JUDGMENT OF THE COURT (Grand Chamber)

10 July 2008 *

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* Language of the case: English.

In Case C-413/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 3 October 2006,

Bertelsmann AG, established in Gütersloh (Germany), represented by P. Chappatte and J. Boyce, Solicitors,

Sony Corporation of America, established in New York (United States of America), represented by N. Levy, Barrister, R. Snelders, avocat, and T. Graf, Rechtsanwalt,

appellants,

the other parties to the proceedings being:

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

applicant at first instance,

Commission of the European Communities, represented by A. Whelan and K. Mojzesowicz, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Sony BMG Music Entertainment BV, established in Vianen (Netherlands), represented by N. Levy, Barrister, R. Snelders, avocat, and T. Graf, Rechtsanwalt,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, E. Juhász, A. Borg Barthet, M. Ilešič, J. Klučka, E. Levits and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 November 2007,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

gives the following

Judgment

1 By their appeal, Bertelsmann AG ('Bertelsmann') and Sony Corporation of America ('Sony') request the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-464/04 *Impala* v *Commission* [2006] ECR II-2289 ('the judgment under appeal'), in which the Court of First Instance annulled Commission Decision 2005/188/EC of 19 July 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3333 — Sony/BMG) (OJ 2005 L 62, p. 30) ('the contested decision').

Legal context

2 Article 2(2) and (3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, and Corrigendum (OJ 1990 L 257, p. 13)), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1, and Corrigendum (OJ 1998 L 40, p. 17)) ('the Regulation') states:

'2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

3 Article 6(1) of the Regulation provides as follows:

'The Commission shall examine the notification as soon as it is received.

…

(c) … where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.'

4 Article 8 of the Regulation empowers the Commission, in the formal proceedings for assessing the compatibility of the concentration with the common market initiated under Article 6(1)(c) of the Regulation ('the formal proceedings'), to adopt a decision pursuant to Article 8(2) declaring the concentration compatible, where appropriate following modification by the undertakings concerned to the proposed concentration as notified, or a decision pursuant to Article 8(3) declaring the concentration

incompatible. Under Article 8(5)(a) of the Regulation, the Commission may revoke the decision it has taken pursuant to Article 8(2) where the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit.

5 Article 10(1) of the Regulation allows the Commission, except in certain circumstances which are not relevant to the present appeal, a period of one month in which to decide whether to initiate the formal proceedings. Article 10(3) provides that a decision declaring the notified concentration incompatible with the common market is to be taken within not more than four months of the date on which the formal proceedings are initiated. Under Article 10(6) of the Regulation, a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision either to initiate the formal proceedings or a decision on the compatibility of the concentration with the common market within the periods laid down in Article 10(1) and (3), respectively.

6 Article 11 of the Regulation concerns the requests for information which the Commission, in carrying out the duties assigned to it by the Regulation, may send to, among others, the notifying parties and to other undertakings or associations of undertakings, where appropriate by way of decision. Articles 14 and 15 of the Regulation provide for the imposition of fines or periodic penalty payments where incorrect or misleading information is supplied.

7 Article 18(3) of the Regulation provides:

‘The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.’

8 Article 19 of the Regulation concerns liaison between the Commission and the competent authorities of the Member States. Under Article 19(3), an Advisory Committee on concentrations is to be consulted before any decision is taken pursuant to Article 8(2) to (5) of the Regulation. Article 19(6) provides that the Advisory Committee is to deliver an opinion on the Commission's draft decision, if necessary by taking a vote.

9 Under Article 3(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1) ('the Implementing Regulation'), the notification of the proposed concentration must contain the information, including documents, requested by form CO annexed to that regulation.

10 Article 13(2) of the Implementing Regulation provides, among other things, that the Commission is to address its objections in writing to the notifying parties and to set a time-limit within which they may inform the Commission of their views in writing.

Facts

11 The facts of the dispute were set out as follows by the Court of First Instance in paragraphs 1 to 11 of the judgment under appeal:

'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 [the Regulation] of a proposed concentration by which the undertakings Bertelsmann … and Sony … proposed to merge their global recorded music businesses.

3 Bertelsmann is an international media company … active in recorded music through its wholly-owned subsidiary Bertelsmann Music Group "BMG" ….

4 … In the recorded music sector [Sony] acts through Sony Music Entertainment ...

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. [Impala] replied to that questionnaire and lodged a separate submission on 28 January 200[4] in which it set out the reasons why in its view the Commission should declare the operation incompatible with the common market. [Impala] 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 [the formal proceedings].

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, [Impala].

11 By [the contested decision], the Commission declared the concentration compatible with the common market pursuant to Article 8(2) of [the Regulation] …'

The proceedings before the Court of First Instance and the judgment under appeal

12 By application lodged at the Registry of the Court of First Instance on 3 December 2004, Impala brought an action for the annulment of the contested decision. In support of that action, Impala put forward five pleas in law, divided into a number of parts.

13 As regards the first plea, relating to the strengthening of a pre-existing collective dominant position, the Court of First Instance, after having first set out a number of observations regarding the concept of a 'collective dominant position', examined the argument according to which, in essence, the contested decision did not explain to the requisite legal standard the reasons for which discounts, in particular campaign discounts, undermine the transparency necessary to allow the development of such a position.

14 Having reached the conclusion set out in paragraph 325 of the judgment under appeal that, in essence, the contested decision should be annulled on the ground that it was inadequately reasoned, in paragraphs 327 to 458 of the judgment under appeal the Court of First Instance none the less examined, in the interest of completeness, Impala's arguments that the elements put forward by the Commission in order to demonstrate insufficient transparency in the recorded music markets at issue were vitiated by manifest errors of assessment.

15 In that regard, the Court of First Instance found in particular, in paragraph 373 of the judgment under appeal, that it followed both from the contested decision and from the arguments advanced by the Commission before it that the only alleged element of opacity of the market resulted from the lesser transparency of the campaign discounts. In paragraphs 377 and 378 of the judgment under appeal, it held, first, that the evidence, as mentioned in the contested decision, did not support the conclusions drawn from it by the Commission and, secondly, that those conclusions were also markedly different from the findings made in the statement of objections.

16 In paragraphs 475 and 476 of the judgment under appeal, the Court of First Instance set out its conclusions relating to the first plea as follows:

'475 … 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 … an essential ground on which the Commission concluded … that there was no collective dominant position, the [contested 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 [contested decision] that there was no collective dominant position, that defect also provides a ground for annulment of the [contested decision].'

17 By its second plea raised before the Court of First Instance, Impala claimed that, by not taking the view that the proposed concentration would create a collective dominant position on the market for recorded music, the Commission had infringed Article 253 EC and made a manifest error of assessment and an error of law.

18 In paragraph 527 of the judgment under appeal, the Court of First Instance set out the terms of the analysis in the contested decision as regards the risk that a collective dominant position might be created and went on to hold as follows in paragraph 528 of the judgment:

'… these few observations, which are so superficial, indeed purely formal, cannot satisfy the Commission's obligation to carry out a prospective analysis … 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 [contested 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 [major record companies ('the 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.'

19 In the interest of completeness, the Court of First Instance held in paragraph 539 of the judgment under appeal that 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 in question was not likely to give rise to a collective dominant position.

20 In those circumstances, the Court of First Instance held that the first and second pleas in law were well founded and annulled the contested decision without examining the third to fifth pleas raised before it.

Forms of order sought and positions of the parties

21 By their appeal, the appellants request that the Court of Justice should:

— set aside the judgment under appeal;

— dismiss Impala's application for annulment of the contested decision or, alternatively, refer the case back to the Court of First Instance for reconsideration; and

— order Impala to pay the costs of the present proceedings.

22 By the seven grounds of appeal put forward by the appellants, some of which are divided into a number of parts, the appellants allege errors of law in that in the judgment under appeal the Court of First Instance:

— relied on the statement of objections as a benchmark for its review of the substance of the contested decision;

— required the Commission to undertake new market investigations following the response to the statement of objections;

— applied an excessive and incorrect standard of proof for decisions approving a concentration;

— exceeded the scope of its role in carrying out judicial review;

— misconstrued the relevant legal criteria applying to the creation or strengthening of a collective dominant position;

— applied an incorrect standard of reasoning as regards decisions approving a concentration; and

— relied on evidence that was not disclosed to the parties to the concentration.

23 Sony BMG Music Entertainment BV adopts in full both the appeal and the forms of order sought by the appellants.

24 The forms of order sought by the Commission are, in substance, the same as those of the appellants. The Commission supports the first, second and fourth grounds of appeal, together with the first part of the third ground.

25 Impala requests the Court to dismiss the appeal and to order the appellants to pay the costs. As a preliminary point, it pleads that the appeal is inadmissible in whole or in part. It also argues that the appeal could not in any event lead to the setting aside of the judgment under appeal, since the appellants have failed to challenge paragraph 528 of the judgment, which is itself sufficient justification for the annulment of the contested decision.

26 The appellants and the Commission claim that both the plea of inadmissibility and the line of argument relating to paragraph 528 of the judgment under appeal summarised in the preceding paragraph of this judgment should be rejected.

27 At the end of its response, the Commission made some 'additional observations on the "essential grounds" of the [contested] decision'. Those observations are challenged by Impala, relying on Article 117(2) of the Rules of Procedure of the Court of Justice. The appellants support those observations.

The appeal

Admissibility

The general plea of inadmissibility

28 As a preliminary point, Impala pleads that the appeal is inadmissible in that it constitutes an attempt to reopen questions of fact relating to the inadequacy of reasoning in the contested decision and to the manifest error of assessment vitiating the contested decision, which were settled by the Court of First Instance. The appeal seeks, to a very large extent, to re-examine questions of fact which are beyond the jurisdiction of the Court of Justice. Impala also submits in this respect that the question whether a decision is sufficiently reasoned is a question of fact. Lastly, it adds that its individual replies to the grounds of appeal raised by the appellants should be understood as being in the alternative.

29 In this regard, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal lies on points of law only. The Court of First Instance accordingly has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-185/95 P

Baustahlgewebe v *Commission* [1998] ECR I-8417, paragraphs 23 and 24; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraphs 51 and 52; and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 41).

30 On the other hand, according to the case-law of the Court, the extent of the obligation to state reasons is a question of law reviewable by the Court on appeal, since a review of the legality of a decision carried out in that context must necessarily take into consideration the facts on which the Court of First Instance based itself in reaching its conclusion as to the adequacy or inadequacy of the statement of reasons (see Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 453).

31 As regards the present case, as is apparent from, among other things, paragraph 22 of this judgment and contrary to what Impala contends, the appellants do not, by their appeal, seek generally to call into question the findings of fact made by the Court of First Instance, as such. By contrast, they raise for the most part questions of law which can form a valid basis for an appeal. Impala's general plea of inadmissibility should therefore be rejected. That being said, to the extent that Impala puts forward more detailed objections of inadmissibility in relation to a number of specific parts of the appeal, those objections fall to be addressed in the context of the grounds of appeal concerned.

The plea of inadmissibility based on the appellants having omitted to challenge a critical passage of the judgment under appeal

32 Impala submits that, in any event, the Court of First Instance held in paragraph 528 of the judgment under appeal that the Commission did not carry out a prospective analysis of whether the concentration would create a collective dominant position, and held that for this reason alone that Impala's second plea in law at first instance was well founded. That, in itself, is sufficient to annul the contested decision. Accordingly, even if the appellants succeed on one or more of their grounds of appeal, the

appeal must in any event be dismissed, since the appellants do not contest the finding that no prospective analysis was carried out.

33 In that regard, it is sufficient to hold that the appeal expressly refers, in a list of the passages in the judgment under appeal that are specifically subject to criticism, to paragraph 528 of that judgment, as well as to paragraphs 533, 539 and 541, which also address the question of the creation of a collective dominant position.

34 That being the case, it cannot validly be argued that the appeal is limited to the reasoning of the Court of First Instance regarding the question of the strengthening of a pre-existing collective dominant position with the result that it should be rejected as inadmissible in its entirety.

Substance

35 The seven grounds of appeal relied on by the appellants overlap in a number of respects. Essentially, the first to fourth grounds, together with the seventh ground, concern the manner in which the Court of First Instance carried out its review, particularly with respect to questions of proof. The fifth ground concerns the concept of a collective dominant position. The sixth ground relates to the findings of the Court of First Instance with respect to the failure of the contested decision to state adequate reasons.

36 It is appropriate to begin the examination of the substance of this appeal by considering the grounds of appeal concerning the manner in which the Court of First Instance approached issues of evidence and proof, and, in the first place, by considering the second part of the third ground.

The second part of the third ground of appeal, alleging an error of law in that the Court of First Instance applied an excessive burden and standard of proof as regards decisions approving a concentration

— The judgment under appeal

37 It is apparent from, among others, paragraphs 289, 366 and 459 of the judgment under appeal that the Court of First Instance considered whether the considerations on which the contested decision was based were capable of justifying the Commission's finding in that decision that the markets in question were not sufficiently transparent to allow a collective dominant position.

— Arguments of the parties

38 By their third ground of appeal, the appellants maintain that the Court of First Instance committed an error of law by applying an incorrect and excessive standard of proof as regards merger clearance decisions. In the second part of that ground, the appellants submit that the Court of First Instance misconstrued the burden and standard of proof which applies to those decisions.

39 According to the appellants, since it is for the Commission to substantiate a decision prohibiting a concentration, where it has not been able to collect evidence which meets the high standard set by the Community judicature to justify such a prohibition, particularly where the Commission is pursuing a theory of collective dominance, it must approve the proposed concentration. It is clear, in particular, from Article 10(6) of the Regulation that if the Commission is unable to substantiate its theory of competitive harm on the basis of convincing evidence, the scheme of the Regulation dictates that it must approve the concentration.

40 The appellants also maintain in that regard that the Court of First Instance committed an error of law in failing to recognise that the Commission is obliged to satisfy a higher standard of proof when a concentration is prohibited than when such a concentration is approved, since a prohibition represents a serious limitation of the commercial freedom of the notifying parties and since concentrations should benefit from a presumption that they are compatible with the common market. It is clear from the case-law that the Commission must prove that a decision prohibiting a concentration is well founded in accordance with a standard which is stricter than one based on the mere balancing of probabilities and, consequently, that the Commission is not subject to the same burden and standard of proof in the case of an approval decision as it is in the case of a prohibition decision. Under a stricter standard than the mere balancing of probabilities, the Commission is, in reality, required only to prove that a decision prohibiting a concentration is well founded. According to the appellants, the failure to accept such an 'asymmetric' standard of proof permeates the assessment by the Court of First Instance of the contested decision and of the evidence on which the Commission relied.

41 The appellants go on to submit that, as a result, the Court of First Instance committed an error of law in requiring the Commission to prove the absence of transparency in the recorded music market, when it should have examined whether, at the date of the contested decision, there was sufficient evidence to prove to the requisite legal standard that that transparency existed. That error vitiates the whole of the judgment under appeal and, in particular, in various respects described in detail in the appeal, paragraphs 381 to 387, 389, 420, 428, 429 and 433.

42 According to Impala, to follow the appellants' line of argument in support of the second part of the third ground of appeal and to accept that there is a presumption in favour of the approval of concentrations could have grave repercussions for the merger control regime, such as the risk of abuse of the system. That line of argument ignores the delicate balance created by the Community legislation on merger control between private and public interests and the symmetrical double obligation imposed on the Commission to prohibit mergers which are incompatible with the common market and to approve those that are compatible with it. The standard of proof required in that regard is that of the balance of probabilities and it is for the Commission to demonstrate where the balance falls. Impala also submits that the

Court of First Instance concluded that the Commission had found a large body of convincing evidence showing that there was transparency on the markets concerned, but that it had ultimately decided that there was not sufficient transparency on the basis of 'less transparent' campaign discounts. The Court of First Instance also found that the evidence that was supposed to establish that insufficiency of transparency did not support it.

43 Impala also considers that in putting forward the arguments referred to in paragraph 41 of this judgment the appellants appear to be inviting the Court to reopen the findings of fact made by the Court of First Instance.

— Findings of the Court

44 As a preliminary remark, it is clear from the Court's case-law that an alleged failure to have regard to the rules of evidence is a question of law, which is admissible in an appeal (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 65, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 40). Thus, in so far as Impala, under its general plea of inadmissibility, specifically argues that the third ground of appeal is inadmissible in its entirety, that argument cannot be accepted.

45 As regards the substance, as Impala points out, at the heart of the second part of the third ground of appeal is the premiss that the standard of proof will differ according to whether a decision approving a concentration or a decision prohibiting a concentration is involved. In this connection, it is common ground between the parties that in the judgment under appeal the Court of First Instance applied the same standard of proof to the contested decision — an approval decision — as that which it would have applied to a prohibition decision.

46 In that regard, it should be noted at the outset that there is nothing in Article 2(2) or (3) of the Regulation which states that it imposes different standards of proof in relation to decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other.

47 Thus, as the Court has, in substance, already held, the prospective analysis called for in relation to the control of concentrations, which consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a significant impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely (see, to that effect, Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 43).

48 Contrary to what the appellants submit, it cannot therefore be inferred from the Regulation that there is a general presumption that a notified concentration is compatible with, or incompatible with, the common market.

49 That interpretation of the Regulation is not invalidated by Article 10(6), which provides that a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision on the compatibility of that concentration within the prescribed period. That provision is a specific expression of the need for speed, which characterises the general scheme of the Regulation and which requires the Commission to comply with strict time-limits for the adoption of the final decision (see, in that regard, Case C-202/06 P *Cementbouw Handel & Industrie* v *Commission* [2007] ECR I-12129, paragraph 39). It is, however, an exception to the general scheme of the Regulation, which is laid down in particular in Articles 6(1) and 8(1), according to which the Commission is to rule expressly on the concentrations which are notified to it.

50 Furthermore, it is true that, as is apparent from the Court's case-law, the decisions of the Commission as to the compatibility of concentrations with the common market

must be supported by a sufficiently cogent and consistent body of evidence (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, '*Kali & Salz*', paragraph 228) and that in the context of the analysis of a 'conglomerate-type' concentration the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important (see *Commission* v *Tetra Laval*, paragraph 44).

51 However, it cannot be deduced from that that the Commission must, particularly where it pursues a theory of collective dominance, comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them. That case-law merely reflects the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the case of the control of concentrations, to support the conclusions underpinning the Commission's decisions (see, to that effect, *Commission* v *Tetra Laval*, paragraphs 41 and 44). Furthermore, the fact that an issue of collective dominance does, or does not, arise, cannot of itself have an impact on the standard of proof which applies. In that regard, the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required.

52 It follows that, where it has been notified of a proposed concentration pursuant to the Regulation, the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue.

53 The appellants are accordingly incorrect in maintaining that, since it was a decision approving a concentration that was at issue, the Court of First Instance should have considered only whether the Commission could, by applying a particularly high standard of proof, have prohibited that concentration. Consequently, without

it being necessary to adopt a position on the admissibility of the specific criticisms relating to the paragraphs of the judgment under appeal listed in paragraph 41 of this judgment, it must be held that since the premiss underlying those criticisms is groundless, they cannot, in any event, be accepted.

54 In the light of the above, the second part of the third ground of appeal must be rejected.

The first ground of appeal, alleging an error of law in that the Court of First Instance relied on the statement of objections as a benchmark for its review of the substance of the contested decision

— The judgment under appeal

55 In a number of passages in the judgment under appeal, among others, in paragraphs 379, 424 and 446, the Court of First Instance referred to the statement of objections in order to support its reasoning, both as regards the plea alleging inadequate reasoning in the contested decision and as regards the argument alleging manifest errors of assessment which vitiated that decision.

56 In its examination of the plea alleging insufficient reasoning in the contested decision, the Court of First Instance observed in particular as follows:

‘282 The Court must examine, first of all, the impact of the circumstance, emphasised by [Impala], 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 [14] and [15] 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 ([Joined Cases 142/84 and 156/84] [*British American Tobacco*] *and Reynolds* [*Industries*] v *Commission*, [[1987] ECR 4487]) 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 [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], 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.'

— Arguments of the parties

57 The appellants claim that the Court of First Instance committed an error of law in using the statement of objections as a benchmark for evaluating the substance of the contested decision, in contravention of the rights of the defence.

58 In those circumstances, the appellants take the view that the comparison made by the Court of First Instance between the contested decision and the provisional findings of the Commission contained in the statement of objections cannot support the conclusions reached in the judgment under appeal as regards the reasoning of the contested decision and the Commission's findings in it. They cite in that regard paragraphs 300, 302 and 308 of the judgment under appeal as regards the conclusions of the Court of First Instance in relation to the reasoning of the contested decision. In addition, as regards the examination by the Court of First Instance of the arguments based on manifest errors of assessment, the appellants criticise in their appeal paragraphs 338, 339, 341, 362, 378, 379, 398, 402, 409, 419, 424, 446, 447, 451, 456, 467, 491, 532 and 538 of the judgment.

59 In support of the appellants in relation to this ground of appeal, the Commission argues that in much of the judgment under appeal the Court of First Instance — contrary to the case-law cited by that court itself in paragraph 284 of the judgment, to which it paid only lip service — did not examine the contested decision on its own merits as regards the question whether it was adequately reasoned and, as regards the plea of substantive error, the question whether that decision contains errors of fact or manifest errors of assessment, but instead focused in its judgment on the question whether the statement of objections was shown to be unfounded. Thus, according to the Commission, since certain facts were not mentioned in the statement of objections, the Court of First Instance inferred from that that they could not be important for the assessment of the consequences of the concentration in general. Moreover, whereas the Commission set out certain findings in the contested decision that were expressed in a less unqualified manner in the statement of objections, the Court of First Instance took as a basis for its review the assessment made in the statement of objections.

60 Impala argues that the Court of First Instance merely mentioned extracts from the statement of objections in order to emphasise inherent inconsistencies in the contested decision itself and the lack of underlying support for the findings set out in it. The Court of First Instance expressly recognised that the statement of objections is a preparatory document, that its findings are purely provisional and that the Commission does not have to explain differences between that statement and the contested decision.

— Findings of the Court

61 It is apparent from the Court's case-law that the right to a fair hearing, which is a fundamental principle of Community law and forms, in particular, part of the rights of the defence, requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the EC Treaty (see inter alia, to that effect, Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, paragraph 15; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825,

paragraph 10; *Kali & Salz*, paragraph 174; and *Aalborg Portland and Others* v *Commission*, paragraph 66).

62 For procedures for the control of concentrations governed by the Regulation, that principle is laid down in the second sentence of Article 18(3) and, in more detail, in Article 13(2) of the Implementing Regulation. The latter in substance requires, among other things, that written notice be given to the notifying parties of the Commission's objections, with an indication to those parties of the period within which they may inform the Commission of their views in writing.

63 It follows, by analogy with the case-law on Articles 81 EC and 82 EC, that the statement of objections is a procedural and preparatory document which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure in question (see, in particular, the order in Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1986] ECR 1899, paragraphs 13 and 14). It is therefore inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact (see, to that effect, *SGL Carbon* v *Commission*, paragraph 62). The Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned (see the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 13).

64 It follows that the Commission is not obliged to maintain the factual or legal assessments set forth in that document. On the contrary, it must give as reasons for its ultimate decision its final assessments based on the situation existing at the time the

formal proceedings are closed (see, by way of analogy, the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 15).

65 Furthermore, the Commission is not obliged to explain any differences with respect to its provisional assessments set out in the statement of objections (see, to that effect, the order in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 15, and the judgment in *British American Tobacco and Reynolds Industries* v *Commission*, paragraph 70).

66 The fact that the Commission is, by contrast to the position under Articles 81 EC and 82 EC, subject to strict time-limits, has no effect on the provisional nature of the statement of objections. The effective exercise of the rights of the defence requires that the arguments of the parties to a proposed concentration be taken into account in proceedings for the control of concentrations in the same way as the arguments of the parties affected by proceedings initiated under Articles 81 EC or 82 EC.

67 It is true that the Court of First Instance expressly recognised, in particular in paragraphs 284 and 285 of the judgment under appeal, the preparatory nature of the statement of objections, including where proceedings for the control of concentrations are involved. It also acknowledged that the Commission is not, in accordance with the case-law relating to Articles 81 EC and 82 EC, obliged to explain any differences by comparison with the statement of objections.

68 However, having regard to the line of argument of the appellants and of the Commission set out in paragraphs 58 and 59 of this judgment, it is necessary to examine the criticisms made by them in relation to a series of specific references to the statement of objections made by the Court of First Instance in its examination of the validity of the contested decision.

69 In that regard, it is clear from the case-law that while, in the context of the control of concentrations, a field in which the Commission has a margin of assessment with regard to economic matters, review by the Court of First Instance is limited to establishing whether the evidence relied on is factually accurate and to establishing the

absence of a manifest error of assessment, it none the less remains the case that the correctness, completeness and reliability of the facts on which a decision is based may be the subject of judicial review (see, to that effect, *Commission* v *Tetra Laval*, paragraph 39, and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraphs 56 and 57). Indeed, that is one of the ways in which the Community judicature can verify whether the factual and legal elements upon which the exercise of the power of assessment depends were present (see, to that effect, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14). It follows that notwithstanding the preparatory and provisional nature of the statement of objections and despite the fact that the Commission is not obliged to explain any differences by comparison with the statement of objections, the Court of First Instance is not necessarily precluded from using the statement of objections in order to interpret a decision of the Commission, particularly as regards the examination of its factual basis.

70 Thus, for example, the references to the statement of objections made by the Court of First Instance in paragraphs 300, 302 and 308 of the judgment under appeal when reaching its findings in relation to the reasoning of the contested decision were, as the Advocate General pointed out in substance in points 165 and 166 of her Opinion, made for purely illustrative purposes, or simply for the sake of completeness. The same applies to certain of the paragraphs of the judgment cited by the appellants which concern the evaluation by the Court of First Instance of the arguments alleging manifest errors of assessment, namely paragraphs 338, 339, 341, 362, 402, 456, 467, 532 and 538 of the judgment under appeal, which serve merely to illustrate and to supplement what the Court of First Instance had, in any event, already directly deduced from the contested decision.

71 However, some of the references in the judgment under appeal to the statement of objections show that, notwithstanding the position it itself adopted as to the provisional nature of that statement, the Court of First Instance treated what, in paragraph 410 of the judgment, it termed 'findings of fact made previously' in that statement as being more reliable and more conclusive than the findings set out in the contested decision itself.

72 The Court of First Instance, in effect, relied in that regard on a distinction between those 'findings of fact made previously', on the one hand, and 'assessments', on the

other, which could, in its view, more legitimately be modified. In particular, in paragraph 379 of the judgment under appeal, the Court of First Instance classified the statement in the statement of objections that 'there is sufficient evidence that the majors are aware of each other's commercial terms' as not being 'an assessment by the Commission that might be modified, but rather a finding of fact resulting from its investigation'. That statement by the Court of First Instance should be understood in the light of other statements made previously in the judgment under appeal. Thus, in paragraph 335 of the judgment, the Court of First Instance stated, among other things, that 'the findings set out in the [contested 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'. In addition, in paragraph 378 of the judgment, the Court of First Instance stated that 'the conclusions drawn from [the evidence as mentioned in the contested decision] are also markedly different from the findings made in the statement of objections'.

73 Thus, the Court of First Instance did not merely use the statement of objections as a basis for verifying the correctness, completeness and reliability of the factual material which underpinned the contested decision. It treated a particular category of conclusions set out in that statement as established, whereas those conclusions could, however, only be considered as being provisional.

74 That conception of the statement of objections can also be seen in other paragraphs of the judgment under appeal. Thus, in paragraphs 409 and 410 of the judgment, the Court of First Instance criticised the fact that the Commission did not refute the 'findings of fact made previously' in the statement of objections. In addition, in paragraph 424 of the judgment, the appellants and the Commission were criticised for not having asserted, 'still less demonstrated', that a 'finding' in the statement of objections was incorrect. In paragraph 446 of the judgment under appeal, it was similarly indicated that 'the observation that there was no evidence that discounts significantly affected prices constitutes a finding of fact rather than an assessment'. Moreover, in paragraphs 398, 419, 447 and 451 of the judgment, the Commission was, in essence, criticised for having relied to a considerable extent, for the purposes of the contested decision, on the impact of 'campaign discounts', whereas, as the Court of First Instance indicated in paragraph 447 of the judgment, the Commission 'did not even consider it necessary to mention [those] discounts in the statement of objections'.

75 As the Commission points out, it can happen that, in their reply to the statement of objections, the notifying parties will supplement or clarify their 'case' regarding the functioning of the market or markets in question in the light of that statement, so that new elements may be added or facts previously examined by the Commission may be put in an entirely different light. In those circumstances, even if the lack of justification for certain of the individual findings of fact provisionally made by the Commission in the statement of objections is not established, the Commission's evaluation of those findings in that new context may be radically different. In the judgment under appeal, it appears that the Court of First Instance, by focusing on the discrepancies between the contested decision, which was the subject of the action brought before it, and the 'findings of fact previously made' in the statement of objections, excluded that possibility. As the Commission argues, the approach adopted by the Court of First Instance in some paragraphs of the judgment under appeal appears to assume that the Commission's provisional conclusions in the statement of objections are invariably based on unequivocal evidence. Apart, possibly, from non-controversial elements which, for example, by reason of their empirical and verifiable nature are obvious to such a degree that they cannot be contested, it should not be assumed that assessments made in a statement of objections cannot be modified in the light of the replies to such a statement. Furthermore, even if it were accepted that the Court of First Instance was entitled to make a distinction between the findings of fact and the assessments made in the statement of objections, it must be held that in paragraphs 379 and 446 of the judgment under appeal, it categorised as findings of fact certain complex assessments which could not in any event be considered as findings of fact that could not be modified.

76 In those circumstances, it must be held that the Court of First Instance committed an error of law in so far as, in its examination of the line of argument alleging the existence of manifest errors of assessment, it treated certain elements in the statement of objections as being established, without demonstrating the reasons for which, notwithstanding the final position adopted by the Commission in the contested decision, those elements should be considered as being established beyond dispute.

77 None the less, that error is not of itself capable of undermining the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that 'the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it'. Consequently, it is not of itself capable of leading to the setting aside of the judgment under appeal. Further grounds of appeal thus fall to be examined.

The second ground of appeal, together with the first part of the third ground, alleging errors of law in that the Court of First Instance required the Commission to undertake new market investigations following the response to the statement of objections and applied an unduly high standard of proof to the evidence submitted in response to the statement of objections

— The judgment under appeal

78 In its examination of the plea alleging manifest errors of assessment in relation to the issue of market transparency, the Court of First Instance stated in paragraph 414 of the judgment under appeal, in particular, 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'.

79 The Court of First Instance also held, in paragraph 415 of the judgment under appeal, that the Commission cannot '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 [contested 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'.

80 In addition, in a number of places in the judgment under appeal, among others in paragraphs 398, 428 and 451, the Court of First Instance stated that the Commission did not, following the response of the parties to the concentration to the statement of objections, carry out any new market investigations in order to test the validity of its altered assessment of the proposed concentration.

— Arguments of the parties

81 By the second ground of appeal, the appellants claim that the Court of First Instance committed an error of law in holding, in essence, that the Commission is required to undertake new market investigations following the response to the statement of objections. Its finding that the Commission committed errors of assessment and of reasoning because it did not undertake any new investigations is accordingly without foundation.

82 By the first part of the third ground, which should be considered together with the second ground, the appellants maintain that the Court of First Instance in effect suggested in paragraph 414 of the judgment under appeal that the exculpatory evidence submitted by the notifying parties in response to the statement of objections is subject to a higher standard of proof than that applied to the evidence cited by the Commission in the statement of objections.

83 In support of the appellants, the Commission argues, first, that in view of the tight deadlines that it faces under the Regulation it must be able to rely on the evidence submitted by the appellants in the reply to the statement of objections, since that reply forms part of the formal proceedings. Like the appellants, it observes that the Regulation provides for the imposition of fines or periodic penalty payments where incorrect or misleading information is submitted and gives the Commission the power to revoke a decision based on incorrect information for which one of the undertakings is responsible or which has been obtained by deceit.

84 Secondly, the Commission considers that paragraph 414 of the judgment under appeal, which sets out the approach followed by the Court of First Instance in paragraphs 415 to 457 of the judgment to a large body of evidence, reveals a number of related errors of law concerning, among other things, the probative value of the evidence submitted in response to the statement of objections.

85 Impala submits that the Court of First Instance took into account the strict timetables laid down by the Regulation. It merely found as a fact that the Commission had failed to carry out any market investigations whatsoever, without stating whether, after the hearing, market investigations should have been carried out. According to Impala, the Commission should have investigated the problem of transparency and discounts before issuing the statement of objections.

86 As regards the first part of the third ground of appeal, Impala submits that it is clear from paragraph 414 of the judgment under appeal that the Court of First Instance referred to a hypothetical situation in which the parties to a concentration provide evidence at the very last minute, giving the Commission no opportunity to carry out the necessary investigations. It is also clear, according to Impala, from that paragraph of the judgment under appeal that it must be inferred that the Court of First Instance considered, not that the Commission should have investigated those matters after the hearing, but that it should have done so earlier in the formal proceedings.

— Findings of the Court

87 It is necessary at the outset to reject Impala's argument set out in paragraph 86 of this judgment that paragraph 414 of the judgment under appeal refers to a hypothetical situation. Such an interpretation of that paragraph is refuted by its very wording, which makes it clear that the observations of the Court of First Instance that are criticised in the first part of the third ground of appeal referred to the procedure leading to the adoption of the contested decision.

88 Next, as is clear from paragraphs 61 and 62 of this judgment, compliance with the rights of the defence prior to the adoption of any decision which may impact adversely on the undertakings concerned is imperative in procedures for the control of concentrations.

89 Accordingly, the notifying parties cannot, as a rule, be criticised for putting forward certain — potentially decisive — arguments, facts or evidence only in their arguments

in reply to the statement of objections. It is only with that statement that the parties to the concentration can obtain detailed indications as to the reservations of the Commission in relation to their proposed concentration and as to the arguments and evidence on which it relies in that regard. As is apparent from paragraph 62 of this judgment, it flows from the notifying undertakings' rights of defence laid down in the second sentence of Article 18(3) of the Regulation and in Article 13(2) of the Implementing Regulation that those undertakings have the right to submit in their written and oral hearing following receipt of the statement of objections all material which they consider capable of refuting the Commission's objections and of leading it to approve their proposed concentration. Contrary to what the Court of First Instance suggests, in particular in paragraph 414 of the judgment under appeal, a line of argument put forward in reply to the statement of objections forms part of the investigation to be undertaken in the formal proceedings. Such a line of argument is not submitted out of time, but at the time laid down for that purpose in the procedure for the control of concentrations.

90 Furthermore, as is apparent from paragraph 49 of this judgment, the need for speed which characterises the general scheme of the Regulation requires the Commission to comply with strict time-limits for the adoption of the final decision.

91 In those circumstances, having regard in particular to the time constraints which arise by virtue of the procedural time-limits laid down by the Regulation, the Commission cannot, in principle, be required, in every individual case, to send, following communication of the objections and after hearing the undertakings concerned, requests for extensive information to numerous economic operators shortly before transmitting its draft decision to the Advisory Committee on concentrations, pursuant to Article 19 of the Regulation.

92 In addition, as the Commission observes, the reply to the statement of objections may concentrate on the elements which the notifying parties consider to be crucial to the outcome of the formal proceedings. Such elements may not have been regarded as crucial in the statement of objections. A failure to take those elements into account may be a component of the parties' criticisms of the Commission's preliminary assessment. Having regard to the requirements of the rights of the defence, the arguments of the notifying parties submitted in reply to the statement of objections

cannot be subject to more demanding standards as to their probative value and their cogency than those imposed in relation to the arguments of competitors, customers and other third parties questioned by the Commission in the course of the administrative procedure or in the light of information provided by the notifying undertakings at a previous stage of the Commission's investigation.

93 Furthermore, when the Commission examines in its decision the arguments in defence submitted by the notifying undertakings and takes the opportunity to reconsider its provisional findings in the statement of objections, with a view to possibly departing from them, it does not 'delegate' the investigation to those undertakings. It should be pointed out in that regard that Articles 14 and 15 of the Regulation provide for the imposition of fines or periodic penalty payments where incorrect or misleading information is submitted and that Article 8(5)(a) of the Regulation gives the Commission the power to revoke a decision which is based on incorrect information for which one of the undertakings concerned is responsible or which has been obtained by deceit.

94 It is true that the Commission is required to examine carefully the arguments of the parties to the concentration as regards their exactitude, completeness and cogency and to disregard them where justified doubts arise. It is also true that, under Article 3(1) of the Implementing Regulation, the notification of the proposed concentration must contain information that is correct and complete and that, in accordance with Article 11 of the Regulation, the notifying parties are bound to provide a response to any requests for information by the Commission which is complete, correct and submitted within the periods laid down, failing which, where the information in question was requested by decision, the Commission may, by virtue of Articles 14 and 15 of the Regulation, impose fines and periodic penalty payments. None the less, it remains the case that the Commission must, at the stage of the reply to the statement of objections, if it is not to undermine the rights of the defence of the notifying parties, apply the same criteria as those applied for the purposes of the examination of the arguments of third parties or those adopted at an earlier stage of its investigation, while being entitled to draw the appropriate consequences in the event that it should transpire at a very advanced stage of the procedure that the notification concerned does not comply with the requirements of Article 3(1) of the Implementing Regulation.

95 It follows that the Court of First Instance committed an error of law, first, in requiring, in essence, that the Commission apply particularly demanding requirements as

regards the probative character of the evidence and arguments put forward by the notifying parties in reply to the statement of objections and, secondly, in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the appellants' arguments in defence amounted to an unlawful delegation of the investigation to the parties to the concentration.

96 Nevertheless, that error of law does not vitiate the whole of the judgment under appeal, in particular that part of it which relates to the inadequacies of reasoning in the contested decision and the finding of the Court of First Instance in paragraph 377 of the judgment under appeal that 'the evidence, as mentioned in the [contested decision], does not support the conclusions drawn from it'. Further grounds of appeal thus fall to be examined.

The seventh ground of appeal, alleging an error of law in that the Court of First Instance relied on evidence that was not disclosed to the parties to the concentration

— The judgment under appeal

97 In paragraph 352 of the judgment under appeal, when examining price transparency and, in particular, the possibility that the retail market was monitored by the majors through weekly reports drawn up by their sales representatives, the Court of First Instance referred to a finding of the Commission in the contested decision that the appellants had set up a system of weekly reports which also included information on competitors. In paragraphs 356 to 360 of the judgment under appeal, the Court of First Instance referred additionally in that regard to a number of documents submitted by Impala, which were classified as confidential. Accordingly, paragraphs 356 to 360 of the version of the judgment under appeal published in the European Court Reports are simply marked '[*confidential*]'. Reference is also made to the weekly monitoring reports in paragraphs 389 and 451 of the judgment under appeal, with paragraph 389 containing a section marked '[*confidential*]' in the version published in the European Court Reports.

— Arguments of the parties

98 The appellants maintain that the Court of First Instance committed an error of law in relying, in paragraphs 356 to 360 of the judgment under appeal, on evidence that was not before the Commission when the contested decision was adopted and which had never been disclosed to them. According to the appellants, it is hard to imagine why the Court of First Instance would have discussed those documents over five paragraphs of its judgment and referred to them on two other occasions, in paragraphs 389 and 451 of the judgment under appeal, if it did not consider them relevant to the outcome of its review.

99 Impala submits that the information in question was mentioned during the hearing of 14 and 15 June 2004 in the presence of the parties and was provided to the Commission on a confidential basis after the hearing. According to Impala, the appellants were accordingly aware, as a result of the hearing, that that information concerned their own price monitoring practices in France and they gave ample comments on that aspect of the pricing system during both the administrative procedure and the proceedings before the Court of First Instance. In any event, according to Impala, even if the appellants' complaint underlying this ground of appeal were correct, it cannot be taken into account since that evidence did not influence the outcome of the judgment under appeal.

— Findings of the Court

100 It is necessary, first of all, to reject Impala's argument set out in paragraph 99 of this judgment that the appellants were adequately informed of the content of the documents forming the subject-matter of paragraphs 356 to 360 of the judgment under appeal at the hearing before the Commission. Impala's written response to the appeal states that 'the information was mentioned during the … hearing … and was then provided to the Commission on a confidential basis post the hearing'. In those circumstances, it cannot be claimed that the content of those documents was disclosed in good time and in a manner which was sufficiently precise and clear to allow the appellants, if necessary, to reply effectively to the inferences which Impala drew from those documents before the Commission.

101 By virtue of Article 18(3) of the Regulation, the Commission may base its decisions taken under the Regulation only on objections on which the parties have been able to submit their observations. It follows that, since the appellants were unable to acquaint themselves in sufficient time with the tenor of the confidential documents in question, the Commission could not rely on those documents for the purposes of the contested decision.

102 The Court of First Instance therefore committed an error of law in relying, as a basis for the annulment of the contested decision, on documents submitted by Impala on a confidential basis, since the Commission itself could not have used them for the purposes of adopting that decision by reason of their confidential nature.

103 Without it being necessary to adjudicate on the question whether the taking into account of those documents could have had an impact on the outcome of the examination by the Court of First Instance of the arguments relating to manifest errors of assessment on the Commission's part, it need only be stated that the error of law identified in the seventh ground of appeal is not, in any event, capable of invalidating the finding of the Court of First Instance in paragraph 325 of the judgment under appeal that, in substance, the contested decision should be annulled on the ground of its inadequate reasoning. Further grounds of appeal thus fall to be examined.

The fifth ground of appeal, alleging an error of law in that the Court of First Instance misconstrued the relevant legal criteria applying to the creation or strengthening of a collective dominant position

— The judgment under appeal

104 In paragraphs 250 to 254 of the judgment under appeal, the Court of First Instance made the following observations as regards the concept of a collective dominant position:

‘250 … 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 [Case T-342/99] *Airtours* v *Commission* [[2002] ECR II-2585], 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 [contested 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 [Impala] 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* … 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 [contested 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 [Impala], 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.'

105 Paragraph 309 of the judgment under appeal reads as follows:

'Furthermore, it follows from the last sentence of recital 77 to the [contested 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".'

106 As regards the question of the impact of variations in discounts on the transparency of the market, the Court of First Instance stated in particular in paragraph 420 of the judgment under appeal, that 'as [Impala] 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'.

107 In paragraph 427 of the judgment under appeal, the Court of First Instance stated that certain evidence on which the Commission relied 'do[es] not preclude the possibility that [variations of discount by customer] 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'.

108 Paragraph 428 of the judgment under appeal reads as follows:

'Although, as the Commission emphasised, [Impala] 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. …'

109 In paragraph 429 of the judgment under appeal, the Court of First Instance stated that, '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'.

— Arguments of the parties

110 The appellants maintain that, in holding that the Commission had committed manifest errors of assessment and had inadequately reasoned the contested decision as regards market transparency, the Court of First Instance misconstrued the position under Community law as regards the concept of a collective dominant position. According to the appellants, the test of market transparency as an indication of a

collective dominant position, as laid down by the Court of First Instance in its judgment in *Airtours* v *Commission*, and which the Court of First Instance purported to follow in the judgment under appeal, required the Commission to establish, first, that the majors had a plausible mechanism for monitoring each other's net wholesale prices and, secondly, given that the contested decision was essentially based on the existence of tacit collusion, that the majors had actually applied such a monitoring mechanism.

111 According to the appellants, the Court of First Instance in practice applied a watered-down test for establishing market transparency, as is apparent in particular from paragraph 251 of the judgment under appeal, in that it inferred that transparency from a number of factors which, as a matter of law, are not sufficient to establish the required degree of transparency. In particular, by ignoring the relevance of discounts in assessing transparency at the level of net wholesale prices, the Court of First Instance committed an error of law in failing to identify a method by which significant changes to the net wholesale prices of the other majors could be observed in a sufficiently precise and timely manner to identify deviation from any tacitly agreed price levels with precision and in good time.

112 According to the appellants, a hypothesis of pre-existing tacit collusion would imply that the appellants and the other majors had actually monitored their net wholesale prices and had sufficiently precise and timely information regarding the changes in each other's net wholesale prices. Neither the Court of First Instance, nor Impala, nor the Commission could identify a mechanism by which the majors could actually monitor net wholesale prices or prove that such a mechanism had been used.

113 Instead, according to the appellants, the Court of First Instance applied an incorrect test in assessing the degree of transparency required for a finding of collective dominance on the recorded music market in question. It considered elements that are irrelevant to the criterion relating to market transparency, while disregarding

elements that are clearly pertinent to that issue. In that last respect, the appellants submit that the Court of First Instance committed errors of law by, in particular:

— inferring, in paragraph 309 of the judgment under appeal, transparency of discounts from their impact on average net prices;

— dismissing, in paragraph 429 of the judgment under appeal, the relevance of complex pricing structures when assessing transparency; and

— dismissing, in paragraphs 298, 306, 310 and 395 of the judgment under appeal, the relevance of price variations for assessing transparency.

114 Impala suggests first of all that the fifth ground of appeal represents an attempt by the appellants to reopen the factual assessments made by the Court of First Instance, rather than alleging errors of law.

115 In the alternative, Impala submits that the Court of First Instance applied the correct test for establishing market transparency in the judgment under appeal, namely the test laid down in paragraph 62 of that court's judgment in *Airtours* v *Commission*. In that regard, Impala contends in particular that the only factor that the Commission had found to be 'less' transparent was that of campaign discounts. However, the Court of First Instance found that the underlying evidence on which the Commission based its finding did not support that finding, despite the Court of First Instance having undertaken an exhaustive examination of that evidence. The true position is that the fifth ground of appeal does not concern the legal test for market transparency, but rather the assessment by the Court of First Instance of the factual elements that may establish that transparency. According to Impala, the judgment under appeal does not misapply the test laid down in paragraph 62 of the judgment of the Court of First Instance in *Airtours* v *Commission*, since that court neither applied a watered-down test nor did it fail to consider transparency at the required level.

116 Impala also challenges the arguments summarised in paragraph 113 of this judgment.

— Findings of the Court

117 It is apparent from the Court's case-law that the question whether the Court of First Instance applied the correct legal standard when examining the evidence is a question of law, which is amenable, as such, to judicial review on appeal (see *Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 40). In the present case, the arguments of the appellants set out in paragraphs 110 to 112 of this judgment are accordingly admissible on appeal.

118 As regards the three specific criticisms summarised in paragraph 113 of this judgment, only the second and the third are admissible. The first of those criticisms does not relate to the relevance of a particular element relied on in order to establish that a collective dominant position existed, but seeks, in reality, a reappraisal of the facts which, under the settled case-law referred to in paragraph 29 of this judgment, falls, in principle, outside the jurisdiction of the Court of Justice on appeal (see also to that effect, by way of analogy, Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraphs 34 and 35). By contrast, the second and third specific criticisms invoke errors of law.

119 As regards the merits of this ground of appeal, it should be noted at the outset that the Court has already held, in substance, that the concept of a collective dominant position is included in that of 'dominant position' within the meaning of Article 2 of the Regulation (see, to that effect, *Kali & Salz*, paragraphs 166 and 178). In that regard, the existence of an agreement or of other links in law between the undertakings concerned is not essential to a finding of a collective dominant position. Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question (see Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 45).

120 In the case of an alleged creation or strengthening of a 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 will lead to a situation in which effective competition in the relevant market is significantly impeded by the undertakings which are parties to the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market (see *Kali & Salz*, paragraph 221) in order to profit from a situation of collective economic strength, without actual or potential competitors, let alone customers or consumers, being able to react effectively.

121 Such correlative factors include, in particular, the relationship of interdependence existing between the parties to a tight oligopoly within which, on a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct on the market 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. In such a context, each operator is aware that highly competitive action on its part would provoke a reaction on the part of the others, so that it would derive no benefit from its initiative.

122 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, 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 enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

123 Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking 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. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

124 The conditions laid down by the Court of First Instance in paragraph 62 of its judgment in *Airtours* v *Commission*, which that court concluded, in paragraph 254 of the judgment under appeal, should be applied in the dispute before it, are not incompatible with the criteria set out in the preceding paragraph of this judgment.

125 In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.

126 In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms

of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.

127 As regards the present case, the appellants submit that, even though the Court of First Instance stated in paragraph 254 of the judgment under appeal that it was following the approach adopted in its judgment in *Airtours* v *Commission*, in practice, it committed an error of law in inferring the existence of a sufficient degree of transparency from a number of factors which were not, however, relevant to a finding of an existing collective dominant position. In that context, the appellants object in particular to the fact that the Court of First Instance indicated in paragraph 251 of the judgment under appeal that the conditions laid down in paragraph 62 of the judgment in *Airtours* v *Commission* could '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'.

128 In this regard, as the Commission observed at the hearing, objection cannot be taken to paragraph 251 of itself, since it constitutes a general statement which reflects the Court of First Instance's liberty of assessment of different items of evidence. It is settled case-law that it is, in principle, for the Court of First Instance alone to assess the value to be attached to the items of evidence adduced before it (see, inter alia, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66, and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 50).

129 Similarly, the investigation of a pre-existing collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself. However, as is apparent from paragraph 125 of this judgment, it is essential that such an investigation be carried out with care and, above all, that it should adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances.

130 In the present case, the Court of First Instance, before which Impala raised arguments relating, in particular, to the parts of the contested decision relating to market transparency, did not carry out its analysis of those parts by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit coordination.

131 It is true that the Court of First Instance referred in paragraph 420 of the judgment under appeal to the possibility of a 'known set of rules' governing the grant of discounts by the majors. However — as the appellants rightly submit in the context of the second specific criticism mentioned in paragraph 113 of this judgment, which relates to the question whether certain discount variations established by the Commission in the contested decision were liable to call into question the possibility of adequate monitoring of mutual compliance with the terms of any tacit coordination there may have been — the Court of First Instance was content to rely, in paragraphs 427 to 429 of the judgment under appeal, on unsupported assertions relating to a hypothetical industry professional. In paragraph 428 of the judgment, the Court of First Instance itself acknowledged that Impala, the applicant before that court, 'admittedly did not explain precisely what those various rules governing the grant of campaign discounts are'.

132 It must be pointed out in that regard that Impala represents undertakings which, even if they are not members of the oligopoly formed by the majors, are active on the same markets. In those circumstances, it is clear that the Court of First Instance disregarded the fact that the burden of proof was on Impala in relation to the purported qualities of such a hypothetical 'industry professional'.

133 In the light of the above and without there being any need to adopt a position on the third specific criticism mentioned in paragraph 113 of this judgment, it must be held that, in misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of a collective dominant position, the Court of First Instance committed an error of law.

134 That error vitiates the part of the judgment under appeal which concerns the examination by the Court of First Instance of the arguments relating to the manifest errors

of assessment committed by the Commission, including the finding of that court in paragraph 377 of the judgment under appeal. However, it is not, of itself, capable of invalidating that court's finding in paragraph 325 of the judgment under appeal that, in substance, the contested decision had to be annulled because it was inadequately reasoned. Further grounds of appeal thus fall to be examined.

The fourth ground of appeal, alleging an error of law in that the Court of First Instance exceeded the scope of its role in carrying out judicial review

— The judgment under appeal

135 In a number of paragraphs in the judgment under appeal, for example, in paragraphs 347 and 361, the Court of First Instance used expressions such as 'a high level of transparency of prices' and 'a high degree of transparency on the market'. Moreover, in paragraph 299 of the judgment under appeal, the Court of First Instance described the finding in the contested decision that list prices were 'rather aligned' as being 'a prudent conclusion to say the least, as the alignment was in fact very marked'. In paragraph 307 of the judgment, the Court of First Instance held 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 [contested decision], is very low'. In paragraph 317 of the judgment under appeal, the Court of First Instance inferred from the contested decision that 'campaign discounts have only a limited impact on prices'.

136 In paragraph 425 of the judgment under appeal, the Court of First Instance stated, as regards the contested decision, that 'the calculation of the differential between minimum and maximum discounts by customer … made for each of the parties to the concentration was carried out incorrectly'. In paragraph 427 of the judgment, the Court of First Instance stated that the data supplied by the parties to the concentration were 'of doubtful relevance'.

137 In paragraph 434 of the judgment under appeal, the Court of First Instance held, in particular, as follows:

'… 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 … 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. …'

— Arguments of the parties

138 The appellants, supported in that regard by the Commission, submit that the Court of First Instance exceeded the scope of its role in carrying out judicial review, in breach of Article 230 EC and settled case-law, in substituting its own assessment for that of the Commission, without proving the existence of manifest errors of assessment vitiating the contested decision and without asking for a report from an economic expert to be obtained.

139 Moreover, in its examination of the contested decision, the Court of First Instance itself committed manifest errors of assessment and fundamentally misconstrued the evidence before it as regards essential parts of the case, including in particular the relevance, the complexity and the opacity of discounts.

140 Furthermore, the appellants consider that in paragraphs 425, 427 and 434 of the judgment under appeal the Court of First Instance also distorted some of the evidence.

141 Impala considers that this ground of appeal represents, at least to a significant extent, an attempt to reopen the assessment of the facts by the Court of First Instance, without any proof on the part of the appellants that that court misconstrued the evidence before it.

142 In the alternative, Impala submits that the Court of First Instance had the relevant case-law concerning the scope of its role in carrying out review in mind when it considered the contested decision, in view of its reference in paragraph 328 of the judgment under appeal to paragraph 39 of the judgment in *Commission* v *Tetra Laval*, and that it did not therefore exceed the scope of its role in carrying out judicial review.

— Findings of the Court

143 It is necessary at the outset to reject Impala's argument alleging the inadmissibility of the fourth ground of appeal. Contrary to what Impala contends, by this ground, the appellants do not merely challenge the assessment of the facts at first instance, but invoke questions of law which are admissible on appeal.

144 As regards the substance, it should first of all be noted that the Commission has a margin of assessment with regard to economic matters for the purposes of the application of the substantive rules of the Regulation, in particular Article 2. It follows that the review by the Community judicature of a Commission decision relating to concentrations is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment (see *Kali & Salz*, paragraphs 223 and 224, and *Commission* v *Tetra Laval*, paragraph 38).

145 That being so, while the Court of First Instance must not substitute its own economic assessment for that of the Commission for the purposes of applying the substantive rules of the Regulation, that does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community judicature establish, among other

things, 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 situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, *Commission* v *Tetra Laval*, paragraph 39, and *Spain* v *Lenzing*, paragraphs 56 and 57).

146 Accordingly, as regards the present case, in so far as the Court of First Instance carried out an in-depth examination of the evidence underlying the contested decision when considering the arguments raised before it, it acted in conformity with the requirements of the case-law set out in paragraphs 144 and 145 of this judgment.

147 Nevertheless, that finding is not, of itself, sufficient to reject the fourth ground of appeal. As well as the question whether the Court of First Instance exceeded the scope of its role in carrying out judicial review as regards the intensity of its review of the factual basis of the contested decision, the appellants also maintain, as is mentioned in paragraph 139 of this judgment, that, in examining the factors underpinning the contested decision, the Court of First Instance itself committed manifest errors of assessment and fundamentally misconstrued the evidence before it.

148 The latter claims overlap partially with other grounds put forward in this appeal, namely, in the first place, the first, second and seventh grounds, together with the first part of the third ground, relating to the manner in which the Court of First Instance dealt with some of the evidence before it and, in the second place, the fifth ground, alleging that the Court of First Instance misconstrued the legal criteria applying to a collective dominant position.

149 It is sufficient to hold in that respect, as is apparent from paragraphs 95, 102 and 133 of this judgment, that, in its examination of the line of argument based on the existence of manifest errors of assessment, the Court of First Instance committed errors of law in relation to both the manner in which some of the evidence was dealt with

and the legal criteria applying to a collective dominant position arising from tacit coordination.

150 Consequently, without it being necessary to adjudicate either on the appellants' claims alleging distortion of the evidence or on the question whether the Court of First Instance in fact substituted its own economic assessment in the judgment under appeal for that of the Commission, it must be held that at least that part of the judgment under appeal dealing with the examination of the arguments alleging the existence of manifest errors of assessment is vitiated by errors of law. As regards that part of the judgment under appeal which concerns the inadequate reasoning of the contested decision, it remains necessary to address the sixth ground of appeal.

The sixth ground of appeal, alleging an error of law in that the Court of First Instance applied an incorrect standard of reasoning as regards decisions approving a concentration

— The judgment under appeal

151 In paragraphs 255 to 276 of the judgment under appeal, the Court of First Instance summarised the relevant elements of the contested decision for the purpose of examining the first plea raised before it. Paragraph 275 of the judgment reads as follows:

'It follows from the foregoing that [it] 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.'

152 In the judgment under appeal, the Court of First Instance reviewed various sections of the contested decision in order to determine whether it contained reasoning which

was adequate to make a finding of a lack of transparency of the market in question, and its reply in each case decided the issue in the negative.

153 The Court of First Instance first of all examined the section of the contested decision which dealt specifically with market transparency. In that regard, it stated in particular in paragraphs 289, 290 and 294 of the judgment under appeal as follows:

> '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 [contested 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 [contested decision], far from demonstrating the opacity of the market, show, on the contrary, that the market was transparent.

…

294 It follows from the foregoing that, in the section of the [contested 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.'

154 The Court of First Instance next examined the reasoning set out in the contested decision relating to the possibility of a 'common understanding on prices' between the majors and analysed that reasoning in paragraphs 295 to 324 of the judgment under appeal, by seeking evidence that would explain the alleged insufficiency of transparency on the markets in question. In that regard, the Court of First Instance made, among others, the following findings:

'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".

…

318 It should also be observed that the [contested 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 [contested 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 [contested 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 [contested 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 [contested 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 [contested decision] and thus eliminate the transparency necessary for the existence of a collective dominant position.

…

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 [contested decision].'

155 Paragraph 411 of the judgment under appeal reads as follows:

'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 [contested decision]. However, that argument cannot be followed.'

156 Paragraph 530 of the judgment under appeal states as follows:

'It follows from recital 157 to the [contested 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.'

— Arguments of the parties

157 The appellants submit, as their principal argument, that the Community system of control of concentrations, and more specifically Article 10(6) of the Regulation, precludes the Court of First Instance from annulling a decision approving such a concentration on the ground of inadequate reasoning.

158 In the alternative, the appellants submit that the Court of First Instance applied an excessively high standard of reasoning that is inconsistent with settled case-law and fails to take account of the particular context and nature of proceedings for the control of concentrations. In the first place, the Court of First Instance was wrong to require the Commission to explain its departure from the statement of objections.

159 In the second place, the Court of First Instance erred in its review of the reasoning of the contested decision in failing to take account of the particular context of a decision approving a concentration. In that regard, the appellants put forward a number of arguments. First, they consider that it is necessary to impose less stringent requirements as regards the reasoning of a decision approving a concentration than as regards a decision prohibiting a concentration. Secondly, the Court of First Instance wrongly failed to review the reasoning of the contested decision from the perspective of knowledgeable industry professionals. Thirdly, the short timescale separating the statement of objections from a decision approving a concentration calls for a measure of restraint in the review of the reasoning of such a decision. Fourthly, the fact that the appellants are entitled to implement the notified concentration pleads in favour of not annulling decisions approving a concentration lightly on the ground that they are inadequately reasoned. Fifthly, the Court of First Instance committed an error of law in paragraph 411 of the judgment under appeal in requiring the Commission to publish details on pricing and discounting, taking into account their confidential and sensitive nature.

160 In any event, contrary to the conclusions of the Court of First Instance, the appellants contend that settled case-law indicates that the contested decision is adequately reasoned since it permitted Impala to ascertain the reasons underlying the decision and the Court of First Instance to exercise its power of review. In that regard, the appellants argue, among other things, that the finding of the Court of First Instance that the contested decision was inadequately reasoned sits ill with its conclusion that the decision was vitiated by manifest errors of assessment.

161 Lastly, the appellants submit that the review by the Court of First Instance of the reasoning of the contested decision is vitiated by the application of an incorrect

standard of proof, the failure to observe the proper scope of judicial review and the application of an incorrect test as regards transparency.

162 Without prejudice to its general plea of inadmissibility, Impala considers, first, that the appellants cannot make a general rule out of the exception clause that is Article 10(6) of the Regulation. Secondly, according to Impala, the appellants are incorrect in maintaining, in substance, that Article 253 EC may or may not be applied according to whether a decision relating to a proposed concentration is negative or positive. Thirdly, Impala submits that the degree of reasoning required depends on the context and legal framework within which a particular measure is adopted. It is entirely consistent with this principle that the type of reasoning required should be adapted to the type of case involved. The present case is one in which the formal proceedings were opened and which involved both substantial third-party opposition and a statement of objections.

163 As regards the appellants' line of argument put forward in the alternative concerning the standard of reasoning applied by the Court of First Instance, Impala contends that the Court merely mentioned extracts from the statement of reasons in order to emphasise the inadequacy of the reasoning of the contested decision and the inconsistencies in it and that that court's finding that the reasoning in the contested decision was inadequate was based on the reasoning set out in it and not on its inadequacy as compared with the reasoning of the statement of objections. Impala also submits that the Court of First Instance did not disregard the context of proceedings for the control of concentrations.

164 Moreover, it does not follow from the fact that the Court of First Instance was able to make an in-depth review of the contested decision that the reasoning of that decision was adequate. According to Impala, it is quite clear that the Court of First Instance was unable to understand in particular why the Commission, when the evidence consistently pointed to there being sufficient transparency to support a finding of collective dominance, nevertheless concluded that there was insufficient evidence of transparency because campaign discounts were less transparent than other kinds of discounts. In Impala's view, the real reasons for the contested decision remain unknown.

165 As regards the appellants' line of argument summarised in paragraph 161 of this judgment, Impala contends that the observations of the Court of First Instance on certain aspects of the reasoning of the contested decision are based on a thorough examination of the Commission's analysis but, above all, on the internal inconsistencies within the contested decision itself.

— Findings of the Court

166 It is clear from settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure 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. It is not necessary for the reasoning to go into all the relevant facts and points of law, since 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 (see, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66; and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 79).

167 The institution which adopted the measure is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections (Joined Cases C-465/02 and C-466/02 *Germany and Denmark* v *Commission* [2005] ECR I-9115, *'Feta'*, paragraph 106). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see Case 16/65 *Schwarze* [1965] ECR 877, 888, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16). Thus, the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant

or insignificant or plainly of secondary importance to the appraisal of the concentration (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 64). Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations.

168 It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 8(2) of the Regulation the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

169 In that regard, while it is true that the Commission is not obliged, in the statement of reasons for decisions adopted under the Regulation, to take a position on all the information and arguments relied on before it, including those which are plainly of secondary importance to the appraisal it is required to undertake, it none the less remains the case that it is required to set out the facts and the legal considerations having decisive importance in the context of the decision. The reasoning must in addition be logical and must not disclose any internal contradictions (see to that effect, by way of analogy, Case 13/60 *Geitling and Others* v *High Authority* [1962] ECR 83, 117; Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 78; Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805, paragraph 26; and Case 28/87 *Arendt* v *Parliament* [1988] ECR 2633, paragraphs 7 and 8).

170 It is in the light of these principles that the objections raised by the appellants under the sixth ground of appeal should be examined.

171 As their principal argument, the appellants submit that a Commission decision approving a concentration cannot be annulled on the ground of inadequate reasoning. They rely in particular in this regard on Article 10(6) of the Regulation.

172 It follows from paragraph 49 of this judgment that the purpose of that provision is to ensure legal certainty where, exceptionally, the Commission has not adopted a decision within the prescribed period. Thus, the undertakings concerned are free to implement their concentration as soon as approval is deemed to have been given.

173 As Impala observes, the line of argument of the appellants based on Article 10(6) of the Regulation has the result that decisions approving concentrations do not have to be reasoned at all, as they cannot be challenged on the ground of lack of a statement of reasons.

174 It should be noted that an inadequate statement of reasons in breach of Article 253 EC constitutes an infringement of essential procedural requirements for the purposes of Article 230 EC and is, moreover, a plea which may, and even must, be raised by the Community judicature of its own motion (see, to that effect, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24). Furthermore, according to settled case-law, where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law (Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075, paragraph 22 and the case-law cited). It follows that Article 10(6) of the Regulation must be interpreted and applied in the light of Articles 230 EC and 253 EC.

175 Thus, as is apparent from paragraph 49 of this judgment, Article 10(6) constitutes an exception to the general scheme of the Regulation, which is laid down in particular in Articles 6(1) and 8(1) thereof, according to which the Commission is to rule expressly on the concentrations which are notified to it, whether its decision be a negative or a positive one. It follows that, not only can Article 10(6) of the Regulation not form the basis of a general presumption that concentrations are compatible with the common market, it also cannot serve as a basis for an exception to the rule that a decision approving such a concentration may be challenged on the ground of infringement of

the duty to state reasons. The legitimate need for legal certainty in exceptional situations, which that provision reflects, cannot go so far as to exclude decisions relating to concentrations in whole or in part from review by the Community judicature.

176 The appellants' line of argument based on Article 10(6) of the Regulation must therefore be rejected.

177 In the alternative, the appellants submit, among other things, that since the contested decision allowed Impala to ascertain the reasons for the approval at issue and the Court of First Instance to exercise its power of judicial review, that court did not observe the settled case-law of the Community judicature on the requirement to state reasons.

178 In that regard, as is apparent from paragraph 166 of this judgment, it is settled case-law, first, that the purpose of the statement of reasons required by Article 253 EC is 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 and, secondly, that the requirements to be satisfied by the statement of reasons must be appraised by reference to the nature of the measure at issue and the context in which it was adopted (see also Case 32/86 *SISMA* v *Commission* [1987] ECR 1645, paragraph 8; Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraph 14; Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraphs 39 to 41; Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraphs 62 and 63; Case C-195/99 P *Krupp Hoesch* v *Commission* [2003] ECR I-10937, paragraph 110; and *Aalborg Portland and Others* v *Commission*, paragraph 372).

179 In the present case, it is true that a certain imbalance in the contested decision between the presentation of the elements tending to plead in favour of there being sufficient transparency and the presentation of the impact of the campaign discounts, which plead, according to the Commission, against such transparency, may appear unfortunate. Nevertheless, in the light, first, of the context in which the contested decision was adopted, marked in particular by the short space of time between the

written reply to the statement of objections and the hearing before the Commission, on the one hand, and the end of the formal proceedings, on the other, and, secondly, the requirements laid down by the case-law referred to in paragraphs 166 to 169 of this judgment, in particular paragraphs 166 and 167, the Court of First Instance could not, without committing an error of law, find that the Commission had failed to comply with the duty to provide an adequate statement of reasons for the contested decision (see, by way of analogy, Joined Cases 275/80 and 24/81 *Krupp Stahl* v *Commission* [1981] ECR 2489, paragraph 13, and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 21).

180 In the first place, the contested decision showed the reasoning followed by the Commission in a way which subsequently allowed a party such as Impala to challenge its validity before the competent Court. It would be unreasonable in that regard to require, as did the Court of First Instance in paragraph 289 of the judgment under appeal, a detailed description of each of the factors underpinning the contested decision, such as the nature of campaign discounts, the circumstances in which they might be applied, their degree of opacity, their size or their specific impact on price transparency (see to that effect, by way of analogy, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 59 to 61, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 108). That is all the more the case because Impala was, as is apparent in particular from paragraphs 7 and 10 of the judgment under appeal, closely associated with the formal proceedings (see, by way of analogy, Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 29, and Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 50) and that it was, in addition, perfectly able to challenge the validity of the Commission's substantive appraisal in the contested decision before the Court of First Instance.

181 In the second place, as is apparent from, among others, paragraphs 275, 289 and 530 of the judgment under appeal, the Court of First Instance was aware of the reasons for which the Commission decided to approve the concentration at issue. It also devoted numerous paragraphs in its judgment to an analysis of whether those reasons were well founded. It must be pointed out in that regard that the duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue (see *Commission* v *Sytraval and Brink's France*, paragraph 67, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48). The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement

of reasons in it, which may be adequate even though it sets out reasons which are incorrect. It cannot therefore be claimed that it was impossible for the Court of First Instance to exercise its power of judicial review (see, by way of analogy, *Chronopost and La Poste* v *UFEX and Others*, paragraph 112).

182 The appellants' sixth ground of appeal should therefore be upheld, without it being necessary to adjudicate on the objections referred to in paragraphs 158, 159 and 161 of this judgment.

183 Having regard to the above considerations, the present appeal must be declared to be well founded.

The alleged cross-appeal

184 The Commission's response contains a separate section containing 'additional observations' on the 'essential grounds' of the contested decision. In that section, the Commission contends that the Court of First Instance was wrong to characterise the Commission's findings in relation to the retaliatory measures as essential grounds of the decision. In the Commission's view, were it to be held in this appeal that the findings made in the contested decision in relation to lack of market transparency were not incorrect in law, the decision should be declared to be lawful irrespective of whether it contains errors of law concerning the retaliatory measures.

185 Impala interpreted the arguments contained in the Commission's response as a cross-appeal and replied to them in a separate document of 23 March 2007, relying on Article 117(2) of the Rules of Procedure of the Court. Subsequently, the parties were allowed to lodge further documents on this matter, the last of which was lodged

at the Court Registry on 16 July 2007, while at the same time the question was left open whether Impala was entitled to invoke Article 117(2).

186 Under Article 117(2) of the Rules of Procedure, for a submission to be regarded as a cross-appeal, the party which relies on it must seek to set aside, in whole or in part, the judgment under appeal on a plea in law which was not raised in the appeal. Whether that is the case here is to be determined by reference to the wording, aim and context of the passage in question in the Commission's response.

187 It must be emphasised in that regard that nowhere in its response does the Commission use the expression 'cross-appeal'. Moreover, the Commission itself clearly stated during these proceedings, for instance at the hearing, that it had no intention of bringing a cross-appeal by its 'additional observations'.

188 In those circumstances, it must be held that those observations do not constitute a cross-appeal. Contrary to what Impala submits, there is accordingly no need to adopt a position with regard to them.

Referral of the case back to the Court of First Instance

189 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

190 Since the Court of First Instance examined only two of the five pleas relied on by Impala in support of its action, the Court of Justice considers that the present case is not in a state where judgment may be given. The case must therefore be referred back to the Court of First Instance.

191 Since the case is to be referred back to the Court of First Instance, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of 13 July 2006 in Case T-464/04 *Impala* v *Commission*;**

2. **Refers the case back to the Court of First Instance of the European Communities;**

3. **Reserves the costs.**

[Signatures]