



EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer¹

Universal Music Group / EMI Music (COMP/M.6458)

- (1) On 17 February 2012, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation² by which Universal Music Holdings Limited (“Universal”) would acquire control, within the meaning of Article 3(1)(b) of the Merger Regulation, of the recorded music assets of EMI Group Global Limited (“EMI”), by way of a purchase of shares (Universal and EMI are referred to as “the parties”).

1. STATEMENT OF OBJECTIONS

- (2) On 23 March 2012, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation. A Statement of Objections (“SO”) was subsequently sent to Universal on 19 June 2012 for which a two-week deadline for the reply was granted, which DG Competition extended by two days upon the request of Universal.
- (3) In the SO, the Commission’s preliminary findings indicated that the notified concentration would significantly impede effective competition in the market for the wholesale of digital music at the EEA level as well as in 25 Member States³ and the market for the wholesale of physical recorded music in 22 Member States.⁴
- (4) Universal submitted its reply to the SO within the deadline without requesting an oral hearing.

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, (the “Terms of Reference”).

² Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004, p.1.

³ Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom, as well as in Iceland and Norway;

⁴ Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom, as well as in Iceland and Norway.

- (5) The main procedural feature of this case is that several access to file issues arose with regard to the use of a data room.

1.1 Access to file

1.1.1 “Early” access to file

- (6) Already prior to the issuance of the SO, Universal requested access to third party data collected by DG Competition and used in analyses of the Chief Economist Team’s (“CET”) analyses. Universal argued that such access was necessary in order not to prejudice its rights of defence and to identify possibilities for commitments.
- (7) DG Competition rejected this request because the requested information was part of the file to which access would be granted only after the notification of the SO in line with Article 17(1) of Implementing Regulation.⁵ With regard to Universal’s commitments argument, DG Competition replied that any data work undertaken by the Commission did not affect Universal’s ability to submit suitable remedies prior to any SO being issued.

Review of data room rules before notification of SO

- (8) Universal subsequently asked me, before the SO was sent, to review the data room rules DG Competition had drawn up for this proceeding (the “Rules). Universal submitted that its rights of defence would be violated mainly for the following three arguments. First, the intended scope of the disclosure was too narrow, as it would not allow Universal to access the raw data and the relevant codes used to build the final datasets on which the CET’s analysis was run. Such information was said to be necessary, however, in order to allow its external economic advisers to verify the soundness of the CET’s analysis and the reliability of the data. Second, it was claimed that specific provisions in the Rules restricting the use of the data would prevent Universal’s external economic advisers properly to verify and test the CET’s analysis. Lastly, Universal claimed that it was unnecessary, disproportionate and unreasonable to anonymise the CET data. It was argued that the anonymisation would prevent Universal’s external economic advisers from understanding the specific factual context in which the data was generated.
- (9) DG Competition justified these restrictions on the basis of the particularly commercially sensitive nature of the data from the customers and competitors in application of the Tetra/Laval case-law.⁶
- (10) Having regard to the need for speed in merger cases, I reviewed the Rules by applying the following principles. An addressee of the SO must be given full access to all adverse evidence. If the evidence is confidential, access must be given to the extent that it is indispensable for an addressee’s rights of defence. In terms

⁵ Commission Regulation (EC) No 802/2004 of 21 April 2004, OJ L 133, 30.4.2004, p.1.

⁶ Case T-5/02 Tetra Laval v Commission [2002] ECR II-4381

of quantitative evidence, which was the subject matter of Universal's requests, this means that an addressee must normally be able to carry out three processes. First, the addressee must be in a position to replicate the CET analysis (i.e. access must be given to the data and methodology used). Second, the addressee must be able to test the Commission's analysis (i.e. access must be given to discarded data, alternative variables and information explaining outliers etc.). Finally, the addressee must be allowed to verify the reliability of the data, at least, on the basis of random checks. On this latter point, if the addressee's external advisers can point out concrete and specific mistakes arising from the random checks, further access could be granted depending on the scope of mistakes and the scope of the data that is actually contained in the file. In this context, and in view of the often confidential nature of the data, it would seem justifiable to impose restrictions, particularly in requiring (a) the addressee to explain to the Commission what its external advisers intend to do and (b) to carry out such computations under supervision of Commission officials.

- (11) I replied to Universal by letter of 18 June 2012 that, after my discussions with DG Competition, the Rules had been amended to address the above principles. Regarding the scope of disclosure, the Rules were clarified to confirm that all raw data and codes would be included in the data room. With respect to the restrictions on the use of the data, these were relaxed in the Rules in order to allow Universal's external economic advisers to conduct the tests and verifications of the CET's analysis indicated in the letter. On the anonymisation of the data, I emphasised that the Commission considered the data to constitute particularly sensitive business secrets, the disclosure of which would undermine the competitive position of certain data providers. In view of the additional access that the amended Rules now foresaw, and the technical explanations given to me by DG Competition, it seemed to me that Universal's external economic advisers were in a position to carry out the computations that they had sufficiently specified in their request and it was therefore not indispensable for the anonymisation to be lifted. Lastly, I referred Universal to the possibility of making further reasoned submissions to me in the event that Universal's external economic advisers were to come across specific concrete examples of unexplainable data patterns and had reason to believe that further access was still necessary for the proper exercise of its right to be heard.
- (12) By letter of 19 June 2012 Universal asked me to amend the Rules further, as they still contained limitations on the use of the CET data which impaired Universal's rights of defence. In particular, Universal claimed, by reference to specific computations, that its external economic advisers would be prevented from verifying the reliability and accuracy of certain data and calculations. In response to Universal's additional claims which had been sufficiently specified, the Rules were further amended to provide Universal's external economic advisers with more possibilities to carry out robustness checks and undertake further computations.

1.1.2 Access to the file after the notification of the SO

- (13) Universal was granted access to the file on 20 June 2012.

Access to data alleged to support claims in the SO

- (14) By means of a reasoned request dated 22 June 2012, Universal formally reiterated, first, its earlier claim to be granted full access to adverse quantitative analysis and renewed its three complaints with regard to the limitation of the scope of access, the restriction of the use of the CET data and the anonymisation. Second, Universal requested that its external legal advisers be granted access to the data room. Universal claimed that such access was necessary to ensure the proper exercise of its rights of defence as the external legal advisers needed (i) to be able to review the information contained in the data room and any confidential analysis carried out by the external economic advisers, (ii) to see the confidential content of the data room report of which only a non-confidential version would be communicated to Universal and (iii) to provide advice on the compliance of the data room process with the Rules.
- (15) I rejected both parts of Universal's request by a decision adopted on 29 June 2012 under Article 7 of the Terms of Reference. On the basis of the technical information I had received from DG Competition, the Rules allowed Universal's external economic consultants, in regard of those computations which had been sufficiently specified, to carry out, in certain instances, any computation they wanted. In other cases, the external economic advisers could propose computations to be carried out and discuss such proposals with the Commission. Finally, certain computations could not be carried out because the case file did not contain the necessary data. In respect of the requested disclosure of anonymised data, Universal had not provided concrete and specific evidence that it was indispensable to the exercise of its rights of defence.
- (16) I also rejected the second part of Universal's request, i.e. to admit its external legal advisers to the data room. Such access would go beyond the very purpose of the data room which was to allow the parties' external economic advisers to access the quantitative data gathered by the Commission. To the extent that the data room contains business secrets of third parties the procedure is an exception to the Commission's general obligation not to disclose confidential information. As this procedure is an exception, strict safeguards are necessary to avoid even unintentional disclosure of the data. I found that Universal's rights of defence did not require direct access for its external legal advisers to the data room, since it is sufficient for the external lawyers in the three situations pointed out by Universal to be able to communicate with the external economic advisers outside of the data room.

Request to review the Article 7 decision

- (17) On the day of the adoption of the rejection decision, having received an advance copy, Universal requested me to review my decision reiterating by and large its earlier arguments regarding the restrictions imposed on the external economic advisers and their inability to perform certain analyses. It also submitted again that its external legal advisers should be allowed direct access to the CET data set in unredacted form as this was necessary to ensure that Universal's right to legal representation and advice was not severely restricted.

- (18) Having again carefully considered Universal's arguments, I decided on 12 July 2012 to maintain my initial decision. First, contrary to Universal's claim, the Rules allowed Universal's external economic advisers to perform the requested analysis in the data room. The fact that the external economic advisers did not make use of it was no reason for me to review my earlier decision or the Rules on this point. Second, while it was correct that a party to proceedings should have effective legal representation and advice as part of its rights of defence, this did not alter the need for demonstrating that access to confidential information was indispensable for the exercise of such rights.
- (19) However, in view of a potential misunderstanding or misinterpretation of the Rules by the parties, I invited Universal to contact DG Competition to discuss any proposals for further regression analyses that Universal's external economic advisers might wish to carry out. To that end, the data room was to be made available for this specific purpose. Moreover, DG Competition approached the data providers, on my behalf, with a view to obtaining consent to allow one of Universal's external legal advisers to enter the data room, so that the external economic advisers could be assisted on the spot with the interpretation of the Rules. Universal decided however not to make use of this exceptional access offer.

Request to disclose confidential data

- (20) On 26 and 27 June 2012, Universal submitted that DG Competition had wrongfully refused its request for its external economic advisers to share the confidential version of one of their data room reports with Universal's external legal advisers and (in redacted form) with Universal. The requested information concerned the parties' royalty shares per platform offering digital recorded music to final consumers, which had been calculated by the external economic advisers on the basis of data contained in the data room. Universal claimed that by refusing to disclose the information in question, DG Competition would deny access to both adverse as well as supporting evidence, since, in Universal's view, the information could be used to rebut the Commission's preliminary view that IFPI⁷ market shares were more reliable than market shares calculated by the parties. After discussions and meetings between Universal's external legal and economic advisers, DG Competition and members of the Hearing Office, it was agreed that the following could be disclosed to Universal: (i) a number of exact royalty shares that were considered not to disclose confidential information; (ii) ranges for other more confidential share information and confirmation whether the royalty shares were below 40%; and (iii) textual descriptions of all the royalty shares.
- (21) By decision of 4 July 2012, taken in accordance with Article 7 of the Terms of Reference, I rejected Universal's request to access the confidential information contained in the external economic advisers' data room report. As there was a real possibility that Universal, and to a certain degree also its external legal advisers, would be in a position to reverse-engineer certain sensitive information if it were given access to the remaining confidential royalty shares (i.e. those not falling

⁷ International Federation of the Phonographic Industry

under category (i) above), and given the additional access granted through (ii) and (iii) above, I concluded that further access was not indispensable to safeguard Universal's rights of defence. Moreover Universal's advisers chose not to make use of the additional access granted under (iii) above. Universal's rights were not infringed as its external legal advisers were able to use the information provided as supportive evidence or to rebut adverse evidence.

1.2 Interested third persons

- (22) Pursuant to Article 16(1) of the Implementing Regulation, I accepted requests from Impala, Merlin BV, Warner Music Group, Sony Music, the Beggars Group Ltd., the UK collecting societies MCPS and PRS as well as the record companies Naïve and Because Music to be heard as interested third persons.

2. LETTER OF FACTS

- (23) On 25 July 2012, the Commission sent to the parties a letter of facts setting out additional elements, namely further data on the relative market position of the majors, in support of the Commission's objections in the final decision. The parties were given until 1 August 2012 to provide their written comments. In their reply of 1 August 2012, the parties submitted that the letter of facts had changed the theory of harm set out in the SO thereby "*recasting the essential nature of the preliminary objections*" raised against them.

- (24) DG Competition responded to this letter on 3 August 2012 by noting that this new factual data supported the Commission's preliminary finding in the SO that Universal was larger than any other major in a number of countries. DG Competition also pointed out that the letter of facts merely provided purely factual information in support of the existing theories of harm described in the SO and did not, as such, establish a new theory of harm based solely on the relative size of the majors. The parties were given the opportunity to provide further comments, but decided not to do so. Consequently, I consider this matter to be closed.

3. COMMITMENTS

- (25) In order to address the competition concerns identified by the Commission in the SO, the parties submitted commitments on 27 July 2012 pursuant to Article 8(2) of the Merger Regulation. The market test of this set of commitments was launched on the same day in order to gather the views of relevant market participants on the effectiveness of the commitments and their ability to restore effective competition in the markets where competition concerns were identified.

- (26) In light of the results of the market test, the parties submitted a revised set of commitments on 13 August 2012 which was subsequently amended on 17 August 2012. Final commitments were submitted on 25 August 2012. The Commission concluded that the commitments proposed by the parties on 25 August 2012 sufficiently addressed all the remaining concerns regarding the compatibility of the proposed transaction with the internal market.

4. THE DRAFT DECISION

- (27) Pursuant to Article 16 of the Terms of Reference, I have examined whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and I have come to a positive conclusion.

5. CONCLUDING REMARKS

- (28) Overall, I conclude that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 11 September 2012

(signed)

Michael ALBERS