

**Section of Antitrust Law
2007 Spring Meeting**

**Are We Done Yet?
Post-Closing Review of and Challenges
to M&A Transactions**

Session Materials

Friday, April 20, 2007
8:15 – 9:45 a.m.

Presented by:

Mergers & Acquisitions Committee
International Antitrust Enforcement Committee

Session Chair and Moderator: James R. Wade

Speakers: Nadia Calviño
John Davies
Joseph G. Krauss
J. Robert Robertson

TABLE OF CONTENTS

<u>Description</u>	<u>Author</u>
Conclusions from the Sony/BMG Judgment	Nadia Calviño
Deal implications of the CFI's Judgment in Sony/BMG	John Davies
Merger Review Under the Tunney Act: Recent Travails	Joseph G. Krauss
Chicago Bridge & Iron	J. Robert Robertson



Conclusions from the Sony/BMG Judgement

Nadia Calviño

Deputy Director-General for Mergers
European Commission, DG Competition

1

Outline



- I. The Commission's case in Sony/BMG
- II. Main findings of the Court of First Instance
- III. Conclusions for European Merger Control Policy and Practice

Note: No discussion of the pending re-examination of the transaction and developments subsequent to the CFI ruling.

2

I. The Commission's case



- Merger combines worldwide recorded music businesses of Sony and BMG
- Commission's main theory of harm outlined in Statement of Objections (SO): **strengthening of existing collective dominant position** of the five music majors on the market for recorded music
- Special feature: Transaction ultimately cleared without remedies after parties submitted extensive additional data post-SO

3

I. The Commission's case



Two main pillars of the Commission's analysis:

- 1) Price parallelism in the past
 - Trend of average net wholesale prices for top 100 albums of five majors 1998-2003
- 2) Market conditions conducive to tacit collusion based on Airtours criteria, in particular market transparency
 - Product homogeneity in format
 - Published prices to dealers (PPD) as limited pricing points
 - Weekly chart publication
 - Multi-market contacts due to vertical integration
 - Structural links

4

I. The Commission's case



Basis for ultimate clearance despite SO:

- Extensive data submitted by parties post-SO showed
 - deviations in the past from parallel pricing trend
 - existence of unpublished discounts, reducing significantly the transparency of actual pricing
- IMPALA (association of independent music labels) submits appeal against Commission clearance
 - Main argument: insufficient reasoning to explain change of Commission position after SO

5

II. Main findings of the CFI



- CFI annuls Commission clearance based on **insufficient reasoning** as regards transparency analysis in assessing collective dominance and **error of assessment** as regards transparency and retaliation in the oligopoly
- Judgment contains important findings on
 - Procedure,
 - Theory of collective dominance and
 - Handling of data submitted by the parties

6

II. Main findings of the CFI



A. Procedural issues

- ❑ **Standard of proof:** CFI confirms symmetry of ECMR test as defended by Commission → balance of probabilities, same evidential requirements for clearance as for prohibition
- ❑ **Nature of Statement of Objections:** CFI confirms preliminary character. Commission does not have to explain reasons for change of position in final decision, but must examine all facts including those considered in the SO

7

II. Main findings of the CFI



B. Theory on collective dominance

- ❑ **Transparency presumption:** CFI considers that close alignment of prices over long period can suffice, in the absence of alternative explanations, to demonstrate existing dominant position, even without direct evidence of strong market transparency
- ❑ **Transparency requirements:** According to CFI, Airtours criteria do not require that each oligopoly member is aware of detailed sales conditions of other members; essential is possibility to identify terms of tacit coordination and to discover deviation
- ❑ **Retaliation:** CFI finds mere existence of retaliation mechanism sufficient; may consist in threat to return to competitive behavior
- Court conclusions: Commission standard for transparency too high; unpublished discounts not material enough to show elimination of transparency

8

II. Main findings of the CFI



C. Handling of data submissions by the parties

- Commission has to **reexamine** submitted data to check its reliability
- Parties have to submit data **in time** to allow verification by Commission
- Data submitted late in the procedure has to be **particularly reliable**, objective, relevant and cogent
- Court conclusions: Data submitted by parties unreliable and unconvincing, Commission committed error in relying on party data without further verification

9

III. Conclusions for EC Merger Control policy and practice



- Current situation
 - Judgement appealed by the parties
 - New assessment of the transaction currently ongoing
 - Based on “old” Merger Regulation and current market situation in the 15 Member States pre-accession
- Confirmation of symmetric test
- Lowered standard for collective dominance theories after clarification of tight Airtours criteria?
- Maintenance of policy on Statement of Objections
- The importance to submit relevant data on a timely basis

10