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Judgment of the Court of Justice in Case C-413/06 P

Bertelsmann AG and Sony Corporation of America

THE COURT OF JUSTICE SETS ASIDE THE JUDGMENT OF THE COURT OF FIRST INSTANCE RELATING TO THE SONY BMG JOINT VENTURE

The Court of First Instance committed errors of law in concluding that the Commission's decision approving the joint venture was vitiated by manifest errors of assessment and was inadequately reasoned

On 19 July 2004, the Commission approved the concentration of the global recorded music businesses of Bertelsmann AG and Sony (with the exception of Sony's activities in Japan) into three newly-created companies to be operated under the name Sony BMG.

Following an action brought by Impala, an international association of independent music production companies, the Court of First Instance annulled that decision by judgment of 13 July 2006¹, on the grounds that it was vitiated by manifest errors of assessment and was inadequately reasoned.

As a result of that annulment, the Commission carried out further review proceedings relating to that merger and approved the creation of Sony BMG for a second time on 3 October 2007, again without imposing any conditions or stipulations.

At the same time as those proceedings were taking place, Bertelsmann and Sony brought an appeal before the Court of Justice against the judgment of the Court of First Instance, claiming that that court had overstated the legal requirements to be applied in relation to a Commission decision approving a merger and that court's role in carrying out judicial review.

In the first place, the Court of Justice rejects the argument put forward by Bertelsmann and Sony to the effect that there is a general presumption that a notified concentration is compatible with the common market, which would mean that the standard of proof the Commission is required to comply with in the case of a decision approving a concentration is less high than in the case of a decision prohibiting a concentration.

¹ Case T-464/04 *Impala v Commission*. See Press Release 60/06 (<http://curia.europa.eu/en/actu/communiques/cp06/aff/cp060060en.pdf>).

None the less, the Court of Justice considers that **the Court of First Instance committed a number of errors of law in its judgment.**

First of all, the Court of Justice holds that the Court of First Instance did not merely use the statement of objections as a basis for verifying the correctness, completeness and reliability of the factual material which underpinned the contested decision, but treated certain of the conclusions set out in that statement as established, whereas those conclusions could, however, only be considered as being provisional.

Furthermore, the Court of First Instance committed an error in requiring, in essence, that the Commission apply particularly demanding requirements as regards the probative character of the evidence and arguments put forward by Bertelsmann and Sony in reply to the statement of objections and in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the arguments in defence put forward by those companies amounted to an unlawful delegation of the investigation to the parties to the concentration.

The Court of Justice also considers that the Court of First Instance committed an error of law in relying on documents submitted by Impala on a confidential basis, since the Commission itself could not have used them for the purposes of adopting the decision, by reason of their confidential nature.

In addition, the Court of First Instance misconstrued the legal criteria applying to a collective dominant position arising from tacit coordination. The Court of Justice finds that the assessment of the relevant criteria in that regard, including the transparency of the market in question, should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. However, the Court of First Instance did not carry out its analysis of market transparency in the light of a plausible theory of tacit coordination.

Lastly, the Court of Justice rejects the arguments of Bertelsmann and Sony that a Commission decision approving a concentration can never be annulled on the ground of inadequate reasoning. Nevertheless, the Court of Justice considers that the Court of First Instance could not find that the Commission had failed, in this case, to comply with the duty to provide an adequate statement of reasons for the decision. In that regard, the Court of Justice notes that the decision showed the reasoning followed by the Commission in a way which subsequently allowed a party such as Impala to challenge its validity before the Court of First Instance. Furthermore, the Court of First Instance was aware of the reasons for which the Commission decided to approve the concentration and devoted numerous paragraphs in its judgment to the analysis of whether those reasons were well founded. It cannot therefore be claimed that it was impossible for the Court of First Instance to exercise its power of judicial review.

For those reasons, **the Court of Justice sets aside the judgment of the Court of First Instance.**

Since the Court of First Instance examined only two of the five pleas relied on by Impala, **the Court of Justice considers that it is not in a position to give a ruling itself on the dispute. It is accordingly referring the case back to the Court of First Instance.**

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE EN FR PL

*The full text of the judgment 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 judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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