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*Case No COMP/M.3595 - SONY / MGM*

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004**
**MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION
Date: 30/03/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30/03/2005

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

**Subject: Case No COMP/M.3595 – Sony / MGM**
**Notification of 18.02.2005 pursuant to Article 4 of Council Regulation No 139/2004**

1. On 18/02/2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004[1] by which the undertakings Providence Equity Partners IV, L.P., ultimately controlled by Providence Equity Partners IV LLC ("Providence"; USA), TPG Partners IV, L.P., controlled by TPG Advisors IV Inc. ("TPG"; USA), Sony Corporation of America, belonging to the Sony group ("Sony"; Japan) and Comcast Studio Investments, Inc. ("Comcast"; USA) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Metro-Goldwyn-Mayer Inc. ("MGM", USA) by way of purchase of shares. Providence, TPG, Sony, Comcast and MGM are hereinafter referred to as "the Parties".

[1] OJ L 24, 29.1.2004 p. 1

## I. THE PARTIES

2. **Providence** is a private investment fund, managed by Providence Equity Partners Inc., also a private investment firm specialising in equity investments in media and communications companies. Current and previous areas of investment include cable TV content and distribution, wireless and wireline telephony, publishing, radio and TV broadcasting and other media and communications sectors.

3. **TPG** (together with certain of its affiliated investment funds) is a group of parallel funds, managed by TPG Advisors IV, Inc. that participates in a variety of companies through acquisitions and corporate restructurings.

4. **Sony** is a manufacturer of audio, video, communications and information technology products. Sony also produces, acquires and distributes motion pictures and its activities include the production and acquisition of motion pictures and other content (including TV programs) for distribution on DVD / VHS and the licensing of broadcasting rights for motion pictures, TV programs and TV channels.

5. **Comcast** is a subsidiary of Comcast Corporation, the largest cable television operator in the USA. In the EEA its activities are limited to the operation of three TV channels, generating a total turnover of approximately EUR […] in 2003.

6. **MGM** produces and acquires motion pictures for theatrical release. MGM is furthermore active in the production and acquisition of motion pictures and other content (including TV programs) for distribution mainly on DVD and it licenses broadcasting rights for motion pictures, TV programs and TV channels.

## II. THE OPERATION

7. The notified operation consists of the proposed acquisition of MGM by Providence [30-40%] of […], TPG [20-30%], DLJ[2] [5-15%], Sony [10-20%] and Comcast [10-20%], pursuant to a number of operating agreements. Sony, Providence, TPG and Comcast are deemed to acquire joint control of the new entity. Sony will exercise joint control *post-merger, inter alia,* by reason of […]. Rights conferring joint control on Providence and TPG respectively include […]. Comcast will exercise joint control, *inter alia*, because of […].

## III. CONCENTRATION

8. Thus, the proposed operation constitutes a concentration within the meaning of Council Regulation (EEC) No. 139/2004.

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[2] DLJ Merchant Banking Partners III, L.P. (together with certain of its affiliated investment funds, "DLJ") is a group of parallel funds, ultimately owned by Credit Suisse Group, a global financial services group that provides a range of banking and insurance services, including – through Credit Suisse First Boston – investment banking services. Based on the information provided by the Parties in the notification, DLJ is not considered to be controlling stakeholder in the new entity.

## IV. COMMUNITY DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Providence: EUR […] in 2003; TPG: EUR […] in 2003; Sony: EUR 56,758.70 million in fiscal year 2004; and MGM: EUR 1,664.60 million in 2003)[3]. Each of Providence, TPG, Sony and MGM have a Community-wide turnover in excess of EUR 250 million (Providence: EUR […] million in 2003; TPG: […] in 2003; Sony: EUR […] in fiscal year 2004; and MGM: EUR […] in 2003), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

## V. COMPETITIVE ASSESSMENT

### A. RELEVANT MARKETS

**Relevant product markets**

*Theatrical release*

10. The Parties consider the principal product market to be the production, acquisition and distribution of motion pictures for theatrical release. As regards distribution, the Parties have explained that distributors negotiate motion picture rental agreements with exhibitors, execute marketing functions and collect motion picture rentals from exhibitors. Distributors acquire their motion pictures from various sources, including the distributor's affiliate studio, a studio or a production company with which the distributor has negotiated an output or "first-look" deal, or a single title acquired during production or after the motion picture is made (a "negative pick-up"). In its decision in *Vivendi/Canal+/Seagram* the Commission has considered that the distribution of films to theatres is the last stage of the cinema chain and can be regarded as a distinct product market[4].

11. At distribution level, about half the distributors of motion pictures that replied to the Commission's market investigation, support the Parties' view that the relevant market concerns the production, acquisition and distribution of motion pictures for theatrical release, arguing for instance that from an economic point of view the production and distribution are part of one continuum. The other half responded that the production and/or acquisition of motion pictures and distribution of films for theatrical release constitute distinct markets, arguing amongst other things, that these activities require different skills and a different approach. The large majority of exhibitors consider that a distinction must be made between the production, acquisition and distribution of motion pictures. In addition, a majority of these exhibitors found that it would not be appropriate, to distinguish US motion pictures from non-US pictures, arguing *inter*

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[3] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

[4] Case No. COMP/M.2050 – Vivendi/Canal+/Seagram, paragraph 16.

*alia*, that these pictures are negotiated on the same market and to a large extent by the same distributors and because rental terms for US and non-US motion pictures are alike. However, it is not necessary to take a definitive position on the above issues, since the assessment of the impact of the transaction would not change.

*Home Entertainment*

12. As regards the Home Entertainment segment, the Parties propose that the relevant product market is that for motion pictures and other forms of content made available on DVD and VHS, either for sale or rental. From the consumer's perspective, the Parties argue, little or no distinction is made between different types of releases, which are generally priced in competition with one another. According to the Parties this reflects the competition that exists among suppliers of a wide array of motion pictures, direct-to-video features, TV and other programs.

13. Market analysis revealed that Home Entertainment encompasses various types of content: motion picture as well as sporting events, music, drama, TV programs and children's content. There is evidence that the market involves rentals as well as sales of relevant content and some respondents suggested that rental takes place particularly for new releases of motion pictures. In addition, the market investigation revealed that VHS as a medium is fast diminishing especially in Western European countries where DVDs comprise over 90% of new releases. Market evidence supports the view that the format (DVD/VHS) is not considered relevant for the purposes of a further sub-division of the market. The issue of whether motion picture content supplied via the Home Entertainment segment can be subdivided based on genre, content type or format can be left open, as the assessment of the impact of the transaction would not change depending on the exact product market definition.

*TV licensing*

14. The Parties have identified a single market for the licensing of broadcasting rights (concerning motion pictures as well as other content such as TV programs and entire TV channels) to operators and distributors of TV channels. In the past, however, in several decisions the Commission has distinguished between the licensing of broadcasting rights for pay-TV and the licensing of broadcasting rights for free-TV. In *Newscorp/Telepiù*[5], the Commission has explained that although free-TV and pay-TV may compete for the acquisition of TV content, there are some categories of content that are acquired only by pay-TV operators in view, *inter alia*, of their prices and of free-TV operators' limited broadcasting capacities. These content categories include new motion pictures that have not yet been released for TV exhibition and certain sporting events. With respect to the licensing of broadcasting rights for motion pictures for pay-TV, the Commission has identified distinct markets for the following exhibition windows: (i) Pay Per View ("PPV"); (ii) the first pay-TV window; and (iii) the second pay-TV window. The Commission has also considered distinguishing between U.S.-produced versus other motion pictures. Finally, in several cases, the Commission has identified a market for the wholesale supply of TV channels for retail pay-TV.

*Pay-TV/Free-TV*

[5] Case No. COMP/M.2876 - *Newscorp/Telepiù*, paragraph 53.

15. The Commission has carried out a thorough market investigation in this case. This inquiry has confirmed that, based on the characteristics of demand and supply, licensing of broadcasting rights to free-TV operators is a separate product market as opposed to licensing of broadcasting rights to pay-TV operators. In particular, as regards licensing of broadcasting rights for motion pictures, free-TV operators do not compete with pay-TV operators for the acquisition of the relevant content that makes pay-TV attractive to end-consumers (for example premium motion picture content, one of the "driver" content for pay-TV). This is borne out by the existence of a widespread business standard consisting of different "exhibition windows" also as regards licensing/acquisition of TV broadcasting rights to content (such as motion pictures). This business standard entails that some "premium content" reaches free-TV only after all of the other TV-related selling windows have been exploited by suppliers.

*TV Exhibition windows*

16. As regards pay-TV windows[6], the market investigation suggested that in some countries (where this window exists) the second pay-TV window may also represent a different market as opposed to first pay-TV window. By the same token, some respondents to the market investigation suggest that a differentiation would also be justified regarding the licensing of motion pictures for PPV, Video-on-demand (VoD) and nearVideo-on-demand (nVoD) windows. In any event, PPV, nVoD and VoD services, depending of the countries at issue, are not necessarily at a very advanced stage of development and dissemination, and appear to be services made available to pay-TV subscribers in addition to the first and (where available) second pay-TV windows. In addition, based on the replies to the Commission's market investigation, it is not clear-cut that, from a licensing/acquisition of rights standpoint, the rights for these (PPV, VoD, nVoD) windows, already at this juncture, would form part of a separate product market. In any case, even if it is not excluded that the evolution of the market dynamics would lead to this possible outcome in the foreseeable future, the assessment of the effects of this transaction would not change whatever the product market definition.

*US/non-US motion pictures*

17. As regards licensing of motion pictures, a certain number of respondents to the market investigation suggest that at least in some countries, US-produced films may be regarded as a separate market, due to both a different pattern of trade and the cost of acquisition rights compared to other non-US motion pictures, as well as due to a very high attractiveness of the US-produced films *vis-à-vis* end-consumers. The same market analysis has however not shown that US-produced motion pictures would clearly represent a distinct product market. However, it is not necessary to take a definitive conclusion on the above issue, since the assessment of the impact of the transaction would not change even assuming that US-produced motion pictures would represent a separate product market.

*TV channels*

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6 Films for pay-TV are generally speaking exhibited under different timing and windows. See also Case No. COMP/M.2876 – NEWSCORP/TELEPIU' paras. 38, 58 & 59.

18. TV channels comprise a full program, which can be of a general nature (general-interest channels), or concentrate on a specific genre (thematic channels). These are typically "mini-pay" channels. Mini-pay channels generally contain non-premium content, and are usually financed primarily by subscription fees and to a lesser extent by advertising fees.

19. The market investigation has confirmed that the supply of (entire) TV channels (mostly if not completely) to pay-TV operators[7] would also form a separate product market. TV channels are traded under very different terms and conditions as opposed to the supply of motion pictures and other content. The commercial structure of licensing rights to TV channels is very different from the trade patterns of licensing of motion pictures and of other content (pricing arrangements, generally non-exclusive rights licensed, etc.). In addition, from the perspective of demand (i.e. acquisition of TV rights), the market investigation clearly confirmed that motion picture and other content are not substitutable for (entire) TV channels. The question whether TV channels can be distinguished based on their genre (generic, thematic, motion pictures, documentaries, other type of channels) can be left open as the assessment of the impact of the transaction would not change regardless of the exact product market definition.

*TV Programs*

20. TV programs include a wide range of content, including made-for-TV motion pictures, TV series, and cartoons specifically produced for TV exhibition. The market investigation confirmed that licensing of rights to TV programs represent a separate product market. The licensing fees for TV programs are often lower than for motion pictures. From the acquisition of rights standpoint, TV programs are mainly purchased by free-TV operators, but may also be purchased by pay-TV operators. In any event, rights to TV programs are traded under different pricing structures and do not have the same economic value as rights to other TV content; ultimately TV programs are not considered to be substitutable with other TV content.

**<u>Relevant geographic markets</u>**

*Theatrical release*

21. With reference to the Commission's decision in *Polygram/Seagram*[8], the Parties consider the relevant geographic market for theatrical distribution of motion pictures most likely to be national, or in some cases regional, *inter alia* based on national languages, the fact that distribution is often carried out on a national basis, the existence of different national regulatory schemes, different Member State censorship and copyright laws, and due to national tastes of the audience.

22. The market investigation has confirmed that the scope of the relevant geographic market in theatrical release of motion pictures is generally considered to be national, predominantly for the above reasons.

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7 TV channels are typically licensed to pay-TV platforms and cable/satellite operators, which include these channels in their subscription packages. Free-TV operators do not acquire broadcasting rights for complete channels.

8 Case No. COMP/M.1219 – Seagram/Polygram, paragraph 53.

*Home Entertainment*

23. Consistent with *Seagram/Polygram* the Parties consider the relevant geographic market for home entertainment products, notably VHS/DVDs, to be national in scope and occasionally regional, based on distribution generally being organised on a national or regional scale, prices typically being set on a national level, release dates being generally co-ordinated nationally, and the marketing, promotion and advertising of home entertainment products which tends to take account of national or regional differences and consumer preferences.

24. Market investigation endorses this view for broadly similar reasons and some respondents cited national languages also in support of this. However, a limited number of respondents put forward the proposition that language considerations would not be such a limiting factor in the case of DVD's. In any event, whatever the geographic definition, the assessment of the impact of this transaction on the various possible Home Entertainment markets would not change.

*TV licensing*

25. In line with the Commission's decisional practice[9], the Parties submit that the geographic markets in TV licensing are national or, in certain cases, regional as licensing arrangements are negotiated on a national or regional basis, customers are different in most countries and language differences require differences in content. In some cases the geographic markets may extend to a linguistic area according to the Parties (e.g. Germany, Austria and the German-speaking part of Switzerland, or the United Kingdom and Ireland).

26. This view of the geographic scope of the various TV licensing markets outlined above has been largely confirmed by the market investigation. In any event, whatever the geographic market definitions, the assessment of the impact of this transaction on the various TV licensing markets would not change.

## B. COMPETITIVE ASSESSMENT

***Introduction***

27. Both Sony and MGM develop and produce motion pictures, initially for theatrical release in cinemas and subsequently for distribution on VHS videotapes and DVDs and for licensing to TV operators (to whom they also supply other content). The assessment of the impact of the proposed operation in respect of the supply of motion pictures (and of other relevant content) through each of these three distribution channels is set forth below.

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9 See Case No. COMP/JV.37, BSkyB/Kirch Pay TV, paragraph 45; Case No. COMP/M.2050, Vivendi/Canal+/Seagram, paragraph 17; Case No. COMP/M.2876, Newscorp/Telepiù, paragraph 62.

*Theatrical release*

28. In theatrical release, Sony is active through several entities including: Columbia Pictures Industries, Tristar Pictures, Screen Gems and Sony Pictures Classics. MGM's subsidiaries active in development, production and acquisition of motion pictures, are: MGM Pictures and UA Films. According to the Parties, Sony typically produces around [5-20] motion pictures annually and acquires for distribution a further [15-35] motion pictures annually. MGM's budgets for new motion pictures are generally lower than those of its larger U.S. rivals and it has produced around [5-15] motion pictures in recent years[10]. Its specialty label, UA Films, acquires for distribution a further [0-15] motion pictures[11]. In Europe, Sony theatrically distributes the motion pictures it produces or acquires through its subsidiary Sony Pictures Releasing International ("SPRI") - prior to November 22, 2004, named Columbia Tristar Film Distributors International - or through national third-party distributors who act as sub-distributor of SPRI.

29. MGM is not active in theatrical distribution in Europe, but its motion pictures are distributed by third parties. Currently, its pictures are distributed by Twentieth Century Fox under an agreement which expires in 2006 and through third party distribution on a motion picture-by-motion picture basis for the territories not covered by this agreement.

30. The Parties have provided market data in the form of estimated gross box office receipts generated by motion pictures produced or acquired by the Parties and their competitors. Sony's share of EEA box office receipts has ranged between about [5-15%] over the past three years. In 2003 Sony accounted for approximately [10-20%] of world-wide box office receipts and about [5-15%] of total EEA box office receipts. At the national level, in 2003 Sony's share of gross box office receipts ranged from less than [5-15%] (Sweden) to about [10-20%] (Estonia). MGM's share of EEA box office receipts has ranged between [0-10%] over the past three years. In 2003 MGM accounted for [0-10%] of world-wide box office receipts and [0-10%] of total EEA box office receipts. At the national level, MGM's 2003 share of gross box office receipts ranged from [0-10%] in France to about [0-10%] in Norway.

31. In 2003, the Parties' combined share in the EEA ranged from [0-10%] in Sweden to [10-20%] in Estonia. Only in the latter Member State would the combined entity's share exceed the 15% threshold, whereas MGM's incremental share is minor only ([0-10%]). EEA-wide the Parties' estimated combined share would be [0-10%] of total gross box office receipts generated by motion pictures (increment MGM: [0-10%]).

32. A number of major competitors are present in theatrical release: Buena Vista (the international theatrical distribution and marketing arm of Walt Disney), Dreamworks, Fox Filmed Entertainment, Gaumont, Icon Productions, Lion's Gate Entertainment Corp., Paramount Pictures and Pixar. On an EEA-wide basis, in 2003, Buena Vista's

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[10] Generally, up to around USD 50 million per release (though higher in some cases) compared with a Motion Picture Association of America (MPAA) member company average of around USD 65 million in 2003.

[11] According to the notification, MGM typically releases fewer motion pictures in Europe than it produces or acquires world-wide. In most European countries, MGM released only [0-10], [0-10] and [0-10] motion pictures, respectively, in the years 2001-2003.

share of gross box office receipts was [10-20%], Fox' share [0-10%], UIP (according to the notification, distributor for Universal, Paramount and Dreamworks[12]) [10-20%], Warner Bros [10-20%] and other studios collectively accounted for [30-40%]. From these figures it must be concluded that Buena Vista remains the leading market player in the EEA *post-merger*, followed by UIP and Warner Bros. The combined Sony/MGM would become the fourth largest player, closely followed by Fox.

33. According to the Parties the motion picture *production* industry has, in recent years, been characterised by intense competition between the larger U.S. studios and a multitude of world-wide independents for the acquisition of source material, actors, directors, producers and other creative personnel; rising production costs; and increased competition from alternative forms of entertainment and leisure time activities. As regards *theatrical distribution* in the EEA, the Parties have described this market as being fragmented and competitive, with many national and international distributors, competing for access to limited screen space. On the demand side, they argue, the various national markets are increasingly concentrated with only a few large cinema chains active in many countries, which are able to exert considerable countervailing buyer power on motion picture distributors.

34. Most third parties (motion picture producers, theatrical distributors and exhibitors) share the Parties' view that the theatrical release of motion pictures is competitive. Moreover, they expect the impact of the proposed operation to be minor. According to a number of respondents a noticeable effect of the merger will be that MGM's products, which are now distributed by Fox, will be distributed by Sony in the future. A small number of theatrical distributors expressed concern that the transaction would reinforce the strength of the major studios *vis-à-vis* the independent or non-integrated film production companies, or that prices for rentals of MGM productions would become aligned with Sony's prices which are alleged to be higher. Additionally, some respondents pointed out that there would be increased concentration of theatrical distribution of motion pictures following the merger.

35. In order to verify any foreclosure concerns due to the Parties' vertical integration in theatrical distribution and given that the distribution market in some Member States seems quite concentrated, the Commission requested that the Parties provide information on Sony's participation in distribution joint ventures (and other types of co-operations) with other (major US) studios in the EEA. In France, Sony distributes its products in co-operation with Gaumont (via Gaumont Columbia Tristar Films), in Poland Sony co-operates with U.I.P. (via United International Pictures SP. z.o.o.), in Portugal Sony jointly distributes its motion pictures with Warner (via Columbia Tristar Warner Films, LDA.) and in Norway it co-operates with Nordisk Film Distributors AS. However, even if the additional share of box office receipts that the relevant joint venture partner represents were to be taken into account, the proposed operation would not give rise to a significant impediment to effective competition, particularly given the small incremental share of MGM in these Member States (France: [0-10%]; Poland: [0-10%]; Portugal [0-10%]; and Norway: [0-10%]).

[12] U.I.P. is a distribution joint venture between Paramount and Universal, which also distributes Dreamworks' motion pictures.

*Home Entertainment*

36. Both Sony and MGM are active in the Home Entertainment market. Since early 2004, MGM has carried out its own distribution of VHS/DVDs in major EEA countries (Austria, France, Germany, Ireland, the UK and, since June 2004, Benelux). Twentieth Century Fox, or a local distributor sublicensed by Fox, previously distributed all MGM Home Entertainment products in the whole of the EEA, and now covers those countries where MGM doesn't act directly. Sony's wholly owned subsidiary Sony Pictures Home Entertainment Inc. distributes Sony's products directly in major EEA countries (Benelux, France, Germany, Italy, Spain, Portugal and the UK), licenses rights to Universal and Warner Bros in Scandinavia and Hungary respectively and relies on local third party distributors in the rest of the EEA. The countries where the Parties distribute their products themselves accounted for [70-80%] of total their Home Entertainment sales in 2003.

37. The Parties describe the Home Entertainment market as highly competitive, citing for instance the purchasing power of supermarkets and hypermarkets. Home Entertainment has undergone considerable changes in recent years, reflecting the exponential growth of DVD titles. The large increase in the number and variety of DVD titles sold has spurred the development of new retail channels, such as online sales.

38. Home Entertainment has become the critical market for motion picture producers. It now brings in a very substantial portion of their revenue, roughly twice that coming from television licensing fees or box-office receipts. In addition, motion pictures are indeed the main source of content for Home Entertainment.

39. There are differences in the Parties' combined market shares (both in terms of volume and of the value of total Home Entertainment revenues: both DVD and VHS) across different EEA countries. The Parties submit that combined shares of both undertakings, Sony and MGM, in the majority of EEA countries are below 15% (one exception is Spain where, in 2003 market share hit [15-25%] based upon Sony's acquisition of the rights for *Lord of the Rings*). Market analysis would support this. Indeed market data from respondents put the combination at nearer to [5-15%] of the various possible Home Entertainment markets. Similarly, ranking estimates of the Parties' market shares for Home Entertainment markets ranged between 5$^{th}$ and 9$^{th}$ for both Sony and MGM.

40. Furthermore, the presence of other major US studios and of third parties mitigates any risks of competition concerns. There is evidence of some price erosion, more retail entrants and piracy should also be factored in (for example in one country this was estimated to be 40% of the market).

41. There is a certain degree of vertical integration between the motion picture production studios and their distributors. As mentioned earlier, where MGM do not distribute directly in a territory, they currently use either Fox or a sub-licensee of Fox. Sony either distributes itself or sublicenses to a third party. In Hungary and the Nordic countries, Sony's distributor is Warner Brothers and Universal pictures respectively. The issue of vertical integration and of joint venture partnerships of major studio suppliers in the distribution of Home Entertainment products was addressed by the market investigation. In this respect, any concerns and foreclosure issues were excluded, as the effect of this transaction would not be of significant consequence. In particular, even if the additional market share that the relevant (joint venture) partner

represents were to be taken into account, the proposed operation would not give rise to a significant impediment to effective competition in the country markets where the above joint ventures or partnership is relevant.

***TV licensing***

42. Sony and MGM license broadcasting rights for i) motion pictures and ii) TV programs to pay-TV and free-TV operators and, to a lesser extent, iii) license (entire) TV channels (to pay-TV operators). Comcast (acquirer of [10-20%] shareholding in MGM) licenses TV channels to cable and satellite (pay) operators.

43. The five major EEA territories (*i.e.*, France, the United Kingdom, Germany, Spain, and Italy) accounted for around [80-90%] of Sony's and MGM's 2003 TV licensing revenues, with the remaining 23 EEA jurisdictions accounting for the remaining [10-20%]. Around [65-75%] of Sony's EEA TV Licensing revenues are derived from free-TV operators, compared to [60-70%] for MGM (concerning licensing of rights for both motion pictures and TV programs). Revenues from licensing broadcasting rights for entire (pay) TV channels account for less than [0-10%] of each of Sony and MGM's EEA TV licensing revenues. The balance, for both, consists of TV licensing revenues from pay-TV operators (licensing of rights for both motion pictures and TV programs). The licensing of broadcasting rights for motion pictures is the most important source of revenue for the Parties. In fact, these rights account for approximately [70-80%] of Sony's total TV licensing revenue in the EEA, compared to about [75-85%] for MGM.

*Overlaps*

44. As to the licensing of broadcasting rights for i) motion pictures and ii) TV programs, Sony and MGM are active in most EEA countries. The Parties submitted that the combined shares are modest and in any event below 15%, in view of the large number of rival licensors and the rather low level of MGM's activities compared to other studios. Comcast is not active in licensing broadcasting rights for motion pictures or TV programs.

45. With respect to the licensing of broadcasting rights for entire (pay) TV channels, Sony's[13], MGM's[14], and Comcast's activities[15] overlap to a limited extent in Germany, Greece, Iceland, Malta, the Netherlands, Poland, Portugal, and the United Kingdom. In

[13] In the EEA, Sony licenses the general entertainment channel AXN to cable and satellite operators in Hungary, Poland, the Czech Republic, Spain, Germany, Slovakia, and Portugal. Sony anticipates that this channel will also be available in Austria and Switzerland in the future. Sony also has a [55-65%] shareholding in the entity operating SET Asia, a Hindi language channel distributed in the United Kingdom, Germany, the Netherlands, and Portugal.

[14] In the EEA, MGM licenses entire TV channels principally through its wholly-owned subsidiary, MGM Networks. These channels offer MGM catalogue motion pictures that MGM does not currently license to TV operators. MGM-branded TV channels are currently available in 12 EEA countries (Austria, Cyprus, Germany, Greece, Iceland, Latvia, Liechtenstein, Malta, the Netherlands, Spain, Poland, and Portugal).

[15] In the EEA, Comcast licenses TV channels such as "E! Entertainment Television", "The Golf Channel". In 2003, E! Entertainment Television accounted for [80-90%] of Comcast's TV channel licensing revenues. Of those, approximately [75-85%] were generated in France and the United Kingdom, *i.e.*, in countries where neither MGM nor Sony are active in TV licensing, except for the Hindi language channel distributed also in the UK.

particular, Sony and MGM's TV channel licensing activities only overlap in Germany, the Netherlands (to a limited extent), Spain, Poland (from autumn 2004) and Portugal.

*Assessment*

46. The Parties submit that the most appropriate measure of the competitive positions of TV licensors is the share of TV licensing revenues, which reflects both TV licensors' success in licensing the titles of their catalogue and the value of those titles. Nevertheless, the Parties have not provided any precise market shares to back the above assertions regarding the competitive situation in the various markets, for pay-TV, free-TV, entire TV channels and TV programs.

47. The characteristics of the market (a large number of content suppliers that negotiate many different types of licensing agreements in each EEA country), make it hard to generate estimates, because there is no public information on TV operators' licensing expenses for content (or the amount they spend on content they produce themselves). Moreover, it is even harder to obtain reliable data for motion picture producers' shares of TV licensing revenues in each of the various TV "windows" as well as for TV channels' and TV programs' shares. However, Sony and MGM contend that they have no reason to believe that their share of sales in TV licensing are higher than their shares of sales in the Theatrical Release or Home Entertainment markets, *i.e.* about 15% or less in the EEA as a whole or in any country in the EEA.

48. In general terms, the transaction will have no adverse effect on competition as regards the licensing of TV broadcasting rights (whether for pay-TV, for free-TV, for motion pictures or for other content). Sony, MGM and also Comcast compete with a significant number of U.S. and non-U.S. undertakings that license content to TV operators (both free and pay-TV) and with distributors of TV channels. In addition, there are a large number of other competitors, including European and other non-U.S. producers of motion pictures and TV programs. European TV program producers in particular appear to be able to counter any possible market power issue that may arise in their local territories. In the TV program licensing market, studios also compete with their customers, in particular free-TV operators who produce made-for-TV motion pictures and TV programs.

*Motion picture rights to Pay-TV operators*

49. MGM does not have a strong foothold as regards licensing of rights to premium pay-TV content (motion pictures) in the last few years compared to other studios and other suppliers. MGM produces relatively few large studio-budget motion pictures each year (around 0-10 in recent years) that may become available for licensing to pay-TV operators as premium content. In general terms MGM's major franchises have been in the past the *James Bond, Pink Panther* and *Rocky Series*.

50. Against this background, the market investigation has confirmed that post-merger the addition of MGM's portfolio of rights to Sony's portfolio of rights regarding premium feature films licensed to pay-TV operators would not alter the pre-merger competitive structure to any significant extent across the EEA. Given the limited time-frame of the market investigation in such complex markets, it has not been possible to precisely reconstruct the market size and shares of the Parties and their competitors, which (depending on the country at issue) may also include a number of non-US suppliers. Nevertheless, based on the reply to the Commission's questionnaire sent to pay-TV operators across the EEA, the Commission concludes that the combined position of the

Parties as regards the licensing of rights for premium motion pictures is far from creating a dominant position, or from significantly impeding effective competition in all alternative market definitions. In addition, in all likelihood any foreclosure of premium content will not materialize, bearing in mind the available possibility of switching to competing premium content available to TV-operators from other motion picture producers. In fact, MGM generally ranked well behind the leading players (after nearly all of the other studios) on the basis of their supposed market share, while Sony was generally not considered to be the leading supplier either. The same conclusion is also valid when considering the respondent's share of purchase of motion pictures from the studios and other suppliers.

51. Furthermore, in some countries, pay-TV operators are in a nearly monopsonistic position (due to the concentration process that the pay-TV industry underwent in recent times); these pay-TV operators may be deemed to be capable of constraining any attempt by the merging Parties to exercise market power.

*Motion picture rights to Free-TV operators*

52. Sony and MGM license broadcasting rights for motion pictures to free-TV customers in competition with other studios and with a noticeable number of content providers across the EEA. MGM's library (or catalogue) of motion picture is relatively large and therefore, in the course of the market investigation it was pointed out that post-merger, in general terms, Sony could increase to a considerable extent its ability to provide content to free-TV operators.

53. In any event, it has appeared that, when looking more closely on a country by country level, MGM's relative positioning in terms of the provision of motion pictures to free-TV operators did not necessarily appear to be higher than that of other motion picture providers. Against this background, the market investigation has confirmed that post-merger, the addition of MGM's motion picture library to Sony's licensed to free-TV[16] operators would not alter the pre-merger competitive structure to any significant extent across the EEA. Given the limited time-frame of the market investigation in such complex markets, it has not been possible to precisely reconstruct the market size and shares of the Parties and their competitors, which (at varying degrees depending on the country at issue) indeed include an important number of non-US suppliers. Nevertheless, based on the replies to the Commission's questionnaire sent to free-TV operators across the EEA, the Commission concludes that the combined position of the Parties as regards the licensing of rights for free TV (library or catalogue) motion pictures is far from creating a dominant position, or from significantly impeding effective competition in all alternative market definitions. Individually, MGM generally ranked well behind the leading players (after nearly all of the other studios) on the basis of their supposed market share. Sony was generally not considered the leading supplier either. The same conclusion is valid when considering the respondents' share of purchase of motion pictures from the studios and other suppliers.

54. In addition, in all likelihood any foreclosure of access to content would not materialize, bearing in mind the option available to free-TV operators of switching to competing content suppliers.

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[16] It should be mentioned that such catalogue or library content may also be licensed to pay-TV operators, which can then use it for their "classics" movie channels.

55. Furthermore, free-TV operators have in general many titles of motion pictures from their own libraries from which to choose as one of many forms of content that may be used to fill their schedules.

*TV channels*

56. With respect to the licensing of broadcasting rights for entire (pay) TV channels, Sony's, MGM's, and Comcast's activities overlap to a limited extent in Germany, Greece, Iceland, Malta, the Netherlands, Poland, Portugal, and the United Kingdom. In particular, Sony and MGM's TV channel licensing activities only overlap in Germany, the Netherlands (to a limited extent), Spain, Poland (from autumn 2004) and Portugal.

57. The Parties contend that a number of larger U.S. studios are believed to offer TV channels throughout the EEA, although they do not have information on how these competitors operate their TV channels (*i.e.* whether these competitors license all content or whether they license only some content to an operator who subsequently compiles the channel). Given the limited time-frame of the market investigation in such complex markets, it has not been possible to precisely reconstruct the market size and shares of the Parties and of their competitors. Nevertheless, based on the replies to the Commission's questionnaire sent to the various suppliers and customers in this market across the EEA, the Commission concludes that the combined position of the Parties as regards the licensing of rights for TV channels is far from creating a dominant position, or from significantly impeding effective competition in all alternative market definitions in all countries where the transaction gives rise to an overlap. In fact, MGM, Sony and Comcast were not considered by respondents to be leading TV channel suppliers. The same conclusion is valid when considering the respondents' share of purchase of TV channels from the studios and from other TV channel suppliers.

*TV programs*

58. As regards the licensing of broadcasting rights for TV programs, Sony and MGM are active in most EEA countries.

59. The Parties contend that TV programs are supplied by many different companies to both pay-TV and free-TV operators. On the supply-side, there would be both pay-TV and free-TV operators, independent production houses, and motion picture producers. According to the Parties, TV programs made by motion picture producers compete head-to-head with a huge array of content.

60. Given the limited time-frame of the market investigation in such complex markets, it has not been possible to precisely reconstruct the market size and shares of the Parties and their competitors. Nevertheless, based on the reply to the Commission's questionnaire sent to the various suppliers and customers in this market across the EEA, the Commission concludes that the combined position of the Parties as regards the licensing of rights for TV programs is far from creating a dominant position, or from significantly impeding effective competition in all alternative market definitions, in all the countries where the transaction gives rise to an overlap. In fact, MGM and Sony were never *inter alia* indicated as leading TV program suppliers by respondents. The same conclusion is valid when considering the respondent's share of purchase of TV programs from the studios and from other TV program suppliers.

61. In addition, foreclosure of content would not be likely bearing in mind the available option of switching to competing suppliers of program content and given that the supply-side is in no way confined to the studios.

***Overall conclusion on competitive assessment***

62. In view of the foregoing, it can be concluded that the proposed operation would not significantly impede effective competition, in particular as a result of creating or strengthening a dominant position in the EEA or any substantial part of it.

## VI. CONCLUSION

63. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission

(signed)
Stavros DIMAS
Member of the Commission