Universal / BMG: Market power of music publishers in view of evolutions in digital music publishing

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On 22 May 2007, the European Commission approved, subject to conditions, the acquisition by Universal Music Group Inc. ("Universal") of BMG Music Publishing ("BMG"). Both companies are active in the music publishing business.

An in-depth market investigation has shown that no competition concerns would arise from the merger where the copyrights are administered by the collecting societies who usually charge uniform tariffs for all songs. However, in the field of online rights (including rights for mobile applications), publishers have recently started to withdraw rights from this traditional collecting societies system which is likely to shift pricing power over these rights from the collecting societies to the publishers.

As a consequence, the market investigation found that the proposed acquisition could have raised competition concerns by combining two large catalogues of musical works. The transaction would have led to an unavoidable "must-have" repertoire for users of digital music rights, such as music downloading services or mobile ringtones. These competition concerns were removed by the parties' remedy to divest several successful catalogues.

I. Introduction

a. The notified transaction

Universal, a US-based company owned by the French company Vivendi, is a leading player in the music recording and music publishing business. The target business consists of the worldwide music publishing activities of BMG, a subsidiary of the German media company Bertelsmann.

On 6 September 2006 Vivendi and Universal signed a share purchase agreement with Bertelsmann AG and seven further companies within Bertelsmann for the acquisition of BMG. As a result of the transaction Universal acquired sole control of BMG.

b. The product markets: exploitation of music publishing rights

Music publishers exploit copyrights for songs received from authors by granting licences to right-users. The right-users encompass all sectors where music is required (CDs, films, internet etc.). The users pay royalties for the use of these musical works. Publishing rights need to be distinguished from so-called "neighbouring rights" or "recording rights" which mainly protect the individual interpretation of a song by a performing artist.

Essentially because of their different usage, the following types of rights have been distinguished: Mechanical rights (for reproduction of a work in a sound recording, e.g. CDs); Performance rights (for commercial users such as broadcasters, concert halls, theatres, night clubs, restaurants etc.); Synchronisation rights (for commercial users such as advertising agencies or film companies, i.e. when the music is synchronised with the visual image); Print rights (for the reproduction of work in sheet music); and Online rights (pars pro toto for all digital rights) which are a combination of mechanical and performance rights for online and mobile applications, such as music downloading services and ringtones.

From a demand-side perspective there is clearly no substitutability between the different categories of rights since a user cannot switch between the licences for the different rights for a specific application. Also from a supply-side perspective, the market conditions differ significantly which points to separate markets. Further differences relate to the role of the collecting societies. Licensing of mechanical and performance rights is generally carried out by collecting societies while synchronization and print rights are generally licensed directly by the publishers.

(1) Directorate-General Competition, units C-5 and 02. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
c. The geographic markets

The geographic markets for mechanical and performance rights appear to be national due to the strictly country-specific activities of the collecting societies. As regards print and synchronisation rights, the scope of the licences is also to a large extent national. The geographic scope of online/digital rights (as a combination of mechanical and performance rights) is still largely national but may become larger as a consequence of recent and future developments. There was, however, no need to strictly define the geographic scope of any of the right categories as the competitive assessment remains unchanged under either a national or EEA-wide dimension.

II. The different systems of rights administration

As indicated above, the publishing rights identified as relevant product markets are administered in different ways. Moreover, the traditional system of collecting societies is undergoing significant changes in the field of online rights whose administration originally did not differ from the administration of mechanical and performance rights for traditional applications. The resulting different ways of rights administration are described in the following.

a. The traditional system of collecting societies

Mechanical and performance rights for the traditional (offline) applications are administered in the system of collecting societies. Collecting societies are organisations which were established to act on behalf of right owners in order to take over the administrative tasks connected to the licensing of publishing rights. Authors usually become members of the collecting society in their country of residence and thereby entitle those to administer their mechanical and performance rights, including online rights. It is then the collecting societies’ task to grant licences, collect the royalties from the users and monitor the use of music. For these services, the collecting society retains a percentage of the collected royalties as commission fee. The net collected royalties are shared between the authors and their publishers.

In order to secure licensing and collecting of royalties also from users abroad, the collecting societies co-operate worldwide on the basis of so-called “reciprocal representation agreements”. These agreements give each of them the right to not only license the repertoire of their own members but also the repertoire of all associated collecting societies. On the basis of the reciprocal agreements each collecting society, however, limits the geographic scope of its licences for the complete repertoire administered, including both the works of the own members as well as the other collecting societies’ works, to its own country. At the same time each collecting society collects royalties from users in its own country not only for the own members but also for the authors and publishers abroad.

On this basis, collecting societies are normally considered dominant in their respective countries. They are for this reason bound by non-discrimination obligations and are not allowed to refuse licences. As a consequence, they in most cases charge a uniform price for the whole repertoire (only differing per category of use).

So far, online rights have been managed in the same way. However, recent changes occurred in this respect due to the publishers’ tendency to withdraw these rights from the traditional collecting societies system.

b. Withdrawal of rights from the traditional system

Several publishers have recently started to withdraw a part of their online rights from the traditional system of collecting societies in order to give the rights to one or a few selected collecting societies for the EEA-wide or even worldwide administration. These initiatives have followed the Commission’s Recommendation with respect to online rights (2) which re-affirms that right-holders should have the right to entrust the management of online rights to a collective rights manager of their choice.

The initiatives mainly relate to Anglo-American works and the mechanical part of the online rights. This results from the differences in the administration of rights and control over rights: Authors generally do not transfer their rights to the publishers and therefore keep control over their rights. However, this does not apply for Anglo-American mechanical rights. Authors in Anglo-American countries normally transfer their mechanical rights fully to their publishers. As a consequence, the publishers may decide independently from the authors about a withdrawal of these rights from the traditional collecting societies system. For the other rights (Continental European works, performance rights), generally, the approval of the authors would be necessary for such a decision.

The most advanced initiative in this respect is the creation of the CELAS joint venture by the German collecting society GEMA and the British collecting society MCPS-PRS Alliance. CELAS administers EMI’s Anglo-American mechanical rights for online applications.

**c. Conclusion on the systems or rights administration**

From this, several systems of rights administration emerge:

(i) *direct licensing*: Publishers grant themselves licences to the music users for synchronization and print rights (see section III).

(ii) *the traditional collecting societies system*: Collecting societies administer the rights and decide on a uniform tariff for all works. Mechanical and performance rights for the traditional (offline) applications are administered in this system (see section IV).

(iii) *withdrawal*: By withdrawing rights from the traditional collecting societies system the publishers transfer these rights to one selected collecting society or several. This system so far only applies to online rights, and more specifically: only to the mechanical rights part of online rights for Anglo-American works (see section V).

**III. Synchronisation and Print Rights**

Synchronisation rights are purchased in order to synchronize a musical work with a visual image for incorporation in an audio-visual work such as a film, TV program or TV advertisement. They are generally directly commercialised by the publishers to the final user. Synchronisation customers have the specific feature in the music industry that they do not need to have access to the complete music repertoire unlike other customers such as radios or online music providers. Conversely, they need only one or a few songs.

In particular, synchronisation customers confirmed that the different musical works are largely substitutable for their purposes and that when the financial conditions offered for one work do not meet their expectations, they do not have problems identifying another musical work for which acceptable conditions can be agreed upon. Therefore, although the merger strengthens the position of Universal/BMG on the synchronisation market, now on a pair with EMI, the enhanced size of Universal’s catalogue does not give rise to competition concerns because a sufficient number of alternative publishers with a vast number of songs remain available.

Print rights are purchased for the reproduction of works in sheet music. Universal is merely active in this market and the merger will only lead to a marginal overlap.

**IV. Mechanical and Performance Rights**

After the merger, the parties would acquire a leading position in a number of EEA-countries in relation to mechanical and performance rights. The market investigation has, however, shown that the merger would not lead to competition concerns in the markets for mechanical and performance rights due to the strong position of the collecting societies which prevents independent pricing on the part of the publishers. The pricing decisions in this system are made by the collecting societies. Due to their dominant positions, the collecting societies are regularly obliged to charge non-discriminatory tariffs. While significant changes to the rights administration are taking place for online rights (in particular withdrawal of rights) leading to a weaker role of the collecting societies, no such developments currently appear likely for mechanical and performance rights for traditional applications.

**V. Online Rights**

The merger raised serious doubts in the market for online rights in Austria, the Czech Republic, Germany, Poland and the United Kingdom as well as on an EEA-wide level. In these territories, the combined catalogues of Universal and BMG would have (co-)controlled the majority of the chart hits which are of particular importance for online and mobile music providers. As indicated above, online rights are composed of mechanical and performance rights for online and mobile applications. The competition concerns mainly relate to the mechanical rights part of the online rights and only to Anglo-American repertoire, as only this part of the repertoire appears likely to be withdrawn from the collecting societies system. However, a price increase in this segment would have had an appreciable effect on the overall market for online rights.

*a. Independence of pricing*

The withdrawal shifts pricing power to the publishers who gain pricing independence with respect to the withdrawn rights. Collecting societies are likely to adopt for the withdrawn rights a role as agents and service providers for the individual publisher and will not anymore act in the traditional sphere of the usual membership agreement and collecting societies’ statutes. The non-discrimination rules or other national regulations in this respect are unlikely to fully apply for collecting societies acting as agents / service providers for individual publishers.
b. Increase in market power

In order to offer a title, an online music provider must acquire licences for all co-publishing rights (a majority of chart albums are jointly published by several publishers) and recording rights controlling this title. As a consequence, a music title is controlled by a music company when this music company is either one of the publishers or the record company of this specific title.

The Commission analysed specifically the top 100 charts in EEA countries. At the EEA level and in the five mentioned Member States, Universal/BMG would control post-merger 50% of all chart albums, either via publishing or recording rights, up from 40% for Universal alone pre-merger. This implies that an online music provider could hardly develop a music web site without the agreement of Universal/BMG, or would alternatively have to abandon half of the overall relevant music repertoire, seriously undermining its viability. Other majors also control a significant share of the total music repertoire, however currently not as much as to be considered as “must-have” partners.

c. Profitability of a price increase

The market investigation showed that a price increase was likely to be profitable for Universal. This is mainly due to the limited substitutability of music and the prevailing business models of the online and mobile music providers. It was therefore concluded that, post-merger, Universal would have both the ability and the incentive to increase prices for its repertoire.

VI. Remedies

a. Description of the proposed remedies

Universal submitted remedies on 15 March 2007 which have been twice improved in the light of the results of the market tests and the Commission’s comments. The Final Remedies Package comprises, amongst other catalogues, the entire catalogues of Zomba Music Publishers Ltd (“Zomba UK”), Rondor Music (London) Ltd (“Rondor UK”), and an EEA-wide licence of the catalogue of Zomba Enterprise Inc. (“Zomba US”) (3).

It is noteworthy that, in order to avoid a copyright split and to ensure the viability of the Divestment Businesses, the Remedies are not confined to online rights but include the entire catalogues for all applications, i.e. mechanical, performance, synchronisation, print and online applications. The combined EEA-wide revenues of the Divestment Businesses exceed €30 million and represent more than one third of BMG’s EEA revenues with Anglo-American repertoire.

b. Assessment of the remedies

The market tests confirmed the divestiture of catalogues as an appropriate remedy to remove competition concerns in music publishing markets. The Remedies Package has the characteristics of a viable commitment as reflected by the market test. For instance, the divested catalogues are a good mixture of successful back catalogue and recent hits and of Anglo repertoire and U.S. American repertoire. In most of the divested titles, Universal will retain neither a recording nor any co-publishing right and will thus no more be able to leverage its control in negotiation with online and mobile music providers.

The catalogues include currently successful authors like Linkin Park, R. Kelly, Jamie T., Justin Timberlake, Kelly Clarkson and Kaiser Chiefs. These authors recently hit the charts several times and in many Member States (including those where competition concerns were found) and therefore have the high potential to deliver more hits in the future. In analysing the future potential of the divested catalogues the Commission also analysed the number of newly signed authors and the advance payments made to them as an indicator for the expected success.

In the light of that bundle of criteria the Commission concluded that the Final Remedies Package removes the serious doubts raised by the notified transaction as to its compatibility with the Common Market and the EEA Agreement.

VII. Conclusion

Changing market conditions may lead to a fundamental shift in market power between the different groups of players. To assess the merger between Universal and BMG in the publishing business, the Commission’s analysis took into account the prospective developments and the resulting likely shifts of market power in the music publishing markets. The case has shown that even against the background of dramatic changes in the market, instruments for the analysis of the likely impacts of the merger can be found, such as the used chart analysis, which allow for a sound competition assessment of the transaction. The final remedies package addresses the identified competition concerns and thereby fosters growth and competition in the online music markets.

(3) The other catalogues are 19 Music which includes many Spice Girls songs, 19 Songs and the BBC catalogue, including the Teletubbies which have been successful as mobile ringtones. For the territories outside the EEA, Universal will act as a sub-publisher of the Divestment Businesses.