

Case No COMP/M.7290 - APPLE/ BEATS

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 25/07/2014

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Brussels, 25.07.2014
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

**Subject: Case M.7290 - Apple/ Beats
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

(1) On 24 June 2014, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Apple Inc. ("Apple", United States) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Beats Electronics, LCC ("Beats Electronics", United States) and Beats Music, LLC ("Beats Music", United States) by way of purchase of shares.

1. THE PARTIES

(2) **Apple** manufactures and sells mobile communication devices, media devices, portable digital music players and personal computers. It also sells a variety of related software, services, peripherals, networking solutions, and third-party digital content and applications. Particularly relevant for this case is the fact that Apple sells headphones under the Apple brand. It does so online and in its retail stores. Also of particular relevance is the fact that Apple sells digital music online. For this

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

purpose, Apple distributes a software application called iTunes, which is integrated with the iTunes Store. The iTunes Store allows users to purchase and download music.

- (3) **Beats Electronics** was established in 2008 and designs, develops and sells audio products such as headphones and audio speakers. Its products are marketed under the "Beats by Dr. Dre" brand, named after Andre "Dr. Dre" Young, a hip hop artist who is also one of the company's two founders. The other founder is Jimmy Iovine, chairman of Interscope Geffen A&M Records, a label owned by Universal Music Group. Beats Electronics also develops and markets audio software and hardware for computers.
- (4) **Beats Music** was established in 2011 by Beats Electronics but it was spun out of that company in 2013. Its shareholders include Jimmy Iovine and Andre Young, who also hold shares in Beats Electronics. Beats Music started a music streaming business in January 2014 via a software application called Beats Music. This product allows subscribers to receive ("stream") music on their mobile device or computer for a monthly or yearly fixed fee. It is currently only available in the United States and Australia.

2. THE OPERATION

- (5) Apple will acquire all the shares in Beats Electronics for approximately USD [...] in cash and restricted stock units of Apple (shares that are not fully transferrable until certain conditions are met). Apple will also acquire all the shares in Beats Music for approximately USD [...] in cash and restricted stock units. As a result of the transaction, Apple will acquire sole control over Beats Electronics and Beats Music.
- (6) Both acquisitions are conditional on one another.² Since both transactions are interdependent and since control is acquired by the same undertaking (Apple), the two transactions must be treated as a single concentration.³

3. EU DIMENSION

- (7) The transaction does not meet the thresholds set out in Article 1(2) of the Merger Regulation. However, it has an EU dimension within the meaning of Article 1(3) of the Merger Regulation.
- (8) The undertakings concerned (Apple, Beats Electronics and Beats Music) have a combined aggregate worldwide turnover of more than EUR 2 500 million⁴ in 2013 (Apple: EUR 128 680 million; Beats Electronics: EUR [...]). The combined turnover of the undertakings concerned in each of at least three Member States exceeds EUR 100 million and in each of at least three Member States where their combined turnover exceeds EUR 100 million, the aggregate turnover of two of the

² Annex 4 to the Form CO (Beats Electronics Agreement and Plan of Merger), Article 8.1(d); Annex 5 to the Form CO (Beats Music Agreement and Plan of Merger), Article 8.1(d).

³ Recital 20 of the Merger Regulation; paragraphs 39-41 of the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p. 1).

⁴ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p. 1).

undertakings concerned is more than EUR 25 million (Apple's turnover in Austria: EUR [...]; in Ireland: EUR [...]; in the United Kingdom: EUR [...]; Beats Electronic's turnover in Austria: EUR [...]; in Ireland: EUR [...]; in the United Kingdom: EUR [...]). Finally, the aggregate EU-wide turnover of two of the undertakings concerned is more than EUR 100 million (Apple: EUR [...]; Beats Electronics: EUR [...]) and none of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. RELEVANT MARKETS

- (9) Apple and Beats Electronics both sell headphones in the EEA. Apple and Beats Electronics also have a vertical relationship, since Apple sells Beats Electronics' headphones in its online and retail stores.
- (10) Apple and Beats Music both distribute digital music. However, only Apple is active in the EEA and, hence, there is no horizontal overlap in the EEA. The Commission nonetheless examines the transaction's impact with respect to the distribution of digital music in the EEA and therefore examines what the relevant market is on which Apple and Beats Music's music distribution activities take place.

4.1. Headphones

4.1.1. Relevant product market

- (11) The notifying party argues that headphones are part of a wider market for portable audio equipment, which includes portable headphones, speakers, and portable audio players.
- (12) The Commission considered consumer audio electronics in *Kenwood / JVC / Holdco* but left the market definition open in that case.⁵ The market definition suggested by the notifying party in this case seems overly broad, as it includes very diverse products, ranging from headphones to mp3-players. The relevant product market is likely to be narrower. One possible product market definition is the supply of headphones. Given the differences in the prices and features of headphones, the relevant product market may even be narrower. For instance, it is possible that there are separate markets for high-end, sophisticated headphones with various features such as wireless connectivity and low-end headphones with no additional features.⁶
- (13) Given that, as explained in section 5, the transaction does not raise competition concerns regardless of the exact product market definition, it is not necessary to reach a conclusion on the relevant product market.

⁵ Case M.5221 – *Kenwood / JVC / Holdco*, 19 August 2008, paragraph 13.

⁶ See, e.g., Annex 29 to the Form CO (GfK analysis on headphones which reports market share data for two categories: headphones that cost more than USD 100 and headphones that cost less than USD 100); Annex 33 to the Form CO (document from Beats Electronics which mentions its market share in the "[...]"; Annex 39 (GfK report).

4.1.2. *Relevant geographic market*

- (14) According to the notifying party, the relevant geographic market is global or at least EEA-wide.
- (15) In *Kenwood / JVC / Holdco* the Commission indicated that the market for consumer electronics can be national due to national distribution systems, service organization, marketing strategies, specific customer preferences or national organization of sales.⁷ Ultimately, however, it left the market definition open.
- (16) Given that, as explained in section 5, the transaction does not raise competition concerns regardless of the exact geographic market definition, it is not necessary to reach a conclusion on the relevant geographic market.

4.2. **Digital music distribution**

4.2.1. *Relevant product market*

- (17) Beats Music primarily offers a music streaming service to its subscribers. Apple, by contrast, primarily offers a music downloading service via its iTunes application. Downloading involves the purchase and storage of a digital copy of a musical work on a computer or electronic device.⁸ With a streaming service, the user does not download music files and no permanent copy is stored on the user's computer or electronic device. Instead, the audio file is delivered in small data packets over the internet and playback commences as soon as the internet streaming is initiated.⁹
- (18) In *Universal Music Group / EMI Music*, the Commission did not consider it necessary to divide the digital music market into a market for digital music obtained through downloading and a market for digital music obtained through streaming.¹⁰ The reasoning of the Commission in that decision related to the wholesale of recorded music but it also applies to the retail sale of recorded music. The Commission also noted that any difference that may exist between streaming and downloading was likely to become less marked in the future.¹¹ The present transaction offers some evidence of this trend. Beats Music, for instance, presents itself as a streaming service but also allows subscribers to download songs and subsequently access them offline. However, subscribers lose access to these songs when their subscription ends. Likewise, iTunes, which originally only offered downloading, started offering a streaming service called iTunes Radio in

⁷ Case M.5221 – *Kenwood / JVC / Holdco*, 19 August 2008, paragraph 21.

⁸ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 58.

⁹ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 59.

¹⁰ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 140.

¹¹ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 139.

September 2013.¹² So far this service is available only in the United States and Australia.¹³

- (19) As the transaction does not raise competition concerns regardless of the market definition, it is not necessary to come to a conclusion on the definition of the product market definition in this case.

4.2.2. *Relevant geographic market*

- (20) In *Universal Music Group / EMI Music*, the Commission noted that the market investigation in that case provided strong indications that the retail market for digital recorded music was national in scope.¹⁴ Ultimately, however, it did not take a view on the relevant geographic market.¹⁵

- (21) In this case too, there is no need to define the relevant geographic market, since the transaction does not raise competition concerns regardless of the geographic market definition.

5. COMPETITIVE ASSESSMENT

5.1. Headphones

5.1.1. *Market shares*

- (22) The combined market share of Apple and Beats Electronics for the supply of headphones is below 20%, both on a global and EEA-wide level. Even on a national level, the two entities together have a market share of less than 20% in all but two EEA countries.
- (23) On a global basis, the combined market share in 2013 was [10-20]% in value terms ([10-20]% for Beats Electronics and [0-5]% for Apple) and [0-5]% measured in volume terms ([0-5]% for Beats Electronics and [0-5]% for Apple).
- (24) In the EEA, the combined market share in 2013 was [10-20]% in value terms ([10-20]% for Beats Electronics and [0-5]% for Apple) and [5-10]% in volume terms ([0-5]% for Beats Electronics and [5-10]% for Apple).
- (25) The combined market share of Apple and Beats Electronics in value terms exceeds 20% in only two member States, namely Austria ([20-30]%) and the United Kingdom ([20-30]%). In both countries, the combined market share in volume terms is much lower.

¹² Annex to the Form CO (Apple Inc., Form 10K 2013), page 3.

¹³ Based on information available on Apple's website at <http://support.apple.com/kb/HT5085> on 17 July 2014 ("iTunes Radio is currently available in the United States and Australia"). [Doc ID 206].

¹⁴ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 234.

¹⁵ Case M.6458 – *Universal Music Group / EMI Music*, paragraph 235.

Austria – supply of headphones by value in 2013

Competitor	Value share (%)
Beats Electronics	[10-20] %
Apple	[0-5] %
Combined	[20-30] %
Other headphone manufacturers	31.7 %
Sennheiser	[10-20] %
Sony	[10-20] %
Philips	[5-10] %
AKG	[5-10] %
Bose	[5-10] %

Source: Form CO, page 26, Annex 6 of the Form CO

Austria – supply of headphones by volume in 2013

Competitor	Volume share (%)
Beats Electronics	[0-5] %
Apple	[5-10] %
Combined	[5-10] %
Other headphone manufacturers	23.8 %
Sony	[10-20] %
Philips	[5-10] %
Sennheiser	[5-10] %
Hama	[5-10] %
Vivanco	[5-10] %
IFrogz	[5-10] %
AKG	[5-10] %
Maxell	[0-5] %
TNB	[0-5] %

Source: Form CO, page 25, Annex 6 to the Form CO

United Kingdom – supply of headphones by value in 2013

Competitor	Value share (%)
Beats Electronics	[20-30] %
Apple	[0-5] %
Combined	[20-30] %
Other headphone manufacturers	14.4 %
Sennheiser	[10-20] %
Sony	[10-20] %
Tradebrand	[10-20] %
JVC	[5-10] %
Skullcandy	[5-10] %
Bose	[5-10] %
Philips	[5-10] %

Source: Form CO, page 26, Annex 6 of the Form CO

United Kingdom – supply of headphones by volume in 2013

Competitor	Volume share (%)
Beats Electronics	[0-5] %
Apple	[0-5] %
Combined	[5-10] %
Other headphone manufacturers	18.6 %
Tradebrand	[20-30] %
JVC	[10-20] %
Sony	[10-20] %
Sennheiser	[5-10] %
Skullcandy	[5-10] %
Philips	[5-10] %

Source: Form CO, page 26, Annex 6 of the Form CO

- (26) These low combined market shares are a first indication that the transaction is unlikely to raise competition concerns, regardless of whether the relevant geographic market is global, EEA-wide or national.

5.1.2. Other elements

- (27) Other elements also indicate that the transaction is unlikely to raise competition concerns.
- (28) First, Apple and Beats Electronics are not close competitors in the market for headphones. Apple supplies only standard white in-ear headphones, often referred to as earphones. They cost between EUR 29 and EUR 79.¹⁶ By contrast, Beats Electronics' headphones range in price from EUR 199 to EUR 400 and consist predominantly of the over-ear variety.¹⁷ They are offered in a range of colours and offer more features than the in-ear headphones of Apple. Although the transaction will remove the competitive constraints that Apple and Beats Electronics exert on each other, the large difference in their product portfolio suggests that these competitive constraints are limited. Other manufacturers such as Sennheiser, Bose and Skullcandy appear to offer headphones with prices and features that are closer to those of Beats Electronics. Hence, they are likely to be closer competitors to Beats Electronics than Apple.
- (29) Second, the market is characterized by a large number of global competitors such as Bose, Sennheiser and Sony. This means the combined entity will still face sufficient competition after the transaction.
- (30) Finally, entry barriers are rather low, as evidenced by the fact that at least 10 new competitors entered the market in the past five years.¹⁸ In fact, Beats itself entered the market in 2008 and, since then, has managed to acquire an EEA-wide market share of around [10-20]% in terms of value.

¹⁶ Form CO, paragraph 52(a) (referring to prices in Apple's online store in Belgium).

¹⁷ Form CO, paragraph 52(a).

¹⁸ Form CO, paragraph 57.

5.1.3. Conclusion

- (31) The transaction is unlikely to lead to horizontal anticompetitive effects because the combined market share of Apple and Beats Electronics on the market for the supply of headphones is low, regardless of the geographic market definition, and because other factors also indicate that no competition concerns are likely to arise.
- (32) A narrower product market definition that would divide the market for headphones into high-end headphones and low-end headphones would not change this conclusion. This is because Beats Electronics is present in the high-end part of the market, while Apple offers less expensive, no-frills headphones. Hence, under such a narrow market definition, there would be little or no overlap and the transaction would also not raise any competition concerns.
- (33) The vertical relationship between Apple and Beats Electronics is also unlikely to lead to either customer or input foreclosure, given the limited market share of Beats Electronics and Apple in the supply of headphones.¹⁹

5.2. Digital Music Distribution

- (34) Apple sells digital music in the EEA via iTunes. Beats Music, however, is currently not active in the EEA. Its music streaming service is only available in the United States and Australia. Hence, there is no horizontal overlap between the activities of Apple and Beats Music in the EEA. However, Beats Music could be considered a potential competitor of Apple in the EEA and the Commission therefore assessed whether the transaction raises competition concerns on this basis. The Commission has also assessed whether the transaction could lead to vertical concerns.

5.2.1. Horizontal assessment: merger with a potential competitor

- (35) Two conditions must be met for a merger with a potential competitor to give rise to anti-competitive effects.²⁰ First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Second, there must be a lack of other potential competitors which could maintain competitive pressure after the merger.
- (36) The first condition is unlikely to be met in this case for at least three reasons. First, there are already a number of actual competitors in the market that likely exert a much stronger constraining influence on Apple than Beats Music. These include Spotify, which has 10 million paying subscribers worldwide,²¹ and Deezer, which

¹⁹ A vertical link also exists between Beats Electronics' activities as supplier of audio software and audio hardware and Apple's activities as manufacturer of computers. However, Beats Electronics' activities as supplier of audio software and audio hardware are extremely limited, as it [...] and has a market share of less than [0-5]% globally. Hence, this vertical link does not raise competition concerns.

²⁰ Paragraph 60 of the Horizontal Merger Guidelines.

²¹ Annex 41 to the Form CO, page 3 (based on information available on Spotify's website at <http://press.spotify.com/uk/information/> on 17 July 2014).

has 5 million paying subscribers worldwide.²² It is difficult to imagine that a *potential* competitor such as Beats Music constitutes a significant constraining influence on Apple if there are more significant *actual* competitors present in the market.

- (37) Second, the entry of Beats Music into the EEA does not seem imminent. [...].²³ Launching a music distribution service would require a significant number of steps such as the negotiation of various licencing and copyright agreements and the identification of individual rights holders. Beats Music has not undertaken [...].²⁴
- (38) Third, in the main market where Beats Music is active, the United States, it has a very limited market share. More specifically, Beats provides services to only [0-5]% of all paid subscribers of digital streaming services in the United States.²⁵ Given its limited market share in the United States, Beats Music probably does not significantly constrain Apple in the United States. The constraints it exerts on Apple in the EEA must be even less significant, given that Beats Music has not entered that market yet.
- (39) For all these reasons, the Commission concludes that Beats Music does not exert a significant constraining influence on Apple and that there is no significant likelihood that Beats Music would grow into an effective competitive force.
- (40) The second condition for a merger with a potential competitor to give rise to anti-competitive effects is also unlikely to be met. Even if the transaction would remove Beats Music as a potential competitor, other potential competitors such as Pandora remain. Pandora has 80 million users in the United States and therefore likely exerts greater competitive pressure than Beats Music.

5.2.2. *Vertical assessment: access to music (input foreclosure) and access to the iOS platform*

- (41) The Commission also assessed whether the transaction could give Apple the ability and incentive to foreclose competing music streaming services from a key input, namely music. Apple's iTunes is an important channel for record labels to sell music. In 2014, iTunes accounted for approximately [70-80]% of all music downloads in several EEA countries.²⁶ Apple's market share on a market that would include streaming is likely to be significantly lower, but iTunes nonetheless represents an important source of revenue for record labels. As a result, Apple probably has a certain degree of bargaining power towards record labels. The Commission assessed whether Apple would have the ability and incentive to use that bargaining power to persuade major record labels to withhold music from streaming services that compete with Beats Music and iTunes.

²² Annex 41 to the Form CO, page 7; http://partners.deezer.com/inapp/ww/pr/new-feed/doc/pr_Deezer.pdf. [Doc ID 205]:

²³ Form CO, paragraphs 70 (ii), 77; Annex 45 to the Form CO - Email from Ian Rogers of Beats Music dated 13 February 2014 ([...]).

²⁴ Form CO, paragraph 72, 73.

²⁵ Form CO, paragraph 69.

²⁶ Form CO, paragraph 68 (the estimate is based on data for Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and Switzerland).

- (42) The Commission does not consider it plausible that the transaction would lead to such an effect. First, the input – music – from which competing services would be foreclosed is not under Apple's control but under that of the record labels. These labels have significant bargaining power themselves and are unlikely to forego the profits from selling music to streaming services that are much larger than Beats Music. Second, the transaction does not change Apple's ability and incentives to engage in a foreclosure strategy because Apple is already present in the downstream market for digital music distribution before the transaction. Apple currently sells digital music through its downloading service iTunes and, in the United States and Australia, through a streaming service called iTunes Radio. To the extent that Apple has the ability and incentive to foreclose other music streaming services from access to music, it already has this ability and incentive before the transaction.
- (43) The Commission also assessed whether the merger could give Apple the ability and incentive to use its control over the iOS platform to discriminate against competing streaming services. iOS is the operating system used in Apple's mobile devices such as the iPhone and the iPad. Subscribers of streaming services use applications ("apps") to access music and these apps must run on the operating system of the mobile device. This means that Apple could potentially use its operating system to disadvantage streaming services that compete with Beats Music or iTunes. For instance, it could reduce the interoperability between iOS and the apps of competitors, withhold important information about iOS to developers of these apps or delay the approval of apps.
- (44) The Commission does not consider it plausible that the merger would give Apple the ability and incentive to use its iOS operating system to the detriment of competing music streaming services. First, the iOS operating system is not the only platform on which music streaming services can offer their services. Other operating systems, including Google's Android, would remain as an alternative. The market share of Apple's iOS operating system has steadily declined in recent years and is now [20-30]% in Western Europe and [10-20]% worldwide.²⁷ It is therefore unlikely that Apple has sufficient market power to foreclose competing streaming services. Second, the transaction does not change Apple's ability and incentive to engage in a foreclosure strategy because, as set out in paragraph 42, Apple is already present in the market for digital music distribution before the transaction. To the extent that Apple has the ability and incentive to disadvantage competing streaming services through its iOS, it already has this ability and incentive before the transaction. Hence, any ability and incentive to engage in a foreclosure strategy is already present before the merger.
- (45) The Commission therefore concludes that the transaction is unlikely to give Apple the ability and incentive to foreclose competing streaming services from music or use the iOS operating platform.

²⁷ Apple's response to the European Commission's questions dated 16 July 2014, paragraph 1.1 (figures cited are for the year 2013).

6. CONCLUSION

- (46) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission
(Signed)
Joaquín ALMUNIA
Vice-President*