

Mergers: Commission confirms approval of recorded music joint venture between Sony and Bertelsmann after re-assessment subsequent to Court decision

The European Commission has confirmed clearance under EU merger control rules for the creation of Sony BMG, a joint venture combining the recorded music businesses of Sony and Bertelsmann after concluding that the transaction would not create or strengthen a dominant or collectively dominant position in the music markets in the EEA (as regards EU Member States, restricted to the 15 countries who were members before 1 May 2004). The merger had first been approved by the Commission in 2004 (see [IP/04/959](#)). Following the annulment of this approval by the Court of First Instance in 2006, the Commission has conducted an in-depth re-assessment of the merger.

Competition Commissioner Neelie Kroes commented: "This investigation represents one of the most thorough analyses of complex information ever undertaken by the Commission in a merger procedure. It clearly shows that the merger would not raise competition concerns in any of the affected markets."

Before its absorption by the joint venture, Bertelsmann Music Group was a subsidiary of Bertelsmann AG, a German-based international media company whose activities also include television and radio production, broadcasting and book and magazine publishing. BMG's music labels included Arista and Jive.

Sony Corp of America belongs to the Japanese Sony group whose activities include consumer electronics and the entertainment industry besides the music recording and publishing business. In recorded music it acted through Sony Music Entertainment which owns the Columbia, Epic and Sony Classical, among other labels.

The 2004 decision

On 20 July 2004 (see [IP/04/959](#)), the Commission authorised under the then in force 1989 EU Merger Regulation the creation of the joint venture Sony BMG, combining the recorded music divisions of Sony Corporation and Bertelsmann AG (BMG). After examining the proposed transaction, the Commission found that it would not create or reinforce a dominant position for the involved firms alone or collectively with the other music majors (Universal, Warner and EMI).

The Court decision

In its 13th July 2006 ruling on case T-464/04 (see CFI press release n° 60/2006), the Court of First Instance however considered that the Commission made manifest errors of assessment and that the evidence relied on by the Commission was insufficient to justify the clearance decision and annulled it.

The second investigation

Following this annulment, the case was re-notified to the Commission on 31 January 2007 and the Commission started a new assessment of the transaction. On 1 March 2007, the Commission opened an in-depth investigation (see [IP/07/272](#)).

The new investigation was carried out under the previous Merger Regulation (EEC 4064/89), applicable to merger agreements signed before 1 May 2004, under which the Commission had to check whether a proposed merger would strengthen or create a dominant or collectively dominant market position in the territory of the European Economic Area as it stood before 1 May 2004 (including the 15 EU Member States at the time) or a substantial part thereof. However, the Commission re-evaluated the transaction in the light of current market conditions, taking into account developments since 2004, including the developments in the sale of online music. This means that the Commission was able to evaluate the actual impact of the merger on the market since 2004 and was not limited, as is usually the case, to an analysis of likely effects on the market in the future.

As a reminder, a merger in a concentrated market may significantly impede effective competition through the creation or reinforcement of a dominant position because it increases the likelihood that firms are able to collectively coordinate their behaviour to the detriment of consumers, notably through increasing prices, limiting production or dividing the market, for instance by geographic area or other customer characteristics.

In this investigation, the Commission examined in great detail all national markets for recorded music in physical format and for the licensing of recorded music in digital format. The investigation has focused in assessing the likelihood of the merger creating or reinforcing a collective dominant position of the major record producers, following the three criteria set in the *Airtours* judgment of the Court of First Instance (case [T-342/99](#)). These criteria are whether there is sufficient transparency in the market in order to spot deviations to the collusion, whether there is a credible retaliation mechanism by the companies on the market against any companies who would not collude, and whether there is any possibility for competitors or customers to undermine the effects of the collusion.

In particular, the Commission performed one of its largest and most complex econometric analysis so far in the context of a merger investigation, analysing all net prices, discounts and wholesale prices for all CD chart albums sold by all major record companies to all of their customers in the European Economic Area between 2002 and 2006 (equivalent to millions of data points) in order to find evidence of any possible collusion between record companies. In addition, the market for the licensing of recorded music in digital format, which was nascent at the time of the Commission 2004 investigation, has now been fully analysed in the light of its development since 2004.

The Commission also investigated all the various theories of price and non-price related coordination between major record companies provided by other market players. These theories included alleged coordination on budgets, on the pricing of each title, on pricing policy, on chart album prices, on access to retailers, on access to airplay, on chart rules, on release date, on coordination at the level of publishing activities and alleged negative impact on cultural diversity.

Taking into account the points raised by the CFI, the in-depth analysis of qualitative as well as quantitative aspects of the markets and third-party submissions provided in all instances, the in-depth investigation has provided no evidence of coordinated behaviour prior to the merger or as a result of it. This finding relates to both the markets for music in physical format and in digital format.

Further information on the case will be available at:

http://ec.europa.eu/comm/competition/mergers/cases/index/m66.html#m_3333