JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

13 July 2006 *

In Case T-464/04,

Independent Music Publishers and Labels Association (Impala, international association), established in Brussels (Belgium), represented by S. Crosby and J. Golding, Solicitors, and I. Wekstein-Steg, lawyer,

applicant,

v

Commission of the European Communities, represented by A. Whelan and K. Mojzesowicz, acting as Agents,

defendant,

* Language of the case: English.

supported by

Bertelsmann AG, established in Gütersloh (Germany), represented by J. Boyce, Solicitor, P. Chapatte and D. Loukas, lawyers,

Sony BMG Music Entertainment BV, established in Vianen (Netherlands),

Sony Corporation of America (SCA), established in New York, New York (United States),

represented by N. Levy, Barrister, R. Snelders and T. Graf, lawyers,

interveners,

APPLICATION for annulment of Commission Decision C(2004) 2815 of 19 July 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.3333 — Sony/BMG),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

gives the following

Judgment

Facts

1 The Independent Music Publishers and Labels Association (Impala) is an international association, incorporated under Belgian law, whose members are 2 500 independent music production companies.

2 On 9 January 2004 the Commission received notification pursuant to Article 4 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as rectified (OJ 1990 L 257, p. 13) and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) ('the Merger Regulation'), of a proposed concentration by

which the undertakings Bertelsmann AG ('Bertelsmann') and Sony Corporation of America ('Sony'), part of the Sony group, proposed to merge their global recorded music businesses.

3 Bertelsmann is an international media company: its worldwide activities include music recording and publishing; television and radio; book, magazine and newspaper publishing; print and media services; and book clubs and music clubs. Bertelsmann is active in recorded music through its wholly-owned subsidiary Bertelsmann Music Group 'BMG'. BMG's record labels include Arista Records, Jive Records, Zomba and Radio Corporation of America (RCA) Records.

4 Sony is globally active in music recording and publishing, industrial and consumer electronics and entertainment. In the recorded music sector it acts through Sony Music Entertainment. Sony's labels include Columbia Records Group, Epic Records Group and Sony Classical.

5 The proposed operation consisted in the integration of the global recorded music businesses of the parties to the concentration (with the exception of Sony's activities in Japan) into three or more newly-created companies pursuant to a Business Contribution Agreement dated 11 December 2003. In the aggregate, these joint venture companies were to be operated under the name Sony BMG.

6 Under the agreement, Sony BMG would be active in the discovery and development of artists (the so-called A&R ('Artist and Repertoire') activity) and the marketing and sale of the resulting discs. Sony BMG would not be involved in related activities such as music publishing, manufacturing and distribution.

7 On 20 January 2004, the Commission sent out questionnaires to a number of players on the market. The applicant replied to that questionnaire and lodged a separate submission on 28 January 2005 in which it set out the reasons why in its view the Commission should declare the operation incompatible with the common market. The applicant set out its concerns about further concentration in the market and the impact that this would have on market access, including in the retail sector, the media, the internet and consumer choice.

8 By decision dated 12 February 2004, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and the functioning of the Agreement on the European Economic Area ('the EEA Agreement'). It therefore initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

9 On 24 May 2004 the Commission sent a statement of objections to the parties to the concentration, in which it provisionally concluded that the notified operation was incompatible with the common market and the functioning of the EEA Agreement, since it would strengthen a collective dominant position in the recorded music market and in the wholesale market for licences for online music and would coordinate the parent companies' behaviour in a way incompatible with Article 81 EC.

10 The parties to the concentration replied to the statement of objections and a hearing took place before the Hearing Officer on 14 and 15 June 2004 in the presence of, among others, the applicant.

11 By decision of 19 July 2004, the Commission declared the concentration compatible with the common market pursuant to Article 8(2) of the Merger Regulation ('the Decision').

12 In response to its application of 26 July 2004, the applicant received a non-confidential copy of the decision on 23 September 2004.

Procedure and forms of order sought by the parties

13 By application lodged at the Registry of the Court of First Instance on 3 December 2004, the applicant brought the present action.

14 By a separate document lodged on the same date, the applicant requested that the Court should adjudicate on the case under an expedited procedure, in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

15 By letter of 17 December 2004, the Commission expressed its doubts as to whether the action was appropriate for an expedited procedure in this case, emphasising, in particular, in addition to the complexity of the case, the difficulties resulting from the fact that, in order to explain the grounds of its decision, it would be required to use very voluminous and complex data and that such a line of defence would, moreover, require delicate negotiations with the parties to the concentration and third parties regarding the extent to which the Commission would be able to disclose confidential information.

16 By statements lodged at the Registry of the Court of First Instance on 10, 11 and 19 January 2005, Bertelsmann, Sony BMG and Sony Corporation of America sought leave to intervene in support of the form of order sought by the Commission. Those applications were granted by order of the President of the Third Chamber of 4 February 2005.

17 In the meantime, by decision of 13 January 2005, the Court of First Instance, by way of measures of organisation of procedure as provided for in Article 64(3)(e) of the Rules of Procedure, invited the parties to take part in an informal meeting on 24 January 2005 in order to examine the possibility of dealing with the case under an expedited procedure, in the light, in particular, of the question raised by the Commission concerning the confidentiality of certain material in the file.

18 By a statement lodged on 18 January 2005, the Commission, in agreement with the applicant, requested a measure of organisation of procedure consisting, essentially, in allowing the Commission to submit certain documents and information which had been transmitted to it on a confidential basis by communicating them solely to the applicant's counsel, to the exclusion of the applicant itself.

19 By decision of 24 January 2005, the Court, taking note, in particular, of the agreement reached between the applicant and the interveners, granted the request for a measure of organisation of procedure. The Court also granted the application for an expedited procedure, while stating that that decision might be reconsidered at any time in the light of developments in the file and the procedure. A timetable for the submission of pleadings was also drawn up.

20 By a pleading lodged on 11 February 2005, the applicant submitted a request for amendment of the measure of organisation of procedure. By letter of 18 February 2005, the defendant and the interveners submitted their observations on that request. By letter of 22 February 2005, the applicant withdrew its request for amendment of the measure of organisation of procedure.

21 Meanwhile, on 11 February 2005, the Commission had lodged its defence. On 25 February 2005, Bertelsmann, Sony BMG and Sony lodged their statement in intervention.

22 In the meantime, by letter of 15 February 2005, the applicant sought leave to lodge observations on the new information in the Commission's defence. By decision of 21 February 2005, the Court granted that request and gave the defendant permission to request leave, by no later than 4 March 2005, to lodge complementary observations, which the defendant did. By letter of 1 March 2005, the applicant objected to that request. On 14 March 2005 the Commission lodged its complementary observations.

23 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the Commission to produce a number of documents and to reply in writing to a series of written questions.

24 By letter of 19 September 2005, the Commission requested further time to lodge its answers to the questions put by the Court; its request was granted. By letter of 21 September 2005, the Commission lodged its answers to the Court's questions.

25 The parties presented oral argument and answered the questions put by the Court at the hearing on 22 September 2005.

26 By letter of 26 September 2005, the Commission lodged a number of documents after the hearing and requested leave to be able to comment in writing on any observations that might be lodged by the applicant on its answers to the written questions of 21 September 2005. Its request was granted.

27 On 29 September 2005, the applicant lodged a pleading concerning the Commission's answers to the written questions put by the Court.

28 On 11 October 2005, the Commission lodged its final observations on the applicant's observations on the Commission's answers to the written questions put by the Court.

29 The applicant claims that the Court should:

— disregard the documents produced by the Commission in the annexes to its defence;

— annul the decision;

— in the alternative, annul the decision in so far as it deals with one or other of the following points:

  — the collective dominant position on the market for licences for online music;

  — the individual dominant position on the market for the distribution of online music;

  — the coordination of the respective activities of the parties to the concentration in the field of music publishing;

— order the Commission to pay the costs.

30 The Commission, supported by the interveners, contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

31 In support of its action for annulment, the applicant puts forward five pleas in law, divided into a number of parts. By its first plea, the applicant maintains that by not finding that a collective dominant position in the market for recorded music existed before the proposed merger and that that dominant position would be strengthened, the Commission infringed Article 253 EC and made a manifest error of assessment and an error of law. By its second plea, the applicant maintains that by not taking the view that the proposed concentration would create a collective dominant position on the market for recorded music, the Commission infringed Article 253 EC and made a manifest error of assessment and an error of law. The third plea alleges infringement of Article 2 of the Merger Regulation in that the Commission did not consider that a collective dominant position on the worldwide market for online music licences would be created or strengthened. By its fourth plea, the applicant maintains that, by not taking the view that Sony would achieve an individual dominant position on the market for online music distribution, the Commission infringed Article 253 EC and made a manifest error of assessment. By its fifth plea, the applicant maintains that, by concluding that the proposed concentration would not have the effect of coordinating the music publishing activities of the parties to the concentration, the Commission made a manifest error of assessment and infringed Article 81 EC, in conjunction with Article 2(4) of the Merger Regulation.

I — *The evidence annexed to the defence*

A — *Arguments of the parties*

32 The applicant observes that the defence reveals that the Commission relied during the administrative procedure on documents and information to which the applicant had access only when it received a copy of the defence, although they played a pivotal role since they were used by the Commission to justify its departure from the position taken in the statement of objections, namely that the proposed concentration would create or strengthen a collective dominant position and would be incompatible with the common market.

33 If the applicant had seen those documents, which contain incomplete information and are misleading, during the administrative procedure, it would have been able to demonstrate those fundamental defects and the decision would have been different or, at least, would have been required to contain express reasons for rejecting the applicant's observations. The applicant criticises the Commission for having kept those documents to itself and for having relied on them without ever putting them to the test of cross-examination or subjecting them to the observations of third parties.

34 While acknowledging that the Commission is obliged to protect business secrets and is under no obligation to disclose all the information on the file to third parties during administrative procedures relating to the control of concentrations, the applicant maintains that the Commission is not thus entitled to deprive those third parties of the opportunity to present their views on the subject; it could, for example, prepare a non-confidential abridged version of the information in question.

35 The applicant makes clear that it is not introducing a plea alleging breach of essential procedural requirements, but maintains that the new evidence adduced by

the Commission has come too late to save the decision on the substance and that it represents an attempt by the Commission to regularise the decision ex post facto. The applicant observes that failure to produce documents during the administrative procedure cannot be remedied during the judicial procedure (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 78) and submits that the documents in question must be disregarded.

36 The Commission submits that this claim must be rejected.

B — *Findings of the Court*

37 It must be noted at the outset that the evidence which the applicant requests the Court to disregard was produced in the annexes to the defence lodged by the Commission in accordance with Article 46 of the Rules of Procedure. The applicant does not indicate in what way the production of that evidence by the Commission is contrary to the Rules of Procedure.

38 It must then be noted that neither the grounds on which the applicant seeks to have that evidence disregarded nor even the sense of its request are readily apparent.

39 In the first place, although the applicant maintains that the documents produced constitute an attempt to regularise the decision ex post facto, it does not claim that those documents were received or drawn up after the adoption of the decision; on the contrary, it asserts that they played a pivotal role during the administrative procedure, in that the Commission relied on them as a basis for the Decision. Even

on the assumption that it were shown to be true, that circumstance could not lead to the documents being disregarded. Furthermore, although the applicant criticises the Commission for attempting to regularise the Decision ex post facto, it does not allege, at least in support of the present request, that there has been a breach of the principle that the statement of reasons must be contained in the decision itself and that it is not sufficient for it to be explained for the first time before the Court (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95). In any event, the penalty for any failure to provide sufficient reasons is annulment of the contested measure and not the exclusion of the documents and the question whether the Decision is supported by a statement of reasons of the requisite legal standard will be examined in the present case in the context of the various pleas put forward by the applicant.

40 In the second place, while the applicant acknowledges that the Commission is under no obligation to disclose all the information on the file to third parties during the administrative procedure relating to the control of concentrations, it observes that, according to the case-law, failure to produce documents during the administrative procedure cannot be remedied during the judicial procedure. Without its being necessary to examine the scope of the rights of the defence or of access to the file by third parties in concentration procedures, it is sufficient to observe that the applicant expressly states that it does not intend to introduce a new plea alleging breach of essential procedural requirements. The request cannot therefore be upheld in so far as it is based on that ground. In any event, a breach of the rights of the defence can be penalised only where it is established that failure to disclose the documents was able to influence the content of the decision in question to the detriment of an applicant, which cannot be done without an examination of those documents.

41 In the third place, the applicant maintains that the documents contain incomplete information and are misleading, and that if it had had access to them during the administrative procedure it would have been able to demonstrate their fundamental defects, which might have led to a different decision. However, while that circumstance may mean that the evidence adduced by the Commission must be assessed with circumspection, it cannot result in the measure sought by the

applicant being granted. Quite to the contrary, that measure would deprive the applicant of the possibility of demonstrating the alleged unreliability or irrelevance of the documents in issue in the context of its pleas alleging a manifest error of assessment.

42 Last, the applicant's alternative request that the Court should declare that the documents are unconvincing or irrelevant must also be rejected, for the same reasons. In any event, that request constitutes a substantive question which will be examined in the context of the various pleas and arguments raised in the action.

43 It follows from the foregoing observations that the applicant's request that the documents produced by the Commission in support of its defence be disregarded, or declared irrelevant, must be rejected.

II — *First plea: strengthening of a pre-existing collective dominant position on the market for recorded music*

44 The first plea is divided into two parts, the first relating to the erroneous nature of the Commission's assertion that there was no collective dominant position on the market for recorded music before the proposed concentration and the second to the error resulting from the absence of a finding that that pre-existing collective dominant position would be strengthened by the proposed concentration.

A — *Arguments of the applicant*

1. First part

45 As a preliminary point, the applicant observes that both the statement of objections and the decision contain much evidence that before the merger the market for recorded music had all the features of a market on which a dominant position prevailed, in accordance with the criteria laid down in the case-law (Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585).

46 The applicant submits in that regard, first, that the major record companies ('the majors') are described as having all the features of a dominant group (high market shares and significant financial strength (recital 53 to the Decision), maintaining high price levels (recital 56 to the Decision) and an oligopolistic structure (recital 148 to the Decision)) and therefore interdependence.

47 The applicant claims, second, that the Commission found that the market had all the features conducive to tacit agreements and facilitated the monitoring of that coordination (points 93 to 116 of the statement of objections) and that it examined 10 factors indicating tacit agreement, which in the applicant's submission have not changed since the statement of objections. The product is homogenous in its format and consumers purchase discs by multiple artists and of multiple genres, thus making room for substitutability (recital 110 to the Decision). The market is highly conducive to coordination and coordination has in fact taken place (recital 112 to the Decision). There is a stable customer base (recital 112 to the Decision) and the parties to the concentration monitor the retail market (recital 113 to the Decision).

48 Third, the prices suggest the existence of a collective dominant position. There is parallelism of actual net prices (points 76 to 80 of the statement of objections and recitals 75, 82, 89, 96 and 103 to the Decision). Public selling prices ('PPDs') are known and the number of reference prices is limited (recitals 111 and 112 to the Decision). Net selling prices are closely linked to PPDs (recitals 77, 84, 91, 98 and 105 to the Decision). PPDs and actual net prices are closely aligned and transparent and the transparency of average real net prices is not affected by discounts (points 88, 90 and 92 of the statement of objections and footnotes 45, 49, 52, 55 and 57 to the Decision).

49 Fourth, the Commission found that there were potentially effective deterrent mechanisms (points 128 to 132 of the statement of objections and recital 118 to the Decision) and the majors are not subject to those effective competitive constraints.

50 The applicant maintains that the reasons put forward by the Commission, based on the heterogeneity of the content of albums, the insufficiency of price transparency owing to the existence of campaign discounts and the lack of evidence of the slightest retaliations, do not make it possible to reject the finding of the existence of a collective dominant position and that the Commission's analysis is vitiated by a lack of reasoning, a manifest error of assessment and an error of law.

(a) Breach of the obligation to state reasons

51 The applicant maintains that the Decision infringes Article 253 EC because it does not include a statement of the facts and law which led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community Institutions have applied the Treaty (Case 45/86 *Commission* v *Council* [1987] ECR 1493).

Product homogeneity

52 As regards, first, product homogeneity, the applicant criticises the Commission for not having stated the reason why product homogeneity carries more weight than a continuum of substitutability, whereby most consumers purchase music by multiple artists and of multiple genres, or than format homogeneity as regards price and transparency. Nor does the Commission indicate why the finding that the pricing of albums is quite standardised is invalidated by the general statement that pricing depends 'on the success of the album'. The applicant claims that recital 110 to the Decision contains contradictory findings.

Transparency

53 As regards, second, transparency, the applicant maintains that the Commission's statements and arguments concerning discounts, which have the effect of negating all the evidence on transparency, are inadequately reasoned.

54 Thus, in the applicant's submission, the Commission maintains that in the large countries the pricing transparency created by the PPDs is eliminated by campaign discounts, but it fails to explain the function of such discounts and their significance for the pricing system.

55 Likewise, in respect of the smaller countries, it is not clear why the Commission attached so much importance to campaign discounts and not to file discounts, when it asserted in the statement of objections that 'as in the larger territories, the most important discounts in all countries are file discounts'. Nor is there any precise

description of what file discounts are. The Commission's assessment of transparency in the smaller countries alternates, without explanation, between the comparison of file discounts and campaign discounts, so that it is not clear whether the examination related to campaign discounts or file discounts.

56 The applicant further maintains that the Decision refers only to the evidence on discounts relating to Sony and BMG and does not cover the other majors (see recital 71 and footnote 43 to the Decision). The reasoning is therefore incomplete.

Deterrents

57 As regards, third, deterrents, the Commission does not explain why, even if it were correct, the fact that it did not find proof that retaliatory measures were ever used should negate all the evidence of the existence of effective deterrents.

Constraints

58 Fourth, and last, the Decision, in contrast to the statement of objections, contains no assessment of countervailing market power and provides no explanation for that absence, which amounts to a complete absence of reasoning.

(b) Manifest error of assessment

59 The applicant refers to the decided principle that the Commission makes a manifest error of assessment where, when it is required to balance conflicting claims, it gives too much weight to one of them (Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph 58) or where the reasons provided to justify a decision do not in fact support that decision. Likewise, where an assessment by the Commission is not supported by certain evidence or certain facts, it must be regarded as not having been made in an appropriate and not unreasonable manner (Case C-16/90 *Nölle* [1991] ECR I-5163). In the applicant's submission, the assertion that there was no collective dominant position is not supported by relevant facts, reasoning or evidence and the Commission has failed to fulfil its obligation to assess all the relevant factors.

60 The applicant maintains that the Decision is vitiated by manifest errors of assessment in the determination of product homogeneity, transparency and the existence of deterrents, in the assessment of countervailing power and in the analysis of the common policy.

Product homogeneity

61 In the applicant's submission, the Commission made an error of assessment in taking the view that content heterogeneity prevailed over format homogeneity, while accepting that the consumer buys records by many artists and of many genres and that there is therefore a 'continuum of substitutability'. In any event, the parameter relating to product heterogeneity would be relevant only if pricing were set on the

basis of individual titles and not, as in this case, on the basis of a few reference prices (recitals 110 and 111 to the Decision). If the Commission's logic were followed, there could never be a dominant position in intellectual property industries, since there can never be total homogeneity of content.

Transparency

— General argument

62 The applicant maintains that the evidence adduced indicates that the majors' pricing is certainly sufficiently transparent to enable them to align their prices. It submits that the Commission has adduced no evidence to invalidate that analysis, but merely inferred from the alleged variation in discounts that transparency could be eliminated or reduced to the point at which price alignment would no longer be possible.

63 The error of assessment is apparent from the Commission's own findings that:

— there is parallelism and relatively similar price development on the part of the majors on average net prices (recitals 75, 82, 89, 96 and 103 to the Decision);

— PPDs could be used as a focal point for alignment (see recitals 76, 83, 90, 97 and 104 to the Decision);

— PPDs and average net prices have moved closely in parallel (recitals 77, 84, 91, 98 and 105 to the Decision).

64 The applicant observes that PPDs are transparent, that retail prices are known, that average net prices move in parallel with PPDs and that retailers' margins are known with sufficient accuracy. It follows, in the applicant's submission, that net prices to retailers (that is to say, PPDs less discounts) are transparent in spite of the discounts. That is also clear from the statement of objections (points 81 to 92) and from recital 77 to the Decision, which states that '[i]f a significant deviation from pricing policies was being implemented by the majors through the grant of discounts, this deviation would have been reflected in their average net prices'.

65 The applicant claims that the Commission made a manifest error of assessment by placing undue weight on discounts, especially campaign discounts, because:

— it relied on the information provided by Sony and BMG on discounts rather than on the information on the parallelism between PPDs and net prices for all of the majors (see footnote 43 to the Decision);

— according to the information provided by retailers, the discounts are transparent. Twenty of the 26 retailers questioned by the Commission stated that the majors were aware of the discounts given by the others. That is particularly true of file discounts, the most important discounts, as they are negotiated annually;

— Sony and BMG produced weekly reports monitoring the retail market which included information on their competitors (recital 113 to the Decision);

— for compilations, the majors have joint distribution arrangements and joint ventures in the course of which file discounts are revealed;

— there is a high rate of transfer of senior executives between the record companies;

— the weekly charts provide information on sales by title, which makes it easy to detect the titles that become hits and generate the bulk of sales (recital 73 to the Decision);

— according to the Report of the Office of Fair Trading (the United Kingdom competition authority), information on competitors is more readily available on the market for recorded music than in any other industry.

66 The applicant observes that, on the basis of those factors, the Commission concluded, at point 81 of the statement of objections, that 'discounts [were] mostly stable and [were] not used to effectively alter pricing policy'. The applicant maintains that the facts have not changed since then.

67 In any event, campaign discounts are generally not used in respect of chart records, which generate about 80% of revenue, but only to entice consumers to draw on the list of titles in the back catalogue, and they have little impact on the sample which the Commission considered (recitals 70 and 71 to the Decision). Furthermore, as the data relating to campaign discounts which the Commission examined related only to Sony and BMG, they are even less relevant.

68 The proportion of the majors' pricing structure potentially affected by a lack of transparency is therefore small, as may be seen from the report annexed to the application which explains the pricing and discounts system in Europe.

69 The applicant maintains that the Commission had sufficient material against which to test its analyses but that it failed to do so, in particular, in respect of the evidence concerning retailers. By not properly assessing the facts and attaching too much importance to discounts, in particular campaign discounts, the Commission made a manifest error of assessment.

— General observations on the new evidence

70 On the basis of the new information produced by the Commission in the annexes to its defence, the applicant infers that the Commission appears to have based its assessment that the market is not transparent on the complexity of the individual variations in discounts between customers and between individual titles, and over time. However, the existence of such individual variations, which are sometimes considerable, does not preclude the possibility that pricing is governed by a finite number of known structures and rules which make average prices predictable and from which any significant and systematic deviation would be apparent.

71 Such rules might not perhaps make it possible to predict the price of each individual release charged to each individual retailer and at every point in time, but would none the less make it possible to know, with a sufficient degree of certainty, the net prices that would result from a set of PPDs and to establish whether or not competitors were complying with those rules. They therefore provide the transparency necessary for the existence of collective dominance. Coordination of behaviour, which is apparent in the parallel movement of PPDs and net average prices, might therefore simply emerge on the basis of commonly-known, well-understood structures which are capable of being monitored, rather than on the basis of perfect and complete knowledge of each individual pricing decision.

72 The applicant maintains that the Commission has not investigated whether the observed parallelism in average prices (both gross and net) could have resulted from the coordination of behaviour resulting from such rules, but has concluded rather that that was not the case, since there were individual variations, without considering whether those variations were statistically significant and had a material impact on averages.

73 Such rules do not apply to all cases, but to a substantial portion of each major's sales in each class of record (new releases, new artist, full-price catalogue, mid-price catalogue, budget catalogue, etc.), for each of which there is a finite number of general retail strategies which govern the vast majority of sales (re-charting a record, participating in retail campaigns, buying shop-window positioning, etc.). Those sales strategies may admittedly differ in each territory and according to customers (supermarkets, specialist chains, independent stores, etc.), but are none the less finite in number and known by sales personnel. Those rules or structures are sufficient to permit price coordination without any need for specific knowledge of net and gross prices for individual releases and, moreover, in an environment in which demand for individual titles varies and in which the success of albums cannot be predicted with certainty, offer the flexibility necessary to adapt in individual cases without undermining the overall pricing structure.

74 Individual variations must not obscure the fact that overall net prices are closely aligned to gross prices and that that is likely to be the case because all undertakings follow certain general rules which make overall pricing highly predictable and systematic divergences apparent. There is therefore transparency.

75 Examination of the new evidence annexed to the defence shows that the Commission has focused on individual variations without considering whether they were statistically significant. The Commission has not undertaken a proper statistical analysis of the underlying data or considered the significance of price or discount ranges or the relevance of variations within common pricing bands, nor has it questioned retailers in order to ascertain whether or not individual variations were within the general rules of the pricing system. The Commission has concluded, incorrectly, that the mere existence of variations precluded the possibility that that variation is caused by a few isolated cases, while the bulk of sales are subject to prices determined on the basis of commonly-known and predictable rules.

76 Furthermore, the Commission has examined the evidence using flawed methodology and without carrying out the necessary tests.

77 The applicant makes the following general observations on the new evidence adduced by the Commission:

— a large part of the data is not volume-adjusted for the purpose of assessing the significance of ranges of pricing and discounts. Where the data are aggregated correctly — that is to say, between all players and adjusted for volume — variations are much less significant;

— in most cases, the data are not analysed from a statistical point of view and it is therefore impossible to ascertain whether, in relation to different classes of products, the variations are significant;

— with the exception of a small number of data used in the statement of objections, the data compare only the pricing of the parties to the concentration. The Commission's argument that establishing opaque discounting practices between two majors is sufficient to reduce transparency is wrong in the light of the fact that Sony and BMG had been performing very differently on the market and that, with differing performance across a series of releases, price and discount ranges would vary even in a uniform pricing system. Moreover, the parties to the concentration were historically the two most different majors, so that the concentration would not only reduce the number of players but also make them more similar;

— the Commission did not investigate whether there were data within the majors that directly contradicted the alleged variety and complexity of pricing, namely budgets or other data which accurately predict net and gross prices and discounts and whose construction is parallel between competitors and stable over time;

— testimony from executives of the parties to the concentration does not focus on key questions — such as the existence of general pricing rules and the monitoring of prices — and was not tested.

78 The Commission's view that average net prices are the expression of a multitude of quite diverse individual decisions and that the latter must be observable with sufficient certainty in order to permit meaningful coordination of net prices is incorrect, since it is sufficient that each undertaking can monitor whether the

pricing decisions taken by each of the other undertakings, across their releases, comply with certain pricing rules in order to make price movements known to each other and to sustain tacit collusion.

79 The variations observed by the Commission on the basis of the data supplied by the parties to the concentration, apart from being less material than the Commission seems to believe, cannot be taken as evidence of opacity of pricing, because, as in any industry in the intellectual property sector in which individual titles' performance is variable and subject to a diversity of marketing activity, but where aggregated slates of such titles conform to generally known rules, it is perfectly possible to explain any variation in the range of discounts and prices by reference to a few commonly-known principles.

80 The applicant expresses surprise, moreover, that the Commission has included very little evidence used in the statement of objections, some of which was weighted and covered the entire industry, but focused rather on the information supplied by Sony and BMG, which lacks those qualities. The differences must therefore be reconciled before the initial data are rejected and it does not appear that the Commission has carried out a balanced assessment.

— Individual examination of the various pieces of evidence

81 The testimony of the executives of Sony and BMG set out in Annex B.2 merely confirms that different discounts were given to different customers, but does not relate to whether or not those discounts were largely determined by a series of general rules. Although the statements emphasise the very complex nature of the pricing mechanism, in reality the annex which seeks to demonstrate the complexity of campaign discounts belies that complexity by describing the operation of the discounts on a single page. The question that should have been asked was whether there were standard margins associated with different pricing categories and

whether most of the discounts tended to cluster within narrow ranges. The questions appear to have been conceived in such a way as to avoid disclosing the fact that mark-ups could be known as general rules and therefore did not need to be known on a release-by-release basis and that there was no need to reverse-engineer individual prices in order for one large record company to be able to monitor the prices applied by its competitors. Nor were those questions put to retailers, although that would have permitted a comparison of their answers.

82 As regards the annex which shows the percentage of Sony's and BMG's gross sales in their top 10 PPDs between 1998 and 2003, which, according to the Commission, demonstrates the unpredictability of success and therefore the need for each major to monitor the PPDs of more than 80 of its competitors' albums, the applicant notes certain inconsistencies in the data (such as variations in the periods) and claims that the data show nothing other than that the merging parties sell their products at different PPDs. That is irrelevant in so far as the Decision states that the PPDs are rather transparent. Furthermore, contrary to what the Commission contends, it follows from recital 111 to the Decision that 'majors only need to monitor the pricing points of a limited number of best-selling albums to account for most of the sales'. Nor does that information contradict the considerations expressed by the Commission at the hearing, according to which a large majority of each major's sales was accounted for by very few PPDs. It is not necessary to monitor the prices of more than 80 albums, since there are generally understood principles and rules; in order to monitor overall respect for coordination, it is sufficient to establish, for very few titles, whether those rules have been observed and whether anomalies are systematic. The conclusion which the Commission draws from the variation in the percentage of the gross sales of the parties to the concentration is therefore unwarranted.

83 Furthermore, those charts seem to emphasise one factor, namely the unpredictability of success, which contrasts with the key statements made in the Decision, that (i) PPDs are transparent and present a focal point for alignment (recitals 76, 83, 90, 97 and 104 to the Decision); (ii) the monitoring of other majors' list prices is possible (recitals 76, 83, 90, 97 and 104 to the Decision); and (iii) the majors only need to monitor the pricing points of a limited number of best-selling albums to account for

most sales (recital 111 to the Decision). Last, even on the assumption that it is necessary to monitor the PPDs of more than 80 albums (or 60 following the concentration), that does not appear to be as onerous a task as the Commission suggests.

84 As regards the annexes dealing with the average invoice discounts granted by Sony and BMG to their top 10 customers in four out of the five large Member States, the applicant states that it wonders first of all to what extent the differences in average invoice discounts reflect differences in treatment of the various customers rather than differences in the relative performance of the portfolios of the parties to the concentration, since the strength of the releases of a large record company and its business mix (chart releases, supermarket activity, catalogue activity, specialist and campaign activity) would affect the average discount granted to customers. Second, any differences in the treatment of customers by the parties to the concentration do not imply that their pricing decisions are opaque, since those differences may be systematic and predictable, and stable over time.

85 The annex which is supposed to show examples where, according to the parties, there is no correlation or parallel movement is irrelevant, as it could be explained by the difference in performance of the portfolios of the parties to the concentration and, moreover, shows remarkable similarities (lower discounts granted to the same customer, or discounts changing at the same time, or differences that are stable over time). Only the example of customer 1 in Germany is consistent with the view that one of the majors can cut effective prices without that being matched by its competitors, but a single specific variation during a specific year in a given territory in relation to a specific customer is not convincing. Furthermore, as the charts only look at Sony's and BMG's data, and as those data are not weighted, the variations are exaggerated. That is particularly true of the prospective analysis that the Commission ought to have undertaken, because since the concentration combines two undertakings performing very differently it might increase symmetry and homogeneity and therefore the likelihood of tacit collusion.

86 As regards the annexes which present supposed evidence of variations in invoice discounts granted by the parties to the concentration over a five-year period to their top 10 customers for their top 20 compact discs ('CDs'), the applicant observes that the charts show only ranges of discounts and that these may be misleading, as they show extremes rather than averages and statistically-significant variations around those averages. Wide discount ranges might be explained by some rare exceptions, with the vast bulk of discounts being at the same level. Furthermore, in addition to their methodological inadequacies, those charts show some interesting regularities. For example, in country A both parties to the concentration generally offer higher discounts to wholesalers than to supermarkets and general retailers and one of the annexes to the defence shows a surprisingly well-aligned relationship between the ranges of discounts.

87 As regards the annexes which, in the Commission's contention, show that the parties to the concentration did not follow a uniform discount practice, that their practices evolved over time and that in 2003 the breakdowns of the discounts granted by the parties to the concentration were not very similar, the applicant again emphasises that the differences found in the ranges of discounts over time and between the parties to the concentration could be the result of differences in performance and that that does not in any way suggest that discounts are not the consequence of a known set of rules. Furthermore, the data presented point rather in the opposite direction from that indicated by the Commission (structure of discounts that are quite stable and similar, or converging, and a high correlation factor).

88 The applicant maintains that discount structures do not vary over time as much as the Commission's analysis suggests. The figures show the coefficient of correlation of the discount structure of each of the parties to the concentration in a given year and the discount structure for the previous year. Even though the business mix affects discounts, the overall high correlation coefficients suggest that discount structures remain relatively stable over time, thus producing fairly predictable net prices from transparent PPDs.

89 Furthermore, the presentation of data in very narrow bands, in combination with particular cut-off points, may accentuate the differences (for example, if the discount changes from slightly below 15% to slightly above 15% there is a change in band without a significant change in the actual discount). Last, the applicant emphasises that if performance were based on the success of Sony's and BMG's top 20, there would be a change in prices in a highly competitive market. As that is not the case, the applicant concludes that the discount mechanism is not really a strong competitive element or a source of opacity.

90 As regards the annex showing the distribution of net prices for Sony's and BMG's top five customers in 2003, the applicant submits that the Commission's inference that different customers make quite different proportions of their purchases from a given major in the various net price bands is of questionable relevance, since the transparency and predictability of pricing do not require that purchase patterns be the same, or similar, between customers of the two majors. As the determining factors for discount levels necessary to achieve sales targets are product mix and the performance of frontline new releases among customers, it is difficult to see how the Commission reached the conclusion that there was a difference in the distribution of net prices in general for the two majors.

91 Furthermore, although those data relate only to Sony and BMG, they are none the less more appropriate because they are weighted. A more detailed examination of the distributions country by country shows remarkable similarities presented in diagrammatic form.

92 Furthermore, the Commission's conclusion that one of the annexes shows differentiation between Sony and BMG is not consistent with the assessment at recitals 74 and 75 to the Decision that their net average prices were relatively similar, which, on the balance of probabilities, suggests the use of pricing rules which ensure that the majority of prices are clustered around a few price points. Rather than

support the view that complex pricing makes prices opaque, that evidence would appear to support the opposite view that prices are fairly predictable and similar in spite of the apparent complexity of individual pricing decisions.

93 The applicant contends that the annex showing Sony's quarterly average net prices per album in the most-used PPDs does nothing to indicate opacity, as the chart is subject to the range problem, that is to say, it merely shows extremes without analysis of weighted averages and variations from averages. Besides, the annex is irrelevant as it relates only to Sony and is not comparative.

94 The following annex is also irrelevant, as it is not comparative and seeks only to show that BMG offers retailers different types of discount.

95 The applicant also criticises the Commission for not having indicated whether the apparent variations in the level of campaign discounts might be explained by a few simple principles. The applicant finds that surprising, since the principles set out by the Commission in one of the annexes to its defence suggest that such rules exist in relation to campaign discounts and that they are very simple, as follows:

(i) campaign discounts vary with the size of the order (other than in the specific case of France);

(ii) campaign discounts vary with the type of customer (for example, in Germany wholesalers and music clubs receive generally higher discounts);

(iii) campaign discounts vary with the type of title or release (for example, depending on the artist's popularity, the target audience);

(iv) campaign discounts focus on customers with a reputation for selling a particular genre, based on the nature of the retailer and the demographics of its customer base;

(v) campaign discounts vary with the nature of the campaign (for example, only one title, or a basket of titles, usually catalogue);

(vi) campaign discounts vary according to the level of marketing spend that the retailer is prepared to provide in return.

96 The applicant contends that if those rules are commonly known, it should not be difficult to predict with reasonable accuracy the level of discount that a major can be expected to offer to a particular customer for a particular title in a particular campaign and therefore to establish whether actual discounts are in line with those rules. The Commission does not appear to have investigated that point.

97 Furthermore, as one of the annexes provides data for only a single year, it is not conclusive, since it does not make it possible to assess whether discount levels are stable and therefore predictable.

98 As regards the annex consisting of a number of monitoring reports submitted to the Court by the parties to the concentration, the applicant observes that that evidence does not suggest that there is no pricing mechanism consisting in a series of general rules and guidance on how prices are set. The Commission should have focused not on whether there was specific monitoring of individual discounts but on whether there was any necessity for such monitoring since the variations within the pricing system are exceptions to the price points which apply to the vast majority of sales.

99 As regards the annex containing the study prepared by the economics consultancy RBB Economics ('the RBB study'), which finds that a record company would not be in a position to infer wholesale prices from the observed retail prices at which competitors' products are sold, the applicant claims that that study concentrates essentially on the pricing of individual releases and not on whether there is a systematic link between PPDs and net wholesale prices for the large majority of releases over a reasonable period. Different retailers may indeed pursue different strategies when setting their retail prices, but it would be surprising if there were no clear-cut and systematic relationship between average retail prices of releases in a particular category, sold at a particular retailer, and their effective wholesale prices, over a sufficiently large range of titles and over a reasonable period. The fact that there is no single uniform mark-up applied automatically to wholesale prices does not mean that retail prices and wholesale prices are unrelated to such an extent that it is impossible to monitor compliance with the general pricing principles. There is a general level of mark-up for different categories of product (top price, super top price, mid-price, developing artists, budget, etc.).

100 The applicant observes that the study avoids examining the rules of the pricing system and expresses its doubt that the Commission subjected the study to examination with retailers or third parties or that it requested the aggregated price and discount data that every major must have in its budgets. Nor is there any comparison with the other data already collected. Such an examination would have revealed that, contrary to the claims made in the study:

— there is a systematic link between classes of product if those products are delineated properly to reflect their performance, maturity and importance in the customer base;

— the assertion that retailers do not apply a standard mark-up to wholesale prices is misleading, since it deliberately avoids the existence of classes of product and classes of retail campaigns, which are both known and consistent between majors. The study ignores the requirement to explain the clustering of discount levels in aggregate around a small number of price and discount levels. Variations in mark-ups merely reflect the accommodation of the rules to demand;

— more generally, the Commission failed to consider the fact that it was examining an industry in the intellectual property sector in the recorded music market. The fact that individual releases move through different known and understood price and discount categories during their life-cycles does not necessarily imply that there cannot be transparency or even coordination.

Deterrents

101 The applicant maintains that the Commission failed to examine all possible forms of retaliation, but looked only at those relating to compilation joint ventures. Thus, if a major were to introduce a policy of reducing prices to retailers, the others might punish that major by inducing retailers to reject the lower price policy by offering them higher discounts and increased cooperative advertising. A further deterrent would be to restrict the chart eligibility of the 'deviant' major's lower-priced products or products which display unilateral innovation. The criteria for chart eligibility are generally determined by committees composed on the whole of record companies, sometimes in conjunction with retailers, and relate in particular to formats or minimum prices.

102 The applicant maintains that the Commission made a manifest error of assessment in that, while finding the existence of credible deterrents, it concluded that there were no such deterrents, on the ground that it had found no evidence that they had been used. The most effective deterrent is the one that does not have to be used.

Constraints

103 The applicant contends that the Commission's analysis is incomplete in so far as the decision contains no examination of countervailing market power. In the statement of objections, moreover, the Commission found that neither the independents nor retailers imposed effective competitive constraints on the majors.

Absence of a proper analysis of common policy

104 In the applicant's submission, the Commission focused its analysis on price competition and wholly neglected a series of other issues although, according to the Notice on horizontal mergers (OJ 2004 C 31, p. 5), coordination may take various forms.

105 Thus, the Commission should have considered whether or not it was more beneficial for the majors to compete vigorously for market share than to adhere to a common policy. The fact that the majors' market shares are relatively stable and that changes are mainly the consequence of the acquisition of independents or of mergers among themselves indicates an absence of genuine price competition or a common policy consisting principally in not engaging in highly competitive actions, especially where the market is oligopolistic (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 43).

106 Nor did the Commission consider whether the majors had parallel licensing policies for online music or for the signing of artists. It did not examine all the features which provide evidence, detailed in points 96 to 116 of the statement of objections, that the music markets are 'particularly conducive to coordination and facilitate the monitoring of such coordination' (point 94 of the statement of objections). The Commission none the less identified 10 factors indicating tacit collusion, including structural links, licensing and distribution agreements, joint ventures and compilations.

107 The Commission also failed to consider whether the concentration might result in an ability to reduce supply, in terms of numbers of new titles or in terms of originality of new releases, or whether it would impoverish creativity, quality and

diversity in musical choice (see Commission Decision of 7 January 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.2978 — Lagardère/Natexis/VUP), OJ 2004 L 125, p. 54, paragraph 674) or would have an impact on consumer choice, as it had done in the statement of objections in the EMI/Time Warner case (see point 55, which deals with marginalisation of the independents and its impact on the choice and diversity of music being offered to the public). Last, the analysis took no account of Article 151(4) EC or of cultural diversity.

(c) Misapplication of the law on collective dominance

108 The applicant maintains that the Commission made three errors of law.

109 In the first place, the Commission concluded that prices were not transparent, on the ground that it was not certain that the transparency was total, when, according to paragraph 62 of *Airtours* v *Commission*, paragraph 45 above, the test is whether there is 'sufficient market transparency' for all members of the oligopoly to be aware 'sufficiently precisely and quickly' of the way in which other members' market conduct is evolving. In this case there is sufficient transparency.

110 In the second place, the Commission considered that because of the discounts there is no common policy, but did not establish that the discounts led to significant price reductions, so that, in the applicant's submission, any competition by means of the discounting structure is marginal. According to paragraph 60 of *Airtours* v *Commission*, paragraph 45 above, however, marginal competition does not in itself invalidate a finding of a collective dominant position. The trader must be aware that 'highly competitive action designed to increase its market share (for example a price

cut) would provoke an identical reaction by the others'. In particular, the Commission need only prove 'the lack of effective competition between ... members of the dominant oligopoly' and not the elimination of all competition (see, to that effect, Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 645).

111 In the third place, the Commission erred in law by basing its analysis on the absence of past evidence of retaliation, whereas according to paragraph 195 of *Airtours* v *Commission*, paragraph 45 above, the Commission need not necessarily prove that there is a specific 'retaliation mechanism' of greater or lesser severity but must show the existence of deterrents.

2. Second part

112 The applicant observes that, in order to establish whether or not a concentration would strengthen a collective dominant position, the Commission must, by way of prospective analysis, examine its impact on the reference markets (*Airtours* v *Commission*, paragraph 45 above, paragraphs 58 and 59). However, the Commission carried out no prospective analysis and wholly failed to consider the question of the strengthening of the dominant position, since, following a retrospective analysis, it wrongly found that there was no pre-existing dominant position capable of being strengthened.

113 To the extent to which the strengthening of the dominant position was examined on the basis of the retrospective analysis, the decision is vitiated by a manifest error of assessment for the reasons set out in the first part, while the failure to carry out a prospective analysis constitutes an error of law.

B — *Arguments of the Commission*

114 The Commission is of the view that the three grounds of annulment raised by the applicant in respect of the market for recorded music overlap to a large extent and that it will be therefore useful to set out, first of all, an account of the reasoning in the Decision and of the evidence on which it based its conclusions, before proceeding to examine certain misrepresentations of the Decision's content which appear in the application and then concluding by analysing the specific arguments raised by the applicant.

1. The Commission Decision and the evidence on which it is based

(a) Context

115 As regards the pricing system applicable to recorded music, the Commission explains that each major and each independent record company periodically determines a range of different price lists for its CD albums, known as 'published prices to dealers'. Each major normally has more than 50 PPDs of that type, of differing importance, which may be allocated to 'full-price', 'mid-price' and 'budget' categories, and fixes the list price for every CD album it issues by reference to one of those PPDs. However, the net price actually charged by a record company to a customer (a retailer or a wholesaler) is lower than that list price owing to invoice discounts (file discounts and campaign discounts), which may vary from customer to customer, over time, or (in the case of campaign discounts) from album to album. Each record company negotiates with each of its customers an annual file discount (possibly with different rates for pop, classical and television-advertised albums) which applies to all sales to that customer. Campaign discounts, on the other hand, are set on a case-by-case basis, for varying durations, for individual albums or baskets of albums which the record company wishes to promote; they are

not necessarily granted to all customers and the amount is not necessarily the same. The Commission draws attention to the fact that the net price of a given album to a given customer must be distinguished from the average net price of all albums sold by a given major in a given year, which is composed of the sum of all the (potentially widely-varying) net prices for individual albums sold to individual customers, divided by the total number of albums sold by the record company concerned.

116 The Commission found that there had been a significant fall in demand for recorded music on CDs since 1999 (recitals 55 to 59 to the Decision).

(b) The five large markets (Germany, the United Kingdom, France, Italy and Spain)

117 The Commission states that it initially analysed whether an existing common understanding on prices among the majors could be identified in the five large Member States (recitals 69 to 108 to the Decision). It investigated whether there was parallelism in prices, by examining movements in the majors' average net real prices and considering whether any observable parallelism could be explained by coordination. In order to do so, the Commission first looked at PPDs as possible focal points and then considered whether discounts were aligned and sufficiently transparent to allow efficient monitoring of any coordination in respect of net prices (recital 73 to the Decision).

Alignment of average net prices and PPDs

118 In the five large markets, the Commission found only a partial similarity between net real prices. In each country, the net average real prices of each major moved for most of the time in a range of around 10% or more by reference to the others. The Commission considered that such a degree of similarity was not conclusive (recitals

75, 82, 89, 96 and 103 to the Decision), for obvious reasons. First, no parallelism of average net real prices was observed. Second, parallelism of behaviour is not generally sufficient to establish existing coordination if the mechanisms of that coordination cannot be identified. Third, in the present case the Commission did not conclude that movements in each major's average net prices were or could be known by the other majors. Average net prices are the expression of a very large variety of individual pricing decisions and those decisions must be capable of being identified with sufficient certainty if they are to permit meaningful coordination of net prices.

119 The Commission did in fact find some indications that list prices (that is to say, PPDs) could be used as a basis for alignment. In each of the five large Member States, the main part of each major's total sales (more than 55%, indeed 85% in one country) was made using five PPDs and even (with the exception of Spain) between one and three PPDs for half or more of the top 100 single album CD sales in 2003. Moreover, list prices are relatively transparent since they are shown in the majors' catalogues (recitals 76, 83, 90, 97 and 104 to the Decision).

120 However, the Commission identified two types of obstacles to the use of PPDs as a reference point for tacit coordination on net prices and as a means of monitoring compliance with such coordination — one relating to the degree of complexity inherent in the PPDs themselves and the other to the complexity and opacity of the relationship between list and net prices.

Complexity and PPDs

121 As regards PPDs, CD albums are not a perfectly homogenous product, owing to the difference in content (recital 110 to the Decision). Although a 'continuum of

substitutability' permits at least albums of the same genre to be regarded as belonging to a single product market (recitals 9 to 13 and 110 to the Decision), CD albums remain differentiated heterogeneous products. Consequently, even if the pricing and marketing of CD albums at wholesale level is quite standardised (elements of standardisation of wholesale pricing are: the three broad price categories; each major's standardised set of PPDs; and the fact that file discounts and agreed return rates for unsold records are normally determined according to a limited number of parameters), individual albums have varying degrees of anticipated and actual success, which influences the initial fixing of the PPD when the album is released and subsequent movements in the PPD.

122 Furthermore, owing to the unpredictability of success, each major wishing to make absolutely certain that coordination of net prices was being complied with by the other majors would presumably be required to monitor the PPDs of more than 80 albums produced by its competitors per annum in a given country (or more than 60 albums of that type per annum following the concentration, since each major's top 20 albums account for a minimum of 30% of its total sales and in many cases over 50% (recital 111 to the Decision)). A record company wishing to obtain a more complete picture of the market would face a huge increase in monitoring activity, as the top 100 albums of each major would normally account for around 70 to 80% of its total music sales (recital 71 to the Decision) and such an exhaustive survey would require the monitoring of almost 400 albums. The parties to the concentration have submitted evidence that the mix of PPDs for their respective top 20 single CD albums often changed substantially from one quarter to the next. Although weekly hit charts facilitate such monitoring by identifying successful titles (recital 112 to the Decision), they do not eliminate the problem.

123 As regards the finding in the Decision that '[there were] some indications that PPDs could have been used as focal points for an alignment of the majors' prices', the Commission emphasises that that is not a definitive finding. Although the Commission found that the monitoring of list prices appeared to be possible, the

shifts in use of different PPDs depicted in an annex to the defence show that such a monitoring exercise, combined with efforts to identify discounting practices, would at the least be resource-intensive.

Alignment and complexity of prices

124 In the five large Member States, the Commission identified a close link between the movements of Sony's and BMG's average gross real prices and average net real prices over a six-year period, with very stable net-to-gross price ratios both across albums and over time (recitals 77, 84, 91, 98 and 105 to the Decision). However, the stable relationship between average gross and net prices (that is to say, the average discount) of each of the parties to the concentration for all albums in a given country inevitably levels out the effects of different types of invoice discounts (file discounts and campaign discounts), of differences in invoice discounts (file discounts and campaign discounts) granted to different customers and of differences in invoice discounts (essentially campaign discounts) granted for individual albums. The conclusion regarding the stability of the ratio of average net and gross prices must also be qualified by the methodological limitations of the analysis. Only Sony's and BMG's data were taken into account, because the other majors stated that they only billed net prices; and, in order to overcome the problem arising from the fact that a given album may have more than one PPD in the course of a given year, the parties to the concentration attributed a single gross price to each album corresponding to the PPD at which most copies of that album were sold in the year in question (gross sales per album were thus calculated simply as PPD x number of albums sold). The gross price recorded for each album and used to calculate each major's average gross price is therefore an approximation.

125 Furthermore, a stable ratio of average gross to average net prices is not sufficient to prove past or likely future coordination in the absence of a demonstrable mechanism enabling the majors to monitor the emergence of that gross-net

relationship from a multitude of individual pricing decisions. The Commission did not discover sufficient evidence of such a mechanism.

126 The Commission noted, first of all, that Sony's and BMG's invoice discounts (file discounts and campaign discounts) were by far the most important discounts in every large Member State (with the exception of France in BMG's case). The overall levels of their respective invoice discounts varied to some extent, when expressed as a proportion of their respective aggregate gross sales to their top 20 customers in those Member States (the difference between those levels was [*confidential*] [1] percentage point of their respective aggregate gross sales in Italy, [*confidential*] percentage points in the United Kingdom and Spain, [*confidential*] percentage points in Germany and [*confidential*] percentage points in France).

127 Furthermore, the Commission found no evidence that invoice discounts were sufficiently aligned between the parties to the concentration on a customer-by-customer basis in the big Member States to permit an inference of coordination and transparency. Recitals 79, 86, 93, 100 and 107 to the Decision record the differences in the total invoice discounts of the two parties at individual customer level, expressed as a proportion of gross sales to each individual customer. The Commission found that the respective average invoice discounts which they granted to each of their top 10 common customers in the large Member States other than France in the period 2000 to 2003 varied by between 2 and 5% (United Kingdom, Germany, Spain) or 1 and 3% (Italy). In the United Kingdom, Germany and Spain, the average annual discounts of the two parties to the concentration for some of those important customers varied in certain years by more than 5% of their respective gross sales to those customers. In France (recital 86 to the Decision), the average invoice discounts granted by the parties to the concentration to each of their common top 15 customers varied more markedly, by up to 10%. Given the

1 — Confidential data omitted.

importance of BMG's retrospective discounts and 'contract discounts' in France, the Commission also examined total discounts. It found differences between the two parties to the concentration of up to 3% in 2003 among this group of customers, and of about 5% for three of them. Those fluctuations were mainly attributable, in all the large Member States, to campaign discounts.

128 The Commission also took into account (recitals 79, 86, 93, 100 and 107 to the Decision) data from all the large Member States demonstrating that discounts granted by the two parties to the concentration varied on three dimensions:

(i) for a given customer, discounts varied over time;

(ii) for a given customer, discounts varied from album to album;

(iii) for a given album, discounts varied from customer to customer.

129 Although the annex to the statement of objections consisting of charts reproducing the average invoice discounts granted by the parties to the concentration to each of their top 10 common retailer customers (that is to say, for any given year, total invoice discounts to a given customer divided by total gross sales to that customer) in the United Kingdom, Germany, Italy and Spain between 2000 and 2003, showed the broad stability of discounts over time (point 88 of the statement of objections), the parties to the concentration pointed out, on the basis of the same charts, that their respective treatment of certain customers in the United Kingdom, Germany and Spain was markedly different.

130 As regards the applicant's observation that '[i]t is far from clear ... that differences in discounts obtained by the top 10 customers reflect differences in treatment rather than differences in the relative performance of the portfolios of each of the ... parties [to the concentration]', the Commission observes that if that is far from clear, even to an observer with access to complete data, it is difficult to imagine how the majors, in conditions of tacit coordination and quite imperfect market information, could eliminate 'interference' caused by portfolio mix in order to get an accurate picture of underlying discount practice or policy.

131 The annex to the defence reproducing evidence provided by Sony and BMG covering a five-year period, shows, in each of the five large Member States, the variation within what are sometimes quite wide ranges in the invoice discounts granted by each of them to their top 10 customers for their respective top 20 single CD albums in a given year, which represent an important part of overall turnover for the majors, so that observable, equivalent treatment at the level of both PPDs and discounts would be an essential component of any coordination of net prices. Each table tends to show, for a given major in a given country, that certain customers received quite divergent discounts in a given year or over a number of years for those best-selling albums and also that there were a number of marked differences in the highest and/or lowest discounts granted to different customers in a given year, even for customers in the same category (for example, wholesalers, specialist retailers or supermarkets).

132 Furthermore, comparison of the tables in that annex for Sony and BMG for any given country permits the conclusion that the discounts granted by each of them to any given customer in any given year often varied considerably as regards both the highest and lowest discounts granted during that period and the range between those two figures.

133 The Commission questions the relevance of the applicant's conclusion that the tables reveal 'interesting regularities' and observes that any such 'regularities' do not detract from the importance of variation in discounts as evidence of the complexity and opacity of net pricing.

134 The annex presenting a breakdown into bands of the discounts granted by the parties to the concentration for their respective top 20 CD albums between 1998 and 2003 in the five large Member States, permitted the Commission to ascertain the proportion of sales of their respective top 20 single CD albums to all customers made by each of the two majors at a given discount (expressed in narrow bands of 2.5%) by reference to the list prices (PPDs) of the albums concerned. More generally, the vertical column for each year in those tables shows that, whatever the year or the country, neither of the two majors followed a uniform discounting practice even for that restricted selection of their best-selling albums. The horizontal rows, relative to the different narrow bands of discounts, also show that the respective discounting practices of both parties to the concentration varied over time, from year to year.

135 Furthermore, one of the annexes to the defence shows that, for the year in question, the breakdowns of the discounts granted by Sony and BMG respectively on their top 20 albums in 2003 were appreciably different.

136 The applicant's observation that the differences in the ranges of discounts do not preclude their being based on a known series of rules rests on the false presumption that if a set of rules were known, that would suffice for all of the majors to be confident that those rules would be respected.

137 The Commission observes that the correlation analysis carried out by the applicant relates to a single party's discounts over time and not to alignment between the parties to the concentration. Furthermore, even if that analysis showed that the discount structures of each party to the concentration were relatively stable over time, in spite of changes in the business mix, that would actually confirm the Commission's argument that figures for average net prices can mask considerable fluctuations at the level of albums or customers. Last, contrary to the applicant's contention, the narrow discount bands (of 2.5%) in the charts in fact make the analysis less sensitive to small changes in discounts.

138 The Commission also contends that the applicant's observations to the effect that some of the charts show, rather, stability over time or a high correlation factor between the parties to the concentration are unfounded.

139 The annex setting out, for the five large Member States, the distribution of net prices to the top five customers of each of the parties to the concentration, shows:

(i) that the distribution of net prices is quite different for the two majors, both in general and for specific customers; and

(ii) that the way in which purchases by different customers from a given record company are divided between different net price bands varies considerably. This observation holds true even for customers in the same category (such as wholesalers, specialist retailers, supermarkets), to the extent to which more than one customer in a given category features in the table.

140 The Commission agrees with the applicant that variations in the distribution of the net prices paid by important customers to the different majors may be attributable to differences in their purchasing patterns and in the majors' product mix. However, those variations are by no means irrelevant. Even if a major were able to discover the different net prices paid for different albums of another major by a common customer (which, on the available evidence, seems unlikely), it would be unable to tell whether those prices reflected adherence to the necessarily complex rules posited by the applicant or deviation from those rules, unless it had, at the very least, much more information about the albums to which those prices related.

141 Furthermore, if product mix and varying levels of success were to account for all or the greater part of the weighted variations in price distribution shown in that annex, that would also indicate the futility of any attempt at coordination based on overall average net prices, as contended by the applicant.

142 The Commission disputes the relevance of the evidence which the applicant puts forward in order to show that the documents annexed to the defence do not demonstrate significant price variation.

143 Furthermore, the Commission also has evidence, concerning the PPDs of the high-price category, that specific very important customers of one of the two parties to the concentration had each paid to that major, over the course of a year (2003), different net prices (in other words, they were granted different discounts) for albums having the same PPD. The range between the highest and the lowest net price paid for albums at a given PPD is often substantial.

144 It follows from the evidence submitted by BMG concerning the proportion of the total average discount granted to each of its top 10 customers in one country (country E) that average campaign discounts per customer varied between around 8.5% and 13% and greatly exceeded average file discounts (which ranged between 3% and 10%) for virtually all customers, while in another country (country C) the average campaign discount (varying between 2% and 5%) was roughly half or more of the highest generally applicable discount, that is to say, excluding a special wholesaler discount. In the three other countries (country B, country D and country A), the level of average campaign discounts varied markedly from customer to customer, being between 0.5% and 12.5%, 0.5% and 13% and around 2.5% and 14.5% respectively. In all three countries, average campaign discounts far exceeded average file discounts for one top customer, while they were much smaller for others.

145 Contrary to the applicant's contention, the fact that each of those annexes shows differences in the net pricing or discounting of only one of the notifying parties does not render them irrelevant. The fact that a single major's discounts vary across different customers (including customers of the same type, who might be expected to be interested in similar elements of its product mix), indicates that even if a competitor were to acquire knowledge of the discounts granted by that major to one customer, that knowledge could not be extrapolated to that major's overall discounting practices. Moreover, the terms of coordination covering individual customers as well as customer types would be much too complex.

146 The Commission also received 'witness statements' indicating that, for the same record company, campaign discounts are granted for frontline albums as well as for back catalogue.

147 That is confirmed by the annex consisting of charts submitted by the parties to the concentration showing, for each of the five large countries, the invoice discounts granted by each of them to its top common customers for the best-selling albums in

2002, with very similar, full-price PPDs. The Commission observes that, for any given major and customer, the file discount should be stable across albums in any given year, and infers that the variation in invoice discounts granted by a given major to a given customer for different albums with the same PPD must be attributable to campaign discounts granted at some stage to the frontline albums in question. The charts reveal such variations in the invoicing practices of each of the notifying majors vis-à-vis at least some of its customers in all the countries concerned.

148 The Commission emphasises that the applicant criticises its failure to examine 'some simple principles that would differentiate albums at the same price point and that might explain differences in the level of campaign discounts', but, when describing those principles, cites six criteria which, being in principle compatible with each other, would cause a vast increase in the number of combinations of rules potentially applicable to campaign discounts alone. The Commission maintains that the applicant makes no attempt at quantification, which must be essential if the terms of coordination on price are to make it possible to predict with reasonable accuracy the level of discount for a given title during a given campaign — and, of course, to establish whether actual discounts are consistent with those rules or deviate from common pricing principles.

149 The variations in campaign discounts are shown in a number of examples: different types of customers were granted different levels of discount for albums of a certain musical genre; different customers were granted different discounts for the same album; the same customer was granted different discounts for different albums; the same customer was granted discounts limited in time for a given album.

150 Last, the Commission's general conclusion that 'the level of the different majors' discounts varied to some extent' in the large markets (recitals 78, 85, 92, 99 and 106 to the Decision) is also supported by economic evidence regarding the discounts

given by the five majors. On the basis of the information obtained by the Commission from the five majors concerning their invoice discounts in 2003, the economic consultants advising the parties to the concentration reached the following conclusion in the RBB study:

'We also compare the distribution of invoice discounts granted by Parties A, B, C, D and E in each of the five main countries in 2003. The analysis shows that there are significant differences in the distribution of invoice discounts granted by the majors. This confirms that the majors' pricing policies are currently not aligned.'

Transparency of discounts

151 The Decision states that, according to several customers in the large Member States, the majors had 'some knowledge' of their competitors' (more stable) file discounts (see footnotes 45, 49, 52, 55 and 57 to the Decision). That issue was discussed at length at the hearing before the Commission. The parties to the concentration claimed that a number of the positive responses referred to PPDs alone or failed to distinguish between PPDs and discounts. Only five responses (from Belgium, France and Italy) out of a total of 36 accessible responses from all countries specifically stated that there was some transparency on discounts; the opposite view was expressly taken in 11 responses. On the basis of the retailers' responses, of the 'witness statements' by the national executives of Sony and BMG and of the absence of discount information from the sales representatives' monitoring reports submitted to it, the Commission concluded that although certain retailers perceived that the majors had a certain awareness of the other majors' pricing policies, that awareness could relate to PPDs, which are relatively transparent, and to a certain extent to file discounts, which are negotiated annually, but was unlikely to extend to campaign discounts, which are negotiated on a case-by-case basis. The majors'

ongoing relations with a stable customer base (recital 112 to the Decision) could allow them to obtain some information on annual discounts but do not appear to be conducive to transparency on short-term campaigns.

152 The Commission found that campaign discounts were less transparent than file discounts and that their monitoring would require careful observation of retail-market promotions (recitals 80, 87, 94, 101 and 108 to the Decision) but that the systems of weekly reports by Sony's and BMG's sales forces (which included observations on competitors) did not achieve the requisite degree of transparency of those discounts. In particular, the Commission did not find sufficient evidence that monitoring of retail prices or contacts with retailers permitted the majors to overcome the transparency deficit as regards discounts, in particular campaign discounts.

153 The market monitoring reports submitted by the parties to the concentration do not contain the type of detailed information on competitors' discounts that would permit effective monitoring of net prices of individual albums to different customers. In other countries, moreover, the reports are much shorter or even non-existent. BMG's representatives, in particular, submit formal monitoring reports only in France and Austria.

154 Although the Commission agrees that it cannot easily prove that there is no pricing mechanism in the form of a series of general rules, it observes that the applicant has not taken the trouble to provide positive proof of how such a pricing mechanism would be devised and then applied to myriad individual contracts, or of how it would be enforced.

155 The Commission also expresses surprise that the applicant should directly question the need for monitoring in order to establish collective dominance.

156 The Commission's conclusion concerning the inefficacy of retail monitoring is also based on the complexity and opacity of retail pricing. A study submitted by the parties to the concentration shows (i) that there are large variations in the retail prices charged by major retailers for comparable CD albums within each major price segment (full-price, mid-price and budget) and (ii) that retail pricing is as complex as wholesale pricing. Furthermore, for any given album in the top five selection, retail prices often vary both over time, in the case of any given retailer, and, in a much more pronounced fashion, as between retailers at any given moment.

157 The evidence indicates that intensive monitoring by the majors of shifts in retail pricing by each retailer for each important album would not permit a major to infer the net pricing practices (PPD minus invoice discount) of its main competitors for a given album. Retailers do not systematically apply the same mark-up to the wholesale price at a given time either to all categories of albums or even to all albums in the more restricted full-price category (table 2.1).

158 Last, the Commission found no demonstrable relationship between retail prices and the invoice discounts granted for albums at the same PPD. On the contrary, the study submitted by the parties to the concentration tends to show that, both for full-price albums and for other albums, the variations in retail price for a given album at a given time in a variety of different retail outlets had no specific relationship with the invoice discounts granted to those retailers for that album (table 3.1).

159 Given such varied and unpredictable retail pricing practices, a major could not conclude with confidence that a given retailer would apply the same level or pattern of mark-up for other majors' equivalent albums as for its own and could not form a reliable view of its competitors' net prices, either for any given album or in the

aggregate, on the basis of the ratio of retail price to wholesale price applied by a given retailer in respect of its own albums, taken either singly or as a whole.

160 The Commission emphasises that the applicant's assertion that 'it would be surprising if there were no clear-cut and systematic relationship between average retail prices of releases in a particular category, sold at a particular retailer, and their effective wholesale prices, over a sufficiently large range of titles and over a reasonable period of time' is unsupported by any evidence. A sufficiently high degree of aggregation over albums and time will tend to mask the variation at the level of individual titles — often with high levels of sales — with which tacit coordination on price must inevitably be concerned. A major cannot reliably establish on the basis of the retail-wholesale price relationship for its own albums — which, as the applicant insists throughout its observations, represent, at any given time, a specific product mix — whether that relationship also holds good for the other majors.

161 The Commission submits that the applicant's criticisms of the RBB study and of the Commission's alleged failure to submit that study to operators on the market are confined to a number of unsubstantiated assertions.

Structural links

162 As regards compilations, the parties to the concentration showed that the partners to a joint venture receive only an average discount figure (without breakdowns by discount or by customer) on sales of the relevant compilation album. In the light of the observed variations in discounting practices over albums, customers and time, of the importance of campaign discounts and of the likely differences in campaign discounts for compilations and for single albums, compilations could not ensure the necessary transparency and are therefore not relevant to the Commission's analysis.

163 Likewise, distribution or licensing arrangements rarely bring together more than two majors and would therefore not be an adequate vehicle for the multilateral exchange of the very complex information on all majors' net-pricing practices which would be necessary for tacit coordination on that basis. Last, as royalty negotiations in respect of music publishing are collective and take place between national associations of record companies (both majors and independents) and national collecting societies (representing publishers and authors), and do not address the pricing of recorded music, the Commission concluded that they were not relevant for the purposes of analysing transparency.

Retaliation

164 It is apparent from recitals 114 and 118 to the Decision that the Commission did not seek to verify the existence of possible credible retaliation mechanisms (it identified a number of potentially credible mechanisms), but sought, rather, to determine chiefly whether the observed degree of parallelism and discount stability at certain very general levels of analysis could, in spite of the complexity of individual net pricing decisions, the dispersion of individual net prices on several dimensions and the apparent lack of sufficient transparency, be attributable to tacit coordination. Clear evidence of retaliatory action by the other majors in response to a 'deviation' from the habitual levels of average net prices or average invoice discounts could have constituted an indicator (although clearly not a decisive one) of the existence of coordination. The lack of evidence of retaliation, in the form of a generalised recourse to greater price competition or at the level of compilations, online music or publishing, can be regarded as a 'negative' indicator that the observed degree of alignment at an aggregate level was not the product of tacit coordination.

165 As regards the more general question whether there are sufficiently credible retaliation mechanisms to sustain coordination on the recorded music market, the Commission clearly regarded the possible exclusion of the deviator from

compilation albums or refusal to participate in its own compilations as being (apart from a return to price competition) the potential method most deserving of attention. The elements set out by the Commission in recitals 116 and 117 to the Decision are not conclusive. On the one hand, the majors do indeed have a network of compilation agreements with each other (recital 116 to the Decision) and those albums account for a substantial part of the recorded music market (between 15 and 20%) and for the most part enjoy very high sales (recital 115 to the Decision). On the other hand, a combination of artists from different labels appears to be a key factor in such success (recital 115 to the Decision), with compilations involving two or three majors being by far the most successful (recital 116 to the Decision). By necessary implication, recourse to that retaliation mechanism could mean sacrificing the additional profits that might accrue from a compilation featuring the deviator's artists. In the light of that mix of incentives and disincentives, and in the absence of evidence that such retaliation had been either used or threatened in the past, the Commission was unable to conclude that a mechanism which 'could, in general, represent credible possibilities for retaliation by the majors' was, or would be, sufficiently credible to sustain past or future coordination.

(c) The other Member States

166 In the other, smaller, Member States, the main part of each major's total sales (between [50-60%] and [90-100%]) was made using five PPDs and (with the exception of Austria) two PPDs of each major represented between [30-40%] and [60-70%] of each major's total CD sales in 2003.

167 Furthermore, invoice discounts showed a significant variation on a customer-by-customer basis for each of the parties to the concentration. The smallest range between the highest and lowest average discounts granted by one of the parties to that concentration to its top 10 customers (top five in Ireland) was 5.7%, while the

range between the highest and lowest average discount granted to a top 10 customer was not less than 10% in any country, for both notifying parties.

168 The Commission observed (recitals 148 to 152 to the Decision) that there were a number of similarities between the markets in the small countries and the five large markets. On the basis of the evidence adduced for the small countries, it was impossible to demonstrate that there was genuine tacit coordination among the majors on those markets.

2. Misrepresentation of the Decision in the application

169 The Commission recalls, as a preliminary point, that a statement of objections is only a preparatory act of a provisional character (Case 60/01 *International Business Machines* v *Commission* [1981] ECR 2639) and that the Commission is not specifically required to give reasons for departing from its provisional views. It is not sufficient for the applicant to observe that the characteristics of the market did not change during the period between the statement of objections and the adoption of the Decision. Although that may be largely true as an objective matter, it is certainly not true as regards the extent of the Commission's knowledge and understanding of the market. In reaching its final position, the Commission gave due regard to the merging parties' detailed submissions in response to the statement of objections.

170 The Commission observes that on a number of points the applicant gives a distorted view of the Decision.

171 First of all, the Decision does not state that the majors have 'all the features of a dominant group'.

172 Nor does the Decision find that the majors were able to maintain high prices. Rather, recital 56 to the Decision finds that there has been a decrease in prices, albeit not as marked as that claimed by the parties to the concentration, and recital 58 to the Decision refers only to a perceived high price level of CDs.

173 Last, the Commission did not find in the Decision that the market bears all the features conducive to tacit coordination. The Decision does not state, in particular, that coordination actually takes place, but at the most that the Commission had found certain indications of coordination (recital 109 to the Decision). Although the Decision notes, at recitals 112 and 113, that there is a certain stability in the customer base and that monitoring takes place, it does not find that such monitoring is sufficient to overcome the lack of transparency of discounts, in particular campaign discounts.

3. First part

(a) Breach of the obligation to state reasons

174 The Commission considers it appropriate to set out the general requirements of Article 253 EC before examining the specific arguments developed by the applicant.

175 First, the Commission maintains that it is important to distinguish between an alleged failure to state sufficiently clear reasons for the adoption of an act and the provision of reasons which are erroneous as a matter of fact, assessment or law, which is a matter of substance rather than a breach of essential procedural requirements and does not constitute a breach of Article 253 EC (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraphs 46 and 47, and Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraphs 44 and 45).

176 Second, the Commission observes that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, and that the Commission is not required to discuss all the issues of fact and of law raised by every party during the administrative procedure, but must have regard to the context and also to all the legal rules governing the matter in question.

177 Among the relevant contextual factors is the level of prior knowledge of relevant facts or considerations on the part of the persons concerned by an act, it being understood that industry knowledge may be expected of certain persons or may be acquired through the close involvement of the persons concerned in the procedure leading to the adoption of the act or in a related procedure. The need for promptness in the control of concentrations has also been deemed to be relevant for the purpose of determining the adequacy of a statement of reasons.

178 Where certain relevant facts are covered by the obligation of professional secrecy laid down in Article 287 EC, the competent institution must none the less ensure that the essential content of its reasoning is communicated to the persons concerned.

179 Where the meaning of the text is not immediately clear, Article 253 EC is not infringed if ambiguities in the statement of reasons can be resolved by a normal effort of interpretation.

180 Furthermore, the Court of Justice has held that 'the Commission is not obliged to explain any differences in relation to the statement of objections, since that is a preparatory document containing assessments which are purely provisional in nature and are intended to define the scope of the administrative proceedings'.

181 Last, if a concentration does not modify, or modifies only to a very limited extent, the competitive situation in a given market, the Commission cannot be required to set out specific reasoning on that point. Nor does the Commission fail to fulfil its duty to state reasons if, in its decision, it does not include specific reasons concerning the assessment of a number of aspects of the concentration which it considers to be manifestly irrelevant or insignificant or plainly of secondary importance for the assessment of the concentration.

Product homogeneity

182 As regards the applicant's complaint that the finding in respect of product homogeneity is insufficiently reasoned, the Commission maintains that it did not find that 'content homogeneity should carry more weight than format homogeneity', but merely concluded that both aspects should be taken into account. Likewise, the standardisation of many aspects of the wholesale CD pricing process (using the most common PPDs and annual discounts for each customer) is not 'overruled', but rather qualified, by the reference to the role of success in the pricing of individual

albums. In short, single CD albums are not comparable to barrels of crude oil and the possibility of considering different CD albums to be on the same market (by way of a continuum of substitutability) does not make them perfectly homogenous, from the point of view of the product itself or of the pricing process. The result is not 'a series of contradictory findings' but a reflection of a complex reality.

Transparency

183 The applicant cannot claim not to have understood the Decision on the ground that the Commission provided no definition of what it means by 'campaign discounts', since the applicant is an industry association which participated actively in the discussions at the Commission's oral hearing and which itself claims familiarity with the function of such discounts. In any event, the Decision explains to the requisite legal standard what the various types of discounts cover (see recitals 78, 79, 85, 92, 93, 99, 100, 106, 107 and 113).

184 Likewise, the applicant is wrong to claim that the general analysis of the smaller countries undertaken by the Commission at recital 148 et seq. does not cover file discounts. The Commission merely observes, at recital 150 to the Decision, that file discounts are the most important in all countries, but then proceeds to analyse the wider category of invoice discounts (which include file discounts and campaign discounts), as it had already done country by country at recitals 119 to 146. There is neither confusion nor uncertainty there.

185 In the Decision, the Commission attaches great importance to campaign discounts, because it is net prices that count for the purposes of effective coordination. 'Some knowledge' of file discounts is not sufficient if campaign discounts can account for

fluctuations in discounts for certain customers over time and from album to album as significant as those referred to at recitals 79, 86, 100 and 107 to the Decision.

186 The Commission examined the other majors' discounts, but as those figures could not be revealed to the notifying parties, they could not be included in the Decision. Nor was it necessary to include them, because the opaque discounting practices of two majors were sufficient to defeat effective monitoring of net prices by all majors. Moreover, the applicant's own submissions on pricing are based on the premiss that all record companies construct their net prices in the same way.

Deterrents

187 It is clear from the Decision (in particular recital 114) that the Commission examined the threatened or actual use of potential retaliatory mechanisms in the past as a secondary means of verifying whether a degree of price alignment at an aggregate level was attributable to tacit coordination. In the absence of evidence of their actual use, the Commission was unable to take a final position on the sufficiency of the various potential retaliatory mechanisms mentioned in the Decision.

Constraints

188 As the conditions for a finding of actual or future collective dominance are cumulative, the Commission did not need to reach a conclusion on the countervailing power of competitors and consumers and therefore did not need to provide reasons in that regard.

(b) Manifest error of assessment and error of law

189 Being of the view that they overlap, the Commission examines the grounds of annulment alleging manifest error of assessment and error of law together.

190 By way of preliminary points, the Commission makes two observations.

191 First, as regards the argument that where the Commission is required to balance conflicting claims it must not place too much weight on one of them, the Commission refers to the discretion which it enjoys when making complex economic assessments and submits that the Decision is extremely measured in its conclusions and that the applicant does not refer on this point to any element in the evidence available to the Commission which in its view was given too much or too little weight.

192 Second, as regards the assertion that a decision which does not record sufficiently detailed factual evidence in support of its conclusions is vitiated by a manifest error of assessment, the Commission states that that is essentially a question of reasoning and contends that it is under no obligation to set out in its decisions the details of the often voluminous (and confidential) evidence which it has taken into consideration. It is sufficient for it to state clearly the general tenor of the evidence which it has examined and the reasons for the conclusions which it has drawn from that evidence, in such a way as to permit the interested parties, and in particular those who have industry knowledge and have already been closely involved in the administrative procedure, to form their own view of the legality of those conclusions. In the present case, the various assessments made in the Decision of the way in which the recorded music markets function is supported by substantial amounts of complex evidence.

Product homogeneity

193 The Commission contends that the applicant errs in suggesting that content heterogeneity is irrelevant on the ground that prices are set on the basis of a limited number of reference prices. Reference prices relate only to list prices for albums, not to invoice discounts. In particular, campaign discounts vary, inter alia, according to the particular album.

194 The Commission claims that a collective dominant position may be difficult to detect in markets characterised by product differentiation, in particular where such differentiation 'exacerbate[s] informational problems in non-transparent markets' (see the Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 3, point 45)).

Transparency

195 Before examining the applicant's various assertions, the Commission considers it necessary to comment on four fundamental errors in the application; two are legal or conceptual errors and two concern the interpretation of the Decision.

196 In the first place, the applicant makes a fundamental conceptual error where it presumes that a finding of a considerable degree of parallelism in the majors' average net prices, or of considerable stability in a given major's average discounts, constitutes sufficient evidence both of tacit coordination and of the transparency to

sustain such coordination on the terms identified. A certain degree of alignment or stability at an aggregate level cannot be a substitute for cogent and consistent evidence that there is the transparency necessary to permit undertakings in an oligopoly situation to monitor each other's market conduct; and, in the absence of evidence of sufficient transparency, it cannot be presumed that when each undertaking in an oligopoly situation reached its decisions on market conduct it had sufficiently precise knowledge of the conduct of its competitors.

197 In the second place, the applicant makes a basic legal error where it criticises the Commission for having relied upon evidence relating to discounts without finding that discounting led to significant price reductions and where it states that competition as regards discounting is in reality quite marginal. That assertion is wholly unfounded: the average invoice discounts of the parties to the concentration represent a very significant proportion of their average gross sales (see recitals 56, 78, 85, 92, 99, 122, 125, 128, 131, 134, 137, 140, 143 and 146 to the Decision) and certain customers and albums benefit from even greater discounts (see recitals 79, 86, 93, 100 and 107 to the Decision). Discounts are therefore a highly important element of the price-formation process and are perhaps the most likely and certainly the least transparent means whereby a major could effect 'a highly competitive action designed to increase its market share (for example a price cut)'. The Commission's concern with transparent discounts is not directly related to verifying whether in the past the majors followed a putative common policy, but to ascertaining whether the undertakings in an oligopoly situation could themselves have sustained (or could sustain after the concentration) such a common policy through adequate mutual surveillance. It was therefore unnecessary to show that one or more majors had in fact lowered prices by means of significant additional discounting by comparison with the others.

198 In the third place, the applicant makes a fundamental error of interpretation of the Decision when it criticises the Commission for confusing the 'sufficient market transparency' of *Airtours* v *Commission*, paragraph 45 above, with a requirement of total transparency applied in the Decision. The Decision refers consistently to 'a

sufficient degree of transparency' (recitals 73, 80, 87, 94, 108 and 120 to the Decision). The applicant also ignores the nature of the Commission's inquiry into the pricing system. The Commission examined the components of the net price of an album to an individual customer (PPD, file discount, possible campaign discount) and concluded that a sufficient degree of transparency would be necessary in respect of all components if a major were to be reasonably confident that it knew the true net pricing practices of another major, as manifested at the level of customers and albums. The Commission was unable to reach such a conclusion in the face of evidence of rather transparent PPDs, some evidence of a certain transparency of file discounts, and strong evidence of the opaque and complex character of campaign discounts.

199 In the fourth place, the applicant again made a fundamental error of interpretation when it stated that the Commission found that PPDs and average net prices move in parallel. That assertion is false. The Commission found that, on each of the large markets, the notifying parties' average gross real prices and average net real prices moved in parallel (recitals 77, 84, 91, 98 and 105 to the Decision), but not that average discounts were the same for both parties to the concentration (recitals 78, 85, 92 and 99 to the Decision). The Commission emphasises that discounts vary according to the customer and to the album, and over time (see recitals 79, 86, 93, 100 and 107 to the Decision, and the discussion of the underlying evidence). The evidence does not show that a given PPD will be systematically reduced by a fixed and predictable discount, irrespective of those variables.

200 The Commission maintains, next, that it must correct or clarify certain of the applicant's assertions:

— the relatively similar price development of the majors took place in a range which usually exceeded 10%;

— the use of a limited number of key PPDs as a focal point is qualified by the need to monitor, at a minimum, more than 80 successful albums a year, with changing PPDs;

— retail prices are public and therefore observable in principle, but it would be difficult for the majors to observe their constant shifts across retailers and over time;

— there is no evidence that the monitoring reports of the parties to the concentration on certain markets contain useful information on competitors' net pricing or retailers' margins;

— the applicant provides no evidence whatsoever to support its claim that retailers' margins are transparent and known to a high degree of accuracy; this bare assertion is contradicted by the evidence in the case-file which shows that retail pricing is complex and unpredictable. The Commission's finding that a significant deviation from pricing policies via discounts would be reflected in a major's average net prices is irrelevant to this question. It is, in fact, doubly irrelevant: (i) it relates to a phenomenon which, had it occurred, the Commission would have been able to observe using its powers of investigation but which would not have been apparent to any individual major because neither the majors' overall discounts nor their average net prices are transparent; and (ii) the interaction of overall discounts and average net prices shows nothing about the existence of a fixed and transparent relationship between retail prices and wholesale net prices;

— there is little reliable evidence suggesting that the majors have detailed knowledge of each other's file and campaign discount levels, and considerable

evidence to the contrary, including the objective complexity of campaign discounts, which vary, in particular, across customers, albums and time;

— the Commission's focus on the discounts granted by the parties to the concentration was sufficient to negate the necessary degree of mutual transparency among undertakings in an oligopoly situation that is necessary if tacit coordination is to function;

— cooperation among some majors on compilations and distribution is unlikely to reveal sufficient information about the complex individual discounting decisions of all the majors;

— the applicant provides no proof of what it alleges to be the high transfer rate of executives between majors, nor does it prove that that transfer rate is higher than in other concentrated industries, or that the knowledge of complex discounting practices, which vary at the level of individual albums with a limited shelf life, which an executive has at the time of leaving one major would be useful for very long or would sustain coordination among all majors;

— although published charts make it easier to identify the top albums, they rarely give information on PPDs and never on discounts;

— the Decision cannot be criticised simply because it differs from the statement of objections.

201 Contrary to the applicant's contention, it is not 'relatively easy' to establish discount levels and it is practically impossible to do so for campaign discounts. The applicant's assertion that campaign discounts represent between one quarter and one third of all discounts may, as a general matter, be accepted as a basis of discussion, but it must be qualified in a number of respects.

202 First, the overall level of campaign discounts probably varies from one major to another, as does the level of discounts generally.

203 Second, the average figures in the case-file indicate that campaign discounts represented a rather higher proportion of invoice discounts in a number of countries in 1998; invoice discounts have the greatest immediacy for customers' purchasing decisions on specific albums.

204 Third, this average figure does not faithfully translate the extraordinary complexity and opacity of the distribution of campaign discounts over albums, customers and time. Although it may well be the case that the other terms of participation in campaigns are relatively standardised and simple, the evidence before the Commission plainly contradicts any suggestion of standardisation or simplicity in the weekly negotiation of the amount and period of such campaigns and of the eligibility of individual albums or customers.

205 Fourth, the very fact that campaign discounts are targeted at selected albums and selected marketing periods and that the amount is adjusted for each retailer probably enables those discounts to have a greater effect on sales of the albums in question.

206 More important still is the fact that the applicant does not adduce decisive proof that the Commission erred in considering that campaign discounts were highly relevant to markets where each major's top 100 albums represent the greater part of its total sales in a given year and country, since many of these albums were not chart albums.

207 On the other hand, the Commission had at its disposal evidence which suggests that even some of Sony's and BMG's most successful full-price albums benefited from campaign discounts.

208 The Commission further submits that the evidence regarding the actual application of campaign discounts at any given moment is relevant only for the purpose of assessing the actual degree of alignment of net prices (whereas it considered in the Decision that discounts in general were not sufficiently aligned to support an inference of the existence of a common policy). However, discount transparency is relevant to the question whether there is sufficient inherent transparency in the pricing system for the majors to be able to detect accurately and in good time whether one of them is deviating from a common policy on net prices for albums by increasing campaign discounts. Apart from its unfounded comments on the transparency of retailer margins, the applicant has offered no argument or concrete evidence on the latter point, so that its plea must necessarily fail in any event.

209 The Commission maintains that the finding regarding the degree of net-price transparency in the market for recorded music was clearly not based on 'speculation' or an 'unsubstantiated and subjective doubt', but rather on concrete evidence of the highly complex and insufficiently transparent manner in which the elements of the final net price (PPD, file discount and campaign discount) are determined for the sale of a given album, with a specific content, to a given customer. In those circumstances, the available evidence could not be interpreted as proving, on the balance of probabilities, the existence of sufficient transparency to permit adequate and timely monitoring of a common policy in respect of prices.

210 As regards the applicant's argument that a finite number of known and knowable structures and rules make average prices predictable, the Commission observes that a degree of similarity in the way in which average net prices for albums develop is not sufficient to show coordination, since prices may display considerable alignment in competitive as well as collusive contexts, as undertakings respond to similar external factors (for example, prices of common inputs) and also to each other's market behaviour. The Commission maintains that the applicant is confusing the identification of terms of coordination ('known and knowable ... rules') with the means employed to monitor compliance with those rules ('the requisite transparency'), more especially because no major has access in the normal course of events to all, or at least the most significant, pricing data of all of the majors in all of the categories of albums and customers covered that would be necessary in order to establish average net prices.

211 Furthermore, while the applicant accepts that those rules and retail strategies may lead to prices and discounts which vary considerably according to the categories of discs or customers, it has not indicated what the rules would be or how they would be determined through tacit coordination for such a wide variety of circumstances. The majors would be unable to determine whether shifts in each other's average net prices were attributable to deviation or to shifts in product mix and product success without having detailed information in good time on those changes in the composition and fortunes of their respective product offerings; and the Commission has not found sufficient evidence that they had access to such detailed information.

212 The applicant cannot merely assert that coordination would actually take place at the level of broad policy decisions by each major on overall discount budgets and margins, without indicating what the content of such a decision might be or how those terms of coordination might be inferred, or how compliance with them could be monitored, by the majors. The Commission is under no obligation to investigate such vague and unsubstantiated arguments.

213 As regards the applicant's criticism of the method whereby most of the data presented by the Commission were not volume-adjusted, the Commission contends that the question of the appropriateness of a given method cannot be dissociated from the proposition which that method is intended to prove or disprove. Although the compilation of weighted data is indeed important for the purpose of detecting whether or not there is underlying alignment among the majors, either generally or in respect of certain types of albums (for example, top 20 albums), that weighting of the data is not relevant for the purposes of examining complexity and its effects on transparency. It is still necessary to examine the variability in the prices of individual titles in order to understand the level of complexity in pricing and the degree of transparency in the market.

214 The Commission reiterates that it is unrealistic to envisage terms of coordination based on average net prices. It notes, however, that its figures regarding the level of observable similarity (in the absence of parallelism) in the majors' average net prices in the Decision were volume-adjusted and that the same applies to the charts based on average annual invoice discounts granted to different common customers of the parties to the concentration. Considerable amounts of other data presented in the defence are also volume-weighted, and in each case that follows from the nature of the exercise.

215 All the abovementioned items of volume-adjusted evidence are potentially relevant for the purpose of determining whether or not there is a high degree of alignment in the majors' practices or as regards the question whether or not pricing is complex, which is important for the purpose of assessing transparency. In the latter context, the issue of volume adjustment is of no great relevance. Variability of net prices or discounts across titles and customers (even of the same type) and over time is important, regardless of the respective amounts sold. Thus, the annexes to the defence show that, even for the top 20 albums of each party to the concentration, there are wide variations in discounts. If the majors are not equipped to monitor

such variations sufficiently closely, a major would be able to deviate from any terms of coordination on net prices by giving large discounts, particularly campaign discounts, without being detected. That applies a fortiori if the terms of coordination are designed to be flexible; a considerable amount of discounting in excess of the tacitly-understood norm would then need to be detected in order for the other majors to be sufficiently sure that the undertaking concerned was deviating.

216 As regards the analysis of correlations carried out by the applicant and the implicit criticism of the Commission for not having conducted tests on the data, the Commission again observes that the question of methodology cannot be assessed in the abstract, without reference to the subject-matter of the investigation, namely whether there is a degree of alignment indicative of coordination and whether there is transparency permitting the monitoring of market behaviour.

217 The Commission notes, first of all, that the parties to the concentration presented a considerable amount of correlation data during the administrative procedure which showed correlation factors that were generally low, but that it none the less treated those contributions with considerable prudence.

218 Similarly, a degree of stability over time of the discounts granted by a given major is not in itself evidence of coordination, as, once again, it might be largely the consequence of stable factors such as customer size, types of music purchased, etc. Even a high degree of statistical predictability does not demonstrate the existence of coordination, for a number of reasons: rational individual decisions may be highly predictable; without the information which would permit such levels of predictability to be estimated, this remains an interesting intellectual possibility without practical consequences; and, likewise, without access to information on actual

practice, it is impossible to verify whether the prediction (continued compliance with a putative common understanding) holds true. Even if the majors were in a position to apply such statistical tools to each other's past pricing practices, that would be no substitute for market monitoring.

219 The Commission observes that, contrary to the applicant's assertion, it did not 'reject' the data used in the statement of objections, which were volume-weighted and industry-wide, in favour of the data provided by the parties to the concentration, which were neither. Many of those data are cited in the Decision (for example, on the degree of similarity of average net prices) and some are annexed to the defence. What the Commission did, rather, was to amend its provisional conclusion concerning what could be proved by those data, in the light of the additional data and arguments submitted by Sony and BMG.

Deterrents and constraints

220 The Commission contends that since it had found that one of the three cumulative conditions (transparency) was not satisfied, it did not make a manifest error of assessment or an error of law by not taking a position on the other two.

Analysis of the common policy

221 The Commission submits, first of all, that the applicant's complaint is based upon a factually incorrect premiss, namely that the conclusion regarding transparency relates exclusively to 'but one form of discount, the campaign discount'. Although

campaign discounts have an essential place in the analysis, the analysis concerned more generally the mode of price setting, which overall is very complex at album and customer level, and also over time, and in the same way PPDs and file discounts.

222 The Commission further contends that the applicant makes a manifest error of law in so far as it seems to suggest that if the Commission were able to prove that it would be beneficial for the majors to adhere to a common policy, then the transparency deficit would be less important. That thesis is inconsistent with the case-law. In the absence of sufficient transparency to permit monitoring and deterrence to function, the Commission is not aware of — and the applicant does not suggest — any other means of proving that a tacit anti-competitive common policy would be beneficial to a group of undertakings in an oligopoly situation and therefore rational.

223 Although relatively stable market shares may create a context favourable to the emergence of collective dominance, they do not suffice to establish actual or likely tacit coordination in the absence of sufficient evidence that such coordination is rational, in accordance with the cumulative economic conditions for collective dominance endorsed in *Airtours* v *Commission*, paragraph 45 above. The applicant provides no additional evidence that would indicate the existence of a common policy of avoiding 'highly competitive actions'. There are therefore no grounds on which to hold that the Commission made a manifest error of assessment in failing to identify such a common policy on the part of the majors.

224 As regards consumer choice and cultural diversity, the Commission first of all notes that if it is not required to state in a final decision its reasons for departing from the provisional conclusions reached in the statement of objections in a given case, that must apply a fortiori where it departs from the conclusions reached in a statement of

objections issued four years previously in a different case. It then observes that the applicant does not expressly cite any substantive argument or evidence pointing towards a coordinated impoverishment of creativity, quality or diversity in musical choice.

4. Second part

225 The Commission maintains that the three grounds of appeal concerning its failure to conclude that a collective dominant position would be strengthened by the merger add nothing to those relating to the prior existence of such a collective dominant position. Should the applicant succeed in respect of one of the latter grounds, the Decision will be annulled in any event, while should it fail, it will follow that the Commission was correct not to address what the applicant alleges to be the reinforcing effects of the concentration.

C — *Arguments of the interveners*

1. Preliminary observations

226 Before examining the applicant's various pleas and arguments, the interveners consider it necessary to make four broad observations concerning the context in which the Decision was adopted and must be assessed and four general remarks in respect of the action.

227 First, the Commission carried out an extraordinarily thorough investigation lasting more than six months. From the outset, the parties to the concentration provided very substantial data and explanations concerning the European music industry and the impact of the concentration on competition, in particular on CD prices, cultural diversity, consumer choice, independent record companies' competitive opportunities, the development of online music and the risk of coordination of the activities retained by Sony and BMG. By means of several questionnaires, containing more than 250 questions and sent to approximately 1 240 operators on the markets (the parties to the concentration, other majors, independents, retailers, authors, publishers, online distributors), the Commission sought and obtained a wealth of data and information on all the relevant questions. The parties to the concentration provided more than 30 million reference prices and economists made a detailed assessment of the five majors' average net prices in the five large countries. A number of independents do not share the applicant's concerns but consider that the concentration will increase their competitive opportunities. On the basis of all of those data, of the opinions of two highly-respected industrial economists, of detailed analyses of wholesale and retail price data in the RBB study and detailed explanations provided by the parties to the concentration in the response to the statement of objections or at the hearing, the Commission concluded that its initial concerns, in particular the risk of collective dominance, were unfounded.

228 Second, the applicant misunderstands the purpose and legal status of the statement of objections, the main function of which is to enable the parties to the concentration fully to understand the Commission's preliminary objections so that they have the opportunity to put forward counter-arguments and counter-evidence (see Article 18(1) and (3) of the Merger Regulation). When faced with evidence of errors, the Commission must abandon such objections as have been shown to be unfounded (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123), as it has done in 14 out of 62 cases during the last five years. The Commission's administrative process was subject to full internal checks and balances, the administrative procedure ensured that all the interested parties had ample opportunity to present argument and evidence and the Advisory Committee voted in favour of unconditional clearance.

229 Third, competition authorities from across the world (the United States, Australia, Canada, the Czech Republic, Hungary, Poland, Romania, Russia, Switzerland, Mexico and South Africa) all concluded that the transaction should be unconditionally authorised and none of those decisions was challenged. Nor did any national competition authority which had previously examined the music industry market in Europe consider that it was subject to tacit coordination (see, in particular, the Office of Fair Trading's conclusion of September 2002 that collective dominance was 'not proven').

230 Fourth, the concentration represents a pro-competitive response to the decline (a 20% fall in the price of CDs in three years, unauthorised downloading of music from the internet, increased competition from alternative leisure products, such as films on DVD) and continuing change in the music industry. The instability of demand and uncertainty about future business models make tacit collusion — which is already unlikely, given the characteristics of the market — even more difficult to achieve or to sustain (*Airtours* v *Commission*, paragraph 45 above, paragraph 139, and point 45 of the Guidelines on horizontal mergers). Likewise, as industry conditions are very different from those existing at the time of the Commission's review of the merger between EMI and Time Warner in 2000, the Commission's conclusions in that case, which were by nature provisional, are irrelevant.

231 Fifth, the reasoning in the Decision is clear, convincing and supported by the abundant weight of the underlying evidence, given that the Commission is not required to provide reasons for its assessments of all the matters of law and of fact (see Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraphs 185 to 187). The application shows that the applicant has understood the grounds on which the concentration was approved.

232 Sixth, prohibition decisions require something more than a pure 'balance of probabilities' standard, since in the event of uncertainty as to whether or not a

transaction is compatible, the interest of the undertakings seeking to carry out the transaction must prevail (Opinion of Advocate General Tizzano in Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, at I-992, points 74 to 79).

233 Seventh, the interveners recall that, while the Court of First Instance undertakes a full review of matters of law and of fact, it has jurisdiction to review only manifest error as regards complex economic assessments of the type made in the context of the assessment of the creation or strengthening of a collective dominant position (Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101). However, on numerous occasions the applicant invites the Court to substitute its own assessment for that of the Commission, by maintaining, for example, that the Commission placed undue weight on product heterogeneity and discounts.

234 Eighth, as regards the collective dominance test, the question is not whether the undertakings have an incentive to collude but whether they have the ability, in light of the characteristics of the market, tacitly to achieve and sustain the terms of coordination (*Airtours* v *Commission*, paragraph 45 above, paragraph 62). It is particularly important to evaluate whether the market is sufficiently transparent.

2. Examination of the applicant's arguments

(a) Campaign discounts

235 The interveners claim that in so far as price coordination cannot be achieved or sustained without sufficient transparency of actual net wholesale prices, the finding that campaign discounts are not transparent is in itself sufficient to support the Decision.

236 The Decision correctly established the link between, on the one hand, the content heterogeneity of albums and, on the other hand, the wide variations in campaign discounts and the resulting lack of transparency for net wholesale prices. The purported evidence shows that campaign discounts are significant both for chart albums and for catalogue albums, that they vary considerably by customer, by album and over time and that they were not aligned between the majors. As those discounts are variable, no reliable inferences can be made merely from observing PPDs. Likewise, retailers' margins vary considerably from one release to another and over time and therefore do not permit net prices to be inferred from retail prices. Furthermore, Sony and BMG did not methodically monitor competitors' retail prices or systematically obtain reliable information from retailers on discounts offered by competitors. Last, the alleged evidence shows that record companies had not engaged in retaliatory conduct, even in the face of highly volatile price movements, which deprives any sanction mechanism of credibility.

(b) Lack of alignment

237 The data relating to average net prices, PPDs and invoice discounts show not alignment but, at the most, development which is similar in part, and they do not permit a finding of price coordination.

238 The data on average net prices show: (i) a high degree of complexity; (ii) a wide dispersion and variability; (iii) a substantial volatility in the majors' 'rankings'; (iv) a wide range in the majors' prices; and (v) an absence of parallelism.

239 A large proportion of top 100 sales is generated outside the PPDs identified in the Decision (see recitals 76, 83, 90, 97 and 107 to the Decision).

240 It follows from the annexes to the defence that invoice discounts and net prices varied widely between the majors.

(c) Lack of transparency

241 The Decision found no convincing evidence of transparency, even on elements of price other than campaign discounts. The cautious references in the Decision understate the full force of the underlying evidence of the absence of sufficient transparency. Thus, apart from the fact that in some countries PPDs are neither known nor readily accessible, record companies do not have accurate information on the PPDs used for a given album at any specific time. File discounts are not sufficiently transparent to be tacitly coordinated. Of the 161 retailers questioned, only 5 stated that competitors had some awareness of each other's discounts, while 10 expressly stated that they did not.

3. Various aspects not mentioned in the Decision

242 The interveners claim that the theories of potential harm to competition examined also fail on many points not mentioned in the Decision. In the first place, the Commission wrongly concentrated on average net prices, whereas coordination could not take place on average prices, as individual album prices are not set with a view to obtaining a certain average net price, and that average is in any event not

observable by the other majors. Averages can mask significant divergence in individual album prices. In the second place, PPDs do not serve as focal points for alignment. Each major uses, even for its top albums, a wide variety of different PPDs that vary over time for the same disc. In the third place, market shares are not stable and a small swing in market share can make an enormous difference in terms of profitability.

D — *Findings of the Court*

1. General considerations

243 The applicant maintains that the considerations relating to product homogeneity, market transparency, deterrence and the absence of constraints, which served as the basis for the finding that the majors did not have a collective dominant position on the markets for recorded music before the proposed concentration, are vitiated by insufficient reasoning, a manifest error of assessment and an error of law.

244 Before examining the applicant's various complaints, the Court considers it appropriate first of all to make a number of observations on the concept of a collective dominant position, then briefly to explain the investigation method which the Commission used in reaching the conclusion in issue, and also the various relevant factors and elements concerning the application in the present case of the concept of a collective dominant position, as set out in the decision, and, last, to identify the grounds on which the Commission concluded in the Decision that there was no pre-existing collective dominant position.

2. Concept of collective dominance

245 It follows from the case-law of the Court of Justice that in the case of an alleged collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (known as *'Kali und Salz'*) [1998] ECR I-1375, paragraph 221).

246 The Court of First Instance has held that a situation of collective dominance which significantly impedes effective competition in the common market or a substantial part thereof may therefore arise following a concentration where, taking into account the actual characteristics of the relevant market and of the change to its structure brought about by the completion of the transaction, the concentration would have the consequence that, being aware of the common interests, each member of the dominant oligopoly would consider it possible, economically rational and therefore preferable to adopt the same policy on a lasting basis on the market with the aim of selling at above competitive prices, without having to conclude an agreement or resort to a concerted practice within the meaning of Article 81 EC, without actual or potential competitors, or customers and consumers, being able to react effectively (see, to that effect, Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 276).

247 In *Airtours* v *Commission*, paragraph 45 above, paragraph 62, the Court of First Instance held, as stated at recital 68 to the Decision in the present case, that the three following conditions must be satisfied in order for collective dominance as defined to be created. 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 jeopardise the results expected from the coordination.

248 It follows from the case-law of the Court of Justice (*Kali und Salz*, paragraph 245 above, paragraph 222) and of the Court of First Instance (*Airtours* v *Commission*, paragraph 45 above, paragraph 63) that the prospective analysis which the Commission is required to carry out in the context of the control of concentrations, in the case of collective dominance, requires close examination of, in particular, the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market and that the Commission must provide solid evidence.

249 It must be observed that, as is apparent from the very wording of those judgments, that case-law was developed in the context of the assessment of the risk that a concentration would create a collective dominant position and not, as in the context of the first part of the present plea, of the determination of the existence of a collective dominant position.

250 However, although when assessing the risk that such a dominant position will be created the Commission is required, *ex hypothesi*, to carry out a delicate prognosis as regards the probable development of the market and of the conditions of competition on the basis of a prospective analysis, which entails complex economic assessments in respect of which the Commission has a wide discretion, the finding of the existence of a collective dominant position is itself supported by a concrete analysis of the situation existing at the time of adoption of the decision. The determination of the existence of a collective dominant position must be supported by a series of elements of established facts, past or present, which show that there is a significant impediment of competition on the market owing to the power acquired

by certain undertakings to adopt together the same course of conduct on that market, to a significant extent, independently of their competitors, their customers and consumers.

251 It follows that, in the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in *Airtours* v *Commission*, paragraph 45 above, which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.

252 Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.

253 It follows that, in the present case, the alignment of prices, both gross and net, over the last six years, even though the products are not the same (each disc having a different content), and also the fact that they were maintained at such a stable level, and at a level seen as high in spite of a significant fall in demand, together with other factors (power of the undertakings in an oligopoly situation, stability of market shares, etc.), as established by the Commission in the Decision, might, in the absence of an alternative explanation, suggest, or constitute an indication, that the alignment of prices is not the result of the normal play of effective competition and that the market is sufficiently transparent in that it allowed tacit price coordination.

254 However, as the applicant has based its line of argument on an incorrect application of the various conditions that must be satisfied in order for there to be a collective dominant position, as defined in *Airtours* v *Commission*, paragraph 45 above, and, in particular, the condition relating to market transparency, rather than on the theory that a finding of a common policy over a long period, together with the presence of a series of other factors characteristic of a collective dominant position, might, in certain circumstances and in the absence of an alternative explanation, suffice to demonstrate the existence of a dominant position, as opposed to the creation of such a position, without its being necessary positively to establish market transparency, the Court will confine itself, in its examination of the pleas in law put forward, to ascertaining that the Decision properly applied the conditions defined in *Airtours* v *Commission*. Without its even being necessary to consider whether the opposite approach would lead the Court to step outside the framework of the dispute as defined by the parties, or whether it would merely constitute an application of the law in the context of a plea raised by the applicant, the Court must follow the approach thus outlined, in view of the inter partes principle, since that issue has not been discussed before the Court.

3. The Commission Decision

255 The relevant elements of the Decision for the purpose of examining the first plea may be summarised as follows.

256 The Commission's findings in respect of the various product and geographic markets are not disputed by the parties. At recital 12 to the Decision, the Commission considered that '... it [was] not necessary to decide whether distinct product markets based on genre exist and whether there is a distinct product market for compilations'. At recital 15, it found that '..., the relevant geographic markets [were] ... considered to be national'.

257 Likewise, it is not disputed that the various national markets have an oligopolistic structure, with the five majors holding, depending on the country, between 72 and 93% of the market and numerous much smaller record companies ('the independents'), which represent approximately [15-20%] of the market.

258 The five majors are characterised, moreover, by (i) a global presence, (ii) partial vertical integration, (iii) an upstream investment in music publishing and in the broadcasting and online music markets, (iv) considerable financial power which enables them to offer more attractive financial benefits to artists and (v) a vast and diversified portfolio of contract artists and a significant list of existing titles.

259 Furthermore, changes in demand show that sales have been in decline since 1999 (having fallen by 13% in the EEA between 1999 and 2002 and by more than 7% between 2002 and 2003). However, prices have remained quite stable. The Commission's market investigation also pointed to explanations other than those put forward by the parties to the concentration for that fall in sales, namely: the perceived high price level of CDs, the general economic downturn, the record companies' failure to meet consumers' tastes, the absence of quality content and of innovative artists and the record companies' failure to adapt to the technological challenges of the internet.

260 As regards the methodology employed by the Commission, it is stated at recital 69 to the Decision that, in assessing whether there was an existing collective dominant position, the Commission analysed whether in the previous three to four years the five majors had in fact pursued a coordinated price policy.

261 To that end, the Commission first analysed the development of average net prices on a quarterly basis for the top 100 single albums of each major, which represented at least 70 to 80% of their total music sales, in the five largest Member States, as in the Commission's view average prices are an appropriate means of assessing parallelism in pricing. The Commission thus analysed the development of average net prices, PPDs, gross-to-net price ratios and invoice and retrospective discounts (recital 72 to the Decision).

262 Second, the Commission examined the possibility that, on the basis of parallelism in average prices, price coordination could have been reached using list prices as focal points.

263 Third, the Commission analysed whether the different majors' discounts were aligned and sufficiently transparent to allow efficient monitoring of any price coordination, also at the level of net prices (recital 73 to the Decision).

264 The Commission's findings, which are couched in virtually identical terms for each of the five large countries, may be summarised thus:

— the Commission states that it 'found some parallelism in net average real prices and a relatively similar price development of the majors', but that 'these observations were, as such, not conclusive enough to constitute sufficient evidence of coordinated pricing behaviour in the past'; '[t]herefore, the Commission further investigated whether additional elements, namely list prices and discounts, were aligned and sufficiently transparent to provide sufficient evidence for coordination';

— the Commission 'found some indications that PPDs could have been used as focal points for an alignment of the majors' prices in France'. Depending on the country, each major generated with three of its main PPDs 55 to 80% of the total of the top 100 net sales of single albums in 2003. The Commission thus considers that '[i]n the light of those observations, the list prices of top albums seem to be rather aligned' (the United Kingdom, France and Italy, or aligned 'to a certain extent' in Germany and Spain);

— the Commission also found that the PPDs were rather transparent, since they appear in the majors' lists. It therefore seems possible to monitor other majors' list prices;

— net selling prices are closely linked to gross prices (PPDs), given the parallel development of Sony's and BMG's average gross prices and real average net prices over the last six years and also the very great stability, at any time, of the net price/gross price ratio, all albums taken together;

— however, the Commission found some variation at the level of discounts applied by the various majors and also differences of between 2 and 5 percentage points between Sony's and BMG's invoice discounts for the greater part of their 10 principal customers and more than 5 percentage points for some customers in some years (the situation is somewhat different on the French market);

— the parties to the concentration submitted data which reveal that the invoice discounts for a given customer vary over time and from album to album and that the discounts granted for a specific album vary from customer to customer. The market investigation revealed that those fluctuations resulted essentially from campaign discounts, which are used more flexibly than file discounts,

which are generally fixed annually. It cannot be shown, on the basis of those observations, that invoice discounts are sufficiently aligned between the parties to the concentration (the situation is somewhat different for France);

— as regards the transparency of discounts, the replies of customers ... to the Commission's market investigation revealed, on the whole, that the majors had some knowledge of the file discounts granted by their competitors, given their permanent interaction with the same customers. It is apparent, however, that campaign discounts are less transparent than file discounts and that monitoring campaign discounts also requires careful observation of developments in discounts of that type on the retail market. Although the Commission found that both Sony and BMG set up a system of weekly reports by their sales forces, it was unable to demonstrate that those reports ensured a sufficient degree of transparency of the campaign discounts granted by competitors.

265 The Commission concluded, next, at recital 109 to the Decision, that '[a]s the results of [its] detailed analysis of the majors' price development in the five largest Member States showed some indications of coordinated behaviour which were as such, however, not sufficient to establish existing collective dominance, [it had] further analysed whether the markets for recorded music were characterised by features facilitating collective dominance'.

266 To that end, the Commission examined product homogeneity (recital 110 to the Decision), market transparency (recitals 111 to 113 to the Decision) and the use of retaliation (recitals 114 to 118 to the Decision).

267 As regards product homogeneity, the Commission found that the heterogeneity of the content and the implications for pricing reduce transparency in the market and make tacit collusion more difficult since it requires some monitoring on the level of individual albums.

268 As regards market transparency, the Commission considered that the majors only need to monitor the pricing points of a limited number of best-selling albums to account for most of the sales. However, the Commission observes that further monitoring on album level is needed, in particular in relation to campaign discounts, and that this could make tacit collusion more difficult (recital 111 to the Decision).

269 As regards retaliation, recital 118 to the Decision states that the Commission found no evidence that retaliatory measures had been used in the past, which would have been evidence of a collective dominant position.

270 Without expressing at this stage of the decision any conclusion as to the existence of a collective dominant position in the five large countries, the Commission proceeded to examine the markets in the smaller countries, and made similar findings.

271 In particular, the Commission observed that there is a high degree of parallelism between the various majors' PPDs. As in the large countries, the most important discounts in the small countries are file discounts. Invoice discounts are not standard and are not public knowledge, and transparency in the market is therefore reduced. Given the relevance of the invoice discounts and the differences between them, the Commission did not find sufficient evidence to show that a parallelism of average net prices could be ascribed to tacit collusion between the majors, even if there was considerable alignment of PPDs and those PPDs could, in principle, be used as a focal point for tacit collusion (recital 150 to the Decision).

272 In addition, the considerations relating to product homogeneity, market transparency and retaliation for the large countries are also valid for the smaller countries of the EEA.

273 The Commission concluded at recital 153 that '[o]n this basis, there is not sufficient evidence to conclude that there is an existing collective dominant position of the ... majors in the national markets for recorded music [in the smaller countries]'.

274 On the basis of the foregoing considerations, the Commission concluded at recital 154 that there was not sufficient evidence to establish that the proposed transaction would lead to the strengthening of an existing collective dominant position in the markets for recorded music in any of the EEA countries.

275 It follows from the foregoing that that was on the basis of product homogeneity, market transparency and also the use of retaliation that the Commission concluded that there was no collective dominant position.

276 That is confirmed at recital 157, which is worded as follows:

'[a]s discussed in the section on the strengthening of a collective dominant position, the markets for recorded music display certain features which indicate a conduciveness to collective dominance. However, the Commission has not found sufficient evidence that the ... majors have held a collective dominant position in the

past, in particular due to the deficits in actual transparency, the partly heterogeneous product characteristics and the lack of actual evidence as regards retaliatory action in the past'.

277 It is in the light of those considerations that the Court must examine the various complaints put forward by the applicant.

4. Transparency

(a) The complaint alleging inadequate reasoning

278 The applicant maintains, in essence, that the Decision does not explain to the requisite legal standard the reasons why discounts, in particular campaign discounts, hinder the transparency necessary to allow the development of a collective dominant position.

279 By way of preliminary observation, the Court observes that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

280 The question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 150).

281 When the Commission declares a concentration to be compatible with the common market on the basis of Article 6(1)(b) of the Merger Regulation, it is a necessary and sufficient condition in relation to the duty to state reasons that the decision states clearly and unequivocally the reasons why the Commission considers that the concentration at issue does not raise serious doubts as to its compatibility with the common market. However, it cannot be inferred from that obligation that, in such a hypothetical case, the Commission must provide reasons for its assessment of all the matters of law and of fact which may be connected with the notified concentration and/or which were raised during the administrative procedure (see *Verband der freien Rohrwerke and Others* v *Commission*, paragraph 231 above, paragraph 185 and the case-law cited).

282 The Court must examine, first of all, the impact of the circumstance, emphasised by the applicant, that the Commission had concluded emphatically in the statement of objections that the concentration was incompatible with the common market on the ground, in particular, that a collective dominant position existed before the proposed concentration and that the market for recorded music was transparent and particularly conducive to coordination.

283 This fundamental U-turn in the Commission's position may indeed appear surprising, particularly in view of the late stage at which it was made. In effect, as may be seen from the case-file and from the oral argument before the Court, throughout the administrative procedure the Commission considered, on the basis of all the information which it had received, during an investigation lasting five months, both from the various operators on the market and from the parties to the concentration, that the market was sufficiently transparent to allow tacit collusion

on prices, and that it was only in the wake of the arguments submitted by the parties to the concentration, assisted by their economic adviser, at the hearing on 15 and 16 June 2004 that, without carrying out any fresh market investigations, it adopted the opposite position and, on 1 July 2004, sent the draft decision to the Advisory Committee.

284 However, as the Commission correctly submits, it follows from the case-law (*BAT and Reynolds* v *Commission*, paragraph 105 above) that, when the Commission rejects an application under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 17), it is sufficient for it to set out the reasons why it did not consider it possible to show the existence of an infringement of the competition rules, but it is not obliged to explain any differences by comparison with the statement of objections, since that is a preparatory document containing assessments which are purely provisional in nature and are intended to define the scope of the administrative procedure vis-à-vis the undertakings forming the subject of that procedure, or to discuss all the points of fact and of law dealt with during the administrative procedure. In *Aalborg Portland and Others* v *Commission*, paragraph 228 above, the Court of Justice referred to the provisional nature of a statement of objections and to the Commission's obligation to take into account the elements resulting from the administrative procedure, in order, in particular, to drop any objections which may have proved unfounded.

285 Admittedly, that case-law was developed in respect of proceedings for the application of Articles 81 EC and 82 EC and not in the specific field of the control of concentrations, where the need to observe the mandatory time-limits governing the adoption of decisions by the Commission does not allow it to extend its investigation, thus reducing the likelihood that the Commission will fundamentally alter its position as the administrative procedure advances. In its final observations, moreover, the Commission emphasised that the measures of investigation carried out after the hearing consisted essentially in consulting the operators on the market concerning the proposed commitments and did not deal with the objections raised against the notified concentration. However, the fact remains that the statement of objections is merely a preparatory document and that the final decision must be based solely on all the circumstances and evidence relevant for the purpose of the

assessment of the effects which the proposed concentration will have on competition in the reference markets. It follows that the mere fact that the Commission did not explain in the body of the decision the change in its position by comparison with that set out in the statement of objections cannot as such constitute a lack of, or an insufficient, statement of reasons.

286 Furthermore, the Commission also relies on the decided principle that if a concentration does not modify, or modifies only to a very limited extent, the competitive situation in a given market, the Commission cannot be required to set out specific reasoning on that point, and that it likewise does not fail in its duty to state reasons if, in its decision, it does not include specific reasons concerning the assessment of a number of aspects of the concentration which it considers to be manifestly irrelevant or insignificant. While those assertions are correct, it must be held that they are irrelevant in the context of the present complaint. First, the present complaint relates not to a limited modification brought about by the concentration but to the situation existing before the concentration and, second, it is not in dispute that the absence of sufficient transparency on the market constitutes the essential, and indeed the only, ground on which the contested finding that there was no pre-existing collective dominant position rests.

287 In the light of those preliminary remarks, the Court will examine whether the Decision contains a sufficient statement of reasons for the finding that the market is not sufficiently transparent to permit coordination of prices.

288 The examination of the question of the transparency of the market is dealt with in a dedicated section, at recitals 111 to 113 to the Decision. It is apparent, however, that the Decision also contains argument relating to transparency in the section dealing with the examination of the common understanding of the five majors on prices in the five large Member States, at recitals 69 to 108, to which the section dealing with transparency makes reference, and also in the section dealing with the assessment of the existence of a collective dominant position on the markets of the smaller countries, at recitals 148 to 153, to which the section dealing with transparency makes no reference. The Court must therefore examine in turn the reasons set out in those three sections.

289 As regards the section on transparency, it must be observed, by way of preliminary remark, that it contains only three recitals, although according to the Decision, and still more so according to the position defended by the Commission in its written submissions to the Court, in the present case transparency is the essential, and indeed the only, ground for the assertion that there is no collective dominant position on the markets for recorded music. It should also be noted that it is not concluded in that section that the market is not transparent, or even that it is not sufficiently transparent to allow tacit collusion. At the very most, it is stated, first, at recital 111 *in fine*, that the need to carry out monitoring at album level, in particular for campaign discounts, 'could reduce transparency in the market and may make tacit collusion more difficult' and, second, at recital 113 *in fine*, that '[h]owever, the Commission has not found sufficient evidence that, by monitoring retail prices or by contacts with retailers, the majors have overcome in the past the deficits as regards the transparency of discounts, in particular campaign discounts as described for the five larger Member States'. Clearly, such vague assertions, which fail to provide the slightest detail of, in particular, the nature of campaign discounts, the circumstances in which such discounts might be applied, their degree of opacity, their size or their impact on price transparency, cannot support to the requisite legal standard the finding that the market is not sufficiently transparent to allow a collective dominant position.

290 Next, it appears that, apart from the two extracts mentioned above, all the factors set out at recitals 111 to 113 to the Decision, far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent.

291 Thus, recital 111 refers to the limited number of pricing points and to the fact that the majors need to monitor only the pricing points of a limited number of best-selling albums to account for most of the sales, since the top 20 titles each year account for at least half of the annual sales in any one country.

292 What is even more, recital 112 states that there 'are further devices in the market which increase transparency and could facilitate the monitoring of an agreement'. These include, first of all, the publication of weekly hit charts which provide information on sales at title level and make it very easy to identify instantly what titles become hits, which, it is explained, 'greatly facilitates monitoring on the part of the majors'. Next, the Decision states that the nature of the market for recorded music is such that '[i]n order for a music retailer to be successful, it needs to carry products from all majors' and that '[a]s a consequence, the industry is characterised by long-term stable relationships between retailers and all majors'. The Commission also observes that '[m]oreover, a large part of the majors' sales of recorded music is channelled to a limited number of customers' and concludes that '[t]his situation of a limited number of players in the market is conducive to the adoption of cooperative strategies on behalf of the majors and also facilitates the monitoring and information flow'.

293 It must be stated that that list of devices and of factors that increase transparency and facilitate the monitoring of compliance with the collusion continues in the final recital in the section dealing with transparency in the market. The Commission states at recital 113 that a 'further source of transparency is the monitoring of the retail market'. It specifies in that regard that '[t]he market investigation revealed that Sony and BMG [had] set up a system of weekly ... reports, which include information on competitors'. Last, the Commission states that the investigation 'also confirmed that the major record companies' sales forces [were] in regular and permanent contact with retailers and wholesalers as negotiations of promotional support and of campaign discounts often [took] place on a weekly basis'.

294 It follows from the foregoing that, in the section of the Decision dealing with the examination of transparency, the Commission not only did not conclude that the market was opaque or not sufficiently transparent to allow a collective dominant position, but, moreover, mentioned only factors capable of giving rise to great transparency in the market and of facilitating the monitoring of compliance with collusion, with the sole exception of the rather limited and unsubstantiated assertion

that campaign discounts could reduce transparency and make tacit collusion more difficult. It must therefore be stated that that section could clearly not, in itself, be considered to support to the requisite legal standard the assertion that the market was not sufficiently transparent.

295 The Court must next examine whether such reasoning is to be found in the section dealing with the common understanding of the majors on pricing.

296 By way of preliminary observation, it is useful to bear in mind that the method followed and the findings made are, subject to very slight variations, the same for the markets of the five large countries, so that the following observations in respect of the United Kingdom apply, *mutatis mutandis*, to all five large markets.

297 After noting what was in part a similar development in the majors' net average real prices in the United Kingdom, the Commission states, at recital 75 to the Decision, that it then investigated whether additional elements, namely list prices and discounts, were aligned and sufficiently transparent to provide sufficient evidence of coordination.

298 It should be noted, by way of preliminary observation, that in the present section the Commission seeks to examine whether the majors' conduct is capable of demonstrating the existence of coordination. In its written submissions to the Court, however, the Commission emphasised on a number of occasions the need not to confuse the common understanding of the players on the market with evidence of the transparency of the market, stating that even a substantial alignment of the conditions applied would not be capable of demonstrating the transparency of the market. It follows that, according to the Commission's own theory, the findings relating to the majors' pricing practices and discounts have no relevance for the

purpose of determining transparency on the market. In those circumstances, the observations set out in that section should not make it possible to compensate for the inadequate reasoning described above. However, as that theory is not consistent with the Decision, the Court finds it necessary to examine whether the findings made in that section may provide sufficient reasons for the finding that there was no transparency on the market.

299 As regards, first, the PPDs, the Commission found that each major generated with its three most important PPDs more than 80% of its total top 100 single album CD net sales in 2003 and that, in addition, one or two PPDs within a range of 17 pence (between GBP 8.98 and GBP 9.15) accounted for more than 47% of the top 100 sales (the figures were quite similar in the other large countries: one or two PPDs in a range of EUR 0.36 — between EUR 12.55 and EUR 12.91 — for example, represented more than 60% of the top 100 sales in Italy). The Commission concluded that 'list prices of the best-selling albums appear thus to be rather aligned'. That is a prudent conclusion to say the least, as the alignment was in fact very marked.

300 It should be observed, moreover, in that regard that, in the statement of objections, the Commission had not found that prices were merely 'rather aligned' but indeed that they were 'substantially aligned' (according to point 82 of the statement of objections,'... the PPDs are placed very close together ...', and point 87 refers to a '... substantial alignment ...'). As regards the top 20 discs, the Commission had even mentioned virtually total alignment (see points 85 and 86 of the statement of objections), but that element of analysis was not repeated in the Decision, although when questioned on that point at the hearing the Commission did not maintain that the analysis was incorrect and could not explain its reasons for suppressing that element of analysis. Furthermore, recital 72 to the Decision mentions only four elements forming the basis of the analysis of the common understanding on pricing, whereas point 75 of the statement of objections also referred to a fifth element. Although, as recalled above, the statement of objections is only a provisional document, and although the Commission is perfectly entitled, and indeed obliged, to

modify its position in the light of the information which it has obtained in the course of its investigation, it cannot suppress certain relevant elements on the sole ground that they might not be consistent with its new assessment.

301 In any event, even considering only the observations set out in the Decision, the Commission concluded that list prices were rather aligned.

302 Likewise, recital 76 to the Decision states that the PPDs are 'rather transparent as they are available in the majors' catalogues' and that '[m]onitoring of other majors' list pricing appears therefore to be possible'. Although that assessment, too, is very prudent and very subdued by comparison with that made in the statement of objections (point 81 of the statement of objections indicated that '[t]he Commission found that it is extremely easy for majors to monitor the PPDs at which new expected hit albums are released because those PPDs are publicly available in the major's catalogues'), the fact remains that it underlines a further element that favours the transparency of the market. The fact that gross prices (list prices) are public knowledge assuredly assumes considerable importance for transparency in pricing.

303 It is thus apparent that, according to the very terms of the Decision, list prices, from both of the aspects examined by the Commission, namely alignment and transparency, constitute a factor of market transparency.

304 As regards, second, discounts, recital 78 to the Decision states that the Commission found that 'the level of the different majors' discounts varied to some extent' and that 'invoice discounts are [by comparison with the other forms of discount (co-op payments and retrospective discounts)] by far the most important discounts'. It then verifies, first, the alignment of invoice discounts and, second, their transparency.

305 As regards the alignment of discounts, recital 79 to the Decision states that '[o]n a customer-by-customer basis ..., the Commission found a certain degree of fluctuation and also differences of 2-5 percentage points between Sony's and BMG's invoice discounts for most of their top 10 customers, and of more than 5 percentage points for some customers in some years'. That recital also mentions that 'these fluctuations are mainly the result of campaign discounts[,] which are more flexibly used than file discounts that are regularly fixed on an annual basis,' and concludes that '[o]n the basis of these observations, it [could not] be established that invoice discounts [were] sufficiently aligned between the Parties [to the concentration]'.

306 It should be observed, as a preliminary point, that, as indicated above, the analysis therefore relates to the conduct adopted by the majors and not to the objective characteristics of the market, so that that finding is at the most of relative relevance for the purpose of assessing the degree of transparency on the market. The Commission emphasised, in that regard, that the finding of parallelism of the net average prices of the majors or of significant stability in the average discounts of a given major did not constitute evidence either of tacit coordination or of the necessary transparency and that the 'degree of alignment or stability at an aggregate level cannot be a substitute for cogent and consistent evidence that there is sufficient transparency to permit [undertakings in an oligopoly situation] to monitor each other's market conduct'. It must be concluded that the examination of the alignment of discounts does not, according to the Commission, constitute an appropriate test to assess the transparency of the market since, according to the Commission, even the alignment of discounts cannot demonstrate such transparency. The test will be appropriate only if it makes it possible to establish both transparency and lack of transparency. However, in so far as that argument of the Commission, as indicated above, does not find sufficient support in the Decision, the Court will examine whether the observations set out at recitals 78 and 79 demonstrate to the requisite legal standard the absence of transparency on the market.

307 It should be noted, first of all, that the variation in the general levels of invoice discounts applied by the parties to the concentration, as referred to at recital 78 to the Decision, is very low, namely [*confidential*] between 2 and 5% of their aggregate gross sales in the United Kingdom. In Italy, that variation is virtually nil, namely

[*confidential*] between 0 and 5% (recital 99 to the Decision). Likewise, the differences of between 2 and 5% [*confidential*] between the invoice discounts applied by the parties to the concentration for most of their largest customers, described at recital 79 to the Decision, are very low. It follows that the data in recitals 78 and 79, and in the corresponding recitals for the other large countries, cannot justify the conclusion that the invoice discounts are not sufficiently aligned.

308 It is apparent, next, that, according to the actual wording of the Decision, that low variation seems to be devoid of significance. According to recital 77 to the Decision, '[t]he Commission's analysis showed that transaction net prices are closely linked to gross prices (PPDs) as, for both Sony and BMG, their average gross real prices and average net real prices have moved closely in parallel over the last six years as also reflected by very stable net to gross price ratios across albums and time'. Contrary to the Commission's contention, moreover, recital 77 to the Decision does not merely record a parallel development solely of average gross and net prices for all albums (that is to say, the stability of the average discount on all sales), which would thus conceal any differences in the discounts granted for individual albums: that recital also describes the stability of discounts by individual album and over time. In effect, if the second part of the sentence in recital 77 referred, as the Commission contends, to the ratio of gross and net prices, it would be superfluous, as such a ratio is synonymous with the gap between gross and net prices, the stability of which is observed in the first part of the sentence. That emerges very clearly from the authentic version of the Decision, since that version uses the word 'ratios', in the plural ('very stable net to gross price ratios across albums and time'). Point 90 of the statement of objections also states, moreover, that the Commission found that 'net to gross price ratios were very stable across albums and across time for those individual releases examined by the Commission'. Likewise, point 75(iv) of the statement of objections states that the Commission analysed the development of gross and net sales of individual albums, stating in footnote 47 that '[a]n analysis for the gross and net prices was made individually for BMG's and Sony's top 10 albums in 2002'.

309 Furthermore, it follows from the last sentence of recital 77 to the Decision that discounts are not capable of really affecting the transparency of the market as regards prices resulting from, in particular, public list prices, since it is stated that '[i]f a significant deviation from pricing policies was being implemented by the majors through the grant of discounts, this deviation would have been reflected in their average net prices'.

310 In addition, although the Commission claims in its written submissions that the data relating to average net prices or to average discounts are not capable of establishing alignment or coordination and that all that matter are the individual decisions setting prices, it must be stated that that argument finds no support in the Decision. Thus, recital 70 to the Decision states that '[i]n the Commission's view average prices are an appropriate means to assess parallelism in the pricing behaviour of the majors'. Furthermore, if, as the Commission contended before the Court, the observations relating to pricing policy were not relevant in assessing transparency, it would follow that the observations on discounts set out at recitals 78 to 80 to the Decision (and at the corresponding recitals for the markets in the other large countries) would not be capable of containing the reasons for the absence of transparency, since discounts are a component of prices and are analysed in the context of the examination of coordination on pricing.

311 It follows from the foregoing that the observations relating to the alignment of invoice discounts set out at recitals 78 and 79 to the Decision (and at the corresponding recitals for the other large countries) cannot substantiate the assertion that there is insufficient transparency on the market.

312 As regards transparency of discounts, recital 80 to the Decision states that 'a majority of the [United Kingdom] customers' responses to the Commission's market investigation indicated that the major record companies have some knowledge of their competitors' file discounts due to their permanent interaction with the same customer base'. That finding is repeated, in identical terms, for the five large

countries (recitals 87, 94 101 and 108 to the Decision) While there is no need, in the context of the examination of the complaint alleging breach of the obligation to state reasons, to examine the merits of that finding, it is already clear that it appears to present the degree of transparency of the market in a very muted form by reference to the evidence on which it is based. In particular, in the case of Italy, it is scarcely possible to understand how the Commission was able to consider that 'a majority' of the customers' responses revealed that the majors had only 'some knowledge' of their competitors' discounts, when footnote 55 to the Decision states that '[f]ive out of five of the Italian retailers which replied to the question said that majors are aware of each other's PPDs and discounts'. Likewise, in the case of France, footnote 49 states that three out of four retailers said that majors were aware of each other's PPDs and discounts.

313 The Court observes, next, that for none of the countries concerned do the explanatory footnotes draw any distinction between file discounts and campaign discounts: thus the Commission's reasons for inferring from the customers' responses that the majors had some knowledge only of file discounts and not of campaign discounts are not apparent.

314 In any event, it must be held that, according to the Decision itself, the Commission considered that there was a certain transparency of file discounts.

315 It is thus apparent that the only element of opacity found in the contested decision consists in the assertion, at recital 80 (and at the corresponding recitals for the other large countries), that '[h]owever, it appears that campaign discounts are less transparent than file discounts and that their monitoring requires also a careful observation of promotional developments on the retail market'.

316 It should be noted, first of all, in that regard, that campaign discounts are not said to be opaque; the Decision merely states that they are 'less transparent than file discounts' and that their monitoring requires careful observations. It is also stated that the Commission found that both Sony and BMG had set up a system of weekly reports by their sales forces, although it could not be established that those reports ensured a sufficient degree of transparency of the campaign discounts.

317 It must be borne in mind, next, that, as is apparent from the second sentence of recital 150 to the Decision, the most important discounts in all countries are file discounts. It follows that, according to the Decision itself, campaign discounts have only a limited impact on prices. Likewise, it follows from recital 77 that over the previous six years discounts (both file discounts and campaign discounts) had not affected the agreed policy on prices.

318 It should also be observed that the Decision does not state that the market is opaque, or even that it is not sufficiently transparent to allow coordination of prices, but at the most that campaign discounts are less transparent, although the Decision does not provide the slightest information as regards their nature, the circumstances in which they are granted or their actual importance for net prices, or their impact on the transparency of prices.

319 It should further be borne in mind that, as stated above, the Commission described in the Decision numerous elements and factors which favour the transparency of the market and facilitate the monitoring of compliance with a collusive arrangement.

320 It follows that the few assertions relating to campaign discounts contained in the section of the Decision dealing with the examination of the coordination of prices in

the large countries, in so far as they are imprecise, unsupported, and indeed contradicted by other observations in the Decision, cannot demonstrate the opacity of the market or even of campaign discounts. Those assertions are confined, moreover, to indicating that campaign discounts are less transparent than file discounts, but do not explain how they would be relevant for the transparency of the market and do not make it possible to understand how they in themselves might compensate for all the other factors of transparency of the market identified in the Decision and thus eliminate the transparency necessary for the existence of a collective dominant position.

321 As regards, last, the observations in the section of the Decision dealing with the assessment of the situation in the smaller countries, the Commission observes, first of all, at recital 149 to the Decision, that the use of PPDs is quite similar to their use in the large countries. It observes, in that regard, that the essential part of sales is made on a few PPDs and that the use of PPDs shows parallelism between the majors, stating that '[a]s can be seen from the figures stated for each of the smaller countries, for the Netherlands and Belgium the two most important PPDs for both Sony and BMG are virtually identical'. The Commission concluded that there was a considerable degree of similar development between the majors' PPDs. It thus follows from recital 149 that the Commission found, in the smaller countries, a transparency and an alignment of PPDs that were even more marked than in the large countries.

322 As regards the discounts granted in the smaller countries, it must be stated that the section in question contains no observation relating to campaign discounts and that those discounts are not mentioned. Quite to the contrary, the Commission states at recital 150 to the Decision that, as in the five large countries, the most important discounts in all the smaller countries are file discounts.

323 Furthermore, although the Commission states that a very wide range of discounts are granted by Sony and BMG, that those discounts vary on a customer-by-customer basis, and that the range also differs between BMG and Sony, and that they are not

public knowledge and that transparency in the market is reduced, it provides no figures relating to their size or the extent to which they vary. Nor is there any explanation of whether and, if so, the reasons why the characteristics of the market do not, as in the large States, at the very least render the file discounts transparent. Likewise, it is not indicated whether the discounts (file discounts and/or campaign discounts) lead to different net prices, although the assertion that 'the Commission has not established that there is sufficient evidence to show that a parallelism of average net prices could be ascribed to tacit collusion' seems rather to indicate that they do not.

324 It follows that the section dealing with the smaller countries, too, contains no reasoning for the finding that the market is not transparent on account of the campaign discounts. In any event, the situation existing in the smaller countries cannot constitute a valid ground for the finding relating to the degree of transparency in the markets in the large countries.

325 It follows from all of the foregoing that the complaint alleging insufficient reasoning for the finding relating to the transparency of the market is well founded, which in itself is reason to annul the Decision.

326 In the interest of completeness, the Court will none the less examine, in addition, the applicant's complaints and arguments that the elements put forward by the Commission in order to demonstrate the insufficiency of the transparency of the market are vitiated by a manifest error of assessment.

(b) The complaint alleging a manifest error of assessment

327 It must be borne in mind, first of all, that the basic provisions of the Merger Regulation, in particular Article 2, confer on the Commission a certain discretion,

especially with respect to assessments of an economic nature. Consequently, review by the Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations (*Kali und Salz*, paragraph 245 above, paragraphs 223 and 224; *Commission* v *Tetra Laval*, paragraph 232 above, paragraph 38; *Gencor* v *Commission*, paragraph 246 above, paragraphs 164 and 165; *Airtours* v *Commission*, paragraph 45 above, paragraph 64; Case T-80/02 *Tetra Laval* v *Commission* [2002] ECR II-4519, paragraph 119; and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 60).

328 However, the Court of Justice has held that:

'Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish 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 analysis and whether it is capable of substantiating the conclusions drawn from it' (*Commission* v *Tetra Laval*, paragraph 232 above, paragraph 39).

329 It is in the light of those considerations that the Court must examine whether the Commission's assessments relating to the transparency of the market are vitiated by a manifest error.

330 The applicant observes, first of all, that before the Decision was adopted the markets for recorded music had been considered sufficiently transparent to allow a collective dominant position.

331 The applicant recalls in that regard that when examining the proposed merger between EMI and Time Warner the Commission had found that the market for recorded music was characterised by 'standard pricing products' and was 'very transparent' (see points 37, 38 and 57 of the statement of objections in respect of the proposed EMI/Time Warner merger).

332 The applicant further submits that in its Report of September 2002 on the market for recorded music in the United Kingdom ('Wholesale supply of compact discs'), the Office of Fair Trading also considered that the market presented a high degree of transparency and identified a series of factors (in particular, the weekly publication of hit parades, sales in common and regular visits to retailers in order to check stocks) that made more information on competitors available than in many other industries (see point 114 of the statement of objections).

333 Last, the applicant claims that in the present case, after a first examination of the proposed concentration between Sony and Bertelsmann, notified on 9 January 2004, and a first market investigation, in particular among retailers and the majors, the Commission, by decision of 12 February 2004, concluded that the transaction raised serious doubts as to its compatibility with the common market and therefore initiated the procedure in accordance with Article 6(1)(c) of the Merger Regulation. In the course of that procedure, the Commission pursued its investigation and sent a series of requests for information to the parties to the concentration (on 19 February, 5 March, 17 March, 23 March, 1 April and 10 May 2004), to the other majors (on 11 March and 10 May 2004) and also to the various players on the market (see also the questionnaire to retailers of 16 April 2004). On the basis of all the data and information obtained, and also of the discussions with Sony and Bertelsmann, the Commission on 24 May 2004 issued a statement of objections in which it concluded provisionally that the transaction was incompatible with the common market, notably because it would strengthen a collective dominant position on the market for recorded music.

334 The applicant emphasises that in the statement of objections the Commission, first, found a parallelism in the majors' prices, both gross and net, and, second, considered that the market was sufficiently transparent to permit the development of a collective dominant position of the majors and the monitoring of collusion on prices (see, in particular, point 93 of the statement of objections). At points 94 to 115 of the statement of objections, the Commission analysed, in that regard, 10 factors which make the market for recorded music particularly conducive to coordination and facilitate the monitoring of such coordination. The Commission thus identified (a) product homogeneity, (b) the limited number of PPDs, (c) the limited number of relevant albums, (d) the weekly publication of hit-parades, (e) customer stability, (f) the relative stability of market shares, (g) the high number of contacts owing to the vertical integration of the majors, (h) the high number of structural links between majors, such as joint ventures for compilations and distribution and also licensing and distribution agreements, (i) joint participation in industry associations and (j) joint negotiation of copyright.

335 While it is thus apparent that, contrary to the assessment made by the Commission in the Decision, the market in question was regarded both by the Commission and by the United Kingdom competition authority in respect of the United Kingdom market as being very transparent and in any event as being sufficiently transparent to permit the necessary monitoring of tacit coordination of prices, that sole circumstance cannot in itself establish that the opposite position adopted by the Commission in the Decision is vitiated by a manifest error of assessment. First, the findings of a national competition authority are not in any way binding on the Commission for the purposes of its analysis and, second, as observed above, the statement of objections is merely a preparatory document, the findings of which are purely provisional, and the Commission is obliged to take account of the evidence obtained during the administrative procedure and also of the arguments put forward by the undertakings concerned, and must drop any objections which might ultimately prove to be unfounded. Naturally, that observation applies a fortiori in the case of provisional findings made a number of years previously in the context of the examination of a different concentration or of the findings of a different competition authority in a different context. That does not mean, however, that the statement of objections is wholly without merit or wholly irrelevant. In effect, unless the entire investigative administrative procedure is to be deprived of the slightest value, the Commission must be in a position to explain, not in the decision, admittedly, but at

least in the context of the proceedings before the Court, its reasons for considering that its provisional findings were incorrect; but above all, the findings set out in the decision must be compatible with the findings of fact made in the statement of objections, in so far as it is not established that the latter findings were incorrect.

336 The applicant then maintains, primarily, that all the evidence obtained by the Commission and set out both in the statement of objections and in the Decision indicates that the prices applied by the majors are transparent and certainly sufficiently transparent to permit tacit coordination. The Commission adduced no evidence establishing that the market was opaque but merely inferred from the alleged variations in discounts that they could reduce transparency. The applicant formulates a series of complaints relating to the considerations on discounts and contends that the Commission accorded excessive importance to discounts, in particular campaign discounts, without having even examined their relevance.

337 The Court will examine in turn the complaints and arguments relating to the factors of market transparency set out in the Decision and then those which seek to challenge the alleged factors of opacity, comparing them at the same time with the arguments and evidence put forward by the defendant and the interveners, even though numerous elements and arguments are interconnected and although the assessment of transparency on the market must be based on a global analysis of all the relevant elements.

Factors of transparency identified in the Decision

338 It must be borne in mind, in the first place, that the majors' gross prices to their customers (retailers, supermarkets, etc.) are public, since they feature in their catalogues. That indisputably constitutes a very important source of price

transparency. Admittedly, recital 76 to the Decision states only that 'the PPDs are rather transparent as they are available in the majors' catalogues. Monitoring of other majors' list pricing appears therefore to be possible'. However, that muted formulation cannot qualify the finding of transparency of gross prices, as the Commission did not adduce, either in the Decision or during the proceedings before the Court, any evidence with a view to explaining that gross prices were only 'rather transparent'. In the statement of objections (point 81), moreover, the Commission observed that 'it is extremely easy for majors to monitor the PPDs at which new expected hit albums are released because those PPDs are publicly available in the major's catalogue'.

339 It should be emphasised, in the second place, that it is indicated in the Decision that although the parties to the concentration stated that they used more than 100 PPDs, the Commission found that each major generated, with its three main PPDs, depending on the country, between more than 55% and more than 80% of its top 100 sales. That concentration of the essential part of album sales on a very limited number of reference prices, which is confirmed by the majors' replies, has the effect of facilitating coordination of prices, as the Commission stated, moreover, at point 96 of the statement of objections ('This pricing system facilitates coordination since it provides easily interpretable information about the level at which the majors are pricing most of their sales').

340 In its defence, the Commission did, admittedly, discuss the complexity of fixing gross prices, in that individual albums have varying degrees of success, which influences the initial fixing of the PPD when the album is released and subsequent changes in the PPD, so that it is difficult to determine whether an album's PPD is altered in order to support declining success or as part of a strategy of 'deviation'. It must be stated, first, that that argument finds no support in the Decision and even contradicts the findings therein. As stated above, the Commission found, at recital 76 to the Decision (and at the corresponding recitals for the other countries) that although the majors stated that they use more than 100 PPDs, they use only two or three PPDs for the essential part of their sales. Furthermore, recital 110 to the

Decision states that, '[d]espite the heterogeneity of the content, the way in which albums are priced and marketed on the wholesale level appears to be quite standardised'. It should then be observed that, as the degree of success of an album is known at any time because of the hit parades, the majors could, contrary to the Commission's contention, easily determine whether or not the change in an album's PPD comes within the agreed price policy.

341 In the third place, recital 111 to the Decision reads as follows:

'[d]espite the fact that sales of albums take place in few price points, the variety of albums priced at different list prices could complicate the monitoring of a tacit agreement. However, majors only need to monitor the pricing points of a limited number of best selling albums to account for most of the sales. Data provided by the [parties to the concentration] show that the top 20 titles each year account for at least half the yearly sales for BMG in all countries except Germany' (see also point 85 of the statement of objections).

342 In its defence, however, the Commission claimed that, as the degree of future success is not foreseeable with complete certainty before a given album is released (or the duration of its success after its release), successful coordination would require the constant monitoring of PPDs on a much larger number of individual albums than the number of albums subsequently deemed to have made the greatest contribution to each major's turnover.

343 It must be stated that that line of argument finds no support in the Decision, where it is indicated that the majors need monitor only the reference prices of a limited

number of albums among the best sellers in order to monitor the bulk of sales. That monitoring, incidentally, is largely facilitated by the hit parades, which supply at any time a very precise indication of the developing success of the various albums.

344 Furthermore, as the applicant rightly observes, the Decision also states that '[t]he Commission found some indications that PPDs could have been used as focal points for an alignment of the majors' prices'. The Commission's assertion that that finding is not final can clearly not be upheld, as the Decision, by definition, constitutes the ultimate stage in the procedure involving the examination of the concentration and as the Commission refers to no other element in the Decision that would invalidate or moderate that finding. At the very most, the Commission relies on the fact that the parties to the concentration submitted evidence demonstrating that the combinations of PPDs corresponding to their respective top 20 albums frequently changed considerably from one quarter to another and that the unpredictability of success obliged each major to monitor the PPDs of more than 80 albums (or 60 albums after the concentration) produced by its competitors. However, that assertion was specifically not reiterated in the Decision and, on the contrary, is contradicted by the findings set out therein.

345 It must also be stated that the data prepared by the economic advisers to the parties to the concentration, quite apart from the fact that it is impossible to see how they might permit the conclusion which the Commission draws from them, are unclear and do not appear to be reliable. Thus, it is surprising, to say the least, that the PPDs were able to increase, from one quarter to another, in the proportions indicated [*confidential*].

346 In any event, the number of albums which, according to the Commission, would have to be monitored does not seem to be so high as to render the exercise impossible or even particularly onerous or costly, a fortiori since, as the Commission acknowledges, the weekly charts considerably facilitate monitoring.

347 It follows from the foregoing that three factors referred to in the Decision — the public nature of gross prices (PPDs), the limited number of reference prices and the limited number of albums to be monitored — are capable of giving rise to a high level of transparency of prices.

348 Furthermore, as stated at recital 112 to the Decision, '[t]here are further devices in the market which increase transparency and could facilitate the monitoring of an agreement'.

349 In the first place, the Decision states, at recital 112, that '[t]he publication of weekly hit charts with information on sales at title level makes it very easy to identify instantly what titles become hits and generate the bulk of sales'. The charts are thus an important source of transparency, since they make it possible not only to identify, at any time, the best selling albums but also to ascertain whether the albums are sold at a price corresponding with their level of success, as PPDs are public. The Decision states, moreover, that '[s]uch availability of weekly public information on sales at the title level greatly facilitates monitoring on the part of the majors'.

350 In the second place, the market is 'characterised by long-term stable relationships between retailers and all majors', as each retailer needs to carry the products of all the majors (recital 112 to the Decision).

351 In the third place, there is, according to the Decision, only a limited number of players on the market, a large part of the majors' sales of recorded music being channelled to a limited number of customers. As stated at recital 112 *in fine*, that situation 'is conducive to the adoption of cooperative strategies on behalf of the majors and also facilitates the monitoring and information flow'.

352 In the fourth place, the Commission found that there was monitoring of the retail market. According to recital 113, '[t]he market investigation revealed that Sony and BMG [had] set up a system of weekly ... reports, which include[d] information on competitors'.

353 In its defence, the Commission does, admittedly, claim that the reports submitted to it by the parties to the concentration contained no information on discounts and that it was unable to demonstrate that those reports guaranteed a sufficient degree of transparency of the campaign discounts granted by competitors.

354 It should be observed in that regard, first of all, that, whatever the degree of precision of the information on gross, net or retail sales prices or discounts contained in those reports, they constitute, as the Decision, moreover, states, an additional factor of the transparency of the market. It follows from the weekly reports submitted by the Commission, moreover, that those reports contain information on stocks of the competition's albums and their developments.

355 It should be observed, next, that the reports in question are merely a few examples of weekly reports produced by the parties to the concentration themselves.

356 [*Confidential*]

357 [*Confidential*]

358 [*Confidential*]

359 [*Confidential*]

360 [*Confidential*]

361 In the fifth place, recital 113 to the Decision states that the majors' sales forces are in regular and permanent contact with retailers and wholesales, as negotiations of promotional support and of campaign discounts often take place on a weekly basis. Although there is nothing unusual about contacts with retailers, the frequency of the contacts allowed the sales forces to obtain more specific information about the competition and the conditions applied by competitors and to follow, virtually in real time, developments in the success of the competitors' various albums. That is *a fortiori* so in the present case since, as stated at recital 112 to the Decision, the nature of the market is such that each retailer must carry products from all majors, so that each major is in permanent contact with all its competitors' customers and is thus able to obtain specific information on the conditions applied by those competitors. It is also stated that a large part of the sales is channelled to a limited number of customers. Those factors are such as to create a high degree of transparency on the market. The Commission concluded, moreover, at recital 112 to the Decision that that situation 'is conducive to the adoption of cooperative strategies on behalf of the majors and also facilitates the monitoring and information flow'.

362 It follows from those five additional factors that the already strong transparency resulting from the first three factors mentioned above (in particular the publication of selling prices) is increased even further. It should be observed, in that regard, that at point 116 of the statement of objections the Commission had concluded, moreover, that 'the structure of the market [was] such that information flow[ed] easily and monitoring on the part of the majors of each other's policies [was] routine'.

363 The Court must now examine whether the factors on which the Commission relied as a source of opacity on the market are sufficiently significant to preclude the conclusion that the market is sufficiently transparent to permit monitoring of compliance with the common policy adopted on pricing.

Elements capable of rendering the market opaque

364 In spite of the numerous sources of transparency on the market described above, the Commission, as is apparent from recital 157 to the Decision, concluded that there was no collective dominant position owing to the deficits found in actual transparency.

365 It follows from the section dealing with the examination of the transparency of the market that that assessment relies on the assertion, at recital 111 to the Decision, that 'further monitoring on album level is needed in particular in relation to campaign discounts'. That recital further indicates that '[t]he market investigation shows that this could reduce transparency in the market and may make tacit collusion more difficult' and that '[t]he Commission has not found sufficient evidence to conclude that these difficulties [had] been overcome in the past'. In that regard, recital 113 to the Decision states that the Commission '[had] not found sufficient evidence that, by monitoring retail prices or by contacts with retailers, the majors [had] overcome in the past the deficits as regards the transparency of discounts, in particular campaign discounts'. It follows that it was because of discounts, or at least campaign discounts, that the Commission considered that the market was not sufficiently transparent to allow the establishment of a collective dominant position.

366 It should be observed, as a preliminary point, that the Commission did not conclude in the Decision that, because of the discounts, the market was not transparent, or even that the discounts affected transparency or the degree of transparency necessary to permit a collective dominant position, but that, at the most, they might 'make tacit collusion more difficult'. In those circumstances, and in the light of the public, and therefore transparent, nature of the PPDs, and of all the other factors which, according to the same words of the Decision, increase the transparency of the market and facilitate monitoring of compliance with an agreement, the observations and considerations in the section dealing with the examination of the transparency of the market do not, as the Court held in the context of the complaint relating to a statement of reasons, justify the finding that the market is not sufficiently transparent.

367 However, in the section dealing with the examination of the common understanding on prices, the Commission found, in identical terms for the five large countries, fluctuations in discounts, resulting essentially from campaign discounts, and indicated that it had been unable to demonstrate a sufficient degree of transparency of campaign discounts (recitals 79 and 80 to the Decision for the United Kingdom, and recitals 86 and 87, 93 and 94, 100 and 101 and 107 and 108, respectively, for the other large countries).

368 The Commission's assessment rests on the idea, put forward expressly in its written submissions and implicit in the Decision, that tacit collusion on prices can be effective only if it relates to net selling prices, that is to say, in the present case, PPDs minus discounts. There would be no point in having a common understanding at the level of PPDs, and in being able to monitor compliance with that arrangement, if secret and opaque discounts eliminated the effects of that coordination of list prices.

369 It is apparent from the Decision (recital 73) that the majors grant discounts of several types: invoice discounts (file or campaign), retrospective discounts and payments under commercial cooperation agreements. It is common ground that only invoice discounts were considered relevant by the Commission for the purpose

of assessing transparency. First, according to recital 73 (and also according to recital 151), the investigation showed that 'co-op spending' was rather a kind of marketing payment than a proper discount and, second, retrospective discounts, according to recitals 78, 92, 99 and 106 to the Decision, are absent or weak and, as stated at recital 151 to the Decision, 'as the purpose of these discounts is a kind of "loyalty rebate", [they] do not have an immediate effect on price competition'. All the recitals to the Decision relating to the transparency of discounts (recitals 111 and 113 in the section dealing with transparency and recitals 79 and 80 in the section on the common understanding on prices for the United Kingdom and the corresponding recitals for the other large States) contain only observations on the transparency of invoice discounts (file or campaign). Likewise, in its written submissions to the Court, the Commission referred only to the lack of transparency of invoice discounts.

370 It must be stated, first of all, that recitals 111 and 113 contain no specific findings, but in reality merely refer to the observations developed in the section dealing with the examination of the common understanding on prices (that is to say, recitals 79 and 80 for the United Kingdom and the corresponding recitals for the other countries, which are formulated in exactly the same terms).

371 It should be emphasised, however, that the reference concerns, at least expressly, only campaign discounts and not file discounts. Recital 111 refers to the need for monitoring on album level 'in particular in relation to campaign discounts' and, furthermore, recital 113 *in fine* mentions the 'deficits as regards the transparency of discounts, in particular campaign discounts as described for the five large Member States'. It thus follows from the observations in the section dealing with transparency that opacity results only from campaign discounts. That analysis is confirmed, moreover, by recitals 79 and 80. Thus, recital 79 to the Decision states that fluctuations in discounts 'are mainly the result of campaign discounts[,] which are more flexibly used than file discounts that are regularly fixed on an annual basis'.

Likewise, recital 80 to the Decision states that the majors 'have some knowledge of their competitors' file discounts due to their permanent interaction with the same customer base' and that 'campaign discounts are less transparent than file discounts'. At no point in the Decision is it claimed, still less is it demonstrated, that file discounts are opaque or insufficiently transparent.

372 In its written submissions to the Court, the Commission also acknowledged that file discounts are rather transparent, in so far, notably, as they are fixed on an annual basis and apply to all the customer's sales (at what may be different rates for pop music, classical music or TV-advertised albums), and put forward arguments solely with a view to establishing the opacity of campaign discounts alone. In its defence, it also explained that it had accorded such importance to campaign discounts because of the need to monitor all the components of net prices, as the relatively transparent PPDs and some knowledge of file discounts were not sufficient if significant opaque campaign discounts were the source of fluctuations in net prices. Likewise, the Commission indicated in its submissions that it was unable to conclude that the majors knew with certainty the any other major's real practices in fixing net prices 'in the face of evidence of rather transparent PPDs, some evidence of a certain transparency of file discounts, and strong evidence of the opaque and complex character of campaign discounts'. Last, in its final observations, the Commission even expressly indicated that it had concluded in the Decision that there was 'a material degree of transparency for both PPDs and file discounts'.

373 Accordingly, it follows both from the Decision itself and from the arguments developed by the Commission before the Court that the only alleged element of opacity of the market resulted from the lesser transparency of the campaign discounts.

374 It must be emphasised, first of all, that only recital 80 to the Decision (and the corresponding recitals 87, 94, 101 and 108 for the other four large States, which are

drafted in identical terms) was expressly aimed at the transparency of discounts. That recital states that, '[a]s regards transparency of discounts, a majority of the ... responses to the Commission's market investigation indicated that the major record companies have some knowledge of their competitors' file discounts due to their permanent interaction with the same customer base. However, it appears that campaign discounts are less transparent than file discounts and that their monitoring requires also a careful observation of promotional developments on the retail market'.

375 It should be observed, in that regard, that for most of the large countries the responses mentioned in the footnotes to recitals 80, 87, 94, 101 and 108 to the Decision indicate a higher degree of transparency than that referred to in the Decision. Thus, footnote 55 states that '[f]ive out of five of the Italian retailers which replied to the question said that majors are aware of each other's PPDs and discounts'; the proportion is three out of four for French retailers, while the fourth stated that it was unable to comment (see footnote 49). With the exception of a single United Kingdom customer, for none of the other countries does the explanatory footnote indicate that at least one retailer replied that the majors are not aware of discounts. Likewise, with the exception of a single retailer out of eight in Germany, no retailer, according to the explanatory footnotes, stated that the majors were only partly aware of each other's discounts.

376 It should further be pointed out that none of the explanatory footnotes states that the retailers' replies indicated that the majors were aware only of file discounts and not of campaign discounts, as the responses refer only to discounts, without distinguishing between them.

377 Accordingly, it must be held that the evidence, as mentioned in the Decision, does not support the conclusions drawn from it.

378 It is apparent, next, that the conclusions drawn from that evidence in the Decision are also markedly different from the findings made in the statement of objections.

379 Thus, the statement of objections indicated at point 81 that 'the Commission considers that there is sufficient evidence that majors are aware of each other's commercial terms'. What is more, it follows from the statement of objections that that is not so much an assessment by the Commission, that might be modified, but, rather, a finding of fact resulting from its investigation. Point 92 of the statement of objections states that 'information obtained from retailers indicates that not only are majors aware of each other's list prices but they are also aware of each other's discounts and commercial practices. Some major retailers in France, the United Kingdom and Germany have communicated to the Commission that they believe that the majors are well aware of each other['s] commercial terms'. Likewise, explanatory note 54 to the statement of objections reports that retailers declared that the 'majors are fairly well acquainted with the range of discounts that their competitors gave. It is widely known that the discounts on commercial operations granted by the recording companies are known by the majors['] commercial teams. A customer declared [that] the majors knew each other's discounts within 0.5%-1 %'. The Commission continues, at point 92 of the statement of objections, in the following terms: '[m]any retailers also think it is a common practice to use the terms of conditions obtained from one of the majors to leverage a position with the other majors', citing, in explanatory note 55, the following response of a retailer: '... in commercial negotiations reference is made to the conditions and discounts operated by other majors. The small number of suppliers make it fairly easy for majors to get a complete picture of the conditions they apply and to align themselves accordingly'. Last, although this is an assessment rather than a finding, the Commission indicated

at point 129 of the statement of objections that 'the market investigation confirmed that the major record companies' sales forces are in regular and permanent contact with retailers and wholesalers ... In combination with the publication of various charts, the major record companies can thereby readily monitor whether any other majors grants additional discounts for hits albums'.

380 A reading of the Commission's defence, moreover, raises still further questions. At footnote 45, accompanying paragraph 51 of the Commission's defence, the Commission states that '[t]he notifying parties argued that a number of the positive responses referred to PPDs alone or failed to distinguish between PPDs and discounts. Only five responses ... out of a total of 36 accessible responses from all countries specifically stated that there was some transparency on discounts; the opposite view was expressly taken by 11 respondents'. While the first sentence does admittedly indicate that this is only an argument put forward by the parties to the concentration, the second sentence, on the contrary, is presented as a finding of fact by the Commission. It must be stated that that assertion is in manifest contradiction with the presentation of the retailers' responses in the Decision, where, as stated above, footnotes 49, 52, 55 and 57 indicate that most retailers had replied that the majors were aware of their competitors' discounts, with no indication that this constituted only partial or imprecise knowledge, and none (with the exception of a single United Kingdom retailer) had stated that the discounts were not transparent. The Commission's argument cannot therefore be followed. Furthermore, the Commission's defence refers only the responses of 36 retailers, whereas there are at least 42 responses, which, moreover, the parties to the concentration commented on in their paper on transparency of 17 June 2004.

381 Next, it is apparent from the Commission's answers to the written questions put by the Court that the conclusions which it drew from the investigation among retailers may be explained, in part, by the fact that it followed the line of argument developed by the parties to the concentration in their response to the statement of objections and in a paper on transparency lodged on 17 June 2004 after the hearing before the

Commission, where they argued that the positive responses of retailers which did not specify whether they were referring to PPDs and/or to discounts should be disregarded.

382 Before examining the merits of that explanation, the Court must first of all express its surprise at the belated stage at which it was presented. As the degree of transparency constitutes the essential issue in the present case, it is difficult to understand that that explanation, relating to the principal element, is not to be found either in the Decision or, above all, in the defence, or even in the supplementary observations, but was put forward only on the eve of the hearing in answer to a specific question put by the Court.

383 As regards the merits of the argument, it must be borne in mind that the questionnaire which the Commission sent to retailers asked the following question: 'According to the experience of your purchasing department, are record companies aware of their competitors' PPDs and discounts?' As the applicant has correctly observed, there is no valid reason to consider that the affirmative replies (which, moreover, are sometimes expressed in very categorical terms, such as 'of course', 'absolutely' or 'certainly') of the retailers which did not specify whether they were referring to prices and/or discounts cannot be taken into consideration. An answer to the question as formulated, whether in the affirmative or in the negative, must logically be understood to refer to both points in issue if it contains no restriction or additional detail. On the hypothesis that the Commission considered that there was none the less still some doubt as to the precise meaning of the responses, it was incumbent upon it, especially in the light of the importance which that point assumed for the Decision, to ascertain that precise point with the retailers in question, which, moreover, it could have done within a very short time.

384 In any event, it must be stated that the assertion of the notifying parties, endorsed by the Commission, that 'only five out of a total of 36 responses indicated expressly that there was some transparency, while the opposite point of view was expressly put forward in 11 responses' is manifestly incorrect.

385 As regards what are alleged to be the 11 responses indicating expressly that there is no transparency for discounts, it must be observed that it follows from Sony's and BMG's paper of 17 June 2004, first of all, that the alleged figure is 10 responses and not 11 (see p. 213) and that, in reality, the paper mentions only seven, only four of which relate to the large countries forming the subject of the principal examination in the Decision. It is apparent, moreover, that virtually none of those four responses can be read as containing an expressly negative response. It is clear that the response [*confidential*], 'Unserer Meinung nach kennen sie die PPDs der Konkurrenten' ('in our opinion they know their competitors' PPDs'), cannot be understood as indicating expressly that the majors are not aware of their competitors' discounts. The other response relating to the German market states 'Nicht im Detail, aber sie wissen i.R. wie hoch die Rock-Bottom Preise des Mitbewerbers sind' ('not in detail, but they are aware of the competition's absolute minimum price'), which does not constitute an expressly negative response either. The response on page 61 [*confidential*] relating to the United Kingdom market is the only expressly negative response ('PPDs — Yes. Discounts — No'), but it immediately states '[a]lthough, if an album is discounted across retail the subsequent decrease in the general retail price will be obvious to the whole market'. Last, the other allegedly negative response [*confidential*] mentioned in the paper of 17 June 2004 ('We are not aware that record companies are aware of their competitors' PPDs and discounts') is not in the file. In effect, the other four responses relating to the United Kingdom market (according to both the Decision and the documents submitted to the Court by the Commission, five United Kingdom retailers responded), indicated, respectively, 'PPDs — Yes Discounts — Within 0.5%-1%' (p. 56), 'Of course' (p. 58), 'Yes' (p. 63), 'Record companies are very well aware of their competitors' PPDs. ... believes they are also fairly well acquainted with the range of discounts that their competitors give' (p. 65) (this retailer also states, in response to the next question, that 'in commercial negotiations reference is made to the conditions and discounts operated by other majors' and that '[t]he small number of competing suppliers makes it fairly easy for the majors to get a complete picture of the conditions they apply and to align theirs accordingly'). It must be stated that, far from being expressly negative, all the United Kingdom customers' responses clearly reveal quite strong transparency in both PPDs and discounts.

386 It follows, moreover, from an examination of the retailers' responses submitted by the Commission on the eve of the hearing that those responses do not support the conclusions which the Commission drew from them. Numerous responses reveal that the discounts were transparent or that the majors were aware of them.

387 It follows from the foregoing that the Commission's assessment of the retailers' responses is vitiated by a manifest error.

388 As regards, next, the distinction which the Decision draws between the transparency of file discounts and the transparency of campaign discounts, it is apparent from the defence that it was on the basis of the analysis which the parties to the concentration made of the retailers' responses, the declarations of the national executives of Sony and BMG and the monitoring reports of the commercial representatives that the Commission concluded that, while transparency could affect PPDs and, to a certain extent, file discounts, it probably did not extend to campaign discounts, which are negotiated on a case-by-case basis.

389 None of those three sources can support the conclusion drawn by the Commission. In the first place, as stated above, the Commission's assessment of the retailers' responses, in accordance with the analysis carried out by the parties to the concentration, is vitiated by a manifest error. Furthermore, none of the retailers' responses, whether positive or negative, draws a distinction between file discounts and campaign discounts. In the second place, mere declarations by the representatives of the parties to the concentration clearly cannot constitute valid proof of the opacity of the campaign discounts. In the third place, the commercial representatives' weekly monitoring reports, which include information on competitors, constitute, as explained at recital 113 to the Decision, a further source of transparency. Accordingly, even on the assumption that they do not contain very detailed information on discounts, in particular campaign discounts, they are not in any event capable of establishing the opacity of campaign discounts. Furthermore, as observed above, [*confidential*].

390 It follows from the foregoing that the assessment of the transparency of the market made in the Decision is vitiated by a manifest error in so far as it relies on elements which are not capable of supporting the conclusions drawn from them.

391 In the interest of completeness, however, the Court will examine the arguments relating to the variation and the complexity of the campaign discounts.

392 At recitals 79, 86, 93, 100 and 107 to the Decision, the Commission noted a certain degree of fluctuation and also differences between Sony's and BMG's invoice discounts for most of their main customers in the five large countries (2 to 5% in the United Kingdom, Germany and Spain; 1 to 3 % in Italy, the situation being slightly different in France but in the same order as regards size if all discounts are taken into account). The Decision also states:

'In addition, the [parties to the concentration] submitted data according to which invoice discounts for a given customer varied over time and from album to album, and discounts for a given album varied from customer to customer. The market investigation indicated that these fluctuations are mainly the result of campaign discounts[,] which are more flexibly used than file discounts'.

393 In its defence, the Commission produced numerous tables with the aim of showing the variation and complexity of discounts. These, it claimed, showed that campaign discounts are less transparent than file discounts and that monitoring them would require a detailed observation of promotions on the retail market and the Commission had not discovered sufficient evidence to show that the majors had proceeded in that way. In its defence, the Commission stated that it had examined the components of the net price of an individual album (PPD, file discount, possible campaign discount) and had concluded that a sufficient degree of transparency of all of those components would be necessary in order for a major to be reasonably certain that it knew another major's actual methods of fixing net prices, as expressed at the level of customers and albums, and that it 'could not so conclude in the face of evidence of rather transparent PPDs, some evidence of a certain transparency of file discounts, and strong evidence of the opaque and complex character of campaign discounts'.

394 That line of argument on the part of the Commission calls for the following observations.

395 In the first place, it is surprising that the Commission should rely on variations in discounts to establish the absence of transparency. In its written submissions to the Court, the Commission emphasised on numerous occasions the irrelevance of the stability or parallelism of net prices or discounts for the purpose of assessing the transparency of the market. Thus, in particular, it maintained that significant stability in a record company's (average) discounts cannot constitute proof of the necessary transparency, that the Commission's interest in the transparency of discounts did not have the object of ascertaining whether the majors had followed a policy, that the evidence relating to the actual application of campaign discounts at a given moment was relevant for the sole purpose of assessing the actual degree of price alignment, that close alignment, at no matter what level, could in any event not be regarded as sufficient evidence of coordination, that a certain degree of stability over time of the discounts granted by a record company was not proof in itself and that even a high degree of statistical predictability did not demonstrate the existence of coordination.

396 Likewise, in their paper of 17 June 2004 on the absence of evidence on price transparency, which was submitted after the hearing before the Commission, the parties to the concentration maintained that Question 28 of the Phase II customer questionnaire ('Have you observed any alignment of PPDs, discounts or other terms and conditions among the [majors]?') had no connection with price transparency ('[c]learly, by its very terms, this question does not address the issue of price transparency').

397 In the second place, it must be borne in mind that the only observations on discounts in the section of the Decision dealing with the examination of transparency of the market (recitals 111 to 113 to the Decision) merely refer, so far as campaign discounts are concerned, to the findings made in the section dealing with the examination of the common understanding on pricing in the five large countries (in other words, recitals 77 to 80 for the United Kingdom and the corresponding recitals for the other large countries). At recital 70 to the Decision, however, the Commission, in order to determine whether the majors had in fact

pursued a policy of coordinating their prices, stated that 'average prices [were] an appropriate means to assess parallelism in the pricing behaviour of the majors'. It follows that, according to the Decision itself, for the purpose of assessing transparency, the Commission considered that it was able to rely on average figures, and not on specific variations, including for campaign discounts.

398 At the very least, it is not apparent that the Commission undertook a serious examination of specific variations in campaign discounts and of the impact of campaign discounts on the market or on prices. It follows from recital 72 to the Decision, moreover, which refers to the various elements analysed by the Commission, that only the average data on invoice discounts were examined (see footnote 43 to the Decision). Both in the statement of objections and during the administrative procedure the Commission contended that the data relating to prices, both gross and net, and to average discounts permitted it to assess the existence of a collective dominant position and, therefore, also to assess whether the market was sufficiently transparent. Only after the hearing on 14 and 15 June 2004 did the Commission modify its assessment and adopt the argument put forward by the parties to the concentration that the complexity and the variations of campaign discounts eliminated the necessary transparency, but without carrying out any new market investigations in order to test the validity of these new conclusions.

399 In the third place, the arguments and evidence relating to the alleged variations in campaign discounts put forward by the Commission in the Decision and in its written submissions to the Court call, moreover, for a series of observations relating, first, to their degree of opacity and, second, to their relevance.

— The opacity of campaign discounts

400 It should be observed, as a preliminary point, that neither in the Decision nor even in any of its written submissions to the Court did the Commission define precisely

what campaign discounts are, the conditions in which they are granted and to which they are subject, their frequency, their amount or the type of albums to which they are supposed to apply. It appears to emerge from the file, however, and in particular from the rare extracts from competitors' responses produced by the Commission, that they are specific discounts, of quite a high percentage, granted for a given volume of specific albums and for a limited period, in specific cases, typically in order to shift significant stocks.

401 According to recital 79 to the Decision (and the corresponding recitals for the other large countries), 'the [parties to the concentration] submitted data according to which invoice discounts for a given customer varied over time and form album to album, and discounts for a given album varied from customer to customer'. Although that recital to the Decision mentions the most general category of invoice discounts, there is reason to consider that the observation in reality concerns only campaign discounts. As is apparent from the Decision and from the Commission's pleadings, file discounts are negotiated with each customer for a full year and applicable to all sales made by the customer in question. The Commission goes on to state, at recital 79 to the Decision, that these fluctuations are mainly the result of campaign discounts. The Commission contends that these three types of variation (by customer, by album and over time) render campaign discounts opaque. In support of that assertion, the Commission annexed to its defence a series of tables which are supposed to demonstrate these different variations ('the new evidence').

402 In that regard, it should be observed at the outset that, as the applicant has correctly claimed, a campaign discount seems, in essence, destined to become public knowledge. Logically, a campaign discount, which is of a high percentage and is added to the file discount, will be granted to a retailer by a record company only on condition that the retailer passes the discount on to the final consumer (in the form of a clear reduction in price or a better position in the display) with a view to increasing sales of the album to which the discount applies. That is a fortiori so since, as stated at point 115 of the statement of objections, royalties are calculated on an album's PPD and not on its net price, so that it is in the majors' interest to limit discounts as much as possible.

403 It must be stated, next, that the only three extracts from competitors' responses to the request for information under Article 11 of the Merger Regulation produced by the Commission before the Court, far from confirming the Commission's assertion, show, on the contrary, that campaign discounts are rather public and transparent.

404 Thus, according to one major's response, '[promotional discounts] can be used in relation to a new release, to promote a new artist, to support a new retail store, to support a particular sales programme or campaign (this typically covers an entire category of records) or to promote a specific event. This type of discount can represent a significant proportion of a PPD [*confidential*] and is important [from] the perspective that it is targeted to drive certain sales'.

405 The information concerning the conditions in which campaign discounts are granted, which is to be found in the only other response of the majors produced by the Commission, also tends to indicate that such discounts relate to very specific events which are easily detectable by competitors. The major in question states that campaign discounts 'are discounts offered in relation to particular promotional campaigns. They are tied to particular releases or groups of releases. If for example, an artist is on tour to promote a new album, a discount may be offered at maximising sales volumes for that album around the time of that artist's tour. Similarly, some seasonal stock (such as releases containing Christmas-related music) might have a particular campaign associated with [them]. Campaign discounts are sometimes aimed at sales in relation to older releases that are no longer strong sellers. Typically, ... will seek to sell a large discounted quantity of a particular release (or a series of related releases) to a retailer who then sells those records at a

special offer price. Discounts for new releases are sometimes given on pre-orders of particular new releases, with the purpose of securing a high presence at the point of sale. ... This type of discount tends to be given for new or breaking artists, where ... wishes to boost sales through a focused promotional campaign'.

406 Last, it follows from the independent producer's response, first, that campaign discounts are visibly reflected in a lower selling price to the consumer and a better position in the shop for the relevant albums and, second, campaigns are often initiated by the retailers themselves, which invite the various producers to participate (see also, to that effect, the declarations of Sony's and BMG's representatives), which thus allows them to be aware of the existence of the campaign discounts.

407 It follows that none of the information from third parties, either in the Decision or in the new evidence produced by the Commission, confirms that campaign discounts are opaque.

408 It follows from recital 79 to the Decision and from the Commission's written submissions to the Court, however, that the parties to the concentration provided data showing that campaign discounts are not sufficiently aligned, in that they vary over time, from customer to customer and from album to album. The Commission and the interveners contend, in substance, that owing to the variations in and the complexity of campaign discounts, the market is not sufficiently transparent.

409 In that regard, it should be borne in mind, first of all, that the Commission had concluded at points 88 to 90 of the statement of objections, on the basis of an examination of the data of all the majors, that discounts varied but were stable, that apart from a few exceptions the differences were rather limited, and that there was

absolutely no evidence that discounts were used in order to make fundamental modifications to pricing policies or, in particular, to affect average net prices of new hit releases, as gross price to net price ratios were stable over time and from album to album.

410 Although, as recalled above, the Commission is indeed entitled to modify the assessments which it made during the administrative procedure, in particular in order to take account of the observations of the parties concerned, and is not required to state its reasons for doing so in the decision, the findings made in the decision must be capable of being justified, at least at the stage of the proceedings before the Court, by reference to the findings of fact made previously, if necessary by demonstrating how the previous findings were incorrect. In the present case, however, as the applicant rightly submits, the Commission did not re-examine the data relating to the discounts granted by all the majors but merely justified its conclusions by reference solely to the data provided by the parties to the concentration.

411 In its defence, the Commission did, admittedly, claim that it examined the other majors' discounts, but that as those figures could not be disclosed to the parties to the concentration, they could not be included in the Decision. However, that argument cannot be followed.

412 In the first place, it follows clearly from the Decision (see, in particular, recital 79 and footnote 43 to the Decision), from other points in the Commission's submissions (see, in particular, the passage in the defence where the Commission states that '[o]nly Sony and BMG data were taken into account because the other majors [had] stated that they only bill net prices') and the new evidence lodged by the Commission, that the assessment inferred from the variations in discounts in the Decision is based solely on the data relating to the discounts granted by the parties to the concentration. At no recital to the Decision, moreover, is there any indication that the Commission examined the data relating to the discounts granted by the

other majors, nor, a fortiori, any indication that those discounts show the complexity of and the variations in the campaign discounts.

413 In the second place, the Commission clearly cannot maintain that in the context of its examination of a proposed concentration it cannot take into consideration, and where appropriate base its conclusions on, the data of the other operators on the market. That argument would in most cases make it impossible to examine the compatibility of a proposed concentration with the common market. It must be stated, moreover, that most of the factors other than discounts (market shares, gross/net prices, etc.) examined in the Decision are based on the data of the various operators on the market.

414 In the third place, the Commission, which in its final observations, lodged after the hearing, emphasises the constraints resulting from the strict deadlines that govern the procedure for the examination of proposed concentrations and the need to observe the rights of the defence of the notifying parties, claimed that numerous allegations by the applicant to the effect that the Commission did not properly investigate certain essential questions connected with the objections identified and should also have investigated other objections, are based on a misconception of the procedure for the control of concentrations, in that the investigation into the competition problems raised by a concentration essentially takes place before the statement of objections. Although the applicant cannot effectively criticise the Commission for not having investigated problems first raised before the Court, a number of which, moreover, are manifestly inadmissible on the ground that they were developed only in the reply or in the observations which the applicant lodged after the hearing, that observation on the Commission's part ignores two aspects. First, it is common ground that at the beginning of the procedure the Commission identified the problem of transparency and discounts and that it questioned both third parties and the parties to the concentration in that regard. Second, the time-constraints also have the effect that the parties to the concentration cannot wait until the last minute before submitting evidence to the Commission with a view to refuting objections raised at the proper time by the Commission, since the Commission would then no longer be in a position to carry out the necessary investigations. In such a hypothetical situation, that evidence must at the very least be particularly reliable, objective, relevant and cogent if it is to be capable of validly refuting the objections raised by the Commission.

415 It must be observed at the outset in that regard that it follows both from the wording of recital 79 to the Decision ('the [parties to the concentration] submitted data') and from the examination of the new evidence (annexed to the defence) that the findings relating to campaign discounts are not only based solely on the data relating to the parties to the concentration but that, in addition, the tables setting out those data were prepared by those parties (or their economic advisers) according to a methodology and on the basis of data selected by the parties themselves, while there is no indication that the Commission ascertained whether they were accurate, relevant or objective and representative. Although, as the Commission stated at the hearing, the procedure for the control of concentrations does indeed rely to a large extent on trust, as the Commission cannot be required to ascertain on its own, in the slightest detail, the reliability and accuracy of all the information submitted to it, it cannot, on the other hand, go so far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration, in particular where, as in the present case, those aspects constitute the crucial element on which the decision is based and where the data and assessments submitted by the parties to the concentration are diametrically opposite to the information gathered by the Commission during its investigation and also to the conclusions which it drew from that information.

416 In the fourth place, the applicant emphasised, without being contradicted by the Commission, and as the Commission acknowledges at point 146 of the statement of objections, that Sony and BMG had achieved very different performances during the years covered by the investigation. As the strength of releases is capable of influencing prices and discounts, the tables which examine only the data of those two parties tend to increase the variations.

417 In the fifth place, examination of the new evidence produced by the Commission, in the light of the foregoing considerations, calls for yet a further series of observations.

418 In its defence, the Commission states that it relied on the data annexed thereto in order to arrive at the conclusion that discounts varied on three dimensions (over time, from album to album and from customer to customer).

419 The Court observes in that regard, first of all, that of all that purported evidence only one of the annexes was drawn up by the Commission itself, although here, too, it relied solely on the data relating to the discounts granted by Sony and BMG. The annex in question consists of diagrams showing the average invoice discounts granted by the parties to the concentration, for the years 2000 to 2003, to each of their top 10 common customers in the large countries, with the exception of France, as the Commission had found that the data submitted in respect of France were inconsistent. In the statement of objections (point 88), the Commission had relied on those diagrams in order to show the overall stability of discounts. The Commission did not dispute the accuracy of that assessment before the Court, but merely indicated that the parties to the concentration had claimed that their respective treatment of certain customers was markedly different and enclosed in an annex an extract from their observations. It must be stated, however, that those observations are not capable of calling in question the general impression gained from those diagrams. Thus, for the Italian market, which shows stability and an established parallelism, although, as the parties to the concentration point out, two customers did admittedly receive discounts significantly lower than those received by the other customers, it is all the more significant that those low discounts were granted by Sony and BMG to precisely the same two customers, that they were at virtually the same level for both majors and that they varied in a parallel manner.

420 As regards the tables annexed to the defence, which, in the Commission's submission, show that the distribution of the invoice discounts granted by Sony and BMG respectively for their top 20 albums in each of the five large Member States was appreciably different, the Court observes, first of all, that they concern the most general category of invoice discounts and not only campaign discounts and that, as the applicant observed, the differences in the ranges of discounts over time could be the result of differences in performance and do not preclude the discounts being based on a known set of rules.

421 It must be observed, next, that although the breakdown of the ranges of discounts between 1998 and 2003 actually varies over time and from country to country, it varies in a similar manner for both parties to the concentration, both over time and

by country. That emerges even more clearly from the table comparing the breakdown of discounts granted for 2003 in each of the five large countries, in so far as, although the breakdown is variable from one country to another, the discounts granted by both parties to the concentration develop in a parallel manner (see, in particular, the data relating to countries A and C). Thus, while in country A Sony's and BMG's discounts are essentially concentrated in the range [*confidential*], they are mainly in the range [*confidential*] and [*confidential*] in country B, in the range [*confidential*] for country C and in the higher ranges for countries D and E. It is thus apparent from those tables in the annexes not only that the breakdown of discounts between the different brackets within each country is rather similar but that, in addition, the variations from country to country are also very similar.

422 As regards, more specifically, campaign discounts, the Commission refers essentially to two of its annexes to support its theory that campaign discounts are opaque because of their extreme complexity and their importance. However, it is apparent that the tables in those annexes, which concern only the discounts granted by Sony and BMG for a single year and were drawn up entirely by those undertakings, cannot be considered sufficiently relevant and reliable.

423 Thus, as regards the tables, which compare the invoice discounts granted by the parties to the concentration to their top six customers for their top-selling albums in 2002 'listed at similar prices', it should be noted, in particular, that in its response to the written questions put by the Court, the Commission indicated that the PPD chosen for each country represented one of the respective parties' most important PPDs in terms of sales generated, while observing, however, that for Germany, for example, the PPDs chosen were the third and fourth most important PPDs for BMG and the most important and sixth most important PPDs for Sony. Since it is stated in the Decision that the parties to the concentration achieved the bulk of their sales using one or two, or a maximum of three, PPDs, the question arises as to the extent to which the albums taken into consideration actually represent their best-selling albums. Furthermore, it follows from a footnote referring to the tables that

numerous albums had their PPDs changed during the year, which appears to be capable of having had an impact on the discounts granted and therefore of increasing the comparative variations. Likewise, it is apparent from those tables that BMG's data relate to 2002, while Sony's relate to the financial year 2002/03.

424 Last, and in any event, although those tables are complicated to read owing to the fact that they juxtapose Sony's and BMG's data alternatively, whereas the comparison must be made between the discounts granted by each of the parties to the concentration to its various customers and not between the discounts granted for the albums of one of those parties by reference to the discounts granted to the other party's albums, careful examination of the tables shows that the variations appear ultimately to be rather limited. It should further be observed in that regard that it follows from point 75 of the statement of objections and from footnote 47 thereto that the Commission had analysed Sony's and BMG's gross and net prices individually for their top 10 albums and had concluded, at point 90 of the statement of objections, that '[n]et to gross price ratios were stable across albums and across time for those individual releases examined'. Neither the Commission nor the interveners have asserted, still less demonstrated, that that finding was incorrect.

425 As regards the tables, which are intended to show the maximum campaign discounts granted by Sony and BMG for their best-selling albums, it must be pointed out that they contain a great number of errors, the effect of which is to increase those discounts. In effect, the calculation of the differential between minimum and maximum discounts by customer (which, in the Commission's submission, is equivalent to the campaign discount) made for each of the parties to the concentration was carried out incorrectly, in most cases, in consideration of the discounts granted by the other party, whereas, as the Commission itself explains, that calculation must be made on the basis of the differential between the minimum and maximum discounts granted by one and the same party to its various customers.

426 It follows from those two examples that, apart from the necessary caution with which the various tables produced by the parties to the concentration must be considered, in so far as those tables were drawn up according to parameters which were chosen by the parties themselves and which, moreover, are not always clear, the possibility arises that they may be affected by material errors, which, in the present case, even a cursory examination can reveal.

427 In any event, even on the assumption that the various tables drawn up by the parties to the concentration and produced by the Commission are in fact capable of establishing the more or less important variations alleged, the fact remains that, as the applicant has rightly observed, those variations are of doubtful relevance in so far as, first, they show only brackets without analysing the weighted averages and variations by reference to the averages and, second, they do not preclude the possibility that those variations may, at least for an industry professional, be explained quite readily on the basis of a number of general or specific rules governing the grant of discounts, in respect of which the Commission did not carry out the necessary investigations.

428 Although, as the Commission emphasised, the applicant admittedly did not explain precisely what those various rules governing the grant of campaign discounts are, or, according to the Commission, referred to too high a number of such rules, which would render their application complex and therefore not particularly transparent, the fact remains that, as already stated, the Commission did not carry out an investigation in the market in that regard or, at least, did not adduce any evidence of the opacity of campaign discounts, apart from the tables drawn up by the parties to the concentration, which, in addition to their imperfections, were in any event intended solely to establish the existence of certain variations in campaign discounts but do not demonstrate that the explanation for those variations might not be more or less readily apparent to an industry professional. Nor is the applicant to be criticised for not having demonstrated that that was so, since the tables do not specify the albums, the customers, the amounts of the discounts or the times at which they were granted and since neither the applicant nor the Court is therefore in a position to ascertain whether the discounts were granted in accordance with what the applicant claims are the general rules of the sector.

429 As regards the Commission's argument that the criteria according to which campaign discounts are generally granted are so numerous that they render their application opaque, it must be observed, first of all, that the applicant explained that for the various categories of discs (new releases, new artist, 'full price' catalogue, 'mid price' catalogue, 'budget' catalogue) there is a limited number of general sales strategies (re-charting of a disc, participation in promotional campaigns, purchase of in-store space), which may differ to a certain extent according to the type of customer (supermarkets, specialist chains, independent stores). Although the combination of variables necessarily has the effect of increasing the hypothetical situations, the Commission has not demonstrated that the exercise would be rendered excessively difficult for a market professional. It should be observed, next, that the account given by the parties to the concentration themselves of the few principles governing the grant of campaign discounts also tends to confirm the existence of the general rules alleged by the applicant and also of their lack of excessive complexity. Last, it should be observed that even quite a high number of rules, of apparent complexity, even, perhaps, difficult to list exhaustively, does not necessarily prevent a professional from determining relatively easily whether those rules are, a priori or taken as a whole, being observed. Thus, the rules of correct behaviour or of etiquette would require voluminous works in order to be described in detail, but a person only slightly familiar with those rules can none the less readily determine whether another person's conduct essentially complies with those rules.

430 In any event, as the applicant emphasised, it is not apparent either from the Decision or from the evidence adduced by the Commission that the Commission investigated the existence of generally-known rules governing the grant of campaign discounts or the possibility that the majors could determine whether the discounts granted by the other majors are consistent with those rules or whether they deviate from the common principles.

431 The applicant further maintained that net prices for retailers were transparent in so far as retailers' mark-ups are generally transparent and are known with a high degree of accuracy.

432 In its defence, the Commission contended, in that regard, that its conclusion that retail monitoring was ineffective was also based on the complexity and opacity of retail pricing. It maintains that it follows from the joint study annexed to its defence that intensive monitoring of retail sales would not allow a major to infer the net pricing practices (PPD minus invoice discount) of its competitors for any given album, on the ground that retailers do not always systematically apply the same mark-up to the wholesale price at any given time, either to all albums or even to all albums in the more limited full-price category. The Commission submits that it found no demonstrable relationship between retail prices and the invoice discounts granted for albums at the same PPD.

433 It is sufficient to observe in that regard that none of the recitals to the Decision mentions that alleged impossibility of determining net selling prices to retailers on the basis of retail prices using reverse engineering. Nor is there any indication in the file that the Commission, during the administrative procedure, carried out the slightest examination as regards the relationship between retail selling prices and gross selling prices, or even gathered information on retail prices. Neither the line of argument developed by the Commission in its defence nor the joint study annexed to the defence can therefore be taken into consideration.

434 It should be observed, moreover, that, as the applicant claimed, the study drawn up by the economic advisers to the parties to the concentration does not present data that are sufficiently reliable, relevant and comparable and does not support the conclusions which the Commission draws from it. Even on the assumption that it is established, the circumstance that not all retailers always systematically apply the same mark-up to the wholesale price is, in any event, irrelevant. While it is indeed probable that the different types of retailer (supermarkets, independents, specialist chains, etc.) apply different mark-up policies, and that there are differences within each category of operators, and even differences for each individual operator, according to the types of album or their degree of success, it is very unlikely, on the other hand, and the study contains no data in that regard, that a retailer will apply a different sales policy for the same type of album. As all the retailers are customers of

all the majors, each major is thus able to observe the mark-up applied by a particular retailer to its own albums and thus to infer the mark-up that it normally applies to its competitors' albums with similar characteristics. Last, it should be observed that according to the declaration of Sony's and BMG's sales managers for France, 'in general, retail prices are set by adding VAT to the PPD of a particular album'.

435 It follows from the foregoing considerations that the new evidence submitted by the Commission does not appear to be sufficiently reliable, relevant or cogent to establish the opacity of campaign discounts.

436 Last, it should further be pointed out, in the interest of completeness, that should the campaign discounts not be transparent because the retailer, on the assumption that it is authorised to do so, does not pass the discount on to the final consumer but keeps it to increase his profit, the Commission has not explained how that would be relevant in the present case. Although in the case of perfectly homogenous products a secret and opaque discount granted to a retailer by a producer may be relevant for the purpose of assessing the transparency necessary for tacit coordination, in so far as that discount allows the producer to increase its sales to the detriment of the other members of the oligopoly, the same does not necessarily apply in the case of sales of different products to intermediaries. Thus, in the present case, as each disc is different, a retailer, which purchases from the majors solely in order to resell to the final consumer, will not, in principle, buy fewer discs from a given major unless the final consumer is encouraged by the effect of the campaign discount to purchase instead the disc of the competing major which granted the retailer that campaign discount. Furthermore, although that is possible, indeed probable, neither the Commission nor the interveners contended, still less did they demonstrate, that where a campaign discount is granted the retailer is unable to return any unsold discs. In those circumstances, a campaign discount granted to a retailer by a major which is not transparent owing to the fact that it is not passed on to the final consumer does not seem likely to have an effect on the volume of sales of the album concerned or to harm a common pricing policy resulting from the tacit coordination. At the very least, the Commission ought to have examined and explained how a campaign discount which was opaque because it was not passed on

by the retailer might have constituted an obstacle to the necessary transparency of the market in so far as it does not conceal conduct capable of harming the tacit coordination.

— The relevance of the campaign discounts

437 The applicant formulates a series of complaints whereby it maintains, in substance, that the Commission was wrong to rely on the need for complete transparency on the market, that it did not examine the relevance of campaign discounts for the purpose of assessing the transparency of the market and that it did not show that campaign discounts eliminate or reduce the requisite transparency in so far as they are of only marginal concern to chart albums or best-selling albums and do not really affect net prices, particularly in that they represent only one quarter to one third of all discounts.

438 As regards, in the first place, the complaint that the Commission confused the requirement for sufficient market transparency, as defined in *Airtours* v *Commission*, paragraph 45 above, with a requirement for total transparency applied in the Decision, it must be held that, as the Commission correctly observes, none of the recitals to the Decision makes any reference to the need for total transparency.

439 However, the Court must ascertain whether, in practice, the Commission required total transparency or, at least, transparency greater than that necessary to permit a collective dominant position.

440 As established at paragraph 62 of *Airtours* v *Commission*, paragraph 45 above, the necessary transparency is that which allows each member of the dominant oligopoly to be aware of the conduct of the others in order to ascertain whether or not they are adopting the same course of conduct, that is to say, that it must have the means of knowing whether the other operators are adopting and maintaining the same strategy. Transparency on the market should therefore be sufficient to allow each member of the dominant oligopoly to be aware, sufficiently precisely and immediately, of the development of the conduct on the market of each of the other members. The requisite transparency does not mean that each member may at any moment be aware of every detail of the precise conditions of each sale made by the other members of the oligopoly but must, first, make it possible to identify the terms of the tacit coordination and, second, give rise to a serious risk that deviant conduct of such a type as to jeopardise the tacit coordination will be discovered by the other members of the oligopoly.

441 The Commission explains that it 'looked at the components of the net price of an individual album to an individual customer — PPD, file discount, possible campaign discount — and essentially concluded that a sufficient degree of transparency would be necessary in respect of all components for one major to be reasonably confident that it knew the true net pricing practices of another, as manifested at the level of customers and albums'. It follows from that explanation that, although the Decision mentions, without further detail, only sufficient transparency, the Commission appears to have required a particularly high level of transparency.

442 Likewise, the Commission contends, in particular, that the importance of campaign discounts is the consequence of the fact that '[i]f the majors are to coordinate net prices, they must be able to monitor all of their components — the relatively transparent PPDs and the various invoice discounts'. The Commission states, in that regard, that '"[s]ome knowledge" of the more important file discounts is simply not enough if campaign discounts can account for fluctuations in discounts (i.e. net price instability) for certain customers over time and from album to album as significant as those noted in recitals 79, 86, 93, 100 and 107 [to the Decision], and are shown to be less transparent'.

443 It should be observed, in that regard, first, that, apart from the numerous other factors of transparency mentioned at recitals 111 to 113 to the Decision (in particular, permanent contacts with a customer base which is stable, limited and common to all the majors, and also the weekly publication of the charts), the Commission considered in the Decision that both gross prices and file discounts were transparent. Although in its written submissions to the Court the Commission qualified the degree of transparency of those two essential components of net prices, and did so, moreover, in rather variable proportions, depending on the arguments to which it was responding, it expressly indicated in its final observations that it had concluded that there was 'a material degree of transparency for both PPDs and file discounts'.

444 Second, it is difficult to describe the fluctuations for which campaign discounts are alleged to be responsible as being 'as significant', as the Decision mentions differences of 2 to 5 percentage points for the United Kingdom, Germany and Spain, 1 to 3 percentage points for Italy and up to 3 percentage points for France for most of the top customers (or principal common customers). Furthermore, as the applicant maintained and as the Commission acknowledged (notably at paragraph 13 of its complementary observations), different product mixes and varying degrees of success, and also the type of customers, may explain the variations in discounts, so that it cannot be inferred that the rather weak variations found are in fact attributable to campaign discounts.

445 As regards, in the second place, the complaints whereby the applicant seeks to challenge the relevance of the discounts, it must be borne in mind, first of all, that, as the applicant observes, the Commission found at recitals 77, 84, 91, 98 and 105 to the Decision that net prices were closely linked to gross prices, since both Sony's and BMG's average gross real prices and average net real prices had moved in parallel over the previous six years. Although the Commission claimed in its written submissions to the Court that the data relating to average prices could eliminate the individual variations, it is clear, first, that it is indicated at recital 70 to the Decision that average prices are an appropriate means to assess parallelism in pricing

behaviour and, second, that in any event recital 77 to the Decision also notes that net-to-gross price ratios across albums and time are very stable. As file discounts are fixed for a given customer and for a given year, it is impossible to see how the variable campaign discounts can affect the net prices of the albums concerned.

446 Serious doubt seems to be cast on the relevance of discounts in general, moreover, by the assessments of the Commission itself. Thus, at points 88 and 89 of the statement of objections, the Commission had indicated that '[a]fter examination of the data[,] the Commission has found that retailer discounts do not alter the relative prices of the [m]ajors' and that '[t]here is absolutely no evidence of discounting being used to fundamentally alter pricing'. Although, as observed above, the Commission is certainly entitled to modify what, by definition, are the provisional assessments made in the statement of objections, the assessments and conclusions set out in the decision must be compatible with the findings of fact made during the administrative procedure, unless the Commission demonstrates, at the very least in proceedings before the Community Courts, that they were incorrect. The observation that there was no evidence that discounts significantly affected prices constitutes a finding of fact rather than an assessment. In any event, the Commission does not appear to have changed its views on that point, since recital 77 to the Decision states that '[i]f a significant deviation from pricing policies was being implemented by the majors through the grant of discounts, this deviation would have been reflected in their average net prices'.

447 It must be stated, in the third place, that the Decision does not contain the slightest information capable of showing the effective impact that campaign discounts would have on the net prices of the albums concerned. The only indication in that regard is at recital 150 to the Decision and tends rather, on the contrary, to deny that they have such an impact, since it states that '[a]s in the larger territories, the most important discounts in all countries are file discounts'. The Commission did, admittedly, suggest at the hearing that this was a typographical error, but it none the less itself repeated the same observation in its defence. It must be borne in mind, moreover, that in the statement of objections, which was drawn up after a five-month investigation during which the Commission had questioned the majors and

independent producers and also the retailers about the respective importance of the various types of discounts, including campaign discounts (see, in particular, Questions 19 and 24 of the questionnaires sent to retailers and competitors on 20 January 2004), the Commission did not even consider it necessary to mention campaign discounts.

448 When invited by the Court to indicate the total value of campaign discounts as a percentage of total sales of the 100 or 20 best-selling albums of each of the five majors (that is to say, the average campaign discount granted on those albums), and also the relative value of campaign discounts by reference to file discounts for those albums, the Commission replied that it was impossible to calculate them on the basis of the information in its file.

449 It follows from the foregoing observations that the Commission concluded that there was insufficient transparency on the market, in spite of the transparency of gross prices and file discounts and the numerous other factors of transparency identified in the Decision, on the sole ground that campaign discounts are less transparent, without having considered whether those campaign discounts represent a sufficiently significant element of the price of the albums concerned to have a real impact on the transparency of the prices of those albums. It follows that the applicant's complaint that the Decision is vitiated by a manifest error of assessment in that the Commission did not examine or, at the very least, did not establish to the requisite legal standard the relevance of campaign discounts is well founded.

450 That finding cannot be called in question by the Commission's assertion that other information submitted during the administrative procedure enabled it to conclude that campaign discounts were an essential element of pricing and to calculate the average campaign discounts for 2002 applied to all albums. In particular, the elements on which that argument rests cannot be considered to be sufficiently consistent, reliable or relevant or to be capable of justifying the conclusions drawn from them.

451 In the first place, the chronology of the investigation gives no indication that the Commission examined the relevance of campaign discounts for the assessment of the degree of transparency of the market, or a fortiori that such an examination could be carried out on the basis of all the relevant and reliable data. It must be borne in mind, in that regard, that until the hearing on 14 and 15 June 2004, the Commission had concluded, provisionally, admittedly, on the basis of its examination of all the evidence gathered during its investigation, that a collective dominant position existed before the concentration and, in particular, that the market and the discounts were transparent and that the discounts were not capable of affecting the coordination of prices. In the light of the responses of the majors and competitors, and also of the retailers, on the respective importance of the various discounts, in particular file discounts and campaign discounts, the Commission did not deem it necessary to mention campaign discounts in the statement of objections (at least in so far as is apparent from the confidential version produced before the Court). There is no indication in the file, and the Commission has not maintained, that at that stage it carried out the slightest examination in relation to campaign discounts. Nor is it apparent that in the brief period between the hearing on 14 and 15 June 2004, following which the Commission modified its assessment, and the draft Decision being sent to the Advisory Committee on 1 July 2004, the Commission carried out any investigation in order to ascertain the relevance of campaign discounts or, moreover, their degree of transparency. The sole measure of investigation carried out after the hearing to which the Commission makes reference consists, moreover, in a request for information dated 21 June 2004 and sent to the notifying parties, concerning not the relevance of campaign discounts but the majors' market-monitoring activities. As stated above, moreover, serious doubt is cast on the representative nature of the monitoring reports prepared by Sony's and BMG's commercial representatives in response to the request by the confidential documents produced by the applicant. Last, in its final observations, the Commission itself emphasises that the notifying parties' right to be heard limits the possibilities of a further investigation after the hearing and precludes wide consultation with the operators on the market in respect of the objections. According to the Commission, the measures of investigation carried out after the hearing consisted essentially in consulting the operators on the market about the proposed commitments and do not address the objections formulated against the notified concentration.

452 In the second place, although the Commission indicated in its answers to the written questions put by the Court that the information provided by the notifying parties

during the administrative procedure had enabled it to calculate the average campaign discounts, it none the less admitted at the hearing that it had not made those calculations itself and had been obliged to leave to the economic advisers to the parties to the concentration the task of explaining how the discounts had been calculated for all of the albums but not for the 20 or 100 best-selling albums, although the investigation and the data collected by the Commission related only to those albums.

453 In the third place, although the Commission indicated that the calculations had been carried out on the basis of the data which served as the basis for one of the annexes to the defence, that annex contains only data relating to BMG and not to Sony.

454 In the fourth place, the data do not appear to be sufficiently consistent, reliable or relevant.

455 First of all, the tables provided by the Commission in response to the questions put by the Court relate only to 2002, without any explanation of the reasons why that year was chosen by the notifying parties, whereas the Decision concerns prices and discounts between 1998 and 2003. Likewise, although for BMG the proportion of gross sales is calculated for the 10 principal customers, it concerns only the 5 to 10 biggest customers (depending on the country), without any explanation in that regard. It should also be observed that the brackets of campaign discounts mentioned in the tables (which concern all albums for the entire customer base) do not correspond to those mentioned in the tables in other annexes (which concern only the 20 best-selling albums to the 10 best customers). As the number of albums and customers taken into consideration in the tables is much wider than that referred to in those annexes, the maximum campaign discount in the tables [*confidential*] should be equal to or greater than the maximum campaign discount in the annexes concerned for the same year [*confidential*]. The total of the invoice discounts of each of the notifying parties, and also the differential between the discounts granted by each of them, are also different from those mentioned in the Decision. Admittedly, the Decision relates to the top-selling albums in 2003, unlike

the tables, which relate to all albums sold in 2002, but that merely goes to confirm that the result may be different according to the parameters chosen and that it is essential that the Commission retain control of the operations, or at least that it ascertain the relevance of the data submitted by the parties to the concentration.

456 Next, it must be stated that, in so far as they relate to the average campaign discount for all albums sold and not the 100 or 20 best-selling albums, the tables lack relevance since they presume what they are specifically required to establish, namely that campaign discounts also play a significant role for the best-selling albums or the new hit releases and that, as the applicant maintains, they do not principally concern the albums at the bottom of the list. The Commission's argument that, given the important contribution which the 100 best-selling albums make to total revenue from music sales, it would be surprising if the average levels of campaign discounts calculated for all albums sold were not significantly reflected in the price of the 100 best-selling albums, since that would mean that average campaign discounts which were a multiple of the general average were applied to all the other albums, cannot be followed. Although the Decision contains no information in that regard and although the Commission has provided scarcely any information in its written submissions, the only elements in the file tend to indicate that campaign discounts are actually at a high, or indeed a very high, level. Thus, in response to the Commission's questionnaire, one major indicated that '[t]his type of discount [might] represent a significant proportion of the PPD (for example, up to [*confidential*])'. Likewise, the tables produced by the Commission, which contain estimates of the maximum campaign discounts, mention the discount rates granted by the notifying parties to their top 10 customers, which are often very high and may be as much as [*confidential*]. Those estimates are described by the Commission as prudent, moreover, since the figures are given on an annual basis, whereas a campaign discount is normally limited in time. Since, even according to the table produced by the Commission, campaign discounts represent only a low average percentage of the selling price [*confidential*] of all albums sold, they should therefore apply only to quite a small number of albums. Last, as stated above, only the declarations by the majors produced by the Commission tend to indicate that campaign discounts apply to individual cases (artist on tour, some seasonal stock, older releases that are no longer strong sellers). In those circumstances, it cannot be

presumed that the average rates of campaign discounts granted to all albums are representative of the campaign discounts granted to the 100 best-selling albums, or a fortiori to new hit releases. It must be borne in mind, furthermore, in that regard that at points 87 and 90 of the statement of objections the Commission had indicated that it considered that the price lists of new releases were used to coordinate and monitor pricing policies and that it had found no evidence that discounts were used to alter substantially the average net prices of new hit releases.

457 In the fifth place, even on the assumption that the tables are accurate and representative, it must be stated that campaign discounts represent only a very small part of the gross selling price of albums in three of the five large countries for BMG [*confidential*]% in country B, [*confidential*]% in country C and [*confidential*]% in country D and in two of the five large countries for Sony [*confidential*]% in country C and [*confidential*]% in country D. Contrary to the Commission's contention, moreover, the tables cannot be considered to show that the two notifying parties' average campaign discounts differ very widely in most countries, since in three countries out of five the difference between Sony's and BMG's campaign discounts is below [*confidential*]%. According to the Decision, each country constitutes a market; and a concentration which creates or strengthens a dominant position with the consequence that effective competition is significantly impeded in respect of a single one of the markets in question must be declared incompatible with the common market. In those circumstances, even on the assumption that campaign discounts can be considered less transparent, unless the Commission proposed to apply a requirement of total transparency, it ought at least to have explained in the Decision how, in spite of their minimum real effect on prices and the presence of the numerous factors of transparency identified in the Decision, the campaign discounts were capable of eliminating the sufficient transparency of the market necessary to permit a collective dominant position.

458 In any event, explanations proffered during the proceedings before the Court or, a fortiori, checks relating to an essential aspect of the Decision cannot compensate for a lack of investigation at the time of the adoption of the decision and eliminate the manifest error of assessment by which the Decision is thus vitiated, even if that error

had no effect on the outcome of the assessment (see, by analogy, Case C-353/01 P *Mattila* v *Council and Commission* [2004] ECR I-1073, paragraphs 31 and 37).

(c) Conclusion on transparency

459 It follows from the foregoing considerations that the findings made in the Decision concerning the transparency of the market are not supported by a statement of reasons of the requisite legal standard and are vitiated by a manifest error of assessment in that they do not rest on an examination of all the relevant data that must be taken into consideration and are not capable of supporting the conclusion that the market is not sufficiently transparent to permit a collective dominant position.

5. Homogeneity

460 As regards the criterion relating to product homogeneity, it must be borne in mind that, at recital 157 to the Decision, the Commission concluded that there was no dominant position, referring in that regard, as well as to the deficits in actual transparency and the lack of evidence as regards retaliatory action in the past, to the partly heterogeneous product characteristics. However, it must be pointed out that at recital 110 to the Decision, which deals with the examination of product homogeneity, the Commission emphasised, first, that the format of recorded music was homogenous, second, that in spite of the heterogeneity of the content, the way in which albums are priced and marketed on the wholesale level appeared to be quite standardised and, last, that, with respect to discounts and agreed return rates for unsold records, the majors did not usually distinguish between genres or types of albums. Then, contradicting — at least apparently — that assertion, and without

providing further explanation, the Commission added that pricing naturally also depended on the success of the album and that further differentiation on individual album level was made as regards campaign discounts. It concluded from the foregoing that the heterogeneity in the content and its abovementioned implications for pricing reduced transparency.

461 It follows that the Commission considered that the elements of heterogeneity identified affected only the campaign discounts. As stated above, however, the elements identified in the Decision and the arguments put forward by the Commission in its written submissions do not suffice to establish the finding that the market did not present the requisite degree of transparency for a collective dominant position to be able to exist. Accordingly, the — contradictory — findings concerning the elements of product homogeneity are not in themselves capable of leading to the conclusion that such a collective dominant position did not exist on the market.

462 It should be observed, moreover, that the fact that the product is heterogeneous, at least as regards its content, and that, as would be expected, its price varies from album to album, confers quite special significance on the finding made by the Commission itself at recitals 76 and 77 in respect of the United Kingdom market (and at the recitals corresponding to the other markets) that the list prices of the best-selling albums appeared to be rather aligned and that transaction net prices were closely linked to gross prices.

6. Retaliation

463 At recitals 114 to 118 to the Decision, the Commission considered whether the majors had in the past adopted any 'retaliatory measures' against any one of their number and concluded that it had found 'no indications that, in response to a major's deviation from a common policy, other majors [had] been excluded from

compilation joint ventures, or that there [had] been a (temporary) return to competitive behaviour as a retaliatory measure' and that it had not even found that 'threats of such retaliatory measures [had] been made'.

464 The applicant contends that that finding is vitiated by a lack of reasoning, a manifest error of assessment and an error of law. The complaints developed under those three parts overlap and consist, in substance, in contesting the fact that the Commission based its analysis on the absence of proof that retaliatory measures had been used in the past when it ought only to have ascertained whether any effective deterrent mechanisms existed.

465 It follows from the case-law (*Airtours* v *Commission*, paragraph 45 above, paragraph 62) that in order for a situation of collective dominant position to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, *Gencor* v *Commission*, paragraph 246 above, paragraph 276).

466 The mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction. As the applicant observes, moreover, the most effective deterrent is that which has not been used.

467 Furthermore, the Commission expressly stated at points 128 to 132 of the statement of objections that exclusion from compilation joint ventures constitutes a particularly effective deterrent mechanism, and although the Decision does not recognise it in such express terms, it confirms that analysis, contrary to what the

Commission contends in its written submissions. After explaining at recitals 115 and 116 to the Decision the economic importance of multi-artist or multi-label compilations, which represent approximately 15 to 20% of the overall market for recorded music, and emphasising that the appearance on an album of artists from more than one record company appears to be a key factor for the success of a compilation, the Commission states at recital 117 to the Decision that '[i]n case of a persistent deviation by one major, the other majors could therefore exclude the deviator from the conclusion of new joint ventures, or they could refuse to license their songs for the deviator's compilations, or they could even terminate some of the existing joint ventures'. Last, recital 118 to the Decision states that the Commission had, however, found no indications that other majors had been excluded from compilation joint ventures or that threats of such retaliatory measures had been made, while making clear that 'these measures could in general represent credible possibilities for retaliation by the majors in the markets for recorded music'.

468 However, as this plea relates to the finding of the existence of a collective dominant position, and not to its creation, it might be considered that the condition relating to retaliation may consist, not, as was the case in *Airtours* v *Commission*, paragraph 45 above, in ascertaining the mere existence of retaliatory measures, but in examining whether there have been any breaches of the common course of conduct which have not been followed by retaliatory measures. Although the Decision does not indicate that the test for establishing the existence of a collective dominant position must be different, and although the Commission did not so contend in its pleadings either, the Court will none the less examine whether the findings made in the Decision satisfy that test.

469 Two cumulative elements must be satisfied in order for the fact that no retaliatory measures have been employed to be taken to mean that the condition relating to retaliation is not satisfied, namely proof of deviation from the common course of conduct, without which there is no need to consider the use of retaliatory measures,

and then actual proof of the absence of retaliatory measures. However, it must be stated that on neither of these aspects is the necessary proof set out in the Decision.

470 First, neither in the section dealing with retaliation nor even in the rest of the Decision did the Commission clearly identify any case whatsoever of a breach of the common pricing policy. In its defence, the Commission did admittedly rely on two cases in which divergence from the common policy were found in the Decision (in the United Kingdom in 2000 and 2001, recital 74, and in Germany, with a slower development on the part of one of the majors, recital 88). However, it is not apparent from the Decision that those cases were regarded as breaches of the common policy, but only as showing that parallelism of prices was not achieved at any moment.

471 Second, and in any event, it must be stated that the Commission, when questioned by the Court at the hearing about the measures of investigation which it had carried out in order to reach the conclusion that it had found no indications that retaliatory measures had been used in the past, or even that threats of such retaliatory measures had been made, was not in a position to indicate the slightest step which it had completed or undertaken for that purpose. Furthermore, in so far as, at the stage of the statement of objections, the Commission's investigation had concentrated on ascertaining the existence of credible deterrent measures and not on the effective exercise of retaliatory measures, and in so far as it was only after the hearing before the Commission that the Commission modified its assessment of the concentration, it is not apparent when or how the Commission could have effectively sought to establish whether there was evidence that retaliatory measures had been used. It follows from the file, moreover, that after the hearing the Commission carried out no further investigation of the market. The only measures of inquiry could therefore have consisted in sending a question to the notifying parties, of which the Commission adduced no evidence before the Court, and the notifying parties were clearly unlikely to provide evidence of retaliatory measures to the Commission.

472 Last, it must be stated that the Commission's argument that '[c]lear evidence of retaliatory action by the other majors in response to a "deviation" from the habitual levels of average net prices or average invoice discounts could have constituted an

indicator (although undoubtedly not a decisive one) that coordination was taking place, despite the difficulty in identifying sufficiently clear terms of coordination and sufficiently effective means of monitoring respect for such terms' cannot be upheld. First, that assertion contradicts the Decision, according to which '[i]ndications for retaliatory action in the past could be seen as pointing to the existence of a collective dominant position in the markets for recorded music' (recital 114 to the Decision) and '[t]he Commission in this case has therefore found no evidence that these means have been used or threatened in the past as element for the proof of an existing collective dominant position'. Second, the Commission's line of argument is tantamount to maintaining that its examination of the condition relating to retaliation was insufficient, since even 'clear evidence of retaliatory action' could constitute only an indicator that was 'undoubtedly not ... decisive'.

473 It follows from the foregoing that the applicant's complaint that the assessments in the Decision relating to retaliation are vitiated by an error of law and a manifest error of assessment is well founded.

474 Since those assessments, as is apparent in particular from recital 157 to the Decision, constitute an essential ground on which the Decision rests, the Decision must be annulled.

7. Conclusion as regards the first plea

475 It follows from the foregoing that the assertion that the markets for recorded music are not sufficiently transparent to permit a collective dominant position is not supported by a statement of reasons of the requisite legal standard and is vitiated by a manifest error of assessment in that the elements on which it is based are incomplete and do not include all the relevant data that ought to have been taken

into consideration by the Commission and are not capable of supporting the conclusions which are drawn from them. As that assertion constitutes, as is evident both from the Decision, and in particular recital 157 thereto, and from the discussion before the Court, an essential ground on which the Commission concluded in the Decision that there was no collective dominant position, the Decision must be annulled on that ground alone.

476 Likewise, as the analysis in respect of retaliation is vitiated by an error of law, or at the very least by a manifest error of assessment, and as that analysis constitutes the other essential ground on which the Commission concluded in the Decision that there was no collective dominant position, that defect also provides a ground for annulment of the Decision.

477 Last, in so far as it is necessary, it must further be stated that, as follows, whether explicitly or by implication, from all of the foregoing considerations, none of the arguments put forward by the interveners is capable of invalidating those conclusions and that a number of them are even contradicted in the Decision.

478 As regards, in the first place, the preliminary observations formulated by the interveners, it must be stated that they have already been rejected or are irrelevant. Thus, the alleged circumstance that the Commission carried out an extraordinarily thorough investigation is not in itself capable of showing that the Commission did in fact gather, analyse and correctly assess all the relevant data. It should further be observed, in that regard, that the interveners emphasise that they provided at the outset very substantial data and explanations concerning the music industry in Europe. However, it is apparent from the file that on the basis of that information and of the other information obtained in the market during an investigation lasting almost five months the Commission had concluded in the statement of objections that the concentration was incompatible with the common market and that it was only after the parties to the concentration and their economic advisers had

presented argument at the hearing on 14 and 15 June 2004 that the Commission altered its assessment and, two weeks later, sent the Advisory Committee a draft decision approving the concentration. Likewise, the fact that competition authorities around the world approved the concentration is irrelevant. Last, the argument that the concentration represents a pro-competitive response to the decline in the music industry, and in particular to the fall in the price of CDs, must also be rejected. Not only is the Decision not based on an alleged balancing of the various advantages and disadvantages of the concentration but, in addition, the arguments which the interveners derive from changing demand were expressly rejected at recitals 55 to 59 to the Decision.

479 As regards, in the second place, the arguments whereby the interveners seek to challenge the merits of applicant's complaints relating to campaign discounts, it is sufficient to state that they are indissociable from the Commission's arguments and have already been rejected above or cannot be taken into consideration in so far as they are expressly contradicted by findings made in the Decision. Thus, the argument alleging that prices were not aligned and the assertion that a large proportion of the top 100 sales is generated outside the PPDs identified in the Decision were expressly rejected in the Decision. Likewise, the assertion that the Decision minimises the weight of the underlying arguments on the absence of sufficient transparency is irrelevant. It is not for the Court to rule on the compatibility of the concentration with the common market, but to review the lawfulness of the findings made in the Decision. It must be stated, in addition, that the interveners' assertions that the PPDs are neither known nor accessible, or that file discounts are not sufficiently transparent, are expressly contradicted by the findings in the Decision.

480 Last, as regards, in the third place, the arguments relating to the various points not mentioned in the Decision, it is sufficient to state that they are wholly irrelevant, as the Court's examination is limited to a review of the lawfulness of the Decision.

481 The Court none the less considers it necessary, in the interest of completeness, to examine the second plea in law.

III — *Second plea: creation of a collective dominant position on the markets for recorded music*

A — *Arguments of the applicant*

482 The applicant observes that the Commission devoted less than a page to considering whether the concentration would create a collective dominant position. While stating that in some oligopolistic markets the reduction in the number of players might lead to the creation of a collective dominant position for the remaining players and that whether or not that occurs will essentially depend on the characteristics of the market, the Commission did not identify those decisive characteristics but merely referred to the analysis carried out in that regard of the collective dominant position pre-existing the concentration before concluding, at recital 157 to the Decision, that it did not find 'sufficient evidence to prove that the reduction of the majors from five to four represents a change substantial enough to result in the likely creation of collective dominance', particularly as regards transparency and retaliation.

1. Error of law

483 In the applicant's submission, the Commission made three errors of law in applying the collective dominant position test.

(a) Failure to carry out a prospective analysis

484 The applicant submits that the Commission erred in applying the law on collective dominant positions by failing to carry out a prospective analysis in order to determine whether a collective dominant position would be created as a result of the concentration. The test of whether a concentration creates such a position is fundamentally different from the test used to determine whether a collective dominant position already exists, which requires an *ex post* analysis, whereas the former requires an *ex ante* analysis, which must be carried out by reference to the level of competition existing on the market before the concentration.

485 It follows from *Airtours* v *Commission*, paragraph 45 above, that the prospective analysis must not only take into account the situation in relation to that position at the time at which the transaction takes place but must also assess it dynamically, having regard, in particular, to the 'internal equilibrium, stability and the question as to whether any parallel anticompetitive conduct to which it might give rise is sustainable over time'. However, it is clear from recital 157 to the Decision that, instead of carrying out the requisite separate prospective analysis the Commission arrived at its finding on the basis of the same — *ex post* — evidence as it used in reaching the conclusion that there was no collective dominant position before the concentration.

486 However, the *ex-post* analysis is not conclusive. The Commission did, admittedly, establish that 'the markets for recorded music display[ed] certain features which indicate[d] a conduciveness to collective dominance' (recital 157 to the Decision), but merely indicated that it had not found sufficient evidence that collective

dominance already existed, so that any change in the factors that increased the possibility of tacit collusion should have been analysed very carefully. The only evidence examined by the Commission was a record of what had happened in the past, which constitutes a tacit admission by the Commission that it carried out no prospective analysis.

(b) Transparency

487 The applicant maintains that, when ascertaining whether a collective dominant position would be created, the Commission made an error of law, for the same reasons as those presented in the context of the first plea, by using a test of total market transparency, whereas, according to *Airtours* v *Commission*, paragraph 45 above, it is necessary to ascertain only whether the market is sufficiently transparent to permit coordination of conduct.

(c) Deterrents

488 The applicant criticises the Commission for not having carried out a prospective analysis in order to ascertain the existence of deterrents and for having relied on the conclusion which it had reached by wrongly relying on the absence of evidence of retaliation in the past, in the context of the strengthening of a pre-existing collective dominant position, in order to reject any argument that the reduction from five to four majors would facilitate retaliation on the market.

489 In the context of the prospective analysis which the Commission ought to have carried out, the finding that there were measures that could represent credible possibilities for retaliation on the part of the majors (recital 118 to the Decision) should have been deemed sufficient evidence, particularly once the number of majors was reduced to four.

(d) Constraints

490 The applicant maintains that the Commission erred in law by wholly failing to consider the third condition laid down in *Airtours* v *Commission*, paragraph 45 above, when ascertaining the existence of a collective dominant position, namely the capacity of customers or competitors to jeopardise by their actions the results of any common policy adopted by the majors.

2. Breach of the obligation to state reasons

491 The applicant claims that the prospective analysis which the Commission must carry out in order to ascertain the risk of the creation of a collective dominant position entails a thorough examination of the circumstances relevant to the effect of the concentration on the market. First, in the statement of objections the Commission did not even consider the possibility that a collective dominant position would be created and, second, in the Decision, the Commission's analysis is neither prospective nor detailed. In the applicant's submission, the Commission concluded from the fact that it had not established the existence of a collective dominant position that there was not sufficient evidence to show that a dominant position would be created in the future.

492 The applicant contends that if the Commission had carried out the requisite prospective analysis, it would have had to address the following questions:

— The extent to which the reduction in the number of majors would mean:

(i) that the majors would become more interdependent on each other owing to the reduction in the number of players from five to four;

(ii) that a market which by all accepted standards is concentrated before the concentration becomes significantly more concentrated following the concentration;

(iii) that coordination between the majors would be even easier to monitor and to sustain over time and that price transparency would also be further enhanced owing to the symmetry which would facilitate monitoring, including on the all-important chart market;

(iv) that it would become easier to identify a focal point and maintain a common understanding of what would be in the joint interest of the majors because the number of majors would be reduced;

(v) that the balance between the long-term gains from adhering to the collusive agreement and the short-term gains from undercutting rivals would shift when there were fewer firms on the market.

— The extent to which the level of symmetry in the market would increase, since Sony BMG would be similar in size and market share to Universal, followed closely by the other two majors, EMI and Time Warner, also with symmetrical market shares. That point is important, because symmetry in size and market shares makes tacit collusion easier to maintain. Sony BMG and Universal would have a combined market share of 50% of the world market for recorded music and their share would be closer to 60 to 70% of the all-important chart market, the significance of which the Commission failed to consider. That market segment is important both for current competition and as an indication of long-term market power, since new releases become back catalogue;

— The extent to which symmetry would be increased and competition reduced because two majors which had produced different results during recent years would now become only one;

— The extent to which the available deterrents would become more effective;

— The extent to which the independents would become even more dependent on the majors, in particular because the number of unavoidable trading partners available to the independents would be reduced by 20%;

— The extent to which any competitive counterweights to the majors would be weakened.

493 In the applicant's submission, the Commission did not carry out a detailed examination of any of those points and, accordingly, its finding that a collective dominant position would not be created (recital 158 to the contested decision) is unsupported by any reasoning or rests on manifestly inadequate reasoning.

3. Manifest error of assessment

494 The failure to carry out a prospective analysis also constitutes an error of assessment. The Commission relied on past evidence concerning the pre-existing collective dominant position without examining in detail the impact of the changes that would be brought about by the concentration. Furthermore, that purported evidence was also itself defective, for the reasons stated in the first plea.

495 While the Commission briefly notes that transparency will be increased, it gives no detailed indication of the level to which it will be increased or of the impact which that will have, but merely points to a lack of sufficient evidence. The Commission should also have considered the extent to which the reduction in the number of players on the market would facilitate tacit collusion and make it more attractive, since profits would be shared among fewer firms. The Commission gives no indication of what evidence has been assembled, of the way in which that evidence is insufficient or of what evidence would be necessary.

496 As regards retaliation, the analysis is based on past evidence relating to a period when, according to the Commission, there was no collective dominant position. The Commission has not considered the question of potential retaliation after the concentration.

497 The applicant observes that the Commission was on the point of finding that a collective dominant position existed before the concentration, but that it wrongly deemed the evidence insufficient. The fact that it reached the same conclusion in respect of the market after the concentration, which increased transparency, indicates a manifest error of assessment.

498 Last, the applicant submits that the Commission's finding is particularly striking because, four years earlier, it had found that the EMI/Time Warner merger would create a collective dominant position on the market for recorded music.

B — *Arguments of the Commission*

1. Error of law

(a) Absence of a prospective analysis

499 The Commission contends that the applicant's allegations that it failed to carry out a prospective analysis and relied upon exactly the same *ex post* evidence as in its analysis of the possible prior existence of a collective dominant position, when the tests are fundamentally different, are unfounded. It begins by making two general observations.

500 First, decisions involving the control of concentrations must always be based on a prospective analysis, because the decision whether or not a concentration is compatible with the common market turns on the changes in the market likely to be caused by the as-yet-unimplemented transaction (*Kali und Salz*, paragraph 245 above, paragraphs 109 to 111). It is therefore necessary, in all cases, to base the prospective analysis on a clear picture of competitive conditions before the concentration. The evidence already compiled and assessed regarding current market conditions (which can hardly be described as *ex post* evidence) remains relevant as the starting-point for the analysis.

501 Second, the assessment of the possible current existence of a collective dominant position entails consideration of the same four conditions as the assessment of the possible creation of such a dominant position: evidence of tacit coordination, sufficient transparency, risk of retaliation, constraint by competitors and customers (Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 111). Where, as in this case, a negative response has already been given to one or more of those questions in respect of the current situation, the prospective analysis will necessarily concentrate on ascertaining whether or how the concentration might cause a positive answer to be given in the foreseeable future.

502 As its conclusion that there was insufficient evidence of an existing collective dominant position was based essentially on the fact that the condition of sufficient transparency was not satisfied, the Commission was chiefly concerned with the effect of the concentration on that parameter. If the concentration automatically led to a reduction in the number of bilateral relationships, from 10 to 6, which, in principle, would facilitate monitoring, that essentially arithmetical observation was not decisive, primarily because the barriers to transparency were attributable not to the number of majors to be monitored but to the complexity of the majors' individual decisions fixing the net pricing of individual albums, with heterogeneous content and varying commercial success, for individual customers, using a combination of PPDs, file discounts and campaign discounts. As regards invoice discounts, the limited information available (which relates primarily to file discounts) is in any event more likely to be obtained from customers than from other majors, and the concentration does not change the relationship of the remaining majors with a customer base which will not change as a result of the concentration. It was for that reason that the Commission concluded — prospectively — that there was insufficient evidence that the change in the market

structure which the concentration should bring about would facilitate transparency to such an extent that the level of transparency required for the creation of a collective dominant position would be achieved (recital 157 *in fine* to the Decision).

503 The Commission submits that those elements constitute a sufficient prospective analysis of the cumulative conditions for a collective dominant position.

(b) Transparency

504 The Commission maintains that as the applicant's argument merely reiterates an argument first presented under the first plea, it is equally unfounded in the present context.

(c) Deterrents and constraints

505 Although it took the view at recital 157 to the Decision that there was insufficient evidence that the transaction would facilitate retaliation, the Commission did not take a definitive position on that point in order to found its assessment. Once it had concluded that it did not have evidence establishing that pricing would be sufficiently transparent to permit effective monitoring, there was no longer any need to examine either the issue of retaliation or the question of countervailing power from the aspect of the 'creation' rather than from that of the 'strengthening' of a collective dominant position.

2. Breach of the obligation to state reasons

506 The Commission contends that most of the criticisms formulated by the applicant have nothing to do with a lack of reasoning. The Commission's alleged failure to take account of various factors concerns the lawfulness of the assessment and not the reasons. If the Commission did not arrive at a conclusion on certain points, it follows that it was not required to provide reasons for that non-existent conclusion.

507 It would be inadmissible for the applicant to attempt at a later stage in these proceedings to transform its ground of annulment from one of procedure (lack of reasoning) to one of substance (error of law and manifest error of assessment) and the patent irrelevance of its specific arguments to the application of Article 253 EC constitutes a sufficient basis for rejecting this ground of annulment.

508 It is therefore purely in the alternative that the Commission briefly examines those arguments.

509 As regards the applicant's assertion that the analysis must be detailed, the Commission refers to its observations under the previous plea.

510 The fact that the Commission did not deal with the possible creation of a dominant position in the statement of objections has no relevance to the sufficiency of the

reasons stated in the Decision. As regards its alleged assumption that it had insufficient evidence to build upon its conclusions on the absence of an existing collective dominant position, the Commission refers to the discussion of the nature of the prospective analysis.

511 The increase in the level of concentration on the markets for recorded music and of the degree of symmetry in market shares, as well as a possible increase in the level of interdependence between the majors, do not contribute to any material extent to removing the obstacles to coordination which were identified in the analysis of the possible current existence of a collective dominant position, namely the complexity and lack of evidence of sufficient transparency of the overall price-fixing process (PPD + file discount + campaign discount) for individual albums and individual customers over time.

512 Although a more concentrated market may alter in the abstract incentives to pursue a common policy, it does not in this case have a material effect on the fundamental disincentive resulting from the inability of the undertakings in an oligopoly situation to detect and, consequently, to punish and deter deviation. In the absence of sufficient transparency, the majors cannot be sure that one of them will not attempt to benefit from both the long-term gains of tacit coordination and the short-term gains of undercutting its rivals, and such uncertainty renders tacit coordination unstable and unsustainable.

513 The applicant's observations on symmetry should also be rejected, on the ground that there is no apparent relationship between symmetry and transparency.

514 Last, the applicant's remaining arguments relate essentially to the second and third cumulative conditions for sustainable collective dominance. The Commission was

not required to take a position on those conditions once it had established that there was insufficient evidence that the first condition would be satisfied.

3. Manifest error of assessment

515 The applicant's assertions concerning the lack of a prospective assessment must be rejected for the reasons set out in the section dealing with an error of law.

516 The applicant's arguments concerning the incentives which prompt undertakings in an oligopoly situation to adopt a common policy should again be rejected, on the ground that they ignore the absence of sufficient transparency.

517 The applicant's theory that, because the reduction in the number of majors would bring about an overall increase in the likelihood of tacit coordination, the Commission should have concluded that a collective dominant position would be created unless the concentration had other characteristics that would make tacit coordination less likely, wholly ignores the distinct character of the different conditions for sustainable collective dominance. The fact that there is an increase in the level of concentration on the relevant markets should not entail a corresponding reduction in the evidential requirements as regards the separate condition of sufficient transparency, if such increased concentration is not itself shown to make a material difference to the assessment of the latter condition.

518 Last, the Commission reiterates that the lawfulness of the Decision cannot be judged against the yardstick of the provisional conclusions in the two statements of objections, one of which was issued four years previously in a different case.

C — *Arguments of the interveners*

519 The interveners claim that the decision to open the Phase II investigation shows that the Commission considered from the outset both the possibility of the creation and that of the strengthening of a collective dominant position. The Commission was correct to focus on the intrinsic features of the market and in particular on whether prices were sufficiently transparent to permit tacit coordination to occur (*Gencor* v *Commission*, paragraph 246 above, paragraph 227). Since the characteristics of the market concerning prices did not support the conclusion that there had been collusion in the past, the Commission correctly concluded that the reduction in the number of majors from five to four would be insufficient to overcome the material obstacles to tacit collusion (*Airtours* v *Commission*, paragraph 45 above, paragraphs 75 and 76).

520 The characteristics of the market remained incompatible with tacit coordination both on prices and on other factors (number, originality, creativity, cultural diversity of new releases, signing of artists). Among these, the interveners claim that recorded music is a heterogeneous product; that the majors have a strong incentive to maximise sales of 'hits'; that decisions on prices and discounts are adopted for each release both at the time of release and also over its lifetime, and from one individual retailer to another; that record companies exercise discretion with regard to the PPD on release and over time, reflecting the subjective judgment of the marketing personnel; that all of the companies grant various discounts and incentives, which are unknown to their competitors and which vary over time, from one album to another and from one retailer to another; and, last, that, as discounts are unpredictable and invisible, no reliable inferences about net prices can be made

from observing PPDs, so that even if coordination of PPDs did occur, it would not impact on actual prices.

D — *Findings of the Court*

521 The applicant maintains, in substance, that the assertion that the concentration would not bring about the creation of a collective dominant position on the market for recorded music is not sufficiently reasoned and is vitiated by a manifest error of assessment and an error of law.

522 It must be borne in mind that when the Commission examines the risk that a collective dominant position will be created, it must 'assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and [ultimately] of consumers' (*Kali und Salz*, paragraph 245 above, paragraph 221; *Gencor* v *Commission*, paragraph 246 above, paragraph 163; and *Airtours* v *Commission*, paragraph 45 above, paragraph 59). The prospective analysis which the Commission must carry out in the context of the control of concentrations, as it relates to a collective dominant position, 'calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market' (*Kali und Salz*, paragraph 245 above, paragraph 222, and *Airtours* v *Commission*, paragraph 45 above, paragraph 63).

523 That is all the more true since the analysis 'does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted' (*Commission* v *Tetra Laval*, paragraph 232 above, paragraph 42). Thus, '[s]uch an analysis makes it necessary to envisage the various chains of cause and effect with a view to ascertaining which of them are the most likely' (*Commission* v *Tetra Laval*, paragraph 43).

524 It is in the light of those considerations that the Court must consider whether the Commission properly analysed the risk of the creation of a collective dominant position.

525 It should be observed, at the outset, that the examination carried out in that regard in the Decision was extremely succinct.

526 The Commission states at recital 156 that 'the features of the market are pivotal for the question whether or not such a concentration leads to the creation of collective dominance'.

527 The Commission's analysis in that regard is limited to the following considerations at recital 157 to the Decision, which is worded as follows:

'As shown in the analysis as to the strengthening of a collective dominant position, it cannot be concluded from the observable degree of parallelism in average prices that there is an existing collective dominance of the majors in the markets for recorded music. The reduction of the majors from five to four leads to an increase in transparency as the number of bilateral competitive relations goes down from 10

to 6. This in principle would facilitate the monitoring of the respective markets. As discussed in the section on the strengthening of a collective dominant position, the markets for recorded music display certain features which indicate a conduciveness to collective dominance. However, the Commission has not found sufficient evidence that the five majors have held a collective dominant position in the past, in particular due to the deficits in actual transparency, the partly heterogeneous product characteristics and the lack of actual evidence as regards retaliatory action in the past. With respect to the creation of a collective dominant position of the majors in the markets for recorded music, the Commission, while taking into account the general facilitation of coordination among the remaining four players, has not found sufficient evidence to prove that the reduction of the majors from five to four represents a change substantial enough to result in the likely creation of collective dominance. In particular, the Commission has not found sufficient evidence that a reduction from five to four majors would facilitate transparency and retaliation to such an extent that the creation of a collective dominant position of the remaining four majors has to be anticipated.'

528 It must be stated that these few observations, which are so superficial, indeed purely formal, cannot satisfy the Commission's obligation to carry out a prospective analysis and to examine carefully circumstances which, according to each particular case, may prove relevant for the purposes of assessing the effects of the concentration on competition in the reference market, particularly where, as in the present case, the concentration raises serious problems. Independently of the Court's findings in respect of the first plea in law, it follows both from the fact that the Commission had to engage in lengthy discussion in the Decision in order to conclude that there was no collective dominant position before the concentration and from the fact that it had concluded in the statement of objections, after an investigation lasting five months, that such a position did exist before the concentration, that the question whether the fusion between two of the five majors might create a collective dominant position raises, for even stronger reasons, serious problems requiring a thorough examination. As that examination was not carried out, it follows, on that ground alone, that the second plea in law is well founded.

529 In the interest of completeness, the Court will none the less examine whether the findings in respect of transparency and retaliatory measures are also vitiated by an error of law or of assessment.

530 It follows from recital 157 to the Decision, and in particular from the final sentence thereof, that the Commission's conclusion that the concentration does not represent a sufficiently significant change to entail the probable creation of a collective dominant position is expressly based on the conditions relating to the transparency of the market and to the retaliatory measures.

531 As regards transparency, it must be borne in mind, first of all, that it was found, in the context of the first plea, that the Commission's finding that campaign discounts have the effect of reducing transparency to the point of preventing the existence of a collective dominant position is not sufficiently reasoned and is vitiated by manifest errors of assessment.

532 Furthermore, as regards an assessment of the risk of the creation of a collective dominant position, the Commission could not rely solely on the existing situation but was required to carry out a prospective analysis and to take into consideration the modifications resulting from the concentration in issue. Recital 157 to the Decision, although laconic to say the least, mentions, in addition, in that regard that coordination between the four remaining players will be made easier. However, the Decision contains no examination of the question whether the concentration, notably because it entails a reduction in the number of albums to be monitored, will make the market sufficiently transparent to permit the development of a collective dominant position. It must be borne in mind in that regard, moreover, that the Commission had found in the statement of objections that 'the proposed

concentration would facilitate the monitoring of price coordination as each major would only be required to take account of the pricing behaviour of three other majors. As a result, PPDs would focus even more on a very narrow range of pricing point accounting for the largest part of the top selling albums. Transparency of discounts would also be increased as the majors also need to monitor three other players in their store visits and contacts with retailers'.

533 It follows that the observations relating to transparency do not support the analysis according to which the concentration is not likely to create a collective dominant position.

534 As regards the retaliatory measures, it should be noted, first of all, that the Commission's assertion in the defence that it did not take a position on the adequacy of the various possible retaliatory mechanisms and that its assessment did not turn on the issue is not compatible with the Decision, as is clear from recital 157 to the Decision.

535 Likewise, the argument of the Commission and the interveners that there was no need to examine the question of retaliatory measures once the Commission had concluded that it had no evidence establishing that price-fixing would be sufficiently transparent to permit effective monitoring must be rejected, since the Decision is expressly based on the absence of retaliatory measures and the Court cannot substitute its assessment for that of the Commission and rectify the Decision. In any event, the argument cannot succeed, since it has been held that the assertion that

the market was not sufficiently transparent, or a fortiori the assertion that it would not become sufficiently transparent following the concentration, is not supported by a statement of reasons of the requisite legal standard and is vitiated by a manifest error of assessment.

536 It should be observed, next, that in the Decision the Commission was content to refer to the examination carried out in respect of the existence of a collective dominant position and to indicate that it had not found sufficient evidence that the concentration would facilitate 'retaliation to such an extent that the creation of a collective dominant position of the remaining four majors [had] to be anticipated'.

537 In the context of that examination, however, the Commission, as is apparent from the first plea, concentrated not on ascertaining the existence of effective deterrent mechanisms but on seeking evidence that retaliatory measures had been employed in the past. That approach constitutes in any event a misinterpretation of the condition set out in *Airtours* v *Commission*, paragraph 45 above, as regards the examination of the determination of the creation of a collective dominant position, since that examination must be based on a prospective analysis. It is clear that, in that context, seeking evidence that retaliatory measures have been used in the past cannot constitute a valid test, as the condition is perfectly capable of being satisfied without there having been any retaliatory measures in the past. As the assessment of the risk of the creation of a collective dominant position is not, by definition, based on the existence of a prior common policy, the criterion relating to the absence of retaliatory measures in the past is wholly irrelevant. The Decision is therefore vitiated by an error on that point.

538 It follows, moreover, from the Decision and from the case-file that such credible and effective deterrent measures do actually appear to exist in the present case and, in

particular, the possibility of sanctioning a deviating major by excluding it from compilations. In the statement of objections, moreover, the Commission had clearly found that that deterrent measure was effective and the Decision provides no explanation of the reasons why it would not ultimately be effective. Quite to the contrary, the analyses set out at recitals 115 to 118 to the Decision are such as to confirm the effective nature of that deterrent measure. After explaining, at recitals 115 and 116 to the Decision, the economic importance of compilations of several artists or labels, which represent approximately 15 to 20% of the total market for recorded music, and emphasising that the appearance on an album of artists from more than one record company appears to be a key factor for the success of a compilation, the Commission states at recital 117 to the Decision that '[i]n case of a persistent deviation by one major, the other majors could therefore exclude the deviator from the conclusion of new joint ventures, or they could refuse to license their songs for the deviator's compilations, or they could even terminate some of the existing joint ventures'. Last, recital 118 to the Decision states that the Commission, however, found no indications that other majors had been excluded from compilation joint ventures in the past or that threats of such exclusion had been made, while observing that 'these measures could in general represent credible possibilities for retaliation by the majors in the markets for recorded music'.

539 Accordingly, the Commission could not, without making an error, rely on the fact that there was no evidence that retaliatory measures had been used in the past to conclude that the concentration was not likely to give rise to the creation of a collective dominant position.

540 It should further be observed that, as stated in the context of the first plea, the Decision does not mention a single case in which a major departed from the common pricing policy without entailing a retaliatory measure, and the Commission, questioned in that regard by the Court, was unable to indicate the slightest inquiry which it had made in order to conclude that it had found no evidence that retaliatory measures, or the threat of such measures, had been used in the past.

541 It follows from the foregoing that the second ground of annulment is also well founded.

IV — *General conclusion*

542 It follows from all of the foregoing considerations that the first and second pleas in law are well founded in that the Decision is vitiated by, first, inadequate reasoning and, second, a manifest error of assessment in so far as the elements forming the basis of the Decision do not constitute all the relevant data that must be taken into consideration and are not sufficient to support the conclusions drawn from them.

543 It follows that, without there being any need to examine the plea relating to the strengthening or the creation of a collective dominant position on the wholesale market for online music licences or the plea relating to the coordination of the respective activities of the parties to the concentration in the sphere of music publishing, the Decision must be annulled.

Costs

544 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. According to Article 87(3) of the Rules of Procedure, however, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that costs be shared or that each party bear its own costs. Last, Article 87(4) of the Rules of Procedure provides that the Court may order an intervener to bear its own costs.

545 In the present case, the Decision must be annulled and the applicant has requested that the Commission be ordered to pay the costs. However, it is also necessary to take account of the following circumstances.

546 As regards the applicant, it must be stated that while it strenuously insisted that, in spite of its complexity, which the Commission correctly emphasised, the case should be dealt with under the expedited procedure, it did not conduct itself accordingly, although in its decision granting the application for an expedited procedure the Court had expressly stated that the decision could be withdrawn in the light of developments in the case. While the Court could indeed have put an end to the expedited procedure, it was necessary to take account of the objective urgency of the case and of the considerable effort already made by all the parties, which made that possibility less and less appropriate as time passed. However, an attitude adopted by the applicant, which was scarcely compatible with the letter or the spirit of the expedited procedure, became progressively worse through the various stages of the procedure.

547 In the first place, the volume of the application and the number of pleas in law and arguments greatly exceed the recommended norms for the expedited procedure and the applicant did not produce an abbreviated version of its application or withdraw certain pleas.

548 In the second place, although the measure of organisation of procedure aimed at permitting access to certain documents or confidential matters had just been negotiated and implemented with the Commission, the interveners and the Court, by means of both the exchange of diverse memoranda and an informal meeting of the Court, the applicant sought an amendment of that measure, which gave rise to significant objections on the part of the other parties, before eventually withdrawing that request.

549 In the third place, after requesting and obtaining the right — which is not customary in an expedited procedure — to lodge a statement in response to the evidence adduced by the Commission in its defence, the applicant wrongly objected to the Commission being granted leave to lodge complementary observations in reply, in accordance with the adversarial principle.

550 In the fourth place, after insisting on obtaining a hearing promptly, the applicant stated that it was not available on any of the four dates proposed by the Court, thus delaying the hearing by several months.

551 In the fifth place, after being granted leave, quite exceptionally, to lodge observations after the hearing, on condition that they were strictly confined to the Commission's answers to the written questions put by the Court, the applicant, as the Commission rightly pointed out, lodged a pleading of more than 50 pages, excluding annexes, in which, inter alia, it put forward numerous arguments and evidence wholly unrelated to those questions and introduced new arguments and evidence.

552 Furthermore, although the applicant was successful as regards the collective dominant position on the market for recorded music, its claim that all the evidence lodged by the Commission as annexes to its defence should be disregarded was rejected. Likewise, its claims relating to the alleged dominant position held by Sony on the markets for the online distribution of music are wholly unfounded, if only on

the ground that at the time of adoption of the Decision SonyConnect had no market share, while other players, in particular Apple, already held a significant position.

553 As regards the Commission, it is a matter for regret that, on a number of points, its observations depart, sometimes quite appreciably, from the analyses made in the Decision, with the consequence that the applicant and the Court were constantly obliged to make abnormal checks. Thus, for example, the assertions that, owing to the fact that recourse to the retaliatory mechanism consisting in excluding a member who deviated from the common policy of compilations could entail the sacrifice of the benefits generated by a compilation, the Commission was not in a position to conclude that this was a credible mechanism or that it did not take a position on the question of retaliation, manifestly do not correspond with the conclusions referred to at recitals 115 to 118 to the Decision, which, on the contrary, recognise the effectiveness of that retaliatory mechanism (as already expressly stated, moreover, at points 128 to 132 of the statement of objections) but claim that the Commission found no evidence of its having been implemented. Likewise, the Commission's assertion that it concluded at recital 169 to the Decision that the transparency of the market for licences for online music was limited owing to the non-existence of generally-known gross prices of licences does not correspond to the assertion, also found in the Decision, that 'transparency in the market for online licences is in any case higher than in the traditional market for recorded music'.

554 In the light of the foregoing considerations, the Court considers on a fair assessment of the circumstances, first, that the Commission must be ordered to bear its own costs and to pay three quarters of those incurred by the applicant and, second, that the interveners must bear their own costs, in accordance with Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Commission Decision C(2004) 2815 of 19 July 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.3333 – Sony/BMG);**

2. **Orders the Commission to bear its own costs and to pay three quarters of those incurred by the applicant;**

3. **Orders the applicant to bear one quarter of its costs;**

4. **Orders the interveners to bear their own costs.**

Jaeger Azizi Cremona

Delivered in open court in Luxembourg on 13 July 2006.

E. Coulon M. Jaeger

Registrar President

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