

Case T-464/04

Independent Music Publishers and Labels Association (Impala, International Association)

v

Commission of the European Communities

(Competition — Regulation (EEC) No 4064/89 — Decision declaring a concentration compatible with the common market — Markets for recorded music and on-line music — Existence of a collective dominant position — Risk of creation of a collective dominant position — Conditions — Transparency of the market — Deterrence — Statement of reasons — Manifest error of assessment)

Judgment of the Court of First Instance (Third Chamber), 13 July 2006 . . . II - 2298

Summary of the Judgment

1. *Competition — Concentrations — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89)

2. *Competition — Concentrations — Assessment of compatibility with the common market — Collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89, Art. 2(3))
3. *Competition — Concentrations — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89, Art. 2(3))
4. *Competition — Concentrations — Risk of creation or existence of a collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89)
5. *Competition — Concentrations — Declaration of compatibility with the common market on the basis of Article 6(1)(b) of Regulation No 4064/89*
(Art. 253 EC; Council Regulation No 4064/89, Art. 6(1)(b))
6. *Acts of the institutions — Statement of reasons — Obligation — Scope*
(Art. 253 EC; Council Regulations No 17, Art. 3, and No 4064/89)
7. *Competition — Concentrations — Examination by the Commission*
(Council Regulation No 4064/89, Art. 2)
8. *Competition — Concentrations — Administrative procedure — Statement of objections*
(Council Regulation No 4064/89, Art. 2)
9. *Competition — Concentrations — Administrative procedure*
(Council Regulation No 4064/89)
10. *Competition — Concentrations — Assessment of compatibility with the common market — Strengthening of a collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89, Art. 2(3))

11. *Competition — Concentrations — Assessment of compatibility with the common market — Creation of or strengthening of a pre-existing collective dominant position*
(Council Regulation No 4064/89, Art. 2(3))
12. *Competition — Concentrations — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market*
(Council Regulation No 4064/89)

1. In the context of Regulation No 4064/89 on the control of concentrations between undertakings, 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.

of the concentration on competition in the reference market and the Commission must provide solid evidence.

The procedure 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. Thus, such 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.

Such a prospective analysis requires close examination of, in particular, the circumstances which, in each individual case, are relevant for assessing the effects

(see paras 245, 248, 522, 523)

2. A situation of collective dominance which significantly impedes effective competition in the common market or a substantial part thereof may 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 para. 246)

3. Three conditions must be satisfied in order for collective dominance significantly impeding effective competition in the common market or a substantial part thereof to be created following a concentration. 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 deter-

rent 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.

(see para. 247)

4. In the context of the control of concentrations between undertakings established by Regulation No 4064/89, 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.

ition, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.

(see paras 250-252)

It follows that, in the context of the assessment of the existence of a collective dominant position, although the conditions which must be satisfied in order for a collective dominant position to be created, 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.

5. When the Commission declares a concentration to be compatible with the common market on the basis of Article 6(1)(b) of Regulation No 4064/89 on the control of concentrations between undertakings, 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.

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 pos-

(see para. 281)

6. In the context of the control of concentrations established by Regulation No 4064/89, 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. That 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.
7. The basic provisions of Regulation No 4064/89 on the control of concentrations between undertakings, and 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.

The final decision must thus 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.

Whilst the Community Courts recognise that the Commission has a margin of discretion with regard to economic matters, that does not mean that they 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.

(see paras 285, 300, 335)

(see paras 327, 328)

8. In the context of the control of concentrations between undertakings established by Regulation No 4064/89, 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. That 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.
- (see paras 335, 410)
9. Although the procedure for the control of concentrations necessarily relies 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, the Commission 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 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.
- (see para. 415)
10. The market transparency which is necessary for the purpose of identifying a collective dominant position which would be strengthened by a concentration 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, which provides it with 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 develop-

ment 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.

provoke identical action by the others, so that it would derive no benefit from its initiative.

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. Furthermore, the most effective deterrent is that which has not been used.

(see para. 440)

11. As regards the examination, within the context of the application of Regulation No 4064/89 on the control of concentrations between undertakings, of the creation of a collective dominant position significantly impeding effective competition in the common market, 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

As regards, in the same context, the examination of the existence of such a dominant position, the condition relating to retaliation may consist, not 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. In that regard, 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.

(see paras 465, 466, 468, 469)

12. Examination of the determination by the Commission of the creation of a collective dominant position must be based on a prospective analysis.

As regards, in the context of that examination, the questions of retaliatory measures, the Commission must apply itself not to seeking evidence that retaliatory measures have been used in the past but to ascertaining the existence of effective deterrent mechanisms. Seeking evidence of the use of retaliatory

measures 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.

(see para. 537)