

*Case* *No*  
**COMP/M.5272 - SONY**  
**/SONYBMG**

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: 15/09/2008

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EUROPEAN COMMISSION  
Competition DG

Markets and cases II: Information, communication, media

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

**To the notifying party:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5272 - Sony/ Sony BMG  
Notification of 8 August 2008 pursuant to Article 4 of Council  
Regulation No 139/2004<sup>1</sup>**

**I. INTRODUCTION**

- (1) On 8 August 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("Merger Regulation") by which Sony Corporation of America, the U.S. subsidiary of Sony Corporation ("Sony", Japan), acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of Sony BMG Music Entertainment ("Sony BMG"), the recorded music company formed and controlled jointly by Sony and Bertelsmann A.G ("Bertelsmann", Germany), by way of purchase of Bertelsmann's 50% equity interest in Sony BMG.

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

## II. THE PARTIES AND THE CONCENTRATION

- (2) Sony is active globally in music recording and publishing, industrial and consumer electronics (TVs, phones, video games), entertainment (cinema, television), and financial services<sup>2</sup>.
- (3) The joint venture Sony BMG is active in the discovery and the development of artists (so-called A&R: artist and repertoire) and the subsequent marketing and selling of recorded music in physical and digital format. Sony BMG is not engaged in related activities such as music publishing, manufacturing and distribution.
- (4) Sony currently owns 50% in Sony BMG which is jointly controlled by Sony and Bertelsmann. The proposed concentration will see Sony acquire the sole control of Sony BMG<sup>3</sup> through the purchase of Bertelsmann's 50% equity interest in Sony BMG. Sony BMG will be renamed Sony Music Entertainment Inc<sup>4</sup>.
- (5) The operation therefore is a change in the structure of control over Sony BMG from joint to sole control and qualifies as a concentration within the meaning of Article 3(1)b of the Merger Regulation.

## III. COMMUNITY DIMENSION

- (6) The undertakings concerned had a combined world-wide turnover of more than EUR 5 000 million in 2007 (Sony: EUR 56 000 million; Sony BMG: EUR [...] million)<sup>5</sup>. The aggregate Community wide turnover of each party exceeded EUR 250 million in 2007 (Sony: EUR [...] million; Sony BMG: EUR [...] million).

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<sup>2</sup> Sony is, among other activities, currently engaged in music recording through its 50:50 joint venture Sony BMG with Bertelsmann AG; it is also engaged in music publishing through its 50:50 joint venture Sony/ATV with the artist Michael Jackson; it is engaged in the sale of mobile telephones through its 50:50 joint venture Sony Ericsson with Telefonaktiebolaget LM Ericsson; it produces, acquires and distributes motion pictures and other forms of TV programming through its wholly-owned subsidiary Sony Pictures Entertainment Inc; it produces video game consoles and publishes video games through its wholly-owned subsidiary Sony Computer Entertainment Inc.

<sup>3</sup> The Sony BMG merger was authorized on 19 July 2004. On 13 July 2006, the Court of First Instance annulled the Commission's decision of 19 July 2004. On 10 July 2008, the European Court of Justice set aside the judgment of the Court of First Instance of 13 July 2006 and referred the case back to the Court of First Instance. This procedure is still pending. In the meantime, following the annulment by the Court of First Instance on 13 July 2008, the Commission declared again the creation of Sony BMG as compatible with the common market on 3 October 2007. On 13 June 2008, an appeal was lodged against this second Commission decision in front of the Court of First Instance. This procedure is still pending. The present decision is based on the premise that the Sony BMG merger has been authorised; should the pending litigations lead to a different outcome which would require to dissolve the Sony/BMG concentration or take other restorative measures, the present decision cannot be read as an obstacle to full compliance with such an obligation.

<sup>4</sup> As part of the transaction, Bertelsmann will acquire certain catalogue rights in France, Germany, Italy and the United Kingdom from Sony BMG, worth revenues of EUR [...] million in 2007. Some of these acquisitions will be reviewed by national competition authorities.

<sup>5</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25).

The parties did not achieve more than two-thirds of their turnover in one and the same Member State.

- (7) The notified operation therefore has a Community dimension under Article 1(2) of the Merger Regulation.

#### **IV. RELEVANT MARKETS**

- (8) Sony BMG is active in the field of music recording. The current parent companies Sony and Bertelsmann have contributed their respective recording businesses to the joint venture Sony BMG. Both current parent companies do not have activities in music recording other than those allocated to Sony BMG<sup>6</sup>. Sony is also a music publisher via its subsidiary Sony ATV, which is a joint venture with the artist Michael Jackson.

##### ***1. Relevant product markets***

###### ***A) Physical recorded music***

- (9) In its second decision of 3 October 2007 in *Sony/BMG*, the Commission identified a separate product market for the sale of physical recorded music that comprises "all physical CD albums, irrespective of their genre or their compilation/single status"<sup>7</sup>. This was based upon the fact, among other considerations, that all styles and genres of music collectively make the new musical standard and that most records stores have to sell a diverse range of music.
- (10) The notifying party submits that there should be a single market for physical and digital sales of music. However, it submits that given the absence of any overlap between Sony and Sony BMG on that market, there is no need to re-consider the finding of the Commission.
- (11) The market investigation conducted by the Commission for the purpose of this case generally confirmed the results of the extensive market investigation conducted in *Sony/BMG* as regards the existence of a separate product market for the sale of recorded music in physical format.
- (12) Therefore, the Commission concludes that the sale of recorded music in physical format constitutes a relevant product market for the purpose of the present case.

###### ***B) Wholesale online music licensing***

- (13) Recorded music can be sold in physical form (mainly CDs) and in digital form. Digital music is delivered either online over the Internet or via mobile networks to the consumer in various forms. Sony BMG is mainly active on the wholesale level, i.e. in the licensing of its catalogue to digital music providers.

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<sup>6</sup> With the exception of Japan where Sony Music Entertainment Japan Inc is engaged in the production of music recordings, in artist management, music publishing and other operations.

<sup>7</sup> Case COMP/M.3333 - *Sony/BMG*, para. 17.

- (14) In its second *Sony/BMG* decision, the Commission identified a market for the licensing of recorded music in digital format as distinct from physical format. Thus, from a demand-side perspective, sales concern mainly single tracks in digital format whereas in physical format purchases are predominantly for albums; and prices for digital single are usually lower than in physical format. From a supply-side point of view, the structure of digital music services differs significantly from physical retail in terms of organisation, technical and commercial conditions, marketing and cost structure<sup>8</sup>.
- (15) Online music providers generally need to acquire licences for the specific rights over the songs they wish to offer. Originally, the rights which are attributed to the special performance of a song are owned by the singer or the band who regularly transfer these rights to their recording company ("recording rights"). Recording rights differ from those which are attributed to the composers and lyricists ("authors") of the songs. These rights are originally owned by the authors and usually transferred either to the collecting societies or to the publishers. These rights will in the following be called "publishing rights".
- (16) The notifying party submits that there should be a single market for physical and digital sales. However, it accepts the market definition of the Commission for licensing of recorded music in digital format for the purpose of the present case.
- (17) The market investigation conducted by the Commission for the purpose of this case also confirmed the results of the extensive market investigation conducted in *Sony/BMG* as regards the existence of a separate product market for the sale of recorded music in digital format.
- (18) Therefore, the Commission concludes that the licensing of recorded music in digital format constitutes a relevant product market for the purpose of the present case.

### C) Music publishing

- (19) In its decision of 22 May 2007 in *Universal/BMG Music Publishing*, the Commission identified five different types of "publishing" rights which cover the intellectual property attached to the works of the authors (composers and lyricists) and which are subsequently exploited via music publishers or collecting societies: mechanical rights (for reproduction on CDs); performance rights (for TV, radio, live performance exploitation); synchronisation rights (for use in movies); print rights (for reproduction on music sheets); and online rights (for online exploitation through downloading or streaming). Both demand-side (different characteristics of rights relating to different customer needs) and supply-side considerations (existence of different exploitation systems, application of dissimilar licensing rates) led to this conclusion<sup>9</sup>.
- (20) The notifying party, in line with the Commission's precedent, submits that music publishing is a separate market from music recording and that although a number

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<sup>8</sup> Case COMP/M.3333 - *Sony/BMG*, para. 23 and ff.

<sup>9</sup> Case COMP/M.4404 - *Universal/BMG Music Publishing*, para. 18 and ff.

of music publishing companies are affiliated to recorded music companies the businesses are operated separately and compete in different markets.

- (21) The market investigation conducted by the Commission for the purpose of this case confirmed that the market for music publishing has not changed significantly since the extensive market investigation conducted in *Universal/BMG Music Publishing*, and that music publishing still constitutes a separate product market from music recording.
- (22) Therefore, the Commission concludes that the five different types of licensing rights identified in paragraph 16 relating to music publishing constitute relevant product markets for the purpose of the present case.

*D) Other related markets: online music retailing and portable digital music devices, electronic game devices and software, and film industry*

- (23) Sony is also active in several sectors for which music rights, including the recording rights offered by Sony BMG, are an input.

***i) Online music retailing and portable digital music devices***

- (24) Sony was active in digital music retail distribution through its online platform Sony Connect. However, the Sony Connect platform closed its operations in March 2008.
- (25) Sony Ericsson opened on 25 August 2008 a new online music store, PlayNow, for downloads of music tracks, ringtones and video games on Sony Ericsson mobile devices in Denmark, Finland, Norway and Sweden.
- (26) As regards portable devices, Sony sells digital music players (Sony Walkman) and Sony Ericsson sells mobile phones. These devices can be used to download digital tracks. The notifying party submits that digital music player devices comprise all devices irrespective of the technology or the media used (hard drive such as the iPod, flash memory, memory stick, CD or MD).
- (27) The market investigation conducted in *Sony/BMG* pointed to the fast evolving convergence of music players and mobile phones (such as the Apple i-Phone) which increases substitutability from the demand side. Much of this evolution is linked to interoperability of (portable) music players, including mobile phones, as the industry is converging its distribution models.
- (28) The decision also confirmed that digital recording of music is delivered mainly through two channels: online over the internet, and via mobile networks. However, given in particular the very dynamic character of the sector, the Commission left open whether the licensing of music for online applications and for mobile applications were part of the same (converging) product market or were belonging to separate product markets.

***ii) Electronic game devices and software***

- (29) Sony is also active in the sales of electronic game devices, in particular the PlayStation video game console and publishes video game software. In 2008, Sony launched its Singstore service, where digital tracks can be downloaded on a

PlayStation 3 connected to the internet for inclusion on the Singstar video game that Sony publishes and which is a karaoke-type video game.

- (30) As regards electronic game devices and software, the Commission, in its decision of 16 April 2008 in *Vivendi/Activision*<sup>10</sup>, left open whether the electronic game devices and software sector could be subdivided into separate product markets along the types of gaming platforms used (PCs, video game consoles, handheld/portable consoles and mobile handsets), games played online or offline games and game genres.

### ***iii) Film industry***

- (31) Sony is also present in the film industry via Sony Pictures Entertainment. It is generally considered as one of the majors in the Hollywood film industry. Like all film producers it licenses music tracks for inclusion and synchronisation in movies.
- (32) In *Vivendi/Canal+/Seagram* and *Sony/MGM* cases<sup>11</sup>, the Commission considered that the distribution of films to theatres can be regarded as a distinct product market. A narrower product market definition along U.S. films versus other films was left open.

### *Conclusion on other related markets*

- (33) In the present case the exact delineation of these related markets can be left open as the competitive assessment does not change under any alternative product market definition considered.

## **2. Relevant geographic markets**

### ***A) Physical recorded music***

- (34) In its second *Sony/BMG* decision, the Commission found that the market for the sale of recorded music in physical format was national in scope (existence of national repertoire, pricing and marketing done on a national basis)<sup>12</sup>.
- (35) The notifying party submits that given the absence of any overlap between Sony and Sony BMG, there is no need to re-consider this finding.
- (36) The market investigation conducted by the Commission for the purpose of this case confirmed the results of the extensive market investigation conducted in *Sony/BMG* as regards the existence of separate national markets for the sale of recorded music in physical format.

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<sup>10</sup> Case COMP/M.5008 – *Vivendi/Activision*, para. 9 and ff.

<sup>11</sup> Case COMP/M.2050 *Vivendi/Canal+/Seagram*, para. 16 and Case COMP/M.3595 *Sony/MGM*, para. 10.

<sup>12</sup> Case COMP/M.3333 - *Sony/BMG*, para. 35 and ff.

- (37) Therefore, for the purpose of the present case, the Commission concludes that the market for the sale of recorded music in physical format has a national scope.

B) Wholesale online music licensing

- (38) In its second *Sony/BMG* decision, the Commission found that the market for the licensing of recorded music in digital format could develop in the future to become larger than national, but that it was still national in scope (licences are mostly granted by the record companies to music online providers for the exploitation in a certain national territory) at the time of the decision<sup>13</sup>.
- (39) The notifying party agrees to keep the same definition for the purpose of the present case.
- (40) The market investigation conducted by the Commission for the purpose of this case confirmed the results of the extensive market investigation conducted in *Sony/BMG* as regards the existence of separate national markets for the licensing of recorded music in digital format.
- (41) Therefore, for the purpose of the present case, the Commission concludes that the market for the licensing of recorded music in digital format has a national scope.

C) Music publishing

- (42) In its second *Sony/BMG* decision and in its *Universal/BMG Music Publishing* decision, the Commission found that the markets for the five types of music publishing rights are national in scope, in particular, because license fees for mechanical and performance rights are generally negotiated and collected through national collecting societies, while there are indications that online rights could potentially develop into a multi-territorial market in the future<sup>14</sup>.
- (43) The notifying party accepts this finding for the purpose of this case.
- (44) The market investigation conducted by the Commission for the purpose of the present case confirmed the results of the extensive market investigations conducted in *Sony/BMG* and *Universal/BMG Music Publishing*. As a result of the Commission Recommendation on Collective Rights Management adopted in 2005 and of the recent Commission decision of 16 July 2008 in *CISAC*<sup>15</sup>, a number of major publishers have licensed (or have indicated that they intend to license) online publishing rights on a pan-European and exclusive basis outside the framework of collective licensing system operated by national collecting societies. However, customers would have to continue taking national licenses from local collecting societies in addition to any rights that may be obtained under a pan-European license.

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<sup>13</sup> Case COMP/M.3333 - *Sony/BMG*, para. 38 and ff.

<sup>14</sup> Case COMP/M.4404 - *Universal/BMG Music Publishing*, para. 50 and ff.

<sup>15</sup> Case COMP.38698 – *CISAC*.



- (45) Therefore, for the purpose of the present case, the Commission concludes that the markets for music publishing rights remains national in scope, but that for the licensing of digital music they may eventually develop into an EEA-wide scope.

D) Other related markets: online music retailing and portable digital music devices, electronic game devices and software, and film industry

- (46) The market investigation conducted by the Commission for the purpose of the second *Sony/BMG* decision indicated differences in the structure, demand, evolution and dynamics of the digital music market at the level of retailing that would support the finding of national markets<sup>16</sup>. The market investigation conducted for the purpose of this case confirmed that online music retailers still largely acquire their publishing rights on a national basis. In addition, the majority of online retailers still sell their music to end-customers via different national web-pages, which also supports a finding of national markets. However, the question of whether the geographic scope of digital music retail is either national or wider can be left open for the purpose of the present case as the competitive assessment does not change under any alternative geographic market definition.
- (47) The second *Sony/BMG* decision did not address the issue of market definition as regards the sale of portable digital music devices, mobile phones and electronic game devices. As regards mobile phones, the geographic market definition (either EEA-wide or worldwide) was left open in the *BENQ/Siemens Mobile* case<sup>17</sup>. In the *Vivendi/Activision* case, the Commission also left open the exact market definition as regard the sales of electronic game devices and software, although the market investigation showed a number of elements pointing to both national and wider than national markets for on- and offline games, irrespective of platform and genres<sup>18</sup>. The precise geographic delineation of these markets can therefore be left open for the purpose of this case as the competitive assessment does not change under any alternative geographic market definition.
- (48) Similarly, as regards the film market where no competition concerns arise, the precise geographic market definition (national or wider) can be left open in the present case.

## V. COMPETITIVE ASSESSMENT

- (49) The effect of the present transaction is to transfer to Sony sole control of Sony BMG in place of the joint control exercised so far. In most cases, a change from joint to sole control only has a limited impact on the competitive structure of the relevant markets as the acquiring undertaking already exercised control. The Commission has analysed exclusively the changes in the market structure brought about by the change in control from joint to sole control.

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<sup>16</sup> Case COMP/M.3333 - *Sony/BMG*, para. 43 and ff.

<sup>17</sup> Case COMP/M.3911 – *BENQ/Siemens Mobile*, para. 13 and ff.

<sup>18</sup> Case COMP/M.5008 – *Vivendi/Activision*, para. 27 and ff.

- (50) The present transaction does not substantially change the recorded music markets in physical and digital formats. In particular, the market position of Sony BMG is not improved as Sony is not active on markets in the EEA where Sony BMG is active.
- (51) Nevertheless, the Commission conducted a detailed investigation, covering both non-coordinated and coordinated effects.

**1. Non-coordinated effects**

**A) Information on Sony BMG's and Sony's market position**

- (52) The notifying party provided market shares concerning the markets for recorded music in physical format:

Sony BMG's share of physical recorded music sales (%) - 2007	
Austria	[20-30]
Belgium	[10-20]
Bulgaria	[10-20]
Cyprus	[10-20]
Czech Republic	[20-30]
Denmark	[10-20]
Estonia	[10-20]
Finland	[20-30]
France	[20-30]
Germany	[20-30]
Greece	[10-20]
Hungary	[10-20]
Iceland	[5-10]
Ireland	[20-30]
Italy	[30-40]
Latvia	[10-20]
Lichtenstein	N/A
Lithuania	[10-20]
Luxembourg	N/A
Malta	[20-30]
Netherlands	[10-20]
Norway	[10-20]
Poland	[10-20]
Portugal	[10-20]
Romania	[0-5]
Slovakia	[20-30]
Slovenia	[10-20]
Spain	[20-30]
Sweden	[20-30]
UK	[10-20]

- (53) The notifying party also provided market shares concerning the market for wholesale licensing of online music:

Sony BMG's share of digital recorded music sales (%) - 2007	
Austria	[20-30]
Belgium	[20-30]
Bulgaria	0-5
Cyprus	0-5
Czech Republic	[20-30]
Denmark	[10-20]
Estonia	0-5
Finland	[30-40]
France	[10-20]
Germany	[10-20]
Greece	[20-30]
Hungary	[30-40]
Iceland	0
Ireland	[10-20]
Italy	[30-40]
Latvia	0-5
Lichtenstein	N/A
Lithuania	0-5
Luxembourg	N/A
Malta	0-5
Netherlands	[20-30]
Norway	[20-30]
Poland	[10-20]
Portugal	[30-40]
Romania	0-5
Slovakia	[30-40]
Slovenia	0-5
Spain	[30-40]
Sweden	[20-30]
UK	[20-30]

- (54) Data provided by the notifying party concerning the music publishing market confirm the findings of the Commission in *Universal/BMG Music Publishing*. The market share of Sony/ATV generally ranges between 5-10% of music publishing rights and is by some distance smaller than that of Universal BMG,

Warner Chappell, and EMI. The market share of Sony/ATV is never higher than [10-20] %.

Sony/ATV share of music publishing (%) - 2007	
Austria	[5-10]
Belgium	[5-10]
Bulgaria	[10-20]
Cyprus	-
Czech Republic	[10-20]
Estonia	-
France	[5-10]
Germany	[5-10]
Greece	[10-20]
Hungary	[10-20]
Italy	[0-5]
Latvia	-
Lichtenstein	-
Lithuania	-
Luxembourg	-
Malta	-
Netherlands	[5-10]
Poland	[10-20]
Portugal	[5-10]
Romania	[10-20]
Slovakia	[10-20]
Slovenia	-
Spain	[5-10]
Nordic countries	[5-10]
UK / Ireland	[5-10]

*B) Horizontal assessment*

*(i) Sale of recorded music in physical format*

- (55) The purchase by Sony of Bertelsmann's 50% equity interest in Sony BMG does not change the market position of Sony BMG, as Sony does not have any other recorded music activities outside of the Sony BMG joint venture within the EEA. The market investigation conducted by the Commission for the purpose of this case showed that the move by Sony from joint to sole control of Sony BMG is not

expected to have any effect on the market situation as regards the sale of music in physical format for competitors and customers.

**(ii) Wholesale licensing of digital music**

- (56) The purchase by Sony of Bertelsmann's 50% equity interest in Sony BMG does not change the market position of Sony BMG, as Sony does not have any other digital music wholesaling activities outside of the Sony BMG joint venture. The market investigation conducted by the Commission for the purpose of this case further confirmed that the move by Sony from joint to sole control of Sony BMG is not expected to have any effect on the market situation as regards the sale of licences for digital music for competitors and customers.

**(iii) Music publishing**

- (57) Sony BMG is not active in music publishing. Sony is only active as a music publisher via its subsidiary Sony ATV, which is a joint venture between Sony and the artist Michael Jackson.
- (58) In its *Universal/BMG Music Publishing* decision, the Commission was able to compare the market shares of Sony/ATV with that of other major competitors in all affected markets. In all markets, Sony/ATV's market share was much smaller than that of its competitors and did not raise any competition concerns.
- (59) For mechanical and performance rights including rights for the online exploitation of music, collecting societies have traditionally carried out the licensing on behalf of the song writers and their publishers. No market power issue could arise where the copyrights are still administered by the collecting societies who usually charge uniform tariffs for the complete administered repertoire.
- (60) However, in the field of online rights, some publishers have recently started to withdraw a specific part of their respective rights for Anglo-American repertoires from the traditional collecting societies system<sup>19</sup>. They have started to transfer their rights to selected collecting societies acting as agents for the individual publisher – a possibility which has been reaffirmed by a Commission Recommendation issued in 2005<sup>20</sup>. Following this withdrawal, the pricing power would shift from the collecting societies to the publishers. In this new environment, a music company could be able to exert control over titles either via its (fully- or partly-owned) copyrights in the song-writers' works, i.e. the publishing rights, or via its rights in the individual recordings, i.e. the recording rights. Usually, licences over both categories of rights need to be obtained by the user of songs.

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<sup>19</sup> The rights which are currently in the process of being withdrawn from the collecting societies are Anglo-American mechanical rights for online use. Online rights consist of a mechanical and a performance part. The performance part of the online rights has not been in the centre of such withdrawal activities.

<sup>20</sup> Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services was published (OJ L 276 of 21.10.2005, p. 54).

- (61) In order to offer a title, an online music retailer must acquire licences for all co-publishing rights and recording rights controlling this title. If one part of all these rights is not covered, the online provider cannot offer this title to its customers. Accordingly, shares of publishing rights and recording rights may alone confer market power vis-à-vis their online music retailer customers. The existence of such market power can only be estimated by fully taking into account titles co-published or recorded by an entity, in addition to titles 100% published by this same entity. A control share analysis allows to measuring this combination of rights to assess market power.
- (62) In line with the assessment made in *Universal/BMG Music Publishing*, the Commission concluded in its second *Sony/BMG* decision that Sony BMG and Sony/ATV did not (co-)control such a large number of chart hits that could indicate a position of single dominance in any of the relevant EEA countries.
- (63) Applying the methodology used in these previous cases<sup>21</sup>, the notifying party provided the following control share figures in 2007 for Sony BMG and Sony/ATV:

Sony BMG / Sony/ATV control shares (Anglo-American and Continental charts - %) in 2007	
Austria	[35-45]
Belgium	[30-40]
Bulgaria	[20-30]
Czech Republic	[20-30]
Denmark	[30-40]
Finland	[10-20]
France	[35-45]
Germany	[35-45]
Greece	[25-35]
Hungary	[0-10]
Ireland	[40-50]
Italy	[30-40]
Netherlands	[30-40]
Norway	[30-40]
Poland	[30-40]
Portugal	[30-40]
Romania	[20-30]
Slovakia	[35-45]
Spain	[35-45]
Sweden	[35-45]
United Kingdom	[35-45]

- (64) The control share analysis confirms the findings of the previous cases: Sony BMG and Sony/ATV are below 50% of control shares, which was the starting point for identifying competition concerns in *Universal/BMG Music Publishing*. These control shares are also well below the shares of Universal as identified in *Universal/BMG Music Publishing* and as such too low to raise concerns of the kind examined in the *Universal/BMG Music Publishing*.

### C) Vertical assessment

- (65) In the course of the market investigation, the Commission received several replies alleging that following the transaction, Sony, through its move from joint to sole

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<sup>21</sup> Indeed, in these cases, the Commission assessed the combination of recording rights with any publishing rights (and not only a combination of recording rights with online rights). Therefore the analysis of control shares can be assumed to be the same regarding all rights.

control over Sony BMG, could potentially create restrictive conditions for online retailers because of the combined strength of its wholesale licensing of recorded music and music publishing activities. It has been also alleged that Sony would be in a position to foreclose its competitors producing music, thanks to its unique position as vertically-integrated actor in portable digital music devices, electronic game devices and software, and in the film industry.

- (66) Prior to the proposed transaction, Sony already exercised joint control over Sony BMG with Bertelsmann and joint control over Sony/ATV with the artist Michael Jackson. After the proposed transaction, Sony will exercise sole control over Sony BMG (to be renamed Sony Music Entertainment Inc) and retain joint control over Sony/ATV with the artist Michael Jackson. Hence, with the proposed transaction, Sony will effectively become an actor that is (partially) integrated in music recording and publishing, like the three other majors, Universal, Warner and EMI.
- (67) When considering the market shares for recorded music in physical format, for wholesale licensing of digital music, for music publishing or when considering the control shares mentioned above, one could identify different vertically affected markets (respectively 3 countries with Czech Republic, Italy and Spain for physical recorded markets, 9 countries with Czech Republic, Finland, Hungary, Italy, the Netherlands, Portugal, Slovakia, Spain and Sweden for wholesale licensing of digital music, none for music publishing, and 18 Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden and United Kingdom when considering control shares<sup>22</sup>). Given that the assessment is the same for all countries and that conclusions remain unchanged for the purpose of the present case, the Commission examined whether the operation would give rise to vertical concerns in all the EEA countries of the common market and the EEA agreement for all activities of Sony and Sony's affiliates. These concerns are analysed below and discarded.

**(i) Online music retailing**

*Input foreclosure of competing online music retailers*

- (68) In its second *Sony/BMG* decision, the Commission concluded that the merger of Sony's and BMG's music recording activities did not raise any competition issues in terms of possible input foreclosure of online music content for online music retailers. This conclusion was based on the fact that the market shares of Sony Connect as an online music retailer were very limited, with Apple iTunes being considerably stronger on this market. Accordingly, it was unlikely that Sony would forego considerable online music license revenues by foreclosing competitors in the downstream markets for online music retailing.
- (69) The same conclusion must be reached in this case. Since the second *Sony/BMG* decision, the Sony Connect platform closed its operations in March 2008. The

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<sup>22</sup> It should however be noted that, as explained in Case COMP/M.4404 - Universal/BMG Music Publishing, control shares are not comparable to market shares and while they are a relevant means to assess the market they are not suitable to identify vertically affected markets.

notifying party submits that in the market for digital music retail distribution, prior to its closure, Sony Connect only had a modest share of music sold over the internet, accounting for less than [5]% revenues in the United Kingdom, Germany and France.

- (70) Despite that the platform is closed, a minority of customers raised the concern during the market investigation that Sony, after having gained sole control of Sony BMG, may be less interested in the future to license its content to competing online music retailers as it could distribute its music content on its own music online service PlayNow launched in August 2008 through Sony Ericsson.
- (71) However, Sony has no ability to conduct such a strategy. As the analysis above has shown, Sony BMG and Sony/ATV are not in a position to significantly impede effective competition for the licensing of music recording and publishing rights and this position will not change due to the merger. Accordingly, Sony would have a limited ability to foreclose its downstream competitors who have still access to significant alternative music content providers.
- (72) Secondly, the change of control over Sony BMG from joint to sole will also not change Sony's incentives to license its content to online music retailers.
- (73) Given its limited online retailing activities, Sony has no incentive to reduce its licensing policy towards online retailers, as it would forego considerable digital music license revenues in the absence of viable alternatives to distribute its music online<sup>23</sup>. Thus, Sony BMG currently licenses its music to more than 60 online music retailers in Europe (and to over 50 mobile phone providers).

*Customer foreclosure of competing music companies*

- (74) Again, Sony and its affiliates have no ability to pursue a strategy of foreclosing competing music companies from the access to an important part of the customer base. Sony Ericsson's PlayNow, which is the only platform owned by Sony for retailing its music online, has just started its operations and it is not guaranteed that it will achieve a significant level of success; it therefore cannot be considered as a significant customer of music content for competing music companies. This is in part due to the fact that PlayNow currently seems to be mainly geared towards Sony Ericsson's mobile phones and Sony portable digital music players, which have relatively low market shares as highlighted below. PlayNow will have to compete for end-customers in a market where competing online service providers are numerous and where the barriers to entry are low, as also demonstrated in *Sony/BMG*. It is clear, as indicated in *Universal/ BMG Music Publishing* that PlayNow, which is still nascent, can only become an appealing offer if it proposes a large number of catalogues to its clients.
- (75) Furthermore, Ericsson, which has joint control over Sony Ericsson, would have no interest in favouring Sony BMG at the expense of rival recorded music

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<sup>23</sup> The notifying party also submit that the formation of Sony BMG did not change either parent's conviction that broad content licensing is an important and necessary component of the anti-piracy strategy and essential to generate revenues.



companies for its PlayNow service, otherwise the PlayNow service will not take off<sup>24</sup>.

- (76) This is confirmed by the fact that PlayNow already licenses music from Sony BMG, Warner Music, EMI, and other smaller record companies such as The Orchard, IODA, The PocketGroup, Hungama, X5 Music, Bonnier Amigo, and VidZone and is planned to offer 5 million DRM-free<sup>25</sup> tracks by the end of 2009 when it will be available worldwide.
- (77) Therefore the change of control over Sony BMG from joint to sole will not change Sony's ability or incentives to foreclose the online music retail market.

**(ii) Portable digital music devices**

*Input foreclosure of competing portable digital music devices manufacturers*

- (78) In its second *Sony/BMG* decision, the Commission concluded that the merger of Sony's and BMG's music recording activities did not raise any competition issues in terms of possible input foreclosure of online music content for portable digital music player manufacturers. This conclusion was based on the fact that the market shares of Sony's music players were very limited, with Apple iPod being considerably stronger on these markets. Accordingly, it was unlikely that Sony would forego considerable online music license revenues by foreclosing competitors in the downstream markets for portable digital music players.
- (79) The same conclusion must be reached nowadays. Since the second *Sony/BMG* decision, the share of Sony's sales of portable digital audio devices in the six largest EU countries has been rapidly declining, reaching [0-5]% by value in 2007 versus [30-40]% in 2003, with Apple iPod becoming by very far the largest player in that market. As regards the sales of mobile phones, Sony Ericsson accounted for only [5-10]% of worldwide mobile phone sales in 2006. In the EEA, Sony Ericsson accounted for around [10-20]% of mobile phone sales in 2006<sup>26</sup>.
- (80) Similarly to the situation in online music retailing, it is very unlikely that Sony will decide to license its music rights only to its wholly-owned activities or those of Sony Ericsson (or license its music rights at above-competitive prices to its competitors or Sony Ericsson competitors or license its music rights to its wholly-owned activities for free), therefore foreclosing other portable digital music devices manufacturers such as Nokia or Motorola. Such strategy could aim at rendering Sony's music devices and Sony Ericsson's mobile handsets more appealing to customers in comparison to other devices. However, Sony will have no incentive to follow such a strategy as it would forego important potential revenues from sales of music on the mobile handsets and portable music players

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<sup>24</sup> In that context, it is illustrative that only [0-10]% of Sony Ericsson's PlayNow recordings come from Sony BMG.

<sup>25</sup> Digital rights management allows a retailer to employ copy control, watermarking (digital identification), authentication, and access control.

<sup>26</sup> Forward Concept: cellphone report 07.

of the leaders in these markets. This could be illustrated by the fact that Sony BMG currently licenses its music to more than 50 mobile phone providers in Europe.

- (81) Indeed, Sony's market position on the downstream markets for portable digital music devices is not strong enough to give it an incentive to engage in input foreclosure. And even if Sony Ericsson were to give its (joint) own devices preferential access to Sony music, this would have no detrimental impact on competition as Sony does not enjoy a dominant market position in the markets for music recording and publishing; therefore, competitors of Sony's portable music players or Sony Ericsson's mobile phones will continue to be able to offer alternative music content.
- (82) The notifying party furthermore confirms that it has used many artists from other record companies to promote Sony Ericsson's mobile phones devices (for instance Robbie Williams and Lenny Kravitz, both signed with EMI, Hard Candy signed with Warner, Bob Sinclar and Mylene Farmer signed to Universal, Mariah Carey, Rihanna and Nas signed to Def Jam Records).
- (83) In addition, an input foreclosure strategy by Sony does not take into account that not only Sony BMG but also the artists signed with Sony BMG would forego revenue and may therefore consider leaving Sony BMG. Given the low market shares of Sony and Sony Ericsson in the sale of these devices, a short-term strategy aimed at favouring Sony's on its own devices by granting them exclusive or preferential access to Sony music would not be viable in the long term, as the offer from artists in Sony's roster would diminish and hence be less attractive to music device customers.

*Customer foreclosure of competing music companies*

- (84) A strategy whereby Sony or Sony Ericsson would restrict access to their devices to competing music companies would be unlikely to result in any anticompetitive effect. As noted above, Sony's portable digital music players and Sony Ericsson's mobile phones have limited market shares and therefore do not constitute "must have" inputs for competing music companies. Moreover, as already indicated above, Ericsson, which has joint control over Sony Ericsson would have no interest in limiting its source of supply to Sony BMG at the expense of rival record companies.
- (85) Finally, a market participant raised particular concerns as regards the acquisition in June 2008 by Sony of the company Gracenote, which specialises in providing software solutions which power the delivery and management of music content on a number of devices and platforms, including iTunes and iPods, Blackberries, Yahoo, Sony Ericsson and Samsung mobile phones. This market participant suggested that with Sony being the owner of that technology, it could modify the software as to ensure that the software will offer customers recommendations about similar songs that they listen to on their iPod and that, for instance, the software would always recommend Sony music repertoire over that of competing record companies.
- (86) The Commission first notes that in this hypothetical concern is not related to the present transaction, which will not increase the ability or incentive for Sony to do so. Secondly, the database that is run by Gracenote necessarily encompasses

recorded music from numerous labels and Gracenote's service would be useless to customers if it did not do so, as customers maintain a collection of songs from various record companies. Furthermore, even if such practice were to take place, it would be verifiable by competing record companies, which could retaliate by for instance refusing to license their information to Gracenote, which would then render the service useless.

- (87) Therefore the change of control over Sony BMG from joint to sole will not change Sony's ability or incentives to foreclose the market for portable digital musical devices.

**(iii) *Electronic game devices and software***

*Customer foreclosure of competing music companies*

- (88) A potential concern would be that post merger competing music companies would not be granted access to Sony's consoles or Sony's software following the transaction (or at degraded conditions).
- (89) First, it should be noted that it is not Sony, as manufacturer of the PlayStation 3 hardware, who decides which music is included in the games. The game publishers decide. Secondly, it must be stated that even if the position of Sony in this sector is favourable in particular due to the success of the PlayStation 3, this console faces strong competition from other similar consoles such as Nintendo Wii or Microsoft Xbox, as well as from portable consoles or PC used for gaming. In addition, Sony is not a major publisher and has no market power in the market for game software. It is a smaller player than Blizzard/Activision (Universal Group) or Electronic Arts for instance.
- (90) In case Sony would favour Sony music tracks for inclusion in Sony games, this would certainly not be feasible for music games which generate the largest music licensing fees, such as Sony Singstar (Karaoké) because the success of such games relies on the inclusion of the most successful titles. Sony would singularly limit the success of such games by restricting them to music from its own catalogues. Similarly, the success of Sony's nascent service Singstore offered on the PlayStation 3 console will hardly be successful if it is limited to Sony catalogues.
- (91) Sony acquires content for SingStore from a large number of recorded music companies, including Sony BMG, Warner Music, and EMI (and is in the process of negotiating an agreement with Universal Music). Consistent with Sony's past policy in respect of Sony Connect, the underlying philosophy of SingStore is to make available to users a wide variety of music content from as many sources as possible.

*Input foreclosure of competing electronic game devices and software suppliers*

- (92) According to some market participants no Sony music content would be available (or only at non-competitive conditions) to competitors of Sony active in game consoles or software following the transaction.

- (93) As discussed in *Vivendi/Activision*<sup>27</sup>, game publishers generally make their own music or license music from all record companies irrespective of their parent companies. They confirmed during the *Vivendi/Activision* market investigation that music is substitutable and the success of a game does not depend on access to a specific song for which the rights are controlled by one major record company. In addition, music only represents a small portion of the costs of publishing a game. More favourable terms in relation to music rights for Sony's game publishing would not significantly raise costs for competing game publishers and thus would have a very limited impact on competition.
- (94) For the vast majority of games, music is only one feature of the game and rarely constitutes the main aspect. Publishers therefore generally need to license a limited number of titles and in case Sony would decide to commercialise its catalogue under non-competitive terms, with the objective to favour its own game publishing arm, they could easily license music from other companies. The result would basically be a loss of revenue for Sony with no benefit for its publishing arm.
- (95) The change of control over Sony BMG from joint to sole will not change Sony's ability or incentives to foreclose the market for electronic game devices and software.

**(iv) Film industry**

- (96) A similar analysis that conducted for the game industry applies to the film industry. As regards any potential market power of Sony, it is relevant to recall that Sony Pictures Entertainment's share of EEA and Member States box office receipts has in recent years ranged between approximately 5 and 10%.<sup>28</sup>
- (97) Because Sony Pictures Entertainment's productions span a broad range of genres, a wide variety of music is required. For this reason, Sony Picture Entertainment licenses music for its productions from all major music publishers (including EMI, Warner/Chappell, Universal, and Sony/ATV), all major recorded music labels (including Warner Music, EMI, Universal, and Sony BMG), and dozens of independent publishers and record labels.
- (98) Furthermore, Sony has no incentive in reducing the access of competitors in film industry to its catalogues, because these competitors can easily source music from other music companies.
- (99) In *Universal/ BMG Music Publishing* case, the Commission conducted an in-depth analysis to understand how music licences are acquired by film producers. In most cases, film producers appoint an intermediary (Sony Pictures Entertainment hires a music supervisor) whose task is to identify several music tracks which respond to criteria fixed by the film publisher. These intermediates do not work in particular with specific music companies, but rather with all of

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<sup>27</sup> Case COMP/M.5008 – *Vivendi/Activision*, para. 9 and ff.

<sup>28</sup> Sony Pictures Entertainment (SPE) is the Sony's wholly-owned subsidiary producing, acquiring and distributing motion pictures and TV programming.

them, therefore reducing the possibility to favour one or the other record or music publishing company. In *Universal/BMG Music Publishing*, the Commission notably dispelled doubts as regard the possibility for Universal film production arm to favour Universal music arm for the licensing of music rights for the production of films. This conclusion also applies to Sony. And even in situations where sales of a particular recording increase because that recording is included in a motion picture or TV program soundtrack, the effect on a recorded music company or music publishing company's overall share of sales will rarely, if ever, be material. Finally, film producers will only need the recording rights of a song if they want the original recording by a specific artist. However, often movie producers also take only the melody and record it anew. So, the link of recording rights as input for movie makers is even less strong than in the case of online music providers.

- (100) The change of control over Sony BMG from joint to sole will not change Sony's ability or incentives to foreclose the market for the film industry.

#### *Conclusion for non-coordinated effects*

- (101) The market investigation showed that the change of control from joint to sole will not lead to any significant impediment of effective competition. The potential integration of the various activities of Sony, which is increased through the proposed transaction, does not raise any competition concerns and given the market positions of Sony in all of its activities, it is unlikely that Sony will have the ability or incentive to engage in foreclosure strategies and that any combination or leveraging between these activities would give a detrimental competitive advantage to Sony<sup>29</sup>. The transaction is therefore unlikely to significantly impede effective competition as a result of non-coordinated effects.

## **2. Coordinated effects**

- (102) In its second *Sony/BMG* decision relating to the 18 Contracting Parties to the EEA Agreement, the Commission concluded after a thorough examination that there was no coordinated effect among major record companies for the sale of recorded music in physical or digital format. In *Universal/BMG Music Publishing*, the Commission also concluded that there was no coordinated effect among major publishing companies for the licensing of publishing rights for physical and online sales in the 13 Contracting Parties to the EEA Agreement examined in this case.
- (103) The transaction, which consists in a mere change from joint control to sole control, will not substantially change the market position of Sony and its ability or incentive to coordinate its activities with other major recording companies.
- (104) The market characteristics in Member States which were not analysed are not different from the characteristics in-depth scrutinized in *Sony/BMG* and *Universal/BMG Music Publishing*; moreover, as the Member States assessed in

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<sup>29</sup> Furthermore, given the existence of joint ventures (Sony/ATV, and Sony Ericsson) within the corporate structure of the group, such combination of the different activities would not be in the interest of their co-owners.

*Sony/BMG and Universal/BMG Music Publishing* represent the vast majority of sales, there would be no incentive in the field of the majors to coordinate in the Member States that were not covered by the investigation in *Sony/BMG and Universal/BMG Music Publishing*.

- (105) The market investigation conducted for the purpose of this case very clearly confirmed that the proposed transaction is unlikely to raise the possibility and incentive for major record companies to coordinate their activities, as competition is deemed by market participants to be very aggressive.
- (106) Any theory of coordinated effects would contradict the concern raised by a significant music recording company during the market investigation, according to which Sony would become the only music recording major to be also active in the production of electronic devices, games and films, hence arguing that Sony, thanks to this asymmetry compared to the other majors would enjoy a competitive advantage.
- (107) The transaction is therefore unlikely to significantly impede effective competition as a result of coordinated effects.

## **VI. CONCLUSION**

- (108) On the basis of its examination of the likely impact of the passage from joint to sole control by Sony over Sony BMG, the Commission concludes that the concentration is unlikely to significantly impede effective competition in the common market or in a substantial part of it. The transaction does not have any negative impact on consumer choice and cultural diversity.
- (109) 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 by)  
Neelie KROES  
Member of the Commission