E.C.R. I-987, ¶ 1 (appeal from *Tetra-Laval v. Comm’n*).

99. EC Treaty art. 225.

merger cases are particularly time-sensitive, considering companies are simply unwilling to deal with further court delays due to fear of lost funds.¹⁰⁰ Consequently, the ECJ hears very few competition cases. The ECJ has therefore become less confident in dealing with those competition cases that do reach it,¹⁰¹ and would rather defer to the CFI on competition issues. The situation becomes almost circular: the rareness of appeal may be a result of practitioners' current recognition that, unless there is a clear error of law, the ECJ will most likely simply defer to the CFI in competition cases because of its expertise, which in turn furthers the CFI's expertise, and so forth. Effectively then, the CFI has become the sole judiciary power in European competition law. With this new role and developed expertise, it is not surprising that the CFI has increased the judicial scrutiny to which the Commission is subject in matters of competition law.¹⁰² *Impala* is thus groundbreaking not because it showed that the CFI had the power to effectively counter the Commission—this was apparent for years—but rather because it showed that the CFI was ready and willing to exercise this power to counter the Commission.

The last factor that has changed the CFI's role is the composition of the CFI itself. There are currently twenty-seven members of the CFI, with at least one judge representing each Member State.¹⁰³ The members are appointed for six-year terms and collectively elect the CFI President for a three-year term.¹⁰⁴ The President of the CFI at the time *Impala* was decided, Bo Vesterdorf of Denmark, was a member of the CFI since 1989 and was elected president in 1998.¹⁰⁵ Many observers believe that Vesterdorf was integral in shaping the CFI over much of the last decade. For instance, even in the first years following the establishment of the CFI, Vesterdorf actively supported the expansion of the CFI's jurisdictional reach.¹⁰⁶ He argued that the Council should give the CFI all possible authority under the Treaty to further lessen the ECJ's workload,¹⁰⁷ and even hinted as to how

100. Gerber, *supra* note 8, at 488.

101. ARNULL, *supra* note 12, at 397 (citing David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT. L.J. 97 (1994)).

102. *Id.*

103. MATHIJSSEN, *supra* note 9, at 139 (referencing EC Treaty art. 224).

104. *Id.*

105. The current president of the CFI is Marc Jaeger, who has held this position since September of 2007. For a list of past and current CFI judges, see The Court of First Instance, The Members, http://curia.europa.eu/en/instit/presentationfr/index_tpi.htm (last visited May 4, 2008).

106. Vesterdorf, *supra* note 91, at 905.

107. *Id.*

the CFI could achieve this maximum authority.¹⁰⁸ Furthermore, Vesterdorf espoused using new procedures that the ECJ was historically reluctant to use, such as amicable settlements,¹⁰⁹ perhaps in an effort to emphasize the CFI as an autonomous authority.

The CFI's role has unquestionably changed within the EU framework since the CFI's conception in the late 1980s as a subsidiary court to the ECJ. Through the influence of the other institutions, a developed expertise in competition law, and dynamic leadership, the CFI has become extremely influential within the EU and consequently worldwide, specifically in competition law. In this area of law, the CFI no longer stands as second-best to the ECJ, but rather as the dominant judicial authority. Most importantly, *Impala* suggests that the CFI is now ready to use this authority, which was first realized in the Merger Trio, toward actively shaping merger control policy. This leads us to the next section of this comment, which explores in further detail what *Impala* implies for the future of merger control policy.

IV. IMPLICATIONS FOR MERGER CONTROL LAW

As our world becomes ever smaller through new technologies in transportation and communication, global business becomes ever more commonplace. Therefore, merger control law stands only to gain importance with the increase of international undertakings. It is thus in the interest of practitioners throughout the world, if they have anything to do with global business, to be familiar with the merger control standards of various economic powers, including the EU. This section discusses the notable effects of *Impala* on European competition policy, including a heightened standard for merger clearance decisions and the encouragement of third-party involvement in competition cases.

A. Heightened Standard of Merger Clearance Decisions

When discussing the legal standard in any case, one must consider both the relevant standard of proof and the standard of review.¹¹⁰ It is important to note that in the context of European competition law, due to the

108. *Id.* at 905 n.10 (noting that the 1991 Maastricht Treaty contains a proposal to amend Article 168(a) of the EC Treaty, whereby the Council would receive the requisite authority to extend the jurisdiction of the CFI).

109. *Id.* at 913–15.

110. For a clear description of the distinction between the two standards, see Tony Reeves & Ninette Dodoo, *Standards of Proof and Standards of Judicial Review in European Commission Merger Law*, 29 *FORDHAM INT'L. L.J.* 1034, 1037 (2006).

economic complexity of the cases, these standards are often closely linked—so much so that they are often regarded as one general concept.¹¹¹ The Merger Regulation unfortunately provides no express provision as to the requisite legal standard for merger clearance decisions. There has accordingly been great debate over the years to define this standard.¹¹² Many observers begin the debate by looking at whether the Merger Regulation implies a presumption of legality for mergers. Although cogent arguments have been made on behalf of a presumption of legality and neutrality, the ECJ has never ruled on the matter,¹¹³ leaving the issue of the requisite standard to be decided by the CFI as cases come before it.

The issue was highlighted in the Merger Trio, where the CFI articulated the standards it used to decide the cases. In *Airtours*, the CFI placed a rather high burden on the Commission, requiring it to prove whether proposed mergers passed or failed a three-prong test (discussed in Section I.B, *supra*) when there were concerns of collective dominance. More generally, the CFI held in the Merger Trio that the Commission bore the burden of providing “convincing evidence” that a transaction would “in all likelihood” *restrict* competition.¹¹⁴ Although somewhat vague, this standard was unquestionably more demanding than what the Commission had been accustomed to.¹¹⁵

In *Impala*, the CFI seemed to impose the same burden on the Commission as set forth in the Merger Trio, but in order to establish that a joint venture does *not restrict* competition.¹¹⁶ Effectively then, the burden established in *Impala* may be more stringent than that in the Merger Trio under the principle that a negative is always more difficult to prove than a positive. In fact, most countries’ merger statutes presuppose that a merger is lawful; in order to prohibit the merger, the government must thereafter prove that the merger restricts competition.¹¹⁷ After *Impala*, however, in order to *clear* a merger, the Commission bears the burden, using “all rele-

111. *Id.* at 1061–62. In this comment that concept will be referred to as “the standard.”

112. *See, eg., id.* at 1042–47 (describing the different views of whether there is a presumption of legality of mergers in the Merger Regulation).

113. *Id.* at 1047.

114. Case T-5/02, *Tetra-Laval BV v. Comm’n*, 2002 E.C.R. II-4381, ¶¶ 148, 155; *The CFI Annuls the EC’s Decision*, *supra* note 4, at 3.

115. The Commission consequently appealed the CFI’s judgment arguing that the CFI had “significantly raised the level of standard of proof required from the Commission to prohibit a conglomerate merger and has thereby gone beyond the review of legality.” Appeal Brought on 13 January 2003 by the Commission of the European Union Against the Judgment Delivered on 25 October 2002 by the First Chamber of the Court of First Instance, 2003 O.J. (C 70) 3, ¶ 1.

116. *The CFI Annuls the EC’s Decision*, *supra* note 4, at 3.

117. *Id.*

vant data,” of proving that a merger does not restrict competition.¹¹⁸ This implies that the CFI has established a presumption of neutrality of mergers, where the Commission has a positive obligation to find a merger restrictive or not restrictive of competition.

In any case, the CFI has created more work for the Commission in formulating binding merger clearance decisions. To meet the high standard set by the CFI, the Commission will undoubtedly need to spend more time and money gathering and analyzing data because it knows that the CFI will rigorously review *everything*. In analyzing the effect of the new standard, observers are thus faced with a new cost-benefit analysis, weighing the costs of added time and money against the benefits of coherence and economically sound reasoning.

On the one extreme, the higher standard may impair a system that is already fraught with efficiency problems. In this situation, an investigation conducted with the added costs may lead effectively to the same merger clearance decision (or perhaps only a marginally more coherent or economically sound decision) as an investigation without the added costs. For instance, following *Impala*, the Commission was required to thoroughly reexamine the merger between Sony and Bertelsmann. Ultimately the Commission expended more resources to reexamine the merger, only to confirm its original finding that the merger is legal.¹¹⁹ Furthermore, in future cases, the Commission may take part in extensive reviews of mergers in highly complex markets, even though the mergers would otherwise be appropriate for clearance after little scrutiny.¹²⁰ These extended reviews may simply represent increased financial and time costs in a system which has long been dealing with efficiency difficulties. If we include the added costs outside of the institutional framework, the analysis becomes even more one-sided. For example, companies that already successfully received merger clearance from the Commission may now have to seek legal advice that they would not otherwise be seeking, out of fear that the joint venture will be required to separate long after having received clearance. Also, companies that would otherwise want to merge may no longer even consider the undertaking because of the added uncertainty and expenses resulting from the stricter review process. This situation was illustrated by the abandoned merger discussions of EMI and Warner, shortly following the

118. *Id.*

119. Press Release, *supra* note 3. For commentary on the added costs of this second investigation, see Susan Butler, *Maligned by a Merger*, BILLBOARD, Dec. 22, 2007, at 36.

120. Bretz, *supra* note 68, at 8.

Impala judgment.¹²¹ This reluctance to merge because of added review costs could potentially weed out even pro-competitive merges, which represents a further cost to the overall economy.

At the other extreme, the higher standard may lead to Commission decisions which are consistently more coherent and economically sound than decisions made prior to *Impala*. In this situation, the added costs of a more thorough review are marginal compared with the increased quality of decisions. To begin with, concerned with being overturned by the CFI, the Commission may take great strides to reform the review process such that as years pass, the system will be refined to the point that it provides for coherent and economically sound decisions at very little cost. The merging parties will further lower costs because they have an incentive to provide the Commission with accurate information regarding the market.¹²² Merging parties will no longer allow for otherwise favorable factual misinterpretations by the Commission, because they know that these misinterpretations may be uncovered at the judicial level, only to cause greater loss of time and money in trying to defend the merger a second time around. These aligned interests of the Commission and the parties towards a more legitimate system would greatly outweigh any extra time or monetary costs.

As is normally the case, there also exists a middle ground. It is possible that the higher standard will create a situation in which the costs of more stringent review are equal to the benefits of higher quality Commission decisions. In practice, this could occur in a number of ways. For instance, the costs of review may only slightly increase such that the quality of decisions also only slightly increases. In this situation, the Commission would effectively be countering the CFI's newly established authority. Namely, by refusing to make major changes to its review process, the Commission would show that it is not intimidated by the CFI's power of judicial review. Alternatively, the costs of review may significantly increase such that the quality of decisions also significantly increases. Here, the Commission would effectively be acknowledging and supporting the CFI's new authority, which would indicate a major shift in actual power in European merger law. Still, the great cost associated with this latter situation could take a toll on the system as whole.

121. Emiko Terazono & Andrew Edgecliffe-Johnson, *EMI Shelves Its Plans for Warner Merger*, FIN. TIMES, July 27, 2006, at 19. Months after *Impala*, discussions between EMI and Warner recommenced, though it is still far from certain whether these discussions will lead to a proposed merger. See Julia Werdigier, *Warner Music Makes New Bid For EMI After 4 Failed Offers*, N.Y. TIMES, Feb. 21, 2007, at C8.

122. Simon Neill & Douglas Peden, *Competition: Clearance and Confusion*, LEGAL WEEK, Sept. 21, 2006, <http://www.legalweek.com/Articles/130599/Competition+Clearance+and+confusion.html>.

In the end, the effect of the heightened standard established in *Impala* will only become clear over time. It is for this reason that observers must pay close attention to the Commission's merger decisions over the next few years. By looking at recent merger decisions, we can more completely assess the effect of *Impala* on merger control policy as well as on the allocation of power on merger control issues. The heightened standard truly signifies the current dynamic state of European merger control law.

B. Third-Party Interests

Another topic of ongoing interest within European competition law, which *Impala* implicitly addressed, is the status of third parties in competition proceedings.¹²³ Doctrinally, Article 19(2) of Regulation 17¹²⁴ and Article 27(3) of Regulation 1/2003¹²⁵ provide that a third party has the right to be heard during the Commission's review of a proposed merger. Indeed, there is authority for the proposition that it is a fundamental right of a third party, just as it is that of a party to a proposed merger, to be heard "before any individual measure which would affect him or her adversely is taken."¹²⁶ Historically, however, beyond the initial Commission review, it has been rather difficult for third parties to bring a case for annulment of a merger decision.

On its face, the Treaty only allows private applicants to challenge decisions which are either addressed to the private parties themselves, or which are of "direct and individual concern" to the private parties.¹²⁷ Private applicants, unlike the institutions, have no express right under the Treaty to challenge regulations or directives.¹²⁸ In practice, the courts have somewhat broadened private applicants' standing in annulment cases by allowing a private party standing when the party is heard during an administrative procedure which leads to the Community act in question, particularly in competition cases.¹²⁹ Still, this is an informal expansion of standing at best, and in no way secures the right of third parties to bring an annul-

123. For an in depth discussion of third-party standing in EU competition cases, particularly during the Commission's review process, see Calvin P. Jellema, *The Redheaded Stepchild of Community Competition Law: The Third Party and Its Right To Be Heard in Competition Proceedings*, 20 B.U. INT'L L.J. 211 (2002).

124. Council Regulation 17, 1959-1962 O.J. SPEC. ED. 87.

125. Council Regulation 1/2003, 2003 O.J. (L 1) 1.

126. Jellema, *supra* note 123, at 281 (citing Charter of Fundamental Rights of the European Union, art. 41, 2000 O.J. (C 364) 1).

127. ARNULL, *supra* note 12, at 40.

128. *Id.*

129. *Id.* at 42.

ment action against a merger decision. Furthermore, private applicants who are not heard during the Commission's review proceedings have almost no access to the courts in responding to a merger decision. This limited access to the courts by third parties in competition matters has led to significant discussion over standing policy. Proponents of a broader rule have argued that relaxation of the standing rules protects the public interest and actually promotes the democratic process by allowing public participation in decision-making.¹³⁰ Alternatively, proponents of a narrow rule have argued that broadening standing, particularly within the CFI, would provide individuals with too much power considering the international ramifications of many of the competition cases.¹³¹

The CFI clearly took a side in this debate by authorizing *Impala*, an independent music association which was not a party to the original merger proceedings, to bring a successful case for annulment against the Commission. Once again, however, the actions of the CFI should not come as a complete surprise. The CFI has for many years implicitly supported broadening the rights of third parties, noting that the right to bring a case for annulment should "not be interpreted restrictively."¹³² Ultimately, however, it is the fact that a third party actually won an annulment case against the Commission in *Impala* that illustrates the potential strength of third parties before the CFI. As a result, *Impala* will encourage private parties to bring future challenges before the CFI.

This receptiveness at the judicial level will also provide private parties with more confidence to lobby the Commission in its initial merger decisions. After all, knowing that the CFI accepts annulment cases brought by third parties, the Commission will be compelled to take third-party interests into account during its merger review process. Such effects are already being seen. For example, following the acquisition of Bertelsmann's music publishing business by Vivendi, *Impala* was quick to suggest that it would lobby the Commission to invalidate the merger.¹³³ And even if the Com-

130. *Id.* at 47.

131. *Id.* at 47–48 ("[I]n international law the very notion of an individual having independent standing to sue before an international tribunal is little short of revolutionary.") (quoting Eric Stein & G. Joseph Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AM. J. INT'L L. 219, 222 (1976)).

132. Joined Cases T-528/93, T-542/93, T-543/93, T-546/93, *Métropole Télévision SA v. Comm'n*, 1996 E.C.R. II-649, ¶ 60.

133. Gerrit Wiesmann & Andrew Edgecliffe-Johnson, *Vivendi Wins \$2bn Auction for BMG Publishing*, FIN. TIMES, Sept. 7, 2006, at 27; see also Doreen Carvajal, *Rivals May Challenge a Proposed Vivendi-Bertelsmann Deal*, N.Y. TIMES, Sept. 7, 2006, at C14 (quoting *Impala* president Patrick Zelnik, as saying "we have a strong case to oppose this merger and it's even stronger than SonyBMG").

mission were to allow the merger, Impala could confidently continue its fight in the CFI.

As the CFI broadens its standing policy, practitioners must be aware of practical ramifications. Although allowing for a more democratic process, the increase of third-party involvement in competition cases will likely also lead to practical problems, including burdening European courts and, of particular interest to practitioners, creating greater uncertainty for companies interested in joint ventures. Traditionally, upon the Commission's merger clearance, companies assumed a confidence that they could continue with their venture. Now, however, not only must these companies spend much more time and money during the Commission's review process to obtain the Commission's clearance, but they must tread ever so carefully even after receiving clearance because a third party might successfully appeal the decision. When representing a party to a proposed merger, practitioners should therefore be aware of and if necessary address third-party concerns at the outset to avoid later appeals.

CONCLUSION

Impala is a crucial case in CFI jurisprudence, one which illustrates a dynamic European competition law. First, within the EU, *Impala* represents a major structural change. By establishing itself as an authority in competition law, the CFI has checked the once seemingly boundless authority of the Commission. Second, *Impala* is important globally because it represents a policy change in European competition law. Specifically, *Impala* raises the standard for merger clearance decisions within the EU and it encourages third-party participation in competition cases.

The effects of these changes can only be seen over time, but they are of significant concern for all practitioners doing business with those global undertakings that do not want to be in the current position of Sony and Bertelsmann. To be sure, the parties in *Impala* have no choice but to battle over the CFI judgment. Sony and Bertelsmann unveiled a two-pronged strategy to rescue their merger, which entailed reapplying to the Commission for clearance of the merger and appealing the CFI ruling to the ECJ.¹³⁴ The first prong proved successful, as the Commission cleared the merger again in October 2007.¹³⁵ Although SonyBMG can thus continue to operate as a single entity, it cannot be too quick to celebrate. *Impala* stated that it would call for a formal inquiry into the Commission's investigation and

134. Cendrowicz, *supra* note 2, at 25. Throughout the appeal, SonyBMG has continued to operate.

135. Press Release, *supra* note 3.

that a second appeal is possible, which could lead to legal fees reaching well into 2010.¹³⁶ Furthermore, in December 2007, the Advocate General of the ECJ issued an opinion recommending that the ECJ uphold the CFI's judgment on appeal,¹³⁷ giving great credibility to the CFI's ability to counter the Commission.

Although the effects on the parties in *Impala* may be trying, the effects on competition law generally may be very beneficial. It is possible, after all, that *Impala* will lead to more coherent and economically sound Commission decisions brought about by more democratic proceedings, such that only truly pro-competitive mergers are cleared, leading to a stronger global economy. We can only hope this will be the case in this new period of European competition law.

136. Press Release, *Impala*, Independent Music Companies Call for Enquiry Into EC's Approval of SonyBMG Merger (Oct. 3, 2007), available at http://www.euractiv.com/29/images/Impala_031007_tcm29-167339.pdf; see also Cendrowicz, *supra* note 2, at 25.

137. Case C-413/06 P, *Bertelsmann AG v. Impala*, 2006, available at 2007 WL 4334882.

