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Opinion of Advocate General Kokott in Case C-413/06 P

Bertelsmann AG and Sony Corporation of America

ADVOCATE GENERAL KOKOTT PROPOSES THAT THE COURT SHOULD UPHOLD THE JUDGMENT OF THE COURT OF FIRST INSTANCE WHICH ANNULLED THE CLEARANCE OF THE SONY BMG JOINT VENTURE

In its judgment the Court of First Instance rightly held that there had been a failure to state reasons and a manifest error of appraisal in the Commission's decision

Following an action brought by Impala, an association of independent music production companies, the Court of First Instance, by judgment of 13 July 2006,¹ annulled the Commission's decision clearing the Sony BMG joint venture.

As a result of the annulment of the first clearance decision, the Commission carried out a new merger control procedure in this case and on 3 October 2007 once more cleared the Sony BMG joint venture, again without any conditions or obligations.

In parallel to those proceedings, Bertelsmann and Sony appealed to the Court of Justice against the judgment at first instance. They argue that the Court of First Instance applied excessive legal requirements for a Commission clearance decision and for judicial review of that decision.

In her Opinion delivered today, Advocate General Kokott suggests that the Court should dismiss the appeal.

Even after the Commission's second decision clearing the joint venture, Bertelsmann and Sony still had an interest in pursuing the appeal. Given the possibility that the Commission's second clearance decision might also be annulled following an action by a third party, they could achieve a *final* – non-challengeable – clearance more rapidly by means of their appeal.

The arguments submitted by Sony and Bertelsmann did not, however, justify the setting aside of the judgment of the Court of First Instance.

Contrary to the appellants' view, the clearance of a concentration can indeed be annulled on the grounds of an *infringement of the duty to state reasons*. Nor had the Court of First Instance laid down any erroneous or excessively high standard of proof for the clearance of a concentration by the Commission. The statement of reasons for a clearance decision is not subject to a lesser standard than for a prohibition decision. The Court of First Instance rightly held that the

¹ Case T-464/04 *Impala v Commission* [2006] ECR II-2289.

Commission's finding that the recorded music market was not so transparent as to allow prices to be co-ordinated, a finding of major importance for its decision, was not persuasive, comprehensible and free of inconsistency.

The Advocate General considers that Bertelsmann and Sony rightly criticise the Court of First Instance for setting excessive requirements as to the *cogency of their defence submissions* in the administrative procedure and also erroneously considered that the Commission was under a duty to carry out a further market investigation after hearing the parties concerned. However, this should not lead to the setting aside of the judgment, because the considerations underpinning that judgment were free of any legal error.

In that respect the Advocate General rejects the argument that the Court of First Instance wrongly relied on a comparison between the clearance decision and the *statement of objections* previously sent to the undertakings. In fact the Court simply took the objections as a reference point for examining the factual basis for the clearance decision. The clearance decision was annulled only on account of its inadequate statement of reasons and a manifest error of assessment, and not on account of a departure from the statement of objections.

The Court of First Instance did not fail to respect the *Commission's margin of discretion*. It did not take it upon itself to decide whether the concentration was compatible or incompatible with the common market, but merely found, in the course of the necessary appraisal of the facts and evidence, that the conclusions drawn by the Commission were not supported by the factual basis of its decision.

The Advocate General emphasises in her Opinion that the Merger Regulation lays down the same standard for the clearance of concentrations as it does for their prohibition. There is *no general presumption* that mergers are compatible with the common market.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

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Languages available: DE EN FR PL

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-413/06>

It can usually be consulted after midday (CET) on the day of delivery.

For further information, please contact Christopher Fretwell

Tel: (00352) 4303 3355 Fax: (00352) 4303 2731