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Simon Hirsbrunner and Christian v. Köckritz *

On July 10, 2008, the European Court of Justice ("ECJ") overturned the European Court of First Instance's ("CFI's") *Impala* judgment,[1] which had previously quashed the European Commission's clearance decision of the *Sony/BMG* merger.[2] Even though the ECJ judgment contains no groundbreaking novelties, it brings some important clarifications with regard to a number of procedural and substantive issues of EC merger control law. The judgment is of particular interest because the ECJ commented for the first time on the CFI's *Airtours* criteria for the establishment of collective dominance. With regard to procedural issues, the ECJ largely restores the pre-*Impala* situation and reduces the uncertainty and imbalance caused by the CFI's judgment as to the importance of the statement of objections ("SO"), the conduct of merger control proceedings before and after the adoption of a SO, and the standard of proof and of adequate reasoning that the Commission has to respect when drafting merger control decisions.

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1 Case T-464/04, Independent Music Publishers and Labels Association (Impala) v. Commission, 2006 E.C.R. II-2289 [hereinafter *Impala*] (judgment of Jul. 13, 2008) [hereinafter "CFI Judgment"].

2 Case C-413/06 P, Bertelsmann AG and Sony Corporation of America v. Impala (not yet reported) [hereinafter *Impala II*] (ECJ judgment of Jul. 10, 2008) [hereinafter "ECJ Judgment"], *available at* http://www.curia.eu.

This article briefly examines the findings of the ECJ in its Bertelsmann and Sony judgment.

I. THE ECJ'S FINDINGS ON SUBSTANCE: PUTTING THE *AIRTOURS* CRITERIA IN THE CONTEXT OF "TACIT COORDINATION"

The ECJ finds that the CFI committed an error of law as it mechanically verified and analyzed the *Airtours* criteria, in particular the transparency of the market, in isolation, instead of basing its analysis on a plausible theory of tacit coordination,[3] thereby misconstruing the legal principles of a collective dominant position.[4]

This part of the judgment is, arguably, of greatest interest, since it is the first time the ECJ comments on the criteria developed by the CFI in *Airtours* for the establishment of collective dominance. The ECJ devotes a considerable number of paragraphs of its judgment to the description of the characteristics of collective dominance. Thereby, it draws the attention away from a schematic identification of particular market characteristics to a more consistent assessment of the required "tacit coordination", which forms the basis of every objection to a concentration under the notion of coordinated effects.

A. The Importance of the "Terms of Tacit Coordination"

The ECJ starts with restating the basic notion of collective dominance as defined in *Kali & Salz*.[5] The ECJ goes on to say that a concentration may result in coordinated

[3] *Id.* at para. 130.

[4] *Id.* at para. 133.

[5] Joined Cases C-68/94 & C-30/95, France and other v. Commission, 1998 E.C.R. I-1375.

effects if the concentration alters the market structure in a way that, as a consequence, the members of an oligopoly become:

> aware of common interests and consider it possible, economically rational and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to resort to [conduct prohibited by Art. 81 EC], and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.[6]

Therefore, the ability and incentive for a permanent tacit coordination of the oligopolists' behavior is the decisive issue when assessing a possible significant impediment to effective competition of a merger possibly leading to coordinated effects.

The ECJ's focus on post-merger price increases in this paragraph is in line with the current Commission practice. However, just as the Commission at least claims to use the label "price increase" as shorthand for any competitive harm, irrespective of which competitive parameter is affected,[7] the ECJ's statement should be read as meaning the same. Indeed, in the judgment, the ECJ explicitly states that the decisive point is whether the market participants can anticipate each others behavior and are therefore encouraged to align their conduct:

> in such a way as to maximise their joint profits by increasing prices, reducing output, the choice or quality of goods and services, diminishing innovation or otherwise influencing parameters of competition.[8]

It is therefore submitted that the assessment of coordinated effects cannot exclusively focus on post-merger price increases, but also has to take into account the possible alignment of the oligopolists' behavior with regard to other parameters of competition.

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[6] ECJ Judgment, *supra* note 2, at para. 122.

[7] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5.

[8] ECJ Judgment, *supra* note 2, at para. 121.

The ECJ goes on to explain that a tacit coordination as described is more likely if the competitors can arrive at a common perception as to how the coordination should work. This means that competitors must be able to identify the possible "focal point" of coordination.[9] Moreover, the coordination must be sustainable. Therefore, a workable monitoring mechanism is required. Market transparency is relevant for the question whether the undertakings concerned can reach a tacit understanding as to the terms of coordination, and for the assessment of the existence of a sufficient monitoring mechanism. In the words of the ECJ, the market must be sufficiently transparent to enable the undertakings concerned "to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving."[10]

B. The *Airtours* Criteria Have to Be Applied in Light of a Concrete Theory of Tacit Coordination

The ECJ explains that the criteria of appraisal that have previously been defined by the CFI in its *Airtours* judgment ("the *Airtours* criteria") are not incompatible with the criteria that the ECJ has developed in its own case law. However:

> in applying those criteria, it is necessary to avoid a mechanical approach involving the separate and isolated verification of each of those criteria, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.[11]

[9] *Id.* at para. 123.

[10] *Id.*

[11] *Id.* at para. 125.

The ECJ then goes on to state that "an investigation must be carried out with care and, above all, it should adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances."[12]

Therefore, the possible parameters of coordination must be established before the *Airtours* criteria can be applied in order to assess whether the market characteristics allow or facilitate such tacit coordination. In other words, the market characteristics cannot be assessed in light of the *Airtours* criteria without having established, first, a concrete theory of harm as to how and on which terms coordination could occur in the concrete circumstances of the case.

II. THE ECJ'S FINDINGS ON PROCEDURAL ISSUES

The CFI's previous judgment had created considerable uncertainty as to the further course of proceedings in case the Commission adopts a SO and the parties subsequently put forward new arguments in their reply or during the oral hearing. The judgment was widely understood to require that, in this case, the Commission could not rely on the evidence presented by the parties after the SO without testing the value of this evidence through an additional market investigation—a task almost impossible to fulfill for the Commission in the tight timeframe of the Merger Regulation without finding a reason for "stopping the clock". Moreover, the Commission would have to justify if the findings in its final decision departed from its findings in the SO.

The CFI's judgment essentially split the merger control procedure in two parts: an investigation before the SO and another investigation after the SO. It led to the

[12] *Id.* at para. 129.

paradoxical situation that the Commission was, on the one hand, obliged to take into account the parties' replies to the SO and, if necessary, change its assessment in light of the parties submissions in order to fully respect their right of defence, and, on the other hand, that a change of the assessment had to be justified by verifying additional evidence which was almost impossible to obtain. As a result, the Commission was discouraged from adopting statements of objections. Furthermore, the burden placed on the parties and the market participants in the phase I and early phase II market investigations was increased. Ideally, the Commission would have had to test and establish every possible aspect of the case before the adoption of a SO. The ECJ's judgment essentially restores the procedural situation before the CFI's judgment.

A. Putting the SO Back in Its Right Place

1. The relevance of the SO

The ECJ held that the CFI committed an error of law by putting excessive weight on the contents of the SO when examining the Commission decision. Although the CFI had repeatedly stressed the provisional nature of the SO, the ECJ found that the CFI erroneously treated the findings in the SO as being established and required the Commission to explain any difference between the SO and the final decision.[13]

However, the ECJ did not state that the CFI was completely banned from using the SO when examining the final decision. Rather, the ECJ essentially confined itself to criticizing that the CFI had erroneously treated certain elements in the SO as being established without explaining why, despite the provisional nature of the SO, they should

[13] *Id.* at para. 76.

be considered as being established beyond dispute.[14] The ECJ also did not decide whether the CFI's distinction between the factual basis (any alteration of which after the SO would have to be explained) and the assessment of facts (which the Commission could change without further explanations after the SO) was correct. The ECJ merely stated that, even if such a distinction were to be accepted, the CFI had erroneously treated some elements as being elements of fact even though they involved complex assessments.[15]

The ECJ's reasoning puts the SO back into its place as a procedural and preliminary step prior to the final decision. The Commission may change its evaluation of the facts and the conclusions it draws from them without having to refute its own previously made arguments or assessments.[16] However, the judgment does not grant the Commission leeway to depart from the SO at will, particularly with regard to findings of fact. Indeed, the ECJ explicitly states that the CFI is not necessarily precluded from using the SO in order to interpret a decision of the Commission, particularly as regards the examination of its factual basis.[17] Therefore, the CFI is still entitled to use the SO as a basis for verifying the correctness, completeness, and reliability of the factual material underpinning the contested decision.[18] Namely, the CFI can still examine whether any facts established in the SO but not addressed in the final decision should have been taken into account and whether, because of that, the factual basis of the decision is incomplete. The CFI may also examine and establish contradictions between the SO and the final

[14] *Id*.

[15] *Id*. at para. 75.

[16] *Id*.

[17] *Id*. at para. 69.

[18] *Id*. at para. 73.

decision. But this is only admissible to the extent that the SO already contains definite findings of facts that are indeed verified and established, and not only provisional findings or assessments that might still be disputed by the parties. In case the SO contains factual findings that are established beyond dispute, it is submitted that the CFI's postulation in the overruled *Impala* judgment still holds true: The Commission must be in a position to explain, not in the decision admittedly, but at least in the context of proceedings before the Court, its reasons for considering that its findings were incorrect or irrelevant, and it cannot suppress undisputed facts from the SO in its final decision without explaining why these facts are irrelevant for its final assessment.[19]

2. No different probative value for evidence or arguments presented after adoption of the SO

The second point of the ECJ's criticism is closely connected to the first and contributes to resetting the balance between the different procedural steps before and after the adoption of a SO. The ECJ holds that the CFI was wrong in criticizing the parties for having presented essential arguments and pieces of evidence only in their reply to the SO. The CFI also erroneously criticized the Commission for having relied on the evidence presented by the parties without further market investigations, thus "delegating parts of the investigation to the parties."

The ECJ states that the CFI was wrong in applying a higher standard of probative value of evidence and arguments of the parties put forward in reply to the SO.[20] It stresses that the SO is the document that delimits the scope of the administrative

[19] CFI Judgment, *supra* note 1, at paras. 300 & 335.

[20] ECJ Judgment, *supra* note 2, at para. 95.

procedure[21] and delineates the scope of potential objections and the evidence that the Commission intends to rely on to justify these objections.[22] The parties' rights of defence are only safeguarded if the parties can put forward in their reply and at the oral hearing all material which they consider capable of refuting the Commission's objections. The SO does not divide the investigation in two parts. Rather, the parties' reply is a logical sequence in the investigation and has to be taken into account as such for the final decision. A higher standard of probative value for the arguments put forward in the reply to the SO would violate the rights of defence.[23] Importantly, the ECJ also stresses that there is no different standard of probative value for the arguments of the parties and the arguments of third parties, and this probative value remains the same regardless of the timing of the presentation during the proceedings.[24]

The ECJ further notes that the Commission cannot be required to verify the arguments of the parties in a market investigation following the replies to the SO as a general principle and in every single case.[25] Nevertheless, ECJ does not exclude, that in certain cases, additional market investigations might be necessary.

B. Clarifying the Relationship between Substantive Appraisal and the Formal Requirement to State Reasons in Commission Decisions

The difference between a violation of the formal duty to state reasons pursuant to Art. 253 EC and the substantive question of whether the reasoning is correct has

[21] *Id.* at para. 63.

[22] *Id.* at para. 89.

[23] *Id.* at para. 92.

[24] *Id.* at para. 94.

[25] *Id.* at para. 91.

significant procedural consequences. While the infringement of Art. 253 EC has to be taken into account by the court ex officio without the parties even having to raise this issue, the challenge of the decision on substance requires that the appellant first identifies a manifest error of assessment or erroneous findings of facts and substantiates its claim in this regard.

The ECJ held that the CFI had erroneously found the Commission's decision to be inadequately reasoned. Even though, in this part of the judgment, the ECJ mainly relied on established case law, it is interesting to briefly outline its reasoning. The ECJ set out clearly the distinction between the formal requirement to state reasons, and the substantive question of whether the reasoning is well-founded.

According to the ECJ, the formal requirement to state reasons as provided for in Art. 253 EC is already fulfilled if the addressees of the decision and third parties directly and individually concerned by the decision are able to ascertain the reasons underlying the decision, and the Courts are able to exercise their power of review. In case of a clearance decision, the duty to state reasons is complied with if the decision clearly sets out why the Commission considers the concentration not to lead to a significant impediment of effective competition.[26] The ECJ reiterated that the Commission is not required to define its position on matters which are plainly of secondary importance or to anticipate potential objections. No precise reasoning is necessary with regard to the factors that, in view of the Commission, are irrelevant or insignificant or only of

[26] *Id.* at para. 168. Note that the wording of the judgment relates to the old dominance test of Regulation 4064/89 and was adapted in the text above to the SIEC test under the new Merger Regulation.

secondary importance to the appraisal of the concentration.[27] The question of whether or not the Commission correctly treated these factors as being irrelevant or insignificant and whether the reasoning of the Commission is right or wrong, is a question of the substantive legality of the decision, but it does not affect the formal duty to state reasons.[28]

Moreover, adequate reasoning also depends on the circumstances, and the short time for drafting the decision can be an element relevant for the assessment of this adequacy. If the reasons put forward by the Commission enable a third party to subsequently challenge the validity of the decision with regard to its substantive assessment, the duty to state reasons is fulfilled, and it is not necessary to describe in detail every factor underpinning the decision.[29]

Nevertheless, the decisive considerations and the underlying facts have to be set out in a clear way, and the reasoning must be logical and must not disclose internal contradictions.[30] It follows that logical flaws or internal contradictions remain violations of the formal duty to state reasons as provided for in Art. 253 EC.

C. Clarifying the Standard of Proof

The ECJ also took opportunity to set an end to the discussions about the required standard of proof for certain decisions under the Merger Regulation that arose after the

[27] *Id.* at para. 167.

[28] *Id.* at para. 181.

[29] *Id.* at para. 180.

[30] *Id.* at para. 169.

ECJ's statements in *Tetra Laval*.[31] Paragraph 44 of this judgment was understood by some as establishing a higher standard of proof or of judicial review for certain kinds of concentrations.[32] The ECJ clearly stressed that

(i) there is no different standard of proof for clearance and prohibition decisions,[33] and

(ii) the standard of proof does not vary depending on the kind of concentration under investigation.

The judgment confirms the CFI's finding in *General Electric*[34] that there is no general presumption that a concentration is compatible or incompatible with the common market.[35] In every case, the Commission must envisage the various possible chains of cause and effect, reach a conclusion, and adopt a position as to which of them is most likely.[36] Even though the ECJ avoided mentioning this term, this clearly appears to be a reference to the standard of "balance of probabilities", as expressly mentioned by Advocate General Kokott in her opinion.[37]

As to the nature or "quality" of the evidence required, the ECJ states that the Commission must base its decision on sufficiently cogent and consistent evidence.[38] This

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[31] Case C-12/03 P, Commission v. Tetra Laval, 2005 E.C.R. I-987 [hereinafter *Tetra Laval*], at paras. 41 & 44.

[32] For a higher standard of proof, *see* G. Drauz & M. König, *The GE/Honeywell Judgement: Conglomerate Mergers and Beyond*, ZWER J. COMPETITION L. 107, 112 (Jun. 2006). For a higher standard of judicial review, *see* J. FAULL & A. NIKPAY, THE EC LAW OF COMPETITION 5.676 ff (2nd ed. 2007).

[33] ECJ Judgment, *supra* note 2, at para. 46 (already apparent in *Tetra Laval*, *supra* note 31, at para. 41).

[34] Case T-210/01, General Electric v. Commission, 2005 E.C.R. II-5575, at para. 61.

[35] ECJ Judgment, *supra* note 2, at para. 48.

[36] *Id.* at paras. 47 & 52.

[37] Opinion of Advocate General Kokott of 13 December 2007, *Impala II*, *supra* note 2, at para. 208.

[38] ECJ Judgment, *supra* note 2, at para. 50.

applies to all cases, regardless of the nature of a concentration. The ECJ clarifies that its statement in paragraph 44 of *Tetra Laval* simply states the "essential function of evidence, which is to establish convincingly the merits of an argument or […] support the conclusions underpinning the Commission's decisions."[39] In this context, the complexity of the underlying theory of harm is a factor to be taken into account when assessing the plausibility of the Commission's conclusions, "but such complexity does not, of itself, have an impact on the standard of proof which is required."[40]

In other words, the evidence that the Commission relies on must be equally convincing in all cases to support the Commission's prediction as to which chain of cause and effect is considered to be most likely. If this prediction is based on a complex theory (e.g., in case of conglomerate mergers or situations of collective dominance or coordinated effects), the evidence to support the prediction will naturally have to be "more convincing" in the sense that there are more assumptions inherent in the theory of harm that have to be supported by evidence. But this does not mean that, if the Commission on the basis of the evidence at hand considers the occurrence of this complex chain of cause and effect to be more likely than another chain of cause and effect, it has to provide additional or especially "good" evidence.

Even if the Commission relies on a complex theory such as a theory of collective dominance or coordinated effects, it may derive certain findings even from a "mixed set of indicia and evidence." The ECJ explicitly holds that it was not wrong in itself for the

[39] *Id.* at para. 51 (already stated in *Tetra Laval*, *supra* note 31, at para. 41).

[40] ECJ Judgment, *supra* note 2, at para. 51.

CFI to state that the factors establishing an existing collective dominant position can be indirectly established on such mixed set of indicia and evidence.[41]

Irrespective of the kind or the quality of the evidence, decisive in the context of judicial review is whether this evidence is sufficiently convincing to support the conclusions that the Commission draws from it.

D. The Procedural Situation after Bertelsmann Sony: Attempt of an Overview

Overall, the ECJ's judgment in the *Impala* case contains some encouraging news for the Commission. Even though the Commission has to be careful when clearing or prohibiting mergers on the basis of complex theories, it may in principle rely on the same kind of evidence to underpin its assessment in all cases. If the Commission provisionally considers, on the basis of the evidence collected in the market investigations in phase I and II that adverse effects are more likely to arise from the merger than not, then it can adopt a statement of objections without having to fear that it cannot subsequently change its mind.

When preparing its final decision, the Commission can generally rely on all evidence in its case file, regardless of when or by whom the evidence was presented. In its final decision, the Commission only has to clearly set out the relevant considerations for its conclusions as to the most likely economic outcome of the concentration, the factual basis for this assessment, and the evidence supporting these facts. If the reasoning of the Commission is logical and not contradictory in itself, and the parties and other undertakings that are directly and individually concerned are able to understand what led

[41] *Id.* at para. 129.

the Commission to its conclusions, then the decision is deemed to be sufficiently reasoned. Applicants may then challenge the decision on the merits, but not merely for lack of sufficient reasoning, even if the decision does not contain all elements that they themselves (or the CFI, for that matter) would have considered decisive for the assessment of the case.

For a successful challenge of a decision on the merits, the applicant first has to substantiate its case. He must establish why he believes that the Commission committed a manifest error of assessment or relied on the wrong factual findings. For this, the applicant has to put forward sufficient evidence to raise doubts as to the Commission's findings or assessment. Once the applicant succeeds in overcoming this hurdle, the CFI can fully review the accuracy and completeness of the factual findings. It will examine whether the evidence is sufficiently convincing to support the Commission's assessment, and whether the Commission has taken all evidence into account. If the Commission's theory of harm (or—in case of a clearance decision in borderline cases—its "theory of non-harm") is complex, it may be more difficult to establish that the evidence in the case file is consistent and convincing enough to actually support this theory. However, this is not a matter of the quality or the amount of evidence itself.

E. Open Questions: Does the Judgment Raise the Burdens for Third-Party Complainants?

With regard to challenges brought by third parties, it is unclear whether the ECJ's judgment further raises the hurdles that an applicant has to overcome in order to

successfully substantiate a manifest error of assessment: In its judgment, the ECJ states that, if a third party challenges a finding of the Commission as to the lack of sufficient market transparency and, therefore, the impossibility of monitoring an alleged tacit coordination, then the applicant bears the burden of proof (at least if the applicant is active on the same market).[42] Impala had argued that there was a "known set of rules" for the granting of discounts that could be easily recognized by industry participants, and the CFI had accepted this argument, even though Impala was not able to explain precisely what these rules were.[43]

The fact that the ECJ explicitly used the term "burden of proof" makes one wonder whether it intended to raise the standards that a third-party applicant would have to meet. Previous statements of the Community Courts only required the applicants to substantiate their case or to adduce "serious evidence of the genuine existence of a competition problem which, by reason of that effect, should have been examined by the Commission."[44] This was understood to mean that the applicant had to present evidence to substantiate its claim that the Commission had committed a manifest error of assessment, but not to put forward evidence to actually prove its own substantive assessment. Once the applicant had overcome the obstacle of sufficiently substantiating a manifest error of assessment, the Commission would then have had to defend its factual findings and its economic assessment, therefore bearing the final burden of proof.[45]

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[42] *Id.* at para. 132.

[43] CFI Judgment, *supra* note 1, at para. 427.

[44] Case T-177/04, easyJet Airline Co. Ltd. v. Commission, 2006 E.C.R. II-1931, at para. 65.

[45] C. Bengtsson et al., *The Substantive Assessment of Mergers*, *in* EU COMPETITION LAW: VOLUME II—MERGERS AND ACQUISITIONS 4.67 (G. Drauz & C. Jones, eds. 2006).

It remains to be seen whether the ECJ's statement will be interpreted in future cases as establishing a greater burden for third-party appeals in the sense that third-party applicants will not only have to substantiate their claims regarding the errors with regard to the fact-finding or assessment in the Commission decision, but will be required to actually and fully prove why they believe that the merger will result in competitive harm.

F. The ECJ's Comments on the Treatment of Confidential Documents

For the sake of completeness, it should briefly be mentioned that the ECJ found another error of law because the CFI relied on certain evidence provided by third parties. The ECJ pointed out that the Commission could not have used this information because it was confidential and, therefore, could not have disclosed it to the parties.[46] The ECJ underlined the importance of the rights of defence of the parties. Confidential documents submitted by third parties could only be relied on if the parties were able to "acquaint themselves in sufficient time with the tenor of the confidential documents in question."[47] The document should have been disclosed to the parties "in good time" and in a manner which was sufficiently precise and clear to allow the parties to reply effectively to the inferences which the third party had drawn from these documents. Otherwise, neither the Commission nor the CFI was allowed to use the contents of these documents against the parties.

The ECJ's judgment thus ensures that the Commission does not have to defend its case in court against objections that are based on documents, which the Commission could not have used itself.

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[46] ECJ Judgment, *supra* note 2, at para. 102.

[47] *Id.* at para. 101.

III. SUMMARY AND CONCLUSIONS

The ECJ's judgment will substantially decrease the pressure that the CFI's previous *Impala* judgment had put on the Commission and the parties in the course of the administrative procedure. It will contribute to resetting the balance between:

- first, the need for expediency in merger control proceedings;
- second, the Commission's obligation to keep an open mind on the likely outcome of a proceeding and to adapt its views in light of new evidence and arguments if necessary; and
- finally, the need to respect the parties' rights of defence.

The Court's remarks on the substantive law of collective dominance or coordinated effects appear to be in line with the Commission's own policy. The Commission has explicitly stated in its horizontal guidelines that reaching a common understanding on the terms of coordination was an important pre-condition for rendering a tacit coordination likely. The Commission described the *Airtours* criteria as being additional conditions that had to be fulfilled for the coordination to be sustainable.[48]

The ECJ's clarification that the same standard of proof applies regardless of the nature of the concentration and the theory of harm has to be particularly welcomed.

To the extent that the Commission may sometimes have hesitated to adopt statements of objections in the wake of the CFI's *Impala* judgment such hesitations should no longer be considered appropriate. The ECJ has made it clear that opinions expressed in a statement of objection are not legally binding. The Commission must therefore not justify itself when it decides to depart from the provisional assessment that

[48] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5, at para. 41.

it has communicated in the statement of objections, provided that the provisional nature of this assessment has been made sufficiently clear. This additional condition should not be an obstacle that is too difficult to overcome for the Commission. The judgment confirms the unlimited ability of the Commission to rely on arguments and evidence that are put forward after the communication of the statement of objections.

Lastly, the judgment raises the barriers for third parties intending to challenge clearance decisions in court. Unless a third party can establish contradictions or logical flaws in the Commission's reasoning, a claim of insufficient reasoning will rarely be successful. In most cases, the applicant will have to go down the more thorny path of claiming—and substantiating—a manifest error in the Commission's assessment. This may, at least to some extent, reduce the amount of third-party challenges to clearance decisions, thus contributing to increased legal certainty for the parties of a concentration.