

COMMISSION DECISION

of 19 July 2004

declaring a concentration compatible with the common market and the functioning of the EEA Agreement

(Case No COMP/M.3333 — SONY/BMG)

(notified under document number C(2004) 2815)

(Only the English text is authentic)

(Text with EEA relevance)

(2005/188/EC)

On 19 July 2004 the Commission adopted a Decision in a merger case under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://europa.eu.int/comm/competition/index_en.html

- (1) On 9 January 2004, the Commission received a notification under Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a transaction whereby Bertelsmann AG (Bertelsmann) and Sony Corporation of America, belonging to the Sony group (Sony), contribute the global recorded music businesses of the parties (excluding Sony's activities in Japan) into a joint venture. This joint venture shall be operated under the name Sony BMG and will be active in the discovery and the development of artists (so-called A&R⁽²⁾) and the subsequent marketing and sale of recorded music. Sony BMG will not engage in related activities such as music publishing, manufacturing and distribution.
- (2) Bertelsmann is an international media company with world-wide activities in music recording and publishing, television, radio, book and magazine publishing, print services and book and music clubs. Bertelsmann is active in recorded music through its wholly owned subsidiary Bertelsmann Music Group (BMG). BMG's record labels include Arista Records, Jive Records, Zomba and RCA.
- (3) Sony is globally active in music recording and publishing, industrial and consumer electronics, and entertainment. In recorded music it acts through Sony Music Entertainment. Sony's labels include Columbia Records Group, Epic Records Group and Sony Classical.
- (4) The Advisory Committee on Concentrations, at its 127th meeting, on 9 July 2004, delivered a favourable opinion on a draft Decision granting clearance submitted to it by the Commission.
- (5) The Hearing Officer, in a report dated 5 July 2004, took the view that the right of the parties to be heard had been respected.

I. THE RELEVANT MARKETS

Recorded music

- (6) The Commission found that the relevant *product market* for recorded music (including A&R and the promotion, sales and marketing of recorded music) might be subdivided into distinct product markets based on genre (such as international pop, local pop, classical music) or for compilations. For the purpose of the present case, however, it could be left open whether the abovementioned genres or categories constitute separate markets, as the concentration would not lead to a creation or strengthening of a dominant position under any market definition considered.
- (7) The market investigation confirmed a number of factors (e.g. A&R, pricing, sales and marketing mainly taking place nationally, strong demand for local repertoire, and limited international presence of independent record companies) for the relevant *geographic* markets for recorded music being considered as national.

Online music

- (8) Supported by its findings in the market investigation, the Commission considers that online music is not part of the market for physical recorded music, in particular due to differences in the product and its distribution. It identified two distinct product markets for online music: (i) the wholesale market for licences for online music and (ii) the retail market for distribution of online music.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

⁽²⁾ A&R = Artist and Repertoire; the music industry's equivalent of research and development.

(9) For the purpose of the present case the Commission considers that both the wholesale market for licences for online music and the retail market for distribution of online music are national in scope. This may change in the future, depending on further cross-border developments in online music licensing and music distribution.

Music publishing

(10) Based on both demand and supply-side considerations the Commission found indications for the existence of separate product markets for music publishing according to the exploitation of the different rights categories (i.e. mechanical, performance, synchronisation, print and other rights). However, the exact scope of the relevant product market could be left open as the competitive assessment is the same under any market definition considered.

(11) The market investigation has confirmed that the geographic scope of the market is essentially, and in spite of some cross-border elements, national, given that licence fees for mechanical and performance rights are generally collected on a national basis. For the purpose of the present case the exact scope of the relevant geographic market could be left open as the competitive assessment is the same under any market definition considered.

II. ASSESSMENT

A. Possible strengthening of collective dominance in the recorded music markets

Introduction

(12) The Commission's investigation has not provided sufficiently conclusive evidence for the existence of a collective dominant position of the five 'majors' (Sony, BMG, Universal, EMI and Warner) in the markets for music recording.

(13) Based on the case law of the European courts, in particular the *Airtours* judgment, a prerequisite for the existence of a collective dominant position among market players is: (i) a common understanding about the terms of coordination; (ii) the ability to monitor whether such terms are adhered to; (iii) the existence of a deterrent mechanism in case of deviations; and (iv) third parties (actual and potential competitors, customers) not being able to effectively jeopardise the benefits expected from coordination.

(14) In assessing whether there exists a collective dominant position in the markets for recorded music among the five music majors, the Commission analysed whether during the last three to four years a coordinated price policy of the majors could be established in the EEA Member States.

(15) For this purpose the Commission investigated the development of the five majors' wholesale prices to wholesalers and retailers in each Member State in the period 1998 to 2003. In particular, the Commission's analysis focused on the development of average net wholesale prices, PPDs (Published Prices to Dealers), gross and net price ratios as well as invoice discounts and retrospective discounts.

(16) To assess a possible coordination of the majors' wholesale prices, the Commission analysed the parallelism of the development of (inflation-corrected) average net prices for the top 100 single albums of each major in the five largest Member States (this is considered a representative sample as the top 100 single albums account for approximately 70 to 80 % of the majors' respective total music sales). Secondly, the Commission examined whether any price coordination could have been reached in using list prices (PPDs) as focal points. Thirdly, the Commission analysed whether the different majors' discounts were aligned and sufficiently transparent in order to allow effective monitoring of competitive behaviour.

France, Germany, Italy, Spain, UK

(17) On the basis of the net average prices, the Commission found some parallelism and a relatively similar development of the majors' prices in the five larger markets, France, Germany, Italy, Spain and the UK. However, these observations as such are not sufficient to conclude that coordinated pricing behaviour existed in the past.

(18) Therefore, the Commission further investigated whether additional elements, namely list prices and discounts, were aligned and sufficiently transparent to provide sufficient evidence for coordination.

(19) The Commission found some indications that PPDs could have been used as focal points for an alignment of the majors' list prices in all five Member States. Regarding discounts, the investigation indicated that the level of discounts varied to some extent among the different majors and that certain types of discounts were not sufficiently transparent to establish existing collusion.

- (20) Furthermore, the Commission analysed whether the markets for recorded music were characterised by features facilitating collective dominance, in particular by considering product homogeneity, transparency and retaliation mechanisms.
- (21) As to product homogeneity, the Commission found that the content of individual albums is differentiated but also that pricing and marketing are standardised to some extent. However, the heterogeneity of content has some implications for pricing and reduces transparency in the market and makes tacit collusion more difficult as it requires monitoring at the individual album level.
- (22) With respect to transparency, the Commission found that the publication of weekly charts, the stability of the common customer base and the majors' monitoring of the retail market by means of weekly reports increase the market transparency and facilitate the monitoring of a coordinated policy. However, the investigation also indicated that the monitoring of campaign discounts requires monitoring on an album level, which reduces the transparency in the market and makes tacit collusion more difficult. On balance, the Commission has not found sufficient evidence that the majors have overcome this transparency deficit in the past.
- (23) As to retaliation, the Commission explored whether majors could retaliate against any 'cheating' major, in particular by a (temporary) return to competitive behaviour or by exclusion of the deviator from compilation joint ventures and agreements. However, the Commission has not found sufficient evidence that such retaliation mechanisms have been applied or used as a threat in the past.

The Netherlands, Sweden, Ireland, Austria, Belgium, Denmark, Finland, Norway, Portugal, Greece

- (24) In the smaller Member States the Commission equally found a considerable degree of parallelism between the PPDs of the majors which, in principle, could have been used as focal points by the majors to align prices. However, the investigation revealed, also in the smaller Member States, some differences in the level of discounts and deficits of transparency with respect to certain discounts.
- (25) The Commission's considerations as to homogeneity of the product, transparency of the market and the possibility to retaliate, as specified above for the larger

Member States, are also valid for the smaller Member States.

Conclusion

- (26) The Commission considers that it has not found sufficient evidence for an existing collective dominant position of the five music majors in the markets for recorded music in any EEA Member State.

B. Possible creation of collective dominance in the recorded music markets

- (27) The Commission has also considered whether the merger would lead to the *creation* of collective dominance of the music majors in any EEA Member State. However, in the light of the above remarks, in particular regarding market transparency, product content heterogeneity and retaliation, the Commission considers that the effect of a reduction from five to four majors following the merger would not be substantial enough to lead to the creation of a collective dominant position of the majors in the recorded music markets.

C. Possible creation of single dominance in the recorded music markets

- (28) Third parties raised concerns that the joint venture would achieve a position of single dominance in the markets for recorded music due to the joint venture's vertical relationship to Bertelsmann's media interests. It is argued that Bertelsmann could use its position in television and radio stations to foreclose competitors and favour Sony BMG, in particular by granting preferential rates or treatment or by foreclosure of competitors from promoting their artists via these channels.
- (29) The Commission concludes that it is not likely that the proposed joint venture would achieve single dominance on the markets for recorded music in Germany, the Netherlands, Belgium, Luxembourg and France, where Bertelsmann is active via RTL TV and radio stations. The advantages derived from the vertical integration in Bertelsmann's media group (e.g. through the Pop Idol format which, according to industry experts has already passed its peak) are already incorporated in BMG's market shares for 2003. On the basis of these market shares the proposed joint venture does not reach the threshold of single dominance. Furthermore, the Commission has not found any evidence that it could be a profitable strategy for Bertelsmann to foreclose competitors from access to its TV channels and radio stations.

D. Possible collective dominance in the wholesale market for licenses for online music

- (30) The Commission notes that the market for legal online music is currently in a state of infancy as most of the sites for online music have only recently started operations in the EEA. It is therefore difficult to definitively conclude on the market positions of the major record companies, particularly in relation to national markets. In addition, the information on actually downloaded or streamed songs does not appear to give a clear picture of the different players' market positions and no public industry data is available. However, on the basis of the information received by the Commission, it can be concluded that the market position of the major record companies on the wholesale market for licences for online music appears to be by and large similar to their position on the markets for recorded music.
- (31) Given the emerging state of the markets and the differences in pricing and conditions in the current agreements, the Commission has concluded that no sufficient evidence could be found for an existing collective dominant position of the majors on the national markets for licences for online music and that the concentration would not result in the creation of a collective dominant position on these markets.

E. Possible single dominance in the online music distribution markets

- (32) Third parties have raised concerns that, as a result of the transaction, Sony could obtain a position of single dominance on the national markets for distribution of online music via its Sony Connect music downloading service. It has been submitted that Sony could use the control of the joint venture to foreclose competitors in the downstream market for distribution of online music, in particular by denying competing online platforms access to the joint venture's library or by engaging in discriminatory behaviour *vis-à-vis* its competitors, e.g. by means of usage rules, time of release of new songs and the track format.
- (33) The Commission considers that Sony Connect is currently only in the process of being launched in Europe, after having been launched in the US in May 2004. It therefore currently does not have a share of

the market. Also, other players have already gained a certain position in the market (e.g. OD2) and further players have recently entered the market or announced that they would do so soon. Furthermore, by foreclosing competitors, the proposed joint venture Sony BMG would forego considerable licence revenues for the tracks sold by competitors and it appears doubtful whether such a strategy would be profitable.

F. Possible spill-over effects in music publishing

- (34) Third parties have raised concerns that the creation of the joint venture would have as its effect the coordination of the parties' competitive behaviour in the closely related markets for music publishing.
- (35) The Commission considers that any coordination could only materialise to a rather limited extent since the administration of publishing rights is mainly carried out by the collecting societies (at least for the important mechanical and performance rights). The collecting societies grant, on the basis of prevailing legislation, licences on non-discriminatory terms and agree on royalties with publishers, authors and composers. The Commission also considers that, contrary to some third parties' concerns, the concentration would not lead to the bypassing of the collecting societies by the majors as there is no sufficiently concrete evidence for such a strategy.

III. CONCLUSION

- (36) The Decision concludes that the proposed concentration does not create or strengthen a single or collective dominant position in the national markets for recorded music, licences for online music, or distribution of online music as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The Decision further concludes that the transaction does not have as its object or effect the coordination of the competitive behaviour of the joint venture's parent companies, Sony and Bertelsmann, in the music publishing markets. Consequently, the Decision declares the concentration compatible with the Common Market and the EEA Agreement, in accordance with Articles 2(2) and (4) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.