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Press and Information

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Judgment of the Court of First Instance in Case T-464/04

Independent Music Publishers and Labels Association (Impala) v Commission of the European Communities

THE COURT OF FIRST INSTANCE ANNULS THE DECISION AUTHORIZING THE CREATION OF SONY BMG

The Commission did not demonstrate to the requisite legal standard either the non-existence of a collective dominant position before the concentration or the absence of a risk that such a position would be created as a result of the concentration

On 9 January 2004, Bertelsmann AG and Sony, two international media companies, notified to the Commission a proposed concentration whereby they envisaged merging their global recorded music activities (with the exclusion of Sony's activities in Japan) into three new companies operated together under the name Sony BMG.

On 24 May 2004, the Commission informed the notifying parties that it had reached the provisional conclusion that the concentration was incompatible with Community law, since, in particular, it would reinforce a collective dominant position on the market for recorded music. After hearing the parties, the Commission on 19 July 2004 declared the concentration to be compatible with the common market.

On 3 December 2004, Impala, an international association whose members are 2 500 independent music production companies and which had participated in the procedure before the Commission, applied to the Court of First Instance for annulment of that decision. The Court of First Instance granted the applicant's request that the action be dealt with under an expedited procedure.

Today the Court of First Instance has annulled the Commission's decision.

The Court observed that, according to the Commission's decision, the absence of a collective dominant position on the market for recorded music may be inferred from the heterogeneity of the product concerned, from the lack of transparency of the market and from the absence of retaliatory measures between the five largest companies.

However, the Court found that the theory that promotional discounts have the effect of reducing the transparency of the market to the point of preventing the existence of a collective dominant position was not supported by a statement of reasons of the requisite legal standard and was vitiated by a manifest error of assessment. The elements on which that argument was founded were incomplete and did not include all the relevant data that ought to have been taken into account by the Commission. They were therefore not capable of supporting the conclusions drawn from them.

The Court further pointed out that the Commission relied on the absence of evidence that retaliatory measures had been used in the past, whereas, according to case-law, the mere existence of effective deterrent mechanisms is sufficient, since where the companies comply with the common policy there is no need to have recourse to sanctions. In that context, the Court stated that the decision and the case-file revealed that such credible and effective deterrent measures appeared to exist, in particular the possibility of sanctioning a deviating record company by excluding it from compilations. In addition, even if the appropriate test in that regard were to consist of determining whether retaliatory measures had been exercised in the past, the Commission's examination was inadequate. At the hearing it was not in a position to indicate the slightest step which it had completed or undertaken for that purpose.

As those two grounds constituted the essential grounds on which the Commission concluded that there was no collective dominant position, each of those errors would in itself constitute sufficient reason to annul the decision.

Furthermore, as regards the possible creation of a collective dominant position after the concentration, the Court of First Instance criticised the Commission for having carried out an extremely cursory examination and for having presented in the decision only a few superficial and formal observations on that point.

The Court considered that the Commission could not rely, without making an error, on the lack of transparency of the market or on the absence of evidence that retaliatory measures had been used in the past in order to conclude that the concentration did not entail a risk that a collective dominant position would be created.

Last, the Court criticised the parties for their conduct during the judicial procedure. In particular, it considered that the attitude of Impala, the party which insisted that the case be dealt with under the expedited procedure, was scarcely compatible with the letter and the spirit of that procedure and slowed down the course of the proceedings. For that reason, the Court decided that Impala must bear one quarter of its costs.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

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

Languages available: DE, EN, FR

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

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-464/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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