

***Case No COMP/M.5008 -  
VIVENDI / ACTIVISION***

Only the English text is available and authentic.

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

---

Article 6(1)(b) NON-OPPOSITION  
Date: 16/04/2008

***In electronic form on the EUR-Lex website under document  
number 32008M5008***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16-IV-2008

SG-Greffe(2008) D/201771

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 party:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5008 - Vivendi/ Activision  
Notification of 07.03.2008 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 07 March 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("the ECMR") by which the undertaking Vivendi S.A. ("Vivendi", France) acquires within the meaning of Article 3(1) (a) and (b) of the ECMR control of the whole of the undertaking Activision, Inc. ("Activision", USA).

**I. THE PARTIES**

2. Vivendi is a communication and media group with activities in the music, TV, cinema, telecommunications and video games sectors. Vivendi Games, a wholly-owned subsidiary of Vivendi, develops and publishes game software for Personal Computers (PCs), video game consoles, handheld/portable consoles and mobile handsets.

---

<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

3. Activision develops, publishes and distributes game software for PCs, video game consoles and handheld/portable consoles. Activision does not publish games for mobile handsets.

## **II. THE OPERATION**

4. The transaction will result in the merger of Vivendi Games with Activision, to create a new entity called Activision Blizzard, Inc. Post-merger Vivendi will hold a 52% share in Activision Blizzard (which may rise to 68%).

## **III. THE CONCENTRATION**

5. Following the proposed transaction, Vivendi will exercise sole control over Activision Blizzard, the combined game businesses of Activision and Vivendi Games. The operation, therefore, constitutes a concentration within the meaning of Article 3(1) (b) of the ECMR.

## **IV. COMMUNITY DIMENSION**

6. The undertakings concerned have a combined aggregate world-wide turnover for the year 2007 of more than EUR 5 billion<sup>2</sup> (Vivendi: EUR 21,657 million, Activision: EUR 1,179 million). Each of Vivendi and Activision has a Community-wide turnover in excess of EUR 250 million (Vivendi: EUR [...] million, Activision: EUR [...] million), without both undertakings achieving more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
7. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the EC Merger Regulation.

## **V. RELEVANT MARKETS**

8. As noted above, both Vivendi Games and Activision are developers and publishers of game software. Vivendi is also active, through its wholly-owned subsidiary Universal Music Group ("UMG"), in the music publishing and recorded music businesses and it licenses such rights to game publishers, including Activision. Activision, through its subsidiaries Centresoft and PDQ, is a wholesale distributor of game software in the EEA and a supplier of logistics services to third party game publishers in the UK. Thus the transaction has an impact on publishing of game software, licensing of music rights and wholesale game distribution and provision of logistics services to game publishers.

---

<sup>2</sup> 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).

## A. PUBLISHING OF GAME SOFTWARE

### 1. Relevant product market

#### *Views of the notifying party*

9. Vivendi Games and Activision publish game software which are developed either in-house or by independent third-party developers. Similarly to the other game publishers, a high proportion of their published games are developed by third-party developers<sup>3</sup>. There is no Commission precedent with respect to the market for publishing of games software. According to the notifying party, the market for game publishing can be segmented along (i) gaming platforms, (ii) online games vs. offline games and (iii) game genres.

#### *Gaming platforms*

10. Video games can be played on the following platforms: (i) Personal Computers ("PCs"), (ii) video game consoles ("consoles"), (iii) handhelds/portables consoles ("handhelds") and (iv) mobile handsets. Both Activision and Vivendi Games develop and publish games for all these platforms, with the exception of Activision not supplying games for mobile handsets.
11. The notifying party argues that third-party game publishers (i.e., game publishers who, like Vivendi Games and Activision, are not hardware manufacturers) commonly publish different versions of a single game for multiple platforms. Multi-platform publishing would largely be driven by the economics of game developing and publishing. Indeed, Vivendi explains that the costs of bringing each game to the market, coupled with the uncertainty regarding success and the limited sales potential for any individual platforms create strong incentives for multi-platform publishing in order to maximise the potential number of customers. In addition, information submitted in the notification suggests that the cost necessary for reprogramming a game developed for one platform into a game for a different platform is relatively low compared to the total cost involved in the publishing of any single game. However, a distinction would have to be made concerning games for mobile handsets, which, due to their technical specificities, cannot easily be adjusted to other platforms and vice versa<sup>4</sup>. As regards the demand side, Vivendi contends that PCs, consoles and handhelds are to a large extent substitutable from a consumer's perspective and that a significant proportion of gamers would play on several of these platforms. Hence, games for PCs, consoles and handhelds would to a large extent also be substitutable.

#### *Online games vs. offline games*

12. Games software can also be divided into online and offline games. Online games can be played with different platforms (originally PCs and increasingly consoles and handhelds). Online gamers play against or with numerous physically remote gamers to which they are connected via the Internet, thus creating a gaming "community" grouping several

---

<sup>3</sup> Vivendi Games: [80-90]% and Activision: [45-55]%.

<sup>4</sup> The notifying party explains that games for mobile handsets are developed specifically for the small screens, the limited gaming control represented by mobile handset key pads, the limited computing and processing power of handsets and the lower resolution screens and limited audio capability of mobile handsets.

thousands of players<sup>5</sup>. Online games are also "persistent", in that they can be played for an indefinite amount of time and continue even if an individual gamer stops playing. By contrast, offline games are written to provide a limited time of entertainment (typically few hours) and allow for play with a pre-determined maximum number of gamers (usually up to 4). According to the notifying party, these differences in game concepts change the experience for the gamers, as a result of which online and offline games would not be substitutable from a consumer's perspective. However, Vivendi notes that the distinction between online and offline games may blur in the future, as game publishers are beginning to augment offline games with online modules, and to release online versions of historically offline games. Although there are different pricing models for online games<sup>6</sup>, the notifying party takes the view that defining the relevant market by reference to how online games are acquired is inappropriate, mainly because a wide range of pricing models would be used by online game publishers.

#### *Game genres*

13. Video games can also be segmented according to different game genres<sup>7</sup>. The notifying party submits that gamers tend to compile libraries of games of different genres. In addition, publishers would have strong incentives to publish games in different genres in order to maximise the range of consumers interested in their games, as evidenced by the fact that each merging party publishes multiple game genres. Vivendi is therefore of the opinion that it is inappropriate to define the relevant markets by reference to the game genres.
14. In the view of the foregoing, Vivendi is of the opinion that three separate product markets should be defined within the games software publishing sector, namely: (i) the market for the publishing of offline games for PCs, consoles and handhelds; (ii) the market for the publishing of (offline) games for mobile handsets, and (iii) the market for the publishing of online games.

#### *Market investigation*

15. The market investigation broadly confirmed the delineation of the market proposed by the notifying party as set out above. Only a few views were raised in support of an overall game software market. In particular some publishers consider that both on the supply and the demand sides there is a high degree of cross over, with regard to on- and offline games and with regard to different platforms and game genres.

---

<sup>5</sup> Vivendi Games' online game "World of Warcraft" has more than 10 million active players world-wide.

<sup>6</sup> While some online game can be played for free, in which case the publisher generates revenue through advertising and/or sale of "virtual" objects, other requires the purchase of the game software and, in some instances, the payment of a subscription fee.

<sup>7</sup> The NPD Group, a market research company, identifies in its study "*Online Gaming 2007: The Virtual Landscape*" of April 2007 the following game genres: Card, puzzle, arcade and world games, gambling/casino games, massively multi-player online role-playing games, shooter games, real-time strategy games, racing games, flight games, sports games, fighting games, action/adventure games, strategy/role-playing (not in a continuous world) games, family-oriented games.

### *Online games*

16. To play an online game gamers have to be connected to the internet. There are a broad range of online games, from massive multiplayer online games to casual board and card games, such as solitaire and poker that are played with/against a smaller number of gamers.
17. The market investigation showed that competitors and customers generally consider pure online games, such as MMOGs (massively multi-player online games), played mainly on PC platforms, as different from offline games primarily due to their characteristics, target group and pricing structure. These online games are considered to offer a different kind of gaming experience (single player vs. multiplayer/social interaction) that appeal to certain types of gamers. Contrary to offline games, online games offer a persistent world, incorporate role-playing and have no fixed "end" like a traditional game. Online gamers are perceived to be more "hooked up" for one particular game and for a longer time. Finally, pure online games also appear to have a different pricing mechanism, often with monthly subscription fees where the consumers purchase gaming time rather than a complete game. For instance, to play Vivendi Games' online game World of Warcraft, gamers must pay an online subscription fee in addition to purchasing the initial game (boxed or downloaded).
18. However, as recognised by the notifying party, the market investigation also indicated, that the delineation between online and offline is somewhat blurred. A growing number of offline games appear to have significant online functionalities. In particular, it was argued that there is a cross over between pure online gaming and next generation console/PC gaming with enabled online content. Furthermore, more and more games are published in both online and offline versions. As almost every consumer has an internet connection, changing from offline to online games was argued to be possible. At present, however, the results of the market investigation revealed that offline games with online playing options/extensions in principle do not constrain the price of pure online games.
19. For the purpose of this decision, the exact product market definition with regard to online games can however be left open, since, regardless of whether the assessment is made on an overall market for online games or a market for pure online games, the competitive assessment will not change.

### *Games for mobile handsets*

20. As regards offline games, the market investigation largely confirmed the view of Vivendi that offline games for mobile handsets constitute a separate market mainly due to their nature, technical features, different pricing structures and distribution channels. Indeed, even if a mobile version of a traditional game exists, it appears to be shorter in order to appeal to people who are "on the move". From a technical point of view, games for mobile handsets have limited file size, notably to comply with limited screen size, and thus have less functionality than other offline games. Few publishers also seem to develop these games but outsource their development to a few, specialised independent developers.

### *Overall market of offline games*

21. As regards the remaining types of offline games, the market investigation revealed a number of elements in support of an overall market for the publishing of offline games for

PCs, consoles and handhelds. Many games are developed and published cross-platform. For this reason most publishers consider that all platforms except mobile handsets are substitutable from a supply side perspective. However, some games are claimed to be designed (“meant”) specifically for PCs or consoles. In the event of multi-platform release, it is rather done from the beginning, i.e., for the developing of new games. To adapt an already finished game to another platform, so called porting, however, seems less common and easy than suggested by the notifying party. Indeed, in certain cases porting seems to be as expensive and take as long time as developing new game software. For a demand-side perspective, the market investigation suggested that console games are more stable and easier to use than those for PCs.

#### *Further delineation of offline games*

22. Based on the results from the market investigation, however, a further possible delineation of offline games by platform and within the console platform between Microsoft's Xbox, Sony's PlayStation and Nintendo's Wii cannot be excluded. Games appear to be substitutable to the extent that their respective platforms are substitutable. In terms of functionalities, some platforms seem to be closer than others, such as PCs and consoles, and some consoles within the console platform, such as Microsoft's Xbox and Sony's Playstation 3. In addition, the price to purchase the hardware is also considerably different where the cost of a console for instance amounts to a fourth of the price of a PC. As concerns substitutability between Microsoft's Xbox, Sony's PlayStation and Nintendo's Wii, the market investigation indicated that in general customers are unlikely to have more than one console. As a result, customers buy games for the individual console they have. Even if some games are available for different consoles, this requires a technical adaptation of the software to the specificities of each console. As a result, the game is released in different versions specific to each individual console. Therefore the Commission has also assessed the effects of the transaction on the different consoles. Finally, because hardware is much less powered on the handheld and mobile handset platforms, consumers are not likely to substitute buying a game on a lesser advanced hardware platform.

#### *Game genres*

23. Finally, the market investigation has revealed that most developers, publishers and customers do not consider that games should be further segmented by reference to different genres of games. To a certain extent, such division is considered to be subjective. There also seem to be games with multi-types of gaming activity inside the same game. From a demand side perspective, most gamers appear to buy games across several game genres. It seems that a significant number of gamers would switch to other genres of games (particularly into neighbouring genres) in response to a significant price rise. Finally, from a supply side perspective, publishers appear generally to publish games across multiple genres.
24. In light of the above, different genres do not seem to constitute a separate product market. However, due to the vertical link between the parties, i.e., Vivendi (through UMG) as licensor of music rights used in Activision's games, in particular in their music games, the Commission has also assessed the effects of the transaction on a hypothetical market for music games.

*Conclusion on the product market for publishing of game software*

25. For the purpose of this decision, the exact product market definition can be left open, since, on the basis of markets for publishing of (i) all games (comprising online and offline games, for all platforms, as well as for all game genres), (ii) online games, (iii) offline games for mobile handsets and (iv) offline games for PCs, consoles and handhelds, together or per platform, the result of the competitive assessment will not change. In addition, as explained above, the Commission has also assessed the vertical link between Vivendi/UMG and Activision with regard to a hypothetical downstream market for music games.

**2. Relevant geographic market**

*Views of the notifying party*

26. As concerns the relevant geographic market, the notifying party contends that the markets for publishing of game software are at least EEA-wide, since game publishers distribute the same games throughout the EEA, whereas on the demand side the growth of online distribution has facilitated cross-border trade within the EEA. However, information submitted in the notification shows that there are significant differences in the average wholesale prices of the games published by Vivendi Games and Activision in the different Member States of the EEA, even for online games. Furthermore, each of Vivendi Games and Activision achieves very limited turnover with online distribution, which means that most of their games are distributed in a "boxed" form via traditional brick and mortar retail outlets.

*Market Investigation*

27. The market investigation showed that there are a number of elements that point to national markets for both on- and offline games, irrespective of platform and genres, in particular:

- a) *National sourcing*: Retailers and wholesalers mainly seem to source on national and only exceptionally on a regional level (e.g., Benelux, Scandinavia). Sales negotiations are also mainly conducted on a national level and only exceptionally centralised at supra national level.
- b) *Local support services*: In most Member States suppliers of game software provide local support in the local language.
- c) *National product specifications*. There seem to be some product differentiation for both offline and online games between different Member States. These differences consist mainly in different language versions of the games themselves, their packaging and the user information. There also seems to be some regulatory differences between different Member States, in particular as regards age rating.
- d) *National consumer preferences and technical conditions*: With regard to different platforms, there seem to be some national preferences both with regard to offline and online games. For instance, the demand for console games seem to be highest in the UK (mainly Sony), reasonably high in France (mainly Nintendo), Spain (mainly Sony) and Italy and relatively low in Germany (where PC sales are stronger). In addition, as regards online games, there seem to be some technological differences between the different Member States, such as broadband penetration and speed of broadband, which affect the demand for online games.



28. However, there are also some indications that the relevant geographic market might be wider than national. For instance, publishers seem to organise their sales on a wider geographic basis, i.e., on a regional and sometimes even EEA basis. In addition, most offline games include the main European languages (Germany, French, Italian, Spanish, English and for some games Dutch) in one and the same game medium (i.e., a CD or DVD).

Conclusion on the geographic market for publishing of game software

29. In light of the above, the Commission has assessed the effects of the transaction on a national and EEA level. For the reasons explained below, the Commission found that, whatever the geographic market definition (national or EEA-wide), the concentration will not significantly impede effective competition in the common market or in a substantial part of it.

**B. LICENSING OF MUSIC RIGHTS**

30. Vivendi, through UMG, is active in the markets for the licensing of music publishing rights and for the licensing of recorded music rights. Game publishers (and sometimes game developers) acquire both types of licences with a view of including music works into their games. Music rights are particularly important for music games, such as "Guitar Hero", published by Activision.

31. In previous decisions, the Commission has taken the view that the markets for the licensing of music publishing rights and recorded music rights are separate markets. The Commission further found that there are distinct product markets according to the use of the different music publishing rights, partly coinciding with the categories of copyrights (i.e., mechanical rights, performance rights, synchronisation rights and print rights)<sup>8</sup>. Game publishers use a bundle of rights. They procure mechanical rights to allow the production of game CDs or DVDs reproducing musical works, synchronisation rights to the extent that the game entails the synchronisation of music with visual content, and recorded music rights to the original sound recording where the game uses an existent recording rather than a version of the work recorded for the game.

32. The market investigation confirmed the Commission's previous case practice. The Commission has therefore assessed the effects of the transaction on the markets for the licensing of music publishing rights and recorded music rights.

33. In the Sony/BMG decision<sup>9</sup>, the Commission found that the market for recorded music rights was national in scope reflecting the fact that these rights are generally licensed and administrated by recording companies on a national basis. It was however noted that these markets also exhibit some international characteristics. In the UMG/BMG Music Publishing decision, the geographic scope of the markets for mechanical and synchronisation rights was left open, although it was noted that depending of the use

---

<sup>8</sup> See Commission decisions in Cases COMP/M.4404 – Universal/BMG Music Publishing and COMP/M.3333 – Sony/BMG.

<sup>9</sup> Case COMP/M.3333.

foreseen, the scope of the licences for synchronisation rights obtained by the customers may be wider than national<sup>10</sup>.

34. The notifying party submits that music publishing and recorded music rights are granted to game publishers directly by music publishers and recording companies (and not by the collecting societies) on a multi-territorial basis. Indeed, game publishers require global or at least EEA-wide licences to ensure that they can sell the same games everywhere. As a result, Vivendi takes the view that, for the purpose of the present case, which entails a vertical relation between a music publishing and recording company (UMG) and a game publisher (Activision), the geographic scope of the market for the licensing of music publishing and recorded music rights to game publishers should be considered at least EEA-wide in scope.
35. In line with the view of the parties, the market investigation indicates that the scope of the geographic market for both licensing of music publishing rights and recorded music rights for the use in game software is for the most part at least EEA-wide. Most music right holders seem to licence these rights for the use in games on an at least EEA basis and game publishers need to obtain such licence so they can sell their games within the EEA. However, in the case of certain music based games, the market investigation showed that material may be licensed for more restrictive territories (certain Member States or even granted on a language by language basis). Some music games appear to use different music works in their various regional versions. For instance, there seem to be 12 versions of "Sing Star", a music game published by Sony and Spain has for instance its own version of the "American Idol" type game. These music games are claimed to be published on a national basis to reflect and incorporate locally successful music.
36. In light of the above, the Commission has assessed the effects of the transaction with regard to music publishing and recorded music rights for use in game software on both an EEA and national level. For the purpose of the present decision, however, the precise geographic market definitions may be left open as the proposed transaction does not raise any competition concerns resulting from the vertical integration of Activision and UMG.

### **C. WHOLESALE GAME DISTRIBUTION AND PROVISION OF LOGISTICS SERVICES**

37. For the physical distribution of boxed games (e.g. CDs or DVDs), game publishers can choose among different options. Game publishers can either directly supply retailers or resellers or use third-party wholesale distributors. If game publishers decide to directly supply retailers or resellers, they can do it either with their own means ("self supply") or use third-party logistics providers.
38. Activision operates a European wholesale game distribution business for the supply of distribution and sales services to third-party game publishers (including Vivendi Games), to its own publishing operations and to game hardware manufacturers (e.g., manufacturers of video game consoles). The wholesale distribution services include a logistical and delivery network, handling services, record keeping and inventory management services, retailer account management services and customer support services for retailers. The retail customers include both brick and mortar outlets and online retailers. Wholesale distributors buy the finished products from game publishers and take title to the stock and the associated risk.

---

<sup>10</sup> Case COMP/M.4404.

39. According to the notifying party, wholesale distribution of games can be distinguished from the provision of logistics services to game publishers and should thus be treated as a separate market. Activision's subsidiary PDQ provides packaging, logistical and sales ("pick, pack and ship") services to game publishers in the UK only. These services range from the provision of warehousing and delivery to additional services such as credit control. Contrary to wholesale distributors, logistics providers act as agents to the game publishers, since they do not buy the products from the game publishers, and therefore the publisher generally remains responsible for invoicing the retailer and retain the risk.
40. In line with the views of the parties, the results of the Commission's market investigation indicate that wholesale game distribution and provision of logistic services constitute two different product markets. The Commission has therefore assessed the effects of the transaction on these two markets separately.
41. Vivendi takes the view that the geographic market for wholesale game distribution is national in scope, due to the fact that different retailers are active in each jurisdiction and distributors are therefore to establish and maintain supply relationships to them in each jurisdiction. The same applies to the provision of logistic services to game publishers, according to the parties.
42. In line with the views of the notifying party, it appears from the Commission's market investigation that the markets for wholesale game distribution and logistic services tend to be national in scope. Distributors and service providers appear to be mainly active on a national, and only exceptionally, on a regional basis. For the purpose of the present decision, however, the precise geographic market definitions may be left open. As Activision's wholesale distribution activities are mainly focused on the UK and Activision provides logistic services only in the UK, its position on a hypothetical EEA wide market would necessarily be weaker than its position in the UK. With regard to these two product markets, the Commission has therefore assessed the effects of the transaction in the UK only.

## **VI. COMPETITIVE ASSESSMENT**

43. The proposed transaction gives rise to horizontal overlaps between Vivendi and Activision in relation to game software publishing. Furthermore the transaction gives rise to vertical links between Vivendi and Activision in relation to music rights (licensing of music publishing rights and recorded music rights for use in games), and game wholesale distribution and the supply of logistics services to game publishers in the UK.

### **A. PUBLISHING OF GAME SOFTWARE**

44. The combination of Vivendi Games and Activision will create a leading publisher of games software. However, there are significant differences between the two companies in terms of product focus. Therefore, the areas of significant overlap between the parties activities are limited, as will be discussed further below.
45. Under all the various approaches to product market segmentation discussed in Section V above, based on Vivendi Games' and Activision's best estimates for their 2007 market shares in value and the results of the market investigation, the proposed transaction does not give rise to any affected markets on an EEA level. On a national level, however, the proposed transaction gives rise to the following affected markets:

- All games in Denmark, Norway and Sweden;
- Games for PCs, console and handhelds combined in Norway and Sweden;
- Games for PCs in Belgium, Denmark, Germany, Norway, Sweden and The Netherlands;
- Games for all consoles in Sweden;
- Games for Microsoft consoles in Spain and Sweden; and
- Games for Sony consoles in Sweden

46. For the reasons set out below, there will remain sufficient competitive constraint on the combined entity to conclude that the proposed transaction does not give rise to any competition concerns under any alternative market definition.

All games

47. On a product market for all games (including games for all platforms, all genres, as well as online and offline games), the combined EEA-wide market shares of Vivendi Games and Activision is [5-15]% (Vivendi Games: [0-10]%, Activision: [0-10]%). At a national level the proposed transaction would only give rise to affected markets in Denmark, Norway and Sweden, where the combined market share of Vivendi Games and Activision would be [15-25]% (Vivendi Games: [10-20]%, Activision: [0-10]%)<sup>11</sup>. Although it has not been able to calculate the competitors' shares of the market for all games, Vivendi estimates that the merged entity will rank third at the EEA level (behind Electronic Arts and Nintendo) and second in Scandinavia (behind Electronic Arts).

Online games

48. On the market for online games, Vivendi Games has a strong position with a revenue-based market share of approximately [40-50]% in the EEA. On a national level, Vivendi's market share exceeds [10-20]% in the UK, Germany, France, Scandinavia<sup>12</sup>, Benelux<sup>13</sup>, Italy and Spain, with peaks of [50-60]% in Scandinavia and [45-55]% in Spain.

49. However, Activision does not currently generate any revenues from online games and would therefore not add any increments to Vivendi Games' high market shares. Furthermore, the market investigation has confirmed that Activision is not seen as a competitor to Vivendi Games in online games.

---

<sup>11</sup> The notifying party has not been able to submit separate market share figures for Denmark, Sweden and Norway.

<sup>12</sup> The notifying party has not been able to submit separate market share figures for Denmark, Sweden and Norway.

<sup>13</sup> The notifying party has not been able to submit separate market share figures for Belgium, Luxembourg and The Netherlands.

Offline games - Games for mobile handsets

50. In the market for publishing of games for mobile handsets, Vivendi Games' holds a share of [0-5]% EEA and below [0-5]% in any Member State. Activision does not currently generate revenues from publishing games for mobile handsets.

Offline games – Combination of games for PCs, consoles and handhelds

51. Considering a publishing market for offline games for PCs, consoles and handhelds, the combined market share of Vivendi Games and Activision is [5-15]% in the EEA. The proposed transaction only gives rise to affected markets on a national basis. In that case, the combined market share of Activision and Vivendi Games is [10-20]% in Norway (Vivendi: [0-10]%, Activision [5-15]%) and [10-20]% in Sweden (Vivendi [0-10]%, Activision [5-15]%). However, in both Member States, the market leader is Electronic Arts with market shares of [25-35]% in Norway and [20-30]% in Sweden, followed by Sony (market shares of [15-25]% in Norway (number 2) and [10-20]% in Sweden (number 3)). Nintendo also hold market shares at least comparable to those of the combined entity ([10-20]% in Norway and [5-15]% in Sweden).

Offline games – Games for PCs only

52. Considering a narrower product market for offline PCs games, the combined entity holds an EEA-wide market share of [10-20]%. On a national level, the proposed transaction gives rise to relatively high combined market shares in the following Member States.
53. In Norway, the combined entity holds a [30-40]% market share (Vivendi Games: [20-30]%, Activision: [5-15]%). However, it will only rank second behind Electronic Arts (market share of [35-45]%), and there are a number of additional competing publishers, including Microsoft, Ubisoft and Atari, with market shares below [0-10]%.
54. In Sweden, the combined entity holds a [20-30]% market share (Vivendi Games: [15-25]%, Activision: [0-10]%). However, it will only rank second behind Electronic Arts (market share of [35-45]%), and there are a number of additional competing publishers, including Microsoft, Ubisoft and Atari, with market shares below [0-10]%.
55. In Belgium, Denmark, Germany and The Netherlands, the combined entity's market share is in the range of [10-20]%. Also here Electronic Arts is the market leader with market shares from [25-35]%, and there are a number of additional competing publishers, in particular Ubisoft with market shares in the range of [0-10]%.

Offline games – Games for all consoles

56. Considering a publishing market for offline games for all consoles, the combined market share of Vivendi Games and Activision is [5-15]% in the EEA. The proposed transaction only gives rise to affected markets on a national level. In that case, the combined market share of Activision and Vivendi Games is [10-20]% in Sweden (Vivendi: [0-5]%, Activision [10-20]%). However, the market leader is Sony with a market share of [15-25]%, followed by Electronic Arts ([15-25]%) and Nintendo ([0-10]%).

Offline games – Games for Microsoft consoles

57. Considering a publishing market for offline games for Microsoft consoles, the combined market share of Vivendi Games and Activision is [10-20]% in the EEA. The proposed

transaction only gives rise to affected markets on a national level. The combined market share of Activision and Vivendi Games is [15-25]% in Sweden (Vivendi: [0-5]%, Activision [15-25]%). However, the market leader is Microsoft with a market share of [25-35]%, followed by Electronic Arts ([15-25]%), Ubisoft ([5-15]%) and Take2 ([0-10]%). The combined market share of Activision and Vivendi in Spain is [10-20]% (Vivendi: [0-5]%, Activision [10-20]%). However, the market leader is Microsoft with a market share of [25-35]%, followed by Electronic Arts ([10-20]%), Ubisoft ([10-20]%) and Take2 ([0-10]%).

Offline games – Games for Nintendo consoles

58. Considering a publishing market for offline games for Nintendo consoles, the combined market share Vivendi Games and Activision would be [0-10]% in the EEA and the proposed transaction does not give rise to any affected national markets.

Offline games – Games for Sony consoles

59. Considering a publishing market for offline games for Sony consoles, the combined market share of Vivendi Games and Activision is [5-15]% in the EEA. The proposed transaction only gives rise to affected markets on a national level. The combined market share of Activision and Vivendi Games is [10-20]% in Sweden (Vivendi: [0-5]%, Activision [10-20]%). However, the market leader is Sony with a market share of [30-40]%, followed by Electronic Arts ([15-25]%) and Ubisoft ([0-10]%).

Offline games – Games for handhelds

60. Considering a publishing market for offline games for handhelds, the combined market share of Vivendi Games and Activision is [0-10]% in the EEA and the proposed transaction does not give rise to any affected national markets.

Conclusion on the competitive assessment for game publishing

61. The market investigation has shown that the gaming market can be characterised as an innovation-driven and growing industry, and that there will be sufficient competitive constraints on the merged entity in the market for publishing of games post-transaction. On most of the alternative product and geographic market segmentations, the combined market share of Activision and Vivendi Games will remain relatively low and concentration levels in the industry will be limited.
62. Under those product and geographic market segmentations where the merged entity will hold a market share above 15%, the market investigation has shown that the proposed transaction does not give rise to any competition concerns. As noted above, in the large majority of those cases, Electronic Arts will continue to be the market leader post-transaction<sup>14</sup>. In the few remaining instances, the console manufacturers will be the market leaders and Electronic Arts will hold the second or the third position. Under no market segmentation will the merged entity be the market leader, with the exception of

---

<sup>14</sup> In addition, Electronic Arts has recently announced its intention to acquire Take-Two, a US-based game publisher with a world-wide turnover of US\$ 1 billion comparable to that of each of Vivendi Games and Activision.

online games for which the proposed transaction does not bring about any accretion of market shares.

63. While Activision and Vivendi Games compete in the overall market for publishing of game software, only few respondents to the market investigation have argued that they see Activision and Vivendi Games in direct competition. While these respondents identify Activision and Vivendi Games competing directly with regard to offline games for consoles and handhelds, the market investigation has confirmed the largely complementary nature of Activision's and Vivendi Games' respective activities. The notifying party has stressed that Activision generates approximately [75-85]% of its revenues from offline games for consoles, whereas [80-90]% of Vivendi Games' publishing revenues are derived from online games, in particular "World of Warcraft", which alone accounted for [70-80]% of Vivendi Games' revenues in 2007. The market investigation has underpinned this different focus and confirmed that Activision and Vivendi Games are not close competitors under all the alternative product and geographic market segmentations. Therefore the proposed transaction will not remove an important competitive constraint on Vivendi Games.
64. According to the market investigation, customers will continue to have the possibility to switch to competing publishers. Due to the nature of game software, alternative suppliers would not be capacity constrained. If prices for games were to increase, competing publishers would therefore be likely to increase supply.
65. Any coordinated effects in the market for publishing of game software stemming from the proposed transaction can also be excluded as this market is characterised by several features that are contrary to coordination, such as the differentiated nature of the product, the importance of innovation and the asymmetry of the publishers' market shares.
66. Firstly, games software can be considered as a highly differentiated product. As seen above, game publishers offer games for various platforms and genres. While different games could be substitutable from a gamers' perspective, each game still provides an experience that is to a certain extent unique. Each game has unique features such as the respective game concept or artwork. Therefore, even games representing very close substitutes would still appeal to different extent to different gamers and would therefore not be considered fully interchangeable from a customer's perspective.
67. Secondly, as mentioned above, game publishing can be characterised as an innovation-driven and fast growing industry. Besides the current strong growth, the market investigation has shown that the average life-cycles of games are relatively short and innovation represents an important feature. Publishers constantly need to develop and publish new games containing innovative features in order to meet gamers' increasing expectations notably resulting from the constant improvement of the hardware devices on which games are played.
68. Thirdly, there are significant differences in publishers' activities, and publishers' market shares are not symmetric. Some publishers (Sony, Nintendo and Microsoft) are combined hardware manufacturers and game publishers and focus their game publishing activities on their proprietary platform, for which they achieve relatively high shares of game publishing. Third-party publishers on the other hand offer games across many different platforms and have significantly different market shares under the alternative market segmentations discussed above.

69. In view of all these elements, coordination is not likely to emerge in the market for publishing of game software post transaction.
70. In the light of all the above, the transaction does not raise serious doubts as to the compatibility with the common market under all the alternative product markets for game publishing, either at the EEA- or national levels.

## **B. LICENSING OF MUSIC RIGHTS**

### Introduction

71. The proposed transaction also gives rise to a vertical link between Vivendi/UMG in the upstream market for the licensing of publishing and recorded music rights (hereinafter together referred to as "music rights") to game publishers and the Activision's activities in the downstream market for game publishing.
72. UMG licenses music publishing rights, in particular mechanical and synchronisation rights, and recorded music rights to game publishers. Vivendi Games and Activision use music works in their games and therefore require licenses for music rights. Activision is active in publishing music games such as the different versions of "Guitar Hero" and "Dancing with the Stars". Vivendi Games does not currently publish any music games. Activision is not active in the market for licensing of music rights.
73. In the recent UMG/BMG Music Publishing<sup>15</sup> and Sony/BMG<sup>16</sup> decisions, it was noted that UMG held a 22% share of the EEA market for music publishing rights, and a 29% share of the market for recorded music in the EEA in 2006. While those markets do not perfectly correspond to the upstream affected markets in the present case, the market shares indicated above can nevertheless be considered as meaningful proxies for the competitive assessment of the proposed transaction. On a national basis, UMG holds market shares above 25% in many Member States in relation to both music publishing and recorded music rights. Therefore, the vertical link between the upstream markets for the licensing of music rights on the one hand and the downstream market for game publishing on the other hand gives rise to vertically affected markets.
74. Activision's market share of a hypothetical downstream market for only music games would also give rise to vertically affected markets. Activision's share of a hypothetical EEA-wide downstream market for music games was [25-35]% in 2007. On a national level, Activision's market share would also exceed 25% and give rise to vertically affected markets in seven Member States<sup>17</sup>.
75. According to the market investigation, game publishers usually license rights for a small number of individual music works as opposed to an entire catalogue. Such licenses are usually granted on a non-exclusive basis. Licensors of music publishing or recorded music rights receive on average an up-front fee of approximately €0] to €5,000 per licence. In addition, for most music games, a royalty based on the number of games sold is charged.

---

<sup>15</sup> Commission decision of 22.05.2007 in case COMP/M.4404 – Universal/BMG Music Publishing.

<sup>16</sup> Commission decision of 03.10.20074 in case COMP/M.3333 – Sony/BMG.

<sup>17</sup> Belgium, Denmark, France, Germany, Italy, Luxemburg, Norway, Spain, Sweden, United Kingdom, The Netherlands



76. The Commission investigated the impact of the vertical link between Vivendi/UMG and Activision on competition and concluded that it does not give rise to any competition concerns for the following reasons.

*Risk of foreclosure on a downstream market for all games*

*Input foreclosure*

77. Although music rights are used in some games, the market investigation revealed that in many instances publishers use in-house compositions or music composed by independent authors. The market investigation has furthermore revealed that game publishers are flexible in choosing those music rights used in their games among an array of substitutable music works. Therefore, rights to any particular music works do not constitute a critical input for the successful publishing of games.
78. In the recent UMG/BMG Music Publishing decision<sup>18</sup>, it was noted that EMI (19%) and Warner (15%) hold market shares comparable to UMG in the EEA-market for music publishing rights. As regards the market for recorded music, it was noted in the Sony/BMG decision<sup>19</sup> that Sony/BMG holds a share of 22% in the EEA, with EMI accounting for 17% and Warner for 12% of the market.
79. While some respondents to the market investigation pointed out that UMG holds a significant portfolio of music rights, the market investigation globally confirmed that the competing licensors of music rights listed above are able to license rights to music works substitutable to those held by UMG. Due to the nature of the music rights, alternative suppliers of licenses for music rights would not be capacity-constrained and additional demand could be met. Therefore publishers of game software will continue to have sufficient access to music rights post-transaction.
80. Even if UMG had the ability and incentive to partially foreclose rivals, any price effect would be minimal, as the cost of the music rights only represents a small part of the overall cost of production of games. Indeed, the market investigation indicated that music rights do not represent a significant portion of overall cost of production of games. According to the parties, on average, Activision's licenses for music publishing rights accounted for €[...] per game unit, and fees for recorded music rights ranged from €[...] to €[...] per game unit. In relative terms, the overall cost of Activision's music rights for non-music games accounted for approximately [0-5]% of production costs. The market investigation has confirmed this cost structure and the small importance of music rights in terms of cost for competing game publishers. Therefore any price increase would have a negligible impact on the cost structure and hence on competition in the downstream market.
81. For the reasons set out above, input foreclosure can be excluded as a result of the proposed transaction.

---

<sup>18</sup> Commission decision of 22.05.2007 in case COMP/M.4404 – Universal/BMG Music Publishing.

<sup>19</sup> Commission decision of 03.10.20074 in case COMP/M.3333 – Sony/BMG.

### *Customer foreclosure*

82. Customer foreclosure on the downstream market for game publishing as a result of the proposed transaction can also be excluded. The market investigation has indicated that game publishers collectively only account for a small fraction of the overall demand for music rights. Given the combined entity's market shares on the downstream market for game publishing in the EEA, regardless of the exact product market segmentation applied, the combined entity would not account for a significant portion of demand for music rights and thus not have the ability nor the incentive to engage in a strategy of customer foreclosure. Any transfer of Activision's demand to UMG would in any case have negligible impact on competition.

### *Risk of input foreclosure on a downstream market for music games*

83. In the course of the market investigation, some concerns about input foreclosure for music games have been raised. Concerns were raised that, post-merger, Vivendi/UMG could foreclose competing music game publishers' access to its portfolio of music rights, in particular to its significant portfolio in areas such as "Hip Hop, Rap, R&B and Urban Music".
84. In a hypothetical downstream market for music games, the importance of music rights as an input for publishers is higher than in the overall downstream market for games. Music games focus on the music content and require a higher number of licenses of well-known music works, which excludes in-house compositions or music composed by independent authors. According to the market investigation, the number of licenses game publishers require per music game ranges from approximately 5 to 100, averaging around 45. According to the parties, the number of licenses for the different version of Activision's "Guitar Hero" ranges from [30-150].
85. As regards the significance of music rights in terms of cost for the publishing of music games, the market investigation has not been conclusive. According to the notifying party, the proportion of the cost of music licences in the total cost of production for Activision's music games is on average [5-15]%, ranging from [0-10]% to [10-20]% per game. The market investigation has shown widespread results indicating a wide range of shares of production cost (from 10% to more than 50%) depending on the individual game.
86. The Commission investigated the impact of the vertical link between Vivendi/UMG and Activision on competition and concluded that, even when considering a hypothetical downstream market for music games, the proposed transaction does not give rise to competition concerns for the following reasons.

### *Input foreclosure*

87. According to the market investigation, publishers of music games usually identify a range of alternative suitable works, whose rights are held by different companies. In case a license is refused, either because an agreement on prices cannot be reached with the potential licensor or because the right holder will decline to licence rights to their works, music game publishers turn to an alternative licensor of substitutable music works. Therefore access to specific music works, repertoire, or chart hit is not critical for the publishers' ability to successfully publish music games.

88. As mentioned above, there are several licensors of music rights with market shares comparable to that of UMG. Even if UMG were to hold a significant portfolio of rights for certain music genres, the market investigation has confirmed that competing licensors are able to license rights to music works substitutable to those held by UMG. Due to the nature of music rights, these licensors are not capacity-constrained and additional demand could be met. As a result, publishers of music games will continue to have sufficient access to music rights post-transaction.
89. Besides, it should be noted that Sony, the current market leader in music games publishing, is already vertically integrated and could threaten to engage in a similar foreclosure strategy vis-à-vis the merged entity if UMG were to stop licensing music rights to Sony.

*Customer foreclosure*

90. Finally, as the hypothetical downstream market for music games only represents a small part of the overall demand for music rights, and therefore a minimal proportion of the revenues generated by the licensing of such rights, customer foreclosure can also be excluded as a result of the proposed transaction. In addition, the notifying party explains that three game publishers have announced the launch of new music games in the EEA for 2008<sup>20</sup>. As two of these three publishers have not yet been active or significantly present in the hypothetical downstream market for music games in the EEA, the combined entity's share of demand by publisher can be expected to come under downward pressure in the near future.

**C. WHOLESALE GAME DISTRIBUTION AND SUPPLY OF LOGISTICS SERVICES TO GAME PUBLISHERS IN THE UK**

91. The proposed transaction also gives rise to vertical links, on the one hand, between Vivendi Games (upstream) and Activision (downstream) as concerns the of wholesale distribution by Activision of "boxed" games (via its Centresoft subsidiaries) and, on the other hand, between Activision (upstream) and Vivendi Games (downstream) as concerns the provision by Activision of logistics services (via its PDQ subsidiary) for the distribution of "boxed" games.

*Wholesale game distribution in the UK*

92. According to the notifying party, the UK is the only Member State where Activision's share of wholesale distribution of boxed games exceeds 25%, and therefore gives rise to a vertically affected market downstream. There are no other Member States with affected markets upstream where Activision also provides distribution services to third parties.
93. In the UK, Activision's market share on the market for the wholesale distribution of boxed games would be [30-40]% (excluding direct distribution by game publishers) or [20-30]% (including direct distribution). The largest competitor, Entertainment UK, would hold a market share of [45-55]% (excluding direct distribution) or [20-30]% (including direct distribution). Vivendi does not provide wholesale distribution services to third-party game publishers.

---

<sup>20</sup> Viacom announced the release of "Rock Band" for the second quarter of 2008, THQ scheduled the release of 'Battle of Bands' for April 2008 and Disney will publish "Ultimate Band" in autumn 2008.

94. The Commission investigated the impact of this vertical link on competition and concluded that it does not give rise to any competition concerns for the following reasons.
95. Firstly, input foreclosure is unlikely. Indeed, input foreclosure is only feasible where the vertically integrated firm will have a significant degree of market power in the upstream market. Even if the merged entity were to decide no longer to supply its games to competing wholesale distributors post-transaction, such distributors would have sufficient alternative sources of supply given the limited combined market shares of Vivendi Games and Activision in game publishing in the UK ([0-10]% for all games, [10-20]% for PCs, consoles and handhelds games). In addition, currently only a limited proportion of Vivendi Games' games in the UK ([10-20]%) is distributed by third-party wholesale distributors other than Activision which, given Vivendi Games' share of the UK market for all games ([0-5]%), represent an insignificant fraction of the total UK market for the wholesale distribution of games. Therefore, even if the merged entity were to directly supply all of its games, the impact on any third party distributor would be minimal.
96. Secondly, customer foreclosure is also unlikely. The Commission's market investigation confirmed that there is a number of alternative wholesale game distributors to Activision in the UK, e.g. Entertainment UK, Pinnacle Software, Koch Media UK, Choices, Gem Distribution, THE and Trilogy, to which game publishers can sell their products. The market investigation also revealed that changing wholesale game distributors appears to be possible and that switching has in fact occurred in the recent past. Furthermore, the market investigation showed that if the merged entity would no longer distribute other publishers' games post-transaction, direct supply to retailers would be an option for game publishers. Finally, although online distribution of game software currently is limited in the UK, it is growing. It can thus not be excluded that at least for the future online distribution could be considered an alternative to traditional "brick and mortar" distribution in the UK.
97. For the reasons stated above, it appears unlikely that the merged entity could post-transaction foreclose the supply of boxed games to competing wholesale distributors, or the access to wholesale distribution to competing game publishers in the UK.

*Logistics services to game publishers in the UK*

98. Vivendi does not supply logistics services to third party game publishers, nor does it procure such services from third party providers in the UK. Activision provides logistics services only in the UK. According to the notifying party, Activision's share of the UK market for the supply of logistics services to game publishers is approximately [20-30]% (including self supply by game publishers) or [20-30]% (excluding self supply). The largest competitor would be Handleman, with a market share of [5-15]% (including self supply) or [10-20]% (excluding self supply). As stated above, the combined market share of Vivendi Games and Activision in game publishing in the UK is [0-10] % for all games and [10-20] % for PCs, consoles and handheld games. The transaction therefore does not give rise to any horizontally or vertically affected markets, neither upstream nor downstream with regard to the supply of logistics services in the UK.
99. The Commission nevertheless investigated the impact of this vertical link on competition and concluded that it does not give rise to any competition concerns. Both customer and input foreclosure are unlikely.

100. Customer foreclosure is unlikely, in light of the limited combined market share of Vivendi Games and Activision in game publishing in the UK ([0-10] % for all games). Indeed, even if the merged entity were to use PDQ as its sole logistics services provider, the impact on competing service providers in the UK would be negligible.
101. Furthermore input foreclosure is also unlikely. The Commission's market investigation confirmed that there are several alternative suppliers of logistics services, including. Handleman, Gem Distribution, Trilogy, Pinnacle, NYK, Technicolor and Cinram with market shares ranging from [5-15]%. Although switching logistics services providers appears to be more complicated than switching wholesale distributors, the market investigation revealed that switching is possible and has occurred in the recent past. Finally, the market investigation showed that game publishers have to a certain extent the possibility of providing logistics services in-house or acquiring them from game duplicators.
102. For the reasons stated above, it appears unlikely that the merged entity could post-transaction foreclose the access of competing logistics services providers in the UK to customers (game publishers), or the supply of logistics services to competing game publishers.

## **VII. CONCLUSION**

103. 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]  
Neelie KROES  
Member of the Commission