

***Case No COMP/M.2883 -
BERTELSMANN /
ZOMBA***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 02/09/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 02.09.2002

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

SG (2002) D/231453

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.2883 - Bertelsmann / Zomba
Notification of 29 July 2002 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 29 July 2002, the Commission received a notification of a proposed concentration, whereby Bertelsmann Music Group ("BMG") belonging to Bertelsmann AG ("Bertelsmann") will acquire control of the whole of Zomba Record Holdings BV ("Zomba Record") and Zomba Music Holdings BV ("Zomba Music"), at present controlled by Summer Shore NV ("Summer Shore").
2. After examination of the notification, the Commission has concluded that the proposed operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. Bertelsmann is an international media company with activities in television and radio, book publishing, magazines and newspapers, music recording and music publishing, print and media services, book and music clubs, and media e-commerce. In the field of recorded music, Bertelsmann operates through BMG, a wholly owned subsidiary, which is a fully integrated music recording and publishing company with operations in 41 countries worldwide.

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

4. Zomba Music and Zomba Record are part of the Zomba Group of Companies (“Zomba”), whose parent company is Summer Shore, a non-public stock corporation incorporated in the Netherlands Antilles. Zomba Record is the holding company of Zomba’s music recording business, with operating offices in 10 Member States and physical distribution companies in the UK and Germany. Zomba Music is the holding company of Zomba’s music publishing business, with operating offices in the US, the UK and the Netherlands.

II. THE OPERATION

5. The proposed concentration results from the exercise by Summer Shore on 7 June 2002 of put options in relation to its controlling equity interests in Zomba Record and Zomba Music. These put options were granted in an Option Agreement of 1991 as amended, and can only be exercised jointly. Currently, BMG holds a 20 % interest in Zomba Record and a 25 % interest in Zomba Music with the remainder held by Summer Shores. After completion of the transaction, BMG will hold 100 % of both Zomba Record and Zomba Music.

III. CONCENTRATION

6. Bertelsmann will acquire sole control of the whole of Zomba Record and Zomba Music by way of purchase of shares. Therefore, the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

7. The parties to the transaction have an aggregate world-wide turnover of more than € 5 billion, and both Bertelsmann and the combination of Zomba Record and Zomba Music have a Community-wide turnover above € 250 million. Furthermore, Bertelsmann does not achieve two thirds of its aggregate Community-wide turnover in one Member State. The notified transaction has therefore a Community dimension.

IV. THE RELEVANT MARKETS

1) Relevant product markets

8. The concentration produces its effects on two market sectors, namely (a) music recording and distribution, and (b) music publishing. The sectors of on-line music delivery and on-line exploitation of publishing rights will not be discussed hereafter in this decision, since Zomba has only *de minimis* activities in this area.

a) Music recording and distribution

9. The principal activities of record companies can be described as discovering and developing artists, recording their music, organising the manufacture of record releases in the main formats (compact disc, cassette and vinyl), distributing the records to retailers and wholesalers, and marketing and promoting each record release.

10. In Cases Thorn EMI/Virgin Music² and Seagram/Polygram³, the Commission considered that recorded music might be broadly divided into 'pop' music and classical music. Zomba Record has no activities in classical music.
11. Furthermore, in the above-mentioned decisions the Commission observed that within pop music a large number of different categories or 'genres' (e.g. jazz, soul, gospel, heavy metal, rap and techno) are readily identifiable, and that these categories may form separate markets. Artists belonging to different genres generally do not compete with each other. There are also indications that the conditions of supply and demand for compilations based on the back catalogue of record companies are different from those applicable to releases of new albums. However, for the purposes of the present operation it is not necessary to decide whether or not different categories of pop music constitute separate markets since the effects of the proposed transaction on the different categories of pop music are similar to those on pop music taken as a whole. Even on the basis of the narrowest product market definition the proposed acquisition will not lead to the creation or strengthening of a dominant position.

b) Music publishing

12. Music publishing consists mainly of the acquisition by publishers of rights to musical works and their subsequent exploitation upon remuneration, mostly in the form of a commission charged by the publisher to the author (lyricist and/or composer) on the revenues generated by the commercial exploitation of musical works. The main activities of publishers consist of (a) discovering of authors, (b) artistic and financial support to authors, (c) legal protection of the musical work, (d) commercial exploitation of the musical work, and (e) administration of the authors' patrimonial rights.
13. Publishers' revenues derive therefore from the commercial exploitation of musical works, be it reproduction-based exploitation (mechanical and synchronisation rights), performance-based exploitation (performing rights) or distribution-based exploitation (printing rights). These different types of rights can be described as follows:
 - Mechanical rights: licensing to a record company for the reproduction of copyrighted music by mechanical means such as CDs or tapes.
 - Performance rights: licensing the performance of copyrighted music to commercial users such as radio, television stations, concert organisers, hotels and discos.
 - Synchronisation rights: licensing the recording of a composition as part of the soundtrack of a film or an advertisement.
 - Printing rights: licensing the production of sheet music.
14. The administration and licensing of mechanical and performance rights are mostly carried out by collecting societies on behalf of their members (i.e. publishers and/or authors). In contrast, the synchronisation and printing rights are generally licensed and

² Case IV/M.202 - Thorn EMI/Virgin Music.

³ Case IV/M.1219 - Seagram/Polygram.

administered directly by the publishers, without much involvement from the collecting societies. The precise scope of the copyright protection attached to each of these categories of rights may vary from one Member State to another, subject however to a number of principles and minimum standards established under several international Conventions.

15. In its Seagram / Polygram Decision⁴, the Commission stated that the exploitation according to the different sources may lead to the definition of separate product markets for each one of the above-referred categories of rights, although it left open the precise product market definition. The market investigation in the Time Warner / EMI case⁵ supported the existence of separate product markets for music publishing according to the exploitation of the different categories of rights, namely mechanical, performance, synchronisation and printing, on the basis of both demand-side considerations (the different types of rights present different characteristics and relate to different customer needs, the licensing of one type of right not being a substitute for the licensing of another) and supply-side considerations (not only the referred existence of different exploitation systems, but also the application of dissimilar licensing rates and the diverse commercial and financial significance of each type of right for the publisher).
16. The activities of professional music publishers differ materially from the activities of so-called “self-publishing” authors, which might thus constitute separate markets. On the acquisition side, music publishing companies seek to sign a large number of authors for whom they provide remunerated music publishing services whereas “self-publishing” authors only administer their own works. Similarly when it comes to the exploitation of the rights acquired, music publishing companies can offer a wide variety of musical material on the basis of entire catalogues consisting of the works of several authors, whilst “self-publishing” authors can only offer their own musical material.
17. The Commission has also indicated in the past that separate markets may be distinguished for the different types (“genres”) of music, at least as regards the broad categories of music (classical and pop)⁶. Moreover, the Commission has left open in its previous practice further possible segmentations of the markets for music publishing, in particular, whether:
 - (a) the acquisition and exploitation of these rights constitute separate product markets;
 - (b) there exist separate markets for national and international (which to a large extent would equate to “Anglo-American”) repertoire; and
 - (c) synchronisation rights may be further divided into licensing for advertising and for film customers.

⁴ Case N° IV/M.1219 - Seagram / Polygram.

⁵ Case COMP/M.1852 - Time Warner / EMI.

⁶ Case N° IV/M.202 - Thorn EMI / Virgin Music.

18. In any event, for the purpose of this case, the exact definition of the publishing product markets can be left open since, even on the basis of the narrowest market definitions, the notified operation will not lead to the creation or strengthening of a dominant position.

2) Relevant geographic markets

a) Music recording and distribution

19. In their notification, the Parties leave open the geographical scope of the market for music recording and distribution. Although this market shows some international aspects such as the pre-eminence of international repertoire particularly in pop music and the presence of the major record companies in all Member States, there are strong indications that the scope of the market is national. Record distribution is mainly organised nationally, and due to different customer preferences promotion and marketing are determined on a national level, too. In spite of considerable price differences between Member States, cross-border trade remains rather insignificant. However, for the purpose of the present case, the precise market definition may be left open since, even on the basis of national markets, the notified operation will not lead to the creation or strengthening of a dominant position.

b) Music publishing

20. In previous cases the Commission has left open whether the geographical scope of the music publishing markets is national or broader, in particular EEA-wide⁷. Regarding mechanical and performance rights, several elements point in the direction of national markets, in particular the fact that they are generally administered and collected by the national collecting societies on behalf of the publishers and / or authors. Moreover, the level of royalties for performance rights is negotiated on a national basis through the local collecting societies and therefore varies across the Community. As for mechanical rights, even if there exist certain exceptions to the setting of tariffs on a national basis (i.e., the licensing for the whole of the EEA through a single collecting society, or the agreement between BIEM, on behalf of the collecting societies, and IFPI, on behalf of the record companies, on the negotiation and establishment of royalties)⁸, the underlying rights are still administered on a national basis. In turn, synchronisation and printing rights are usually administered directly by publishers even though, for a number of countries in the EEA, synchronisation rights are licensed via a national collecting society.
21. In any event, for the purpose of this case, it is not necessary to give a precise definition of the relevant geographic markets since, even on basis of the narrowest market definition, the notified operation will not lead to the creation or strengthening of a dominant position.

⁷ Cases N° IV/M.202 - Thorn EMI / Virgin Music, IV/M.1219 - Seagram / Polygram, and COMP/M.1852 - Time Warner / EMI.

⁸ *Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique (BIEM)* and *International Federation of the Phonographic Industry (IFPI)*.

V. COMPETITIVE ASSESSMENT

1) Music recording and distribution

22. According to the figures provided by the Parties, the market for music recording and distribution is currently in a phase of stagnation and even decline in terms of growth. Its structure is characterised by the presence of five “major” international companies (Universal, Warner, Sony, EMI and BMG) and a very large number of “independent” labels with Zomba and Edel being the largest “independents”. The “majors” feature a complete vertical integration from the signing of artists to their recording and the distribution of music. They generally have a global reach and own a diversified portfolio of artists and a large back catalogue. Most of the “independents”, on the other hand, specialise in particular segments and focus more on A&R (artist and repertoire) and their recording while they outsource their distribution activities to the majors and other third parties. For the last three years, the combined market share of the five majors has amounted to more than 75 % in the EEA and in most Member States. The majors are structurally linked with each other by a series of joint ventures, distribution and compilation agreements.
23. The acquisition by BMG of Zomba Record will result in the elimination of Zomba Record as a competitor in pop music recording and distribution. In terms of market shares, Zomba Record currently is the largest “independent” record company world-wide. Its vertical integration is incomplete: since Zomba Record only controls a small vinyl pressing plant, it mainly sub-contracts its manufacturing activity to third parties such as Sonopress (wholly owned by Bertelsmann), Sony and Technicolor. On the distribution side, Zomba conducts its own distribution, sales and marketing activities in the UK, Germany, Austria and Benelux. In these countries, Zomba’s physical distribution companies also distribute records for other “independent” labels. In France, Italy, Portugal, Spain and Sweden, Zomba Record carries on its own marketing and sales activities, but sub-contracts distribution to EMI. In Denmark, Finland and Greece Zomba Record’s catalogue of recordings is licensed exclusively to EMI, which controls marketing, sales and distribution. All of these agreements with EMI expire in June 2003.
24. On an EEA-wide basis, the concentration will bring about a combined market share of [5-15]% (figures of 2001) in terms of qualifying sales⁹ and of [10-20]% in terms of

⁹ According to the parties, ‘qualifying sales’ are defined by the IFPI as wholesale sales of Owned Content finished music product by the Member Company (i.e. record company) to retailers or to intermediate wholesalers, net of returns and discounts and excluding exports (in accordance with IFPI Market Data Reporting Definitions). The following defines Owned Content on a territory-by-territory basis: (a) sales of finished music product of repertoire owned by the Member Company; (b) sales of finished music product of repertoire owned by the Member Company’s majority owned (>50%) labels/companies; (c) sales of finished music product licensed-in by the Member Company or its majority owned label/company; (d) sales of compilations/soundtracks finished music product based on joint-venture agreements between record companies.

The following **do not** qualify as Owned Content revenues: (a) sales of minority owned labels; (b) sales of finished product from distribution deals; (c) sales of finished music product by Member Companies licensees; (d) all other forms of revenue that are not wholesale sales of finished music product e.g. license income fees or royalty based income, etc.

total distributed sales¹⁰, representing an increase of BMG's existing market share of [0-10]% and [0-10]%, respectively. On a national level, affected markets exist only in Italy ([15-25]%) and Germany ([10-20]%) on the basis of qualifying sales. As a result of the acquisition of Zomba, BMG's market shares increase by [0-10]% in Germany and by [0-10]% in Italy. On the basis of total distributed sales, there are affected markets in six Member States with the Parties' highest combined market shares in Italy ([15-25]%), Germany ([15-25]%) and the UK ([15-25]%), representing an increase of BMG's market shares of [0-10]% in the UK, of [0-10]% in Germany and of [0-10]% in Italy. However, in all of these Member States Universal remains the market leader, with EMI being just behind the combined entity (and even ahead of it in the UK in terms of total distributed sales).

25. The proposed acquisition will not affect any particular pop music genre in the Community or on a national level. Even though Zomba Record's turnover corresponds largely to the "international pop" segment, the competitive assessment thereof does not differ from that of pop music taken as a whole.
26. Therefore, the notified operation does not lead to the creation or strengthening of a single dominant position on the basis of all alternative market definitions considered.
27. The notified operation will not lead either to the creation or the strengthening of a collective dominant position in music recording and distribution since the competitive situation on the relevant market will not be substantially altered as a result of the concentration. As stated above, the acquisition of Zomba Record by BMG will increase the combined EEA-wide market share of the five majors only by [0-10]% in terms of qualifying sales and by [0-10]% in terms of total distributed sales. On a national level, even though the increase will be higher in some Member States, namely in the UK ([0-10]% for qualifying sales and [0-10]% for total distributed sales), Germany ([0-10]% for qualifying sales and [0-10]% for total distributed sales) and the Netherlands ([0-10]% for qualifying sales and [0-10]% for total distributed sales), Zomba Record's market shares are declining both on an EEA-level and in all Member States.
28. These decreasing market shares reflect Zomba Record's strong dependence on few very successful "acts", which have not been followed recently by similarly successful "new stars". Moreover, for "independents" it is particularly vital to discover unknown talents and to sign them. [...].
29. More importantly, the notified acquisition will not substantially alter the competitive situation on music recording and distribution markets since Zomba has been "independent" from the "majors" only to a limited extent. BMG already held a 20 % stake in Zomba Record since 1996 and provides manufacturing and distribution services for Zomba Records in North America. In the EEA, Zomba Record is linked to another "major", EMI, by means of distribution and licensing agreements. In this sense, the Commission's investigation in the EMI / Time Warner case indicated that independents do not appear to be effective competitors to the majors to such an extent

¹⁰ 'Total distributed sales' comprise 'qualifying sales' plus those sales that do not qualify as Owned Content revenues pursuant to the above IFPI definition.

that competition from the independents has a significant impact on prices paid by retailers, and in turn for the consumer for recorded music.

30. Owing to all these considerations the impact of the acquisition of Zomba Record by BMG will not lead to the creation or strengthening of a collective dominant position on any market for music recording and distribution.

2) Music publishing

31. In previous cases, the Commission has found that the markets for music publishing are relatively fragmented¹¹. The largest operators are the music publishing arms of the major record companies, but a large number of small publishers are also present in the music publishing markets. The market investigation in the Time Warner/EMI case revealed however that the large majority of smaller publishers, which specialise in particular niches genres or are more focused on national repertoire, only compete to a limited extent with the major publishers for the signing up of authors with an international appeal, which appears to be the most important area of music publishing.
32. BMG has been active in the music publishing sector since 1987 and owns a diverse music catalogue comprising over 70.000 copyrights. BMG's activities in this sector are organised in three divisions: (1) classical music publishing; (2) pop music publishing; and (3) production music¹² publishing. BMG also engages in sub-publishing on behalf of third parties (including Zomba, see below). Sub-publishing is a form of licensing in which the owner of rights grants an exclusive license of those rights (and/or the right to manage and administer them) in respect of one or more national territories to the sub-publisher.
33. In turn, Zomba, which has no activities in the classical publishing sector, structures its operations among two divisions: (1) pop music publishing; and (2) production music publishing. With regard to pop music publishing in the EEA territories, Zomba's operations are located in the UK and in Benelux¹³; in every other territory Zomba's catalogue is sub-published by BMG. As to production music publishing, Zomba's operations in the EEA are located in the UK and France and it has also small marketing and promotion activities in Sweden and the Netherlands; in Germany and Austria, BMG and Zomba market their respective libraries through jointly-owned entities; finally, in Spain and Italy, Zomba licenses its production music rights exclusively to BMG.

¹¹ Cases N° IV/M.202 - Thorn EMI / Virgin Music, and IV/M.1219 - Seagram / Polygram.

¹² As described in the notification, production music libraries are collections of pre-recorded background music tracks which are made available for distribution to television and radio stations, video producers, multi-media companies and others for incorporation into their own productions such as advertisements, broadcast programmes, film and video.

¹³ In the Benelux, Zomba Music handles the administration of Zomba's publishing catalogues, collecting revenues from the local collecting societies) but it is not involved in local writer activities.

(a) Mechanical and performance rights

34. BMG's and Zomba's combined market share at the EEA-wide level, in terms of the turnover generated by these activities¹⁴, is about [10-20]% for mechanical rights, [5-15]% for performance rights and [5-15]% if account is taken of both mechanical and performance rights together. The acquisition of Zomba will bring about a small accretion of market share: [0-10]% for mechanical rights, [0-10]% for performance rights and below [0-10]% for mechanical and performance together. The merged entity will still be smaller or of a similar dimension than EMI [15-20%], Warner Chappell [10-15%] and Universal [10-15%].
35. With regard to national markets, the parties have submitted that, because of the referred sub-publishing arrangements between BMG and Zomba, the acquisition of the latter by BMG will only have an impact in those territories where such arrangements do not exist, namely the UK and the Benelux, given the sub-publisher's control over pricing in the territories covered by these arrangements.
36. In any event, the combined entity will only reach market shares above 20% in two countries, Greece and the Netherlands. In Greece, the market share will be of [10-20]% for mechanical rights, [25-35]% for performance rights and [15-25]% for mechanical and performance rights together. However, Zomba has no existing activities of its own in Greece prior to the transaction, and therefore the merger will bring about no increment in market share. In the Netherlands, the parties' market share will be of [20-30]% for mechanical rights, [15-25]% for performance rights and [15-25]% for mechanical and performance rights together, with an accretion of [0-10]%. The combined entity, though, will be of a similar dimension as that of EMI [20-30%], and not significantly bigger than Warner Chappell [15-20%] and Sony [15-20%].
37. Notwithstanding the above, during the Time Warner/EMI investigation, the Commission considered that "basic" market shares such as the ones analysed so far do not reflect accurately by themselves a publisher's true market position, given the overall control enjoyed by a publisher over co-owned or co-administered musical compositions. Whilst partial ownership or administration gives rise only to partial receipts from the composition in question, it nevertheless gives the publisher total (negative) control over the commercial exploitation of that composition. Since the exploitation requires the consent of all right-holders, any partial owner or administrator of a composition have the power to prevent the licensing of that work and thus exercises 100 % control over its commercial exploitation. The Commission has therefore addressed as well the issue of negative control during its investigation in the present case. In any event, because of Zomba's small dimension and the sub-publishing arrangements already in place with BMG, no competitive concerns arise in this regard for the purposes of the assessment of this case.

¹⁴ There are two possible approaches to calculate market shares in music publishing, one based on the number of protected works owned or administered by publishers and another, which has proved to be more accurate, based on turnover or revenues generated. Indeed, the number of protected musical works provides no accurate indication of the success rate and the turnover derived from the musical works at stake, and therefore would not, in itself, provide an adequate reflection of the relative strength of the operators in these markets.

38. In sum, and on the basis of the above, the Commission has come to the conclusion that the proposed concentration will not lead to the creation or strengthening of a dominant position in the markets for performance and / or mechanical rights.

(b) Synchronisation and printing rights

39. The parties are not aware of any source which either publishes or could otherwise supply accurate total data regarding the markets for synchronisation and printing rights, and have accordingly provided their best estimates thereof, based on their knowledge of the market and their industry experience. In the course of its investigation, the Commission received no evidence from third parties which would call into question the parties' estimates.

40. The Parties have submitted that Zomba independently obtained synchronisation revenues in 2001 only in the UK and Ireland, where its estimated market share was below [0-10]%. In addition, Zomba received sub-publishing royalties through its sub-publishing arrangement with BMG in five other EEA territories (France, Germany, Italy, Scandinavia and Spain). In any event, and based on the Parties' estimates, BMG and Zomba's combined market share in 2001 only exceeded 15% in Greece ([15-25]%) and in Italy ([15-25]%). In Greece, Zomba did not generate any revenue from synchronisation rights (either directly or through its sub-publishing arrangement with BMG) and therefore the operation will not result in any overlap. In Italy, where Zomba has insignificant activities, the combined entity will be smaller or of a similar dimension than two of its competitors (Warner Chappell and EMI).

41. As far as printing rights are concerned, both BMG and Zomba license the right to sell sheet music to specialist third parties and obtain royalty revenues in return. In addition to receiving royalty revenues, BMG also sells and distribute printed music directly, primarily in the field of classical music, while Zomba has no printed music sales or distribution activities in the EEA. The parties' combined market share only exceeded 15% in 2001 in Italy ([15-25]%) and in the Benelux ([15-25]%). Zomba did not generate any income from printing rights in the Benelux, while in Italy the acquisition of Zomba represents only a small accretion for BMG, the market share of the combined entity being significantly smaller than that of Warner Chappell.

42. Finally, at EEA level, the combined activities of the parties in the markets either for synchronisation and printing rights will still be of a smaller dimension that those of several of their competitors (in particular, Universal, Warner Chappell and EMI).

43. On the basis of the above, the proposed concentration will not lead to the creation or strengthening of a dominant position in the markets for synchronisation and printing rights.

VI. CONCLUSION

44. 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 (EEC) No 4064/89.

For the Commission

Mario MONTI
Member of the Commission
(signed)