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Case *No*
COMP/M.3333 – SONY
/ BMG

Only the English text is authentic.

REGULATION (EC) No 4064/89
MERGER PROCEDURE

Article 8 (2)
Date: 03/10/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03/X/2007

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COMMISSION DECISION

of 03/X/2007

**declaring a concentration to be compatible with the common market
and the EEA Agreement**

(Case No COMP/M.3333 – Sony/ BMG)

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**Commission Decision
of 03/X/2007**

**declaring a concentration to be compatible with the common market
and the EEA Agreement**

(Case No COMP/M.3333 – Sony/ BMG)

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular, Article 26(2) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings², and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 01.03.2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations³,

Having regard to the final report of the Hearing Officer in this case⁴,

¹ OJ L 24, 29.1.2004, p.1.

² OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

³ OJ C ...,...200. , p....

⁴ OJ C ...,...200. , p....

WHEREAS:

I. INTRODUCTION

1. On 09 January 2004, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89⁵, as last amended by Regulation (EC) No 1310/97⁶, by which the undertakings Bertelsmann AG (“Bertelsmann”, Germany) and Sony Corporation of America belonging to the Sony group (“Sony”, Japan) acquired joint control within the meaning of Article 3(1)(b) of the Regulation 4064/89 of the recorded music joint venture “Sony BMG” by way of purchase of shares in a newly created company. Bertelsmann and Sony are collectively referred to as “the Parties”.
2. On 19 July 2004, the Commission declared the concentration compatible with the common market. On 13 July 2006, the Court of First Instance of the European Communities annulled the Commission’s decision⁷.
3. As the triggering event, that is the signing of the joint venture agreement, occurred prior to the entry into force of the Regulation 139/2004⁸, Regulation 4064/89, hereinafter referred to as 'the Merger Regulation' has to be applied. The following assessment has therefore to determine whether the operation creates or strengthens a dominant position; it will also only relate to the countries which were Contracting Parties to the EEA Agreement at that time.
4. The concentration is, however, to be reassessed under the current market conditions. On 31 January 2007, the Commission received an up-date of the initial notification containing the necessary information and data in order to enable the Commission to assess the transaction in the light of the current market circumstances.
5. On 01 March 2007, after examination of the notification, the Commission concluded that the notified operation falls within the scope of the Council Regulation No. 4064/89 and raises serious doubts as to its compatibility with the Common Market and the functioning of the EEA Agreement.
6. By decision of 22 March 2007 pursuant to Article 11(5) of Regulation No 4064/89, complementary information was requested from the notifying parties. The parties provided the requested information on 26 June 2007, re-starting the Phase II timetable.

⁵ OJ L 395, 30.12.1989 p. 1; corrigendum: OJ L 257, 21.9.1990, p. 13.

⁶ OJ L 180, 9. 7. 1997, p. 1; corrigendum OJ L 40, 13.2.1998, p. 17.

⁷ T-464/04 (Impala/Commission). The notifying parties have lodged an appeal against the CFI judgment (C-413/06 P).

⁸ Cf. Art. 26 of Council Regulation (EC) N° 139/2004, Official Journal L 24, 29.01.2004, p. 1-22.

II. THE PARTIES

7. Sony is globally active in music recording and publishing, industrial and consumer electronics, and entertainment. Bertelsmann is an international media company active in music recording, TV and radio production and broadcasting, publishing of books, magazines and newspapers, print and media services, as well as book and music clubs. Bertelsmann recently sold its publishing division to Universal.⁹
8. The re-notified concentration comprises the creation of the recorded music joint venture Sony BMG which has been completed following the Commission's clearance decision of 19 July 2004. Bertelsmann contributed the worldwide recorded music business of its wholly owned subsidiary Bertelsmann Media Group ("BMG"); Sony contributed its worldwide - with the exception of Japan - recorded music business which had been operated by Sony Music Entertainment.

III. THE CONCENTRATION

9. Bertelsmann and Sony jointly control Sony BMG which operates as a full function joint venture. The operation, therefore, gives rise to a concentration pursuant to Article 3(2) of the Merger Regulation.
10. After the Commission declared the concentration compatible with the Common Market, the joint venture was set up. According to the parties, implementation of the concentration was gradual and became fully implemented in 2006. It has been active in the discovery and the development of artists (so-called A&R: artist and repertoire) and the subsequent marketing and sale of recorded music. Sony BMG has not engaged in related activities such as music publishing, manufacturing and distribution. Sony's and BMG's activities in these fields remained with the parent companies or have been outsourced.

IV. COMMUNITY DIMENSION

11. The undertakings concerned had a combined world-wide turnover of more than EUR 5 billion in 2002 (Sony: EUR 62 519 million; Bertelsmann: EUR [...] *million)¹⁰. Both Sony and Bertelsmann each had a Community-wide turnover in excess of EUR 250 million (Sony: [...] *million; Bertelsmann: EUR [...] *million), but they did not achieve more than two-thirds of their aggregate Community-wide turnover within one

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

⁹ Case N°COMP/M.4404 – Universal/BMG, 22.05.2007.

¹⁰ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

and the same Member State. The notified operation therefore has a Community dimension.

V. RELEVANT MARKETS

A. RELEVANT PRODUCT MARKET

1. PHYSICAL RECORDED MUSIC

12. The notifying parties consider the relevant product market to be the market for recorded music (that is the discovery and development of artists, and the promotion, sales and marketing of recorded music) for all types of music. They do not consider a subdivision along different categories (international pop, local pop, classical music and compilations) meaningful, indicating that competition does not take place exclusively in genres or in other possible segmentations. In addition, the notifying parties point out that there are no accepted industry standards of genres. As regards compilations, the notifying parties indicate that there is direct competition between compilations and single artist recordings (including “best of” tracks from a single artist) and as such a distinction is considered of little relevance to market definition.
13. The Commission previously investigated the market for music recording in Thorn EMI/Virgin Music¹¹, Seagram/Polygram¹², and in the first Sony BMG market investigation (hereinafter “the 2004 decision”). The Commission specified that record companies discover and develop artists, record music, organise manufacturing and distribute, market and promote record releases. Regarding the distinction between national and international pop, the Commission observed that some pop music is only marketed nationally and therefore possibly represents a distinct product market. The Commission also noted that within pop music a large number of different categories could be identified (for example jazz, soul, heavy metal and techno), possibly constituting distinct product markets as well. However, in these cases the exact product market definition was left open¹³.
14. From a demand side perspective, end-consumers make purchasing decisions based on a number of criteria, among which type of music or genre, international vs. national, new release vs. back catalogue, individual artist vs. compilation, single vs. album or promotional campaigns. From the supply side, record companies may sign artists and sell records across a range of different genres. A number of independents labels, however, specialise in certain specific genres.
15. The results from the market investigation show that, notwithstanding that every single repertoire, and even each artist, has its own specificities in term of audience, all styles and genres collectively make the new musical standard and influences. Further, artists

¹¹ Case No IV/M.202 – Thorn EMI/Virgin Music, Commission decision of 27.04.1992.

¹² Case No IV/M.1219 – Seagram/Polygram, Commission decision of 21.09.1998.

¹³ See also Case No COMP/M.2883 – Bertelsmann/Zomba, Commission decision of 02.09.2002.

may fit within more than one genre at a given moment in time, whilst an album or song may also fall into more than one genre. Most records stores sell a diverse range of music: their buyers talk to music companies and buy all kinds of music. Moreover, clear and consistent definitions of categories and genres are difficult to find as there are many similarities between all of them (producers, outlets, customers, contract mechanism) which led to consider that talking about different markets is not relevant.

16. As regards compilations, there is a general appraisal that they form a separate market from a demand side perspective¹⁴. But the suppliers (recording companies) are equally divided on this issue: some, in line with their customers, consider the compilations as an add-up to the other products, mainly for established and bestseller repertoire; conversely for others, compilations compete for the same retail space that is available and the same people buy both kinds of records.
17. Based on these considerations, and for the purpose of the present case, the Commission concludes that the relevant product market for physical recorded music includes all physical CD albums, irrespective of their genre or their compilation/single artist status.
18. The notifying parties submit that the recorded music market does not include manufacturing and distribution (logistics) of records because major recording companies, hereinafter referred to as major recording companies, or majors, increasingly outsource these non-core activities (often to sister companies within their group) as do smaller labels.
19. However, it is not necessary to decide whether or not manufacturing and distribution form an integral part of the relevant market, since the conclusions of the competition analysis will not be affected.

2. RECORDED MUSIC IN DIGITAL FORMATS

a) Introduction

20. Recorded music can be sold in physical form (mainly CDs) and in digital form. Digital music is delivered either online over the Internet or via mobile networks to the consumer in various forms, including downloads (of tracks, albums and mastertones¹⁵), subscription services and streaming.
21. The growth of the Internet and its related technologies have fundamentally changed the music industry, as piracy and the ability of consumers to choose music other than bundled in the form of a CD have challenged the music industry's business model. Whilst digital sales have increased, they have not offset the declines of the physical market, which is – according to the parties – caused by counterfeit CD sales,

¹⁴ Question n°9.b – Questionnaire to customers 12-02-2007 – 72% of customers consider compilations as a separate market.

¹⁵ Mastertones are mobile phone ring tones which have been encoded with a high fidelity format such MP3, AAC, or WMA format, and represents the latest evolution of the ringtone.

unauthorised copying and downloading and the growing importance of other entertainment products.

b) The wholesale market for licensing of digital music

22. As Sony BMG is mainly active on the wholesale level¹⁶ - licensing its catalogue to digital music providers - the relevant market is the wholesale market for digital licensing of music. It must be emphasised that this market concerns the licensing of recorded music rights, which are to be distinguished from music publishing rights. The latter are only relevant for the downstream digital music retail market as the digital music service providers need to obtain licences from the holders of the publishing rights,¹⁷ that is from authors and composers and/or their publishers, which are normally obtained via the (national) collecting societies.

c) The digital market is distinct from the physical market

23. The notifying parties consider that digital and physical distribution, are simply two methods of distributing the same product: recorded music. The notifying parties therefore consider that there are no grounds to define digital music as a separate product market. Rather, according to them, digital music forms part of the larger market for recorded music. In the market investigation, some third parties also consider digital and physically distributed music substitutes for each other, as the exponential growth of digital music has partly replaced physical sales. In previous decisions, the Commission came to the conclusion that there is an emerging but separate market for the online delivery of music, including streaming and downloading of music¹⁸. Also in the 2004 decision, the Commission concluded that (digital) online music is not part of the general market for recorded music, mainly because significant differences between the distribution of recorded music via physical carrier and online sale were found.
24. The notifying parties' statement that digital and physical music are largely substitutable from the final user perspective has not been confirmed by the market investigation. Seen from the demand side, it appears that the growth of digital sales has also led to a shift in demand. Unit sales of online 'à la carte' music services are predominantly for single tracks (80% - 90% in terms of volume¹⁹) and almost all

¹⁶ Sony BMG's presence on the downstream market for the distribution of digital music (SonyConnect) and its presence on the related market for digital portable music players is limited.

¹⁷ It depends on the type of online service offered what bundle of publishing rights will be required. As online distribution implies reproduction as well as public performance, an online music service generally needs licences for both mechanical rights and performance rights relating to the musical works.

¹⁸ See Cases No COMP/M.2050 – Vivendi/Canal+/Seagram, Commission decision of 13 October 2000; No COMP/M.1845 – AOL/Time Warner, Commission decision of 11.10.2000, OJ L268, 9.10.2001, p 28; No COMP/JV.25 - Sony/Time Warner/CDNow, Commission decision of 21 December 1999.

¹⁹ When measured in terms of value, the relative importance of albums increases to 36% of the online download revenues. The relative importance of single and album downloads in each of the assessed Member States is covered further.

mobile downloads are single tracks. Demand for physical singles is reducing²⁰ as a result of the limited price difference compared with full CDs. A typical single on Amazon.com costs about EUR 5-10 whereas an album costs about EUR 15-18. As a result, more than 90% of physical retail unit sales are albums. The situation is reversed for digital music. On iTunes, a single track costs EUR 0.99 (EUR 1.29 for Digital Rights Management –hereinafter DRM- free tracks) and the majority of albums cost EUR 9.99. Being able to purchase a specific track rather than the whole album appears the principal reason for consumers to move to the digital market. As online/mobile music services turn people into single track buyers, and online customers often wish to create their own albums with selected tracks from different albums, demand substitution is therefore imperfect.

25. Some market respondents have indicated that digital music services compete to a certain extent with physical sales of music – as reflected by the fact that digital retail pricing levels may have exerted some downward pressure on CD prices. However, only part of the physical market is concerned. A large number of respondents from the market investigation have indicated that the physical market is not likely to be more than partly substituted by digital sales, pointing to the added value of physical CDs with (i) better sound quality, (ii) the absence of DRM-based usage restrictions²¹:retailers consider 256 bit DRM-free EMI music as a distinct product that commands higher prices, (iii) art work, covers, booklets and lyrics. Finally, whilst downloading of music is the way of acquiring online music most similar to the purchase of CDs, there are digital business models that are considerably different from the sale of physical CDs. For example, streaming only allows a temporary storage of the music, not comparable to the purchase of a traditional CD.
26. From the supply side point of view, the market investigation has indicated that the structure of digital music services differs from physical retail in terms of organisation, as separate divisions for physical and digital music exist at the major record companies in order to handle the distinct value chain of digital music compared to the physical market. Also, the technical and commercial conditions negotiated between digital music services are different from those prevailing in the physical market (both bricks and mortar retail shops and e-commerce). Moreover, marketing and cost structure in the digital market differ significantly from the physical market (no production and distribution costs, no returns). Even when the parties state that 'increasingly, digital music is no longer viewed as a distinct business but as an integral part of the commercialization of an album, which requires interaction between employees focused on digital and physical distribution'²² these differences are likely to

²⁰ According to IFPI, overall single sales in physical and digital formats reached over 900 million units in 2006 – with digital accounting for over 80 per cent of that figure. In the US and Canada, digital sales have already completely replaced the physical singles market. Source : IFPI 07: Digital music report page 9, See http://www.ifpi.org/content/section_resources/digital-music-report.html.

²¹ DRM allows a retailer to employ copy control, watermarking (digital identification), authentication, and access control.

²² Whilst it is correct that physical album releases are increasingly accompanied by a multitude of digital formats such as digital singles, exclusive digital tracks, digital ‘bundles’, artwork, videos and a whole range of music products created for mobile phones, this currently remains limited to a small number of high profile releases. For instance, Madonna’s latest album was released digitally with three price points in three

persist for the time being. Also, the notifying parties' submission that Sony BMG's retail customers 'are starting to integrate their business units and to seek combined negotiations of both physical and digital music deals' has not been confirmed by the market investigation. The majors' customers on the digital market differ largely from those on the physical market. The digital wholesale market is characterised by the presence of telecom operators, media companies, Internet service providers and white label providers (for example OD2) which are not active on the physical market. Even to the extent that these retail customers have both physical and digital music businesses, the businesses are separated and negotiations with record companies are held separately.

27. It can be concluded that, both from the demand- and supply side, the digital market can be distinguished from the physical market. The market investigation therefore confirms the conclusion the Commission reached in its 2004 decision, namely that the wholesale market for licensing of digital (online/mobile) music constitutes a separate market.

d) The online segment versus the mobile segment

28. The market investigation has indicated that digital recorded music may be delivered through mainly two channels: (1) online over the Internet; or (2) via mobile networks. This raises the question whether the wholesale licensing of online music and of mobile music constitute distinct product markets.
29. Sales to mobile phones are an important segment of the market and the record companies obtain significant revenues from mastertones and mobile track downloads. On average across Contracting Parties to the EEA Agreement and majors, approximately 40-60% of their overall digital revenues come from these two sources. Further, the development of the digital music market shows important differences between Contracting Parties to the EEA Agreement, and mobile sales are higher than online sales in some Contracting Parties to the EEA Agreement. Music downloading to a PC is the more common format in the United Kingdom and Germany, whilst in Italy, Spain and to a lesser extent France, downloading to mobile phones is more common.
30. In the market investigation, a number of market participants²³ have pointed to mobile music possibly constituting a distinct product market due to limited demand-substitutability, in particular on the level of end-consumers (whose demand is reflected on the relevant wholesale level). Firstly, music downloads to mobile phones meet the demand for instantaneous buys on the move, with payments integrated into the consumers' mobile bills. Secondly, there are fewer substitutes to music purchased from the mobile music service provider. For reasons of mobile DRM restrictions, it is more difficult to load music on mobile phones other than the music purchased from the mobile music service provider. Also due to DRM, mobile downloads are not

bundles, reaching numbers one, two and four in the iTunes chart, with the most expensive bundle coming first.

²³ About half of the respondents to the Commission's questionnaire considered that – mainly from a demand side point of view – online and mobile digital music services are not substitutable to each other.

suitable for all mobile phones and may only be available and applicable on mobile phones of a certain brand (limited interoperability). Thirdly, the consumer can perceive mobile music as having a higher value compared to an online download as it personalises the mobile phone (explicitly so for ringtones). Mobile music content (and in particular mastertones) are generally priced at a higher level to end-consumers. Whilst prices have decreased following the growth of the market, significant price differences between online and mobile downloads and mastertones remain.

31. However, a substantial minority of the respondents to Commission's questionnaire indicate that, on the retail level, the mobile and online segments are evolving to become substitutes rather than complements. Much of this evolution is linked to interoperability of (portable) music players – including mobile phones – as the industry is converging its distribution models. The major mobile operators increasingly offer "dual downloads" which allow the customer to download the same track on both PC and mobile. A number of respondents also point to the fast evolving convergence of music players and mobile phones (such as the Apple i-phone)²⁴ which increases substitutability from the demand side. It is expected that as portable phones become more capable music players and specific DRM restrictions for mobile phones will disappear, users will increasingly 'sideload' tracks from their PC to their mobile phones. In that respect, almost all music enabled portable phones from market leaders Nokia, Motorola, Samsung, LG and SonyEricsson support at least the MP3 format (with limited DRM restrictions) alongside AAC, WAV and M4A formats.
32. Studies by research companies such as M:Metrics and Telephia²⁵ indicate that markets such as Asia, Japan, Italy, United Kingdom and the Nordic countries are the most advanced mobile music markets, also because 3G mobile telecommunication offerings are more advanced. These reports also state that mobile music sales can be expected to increasingly converge with online sales. Consumers are in particular expected²⁶ to synchronise their music libraries on PC with their music players and portable phones, and such points to convergence of both demand and supply.
33. On the relevant wholesale level of digital music licensing, online and mobile applications have so far been covered by different licences which frequently apply different rates for similar applications, for example licences for mobile single track downloads are regularly more expensive than licences for online single track downloads. On the other hand, more and more "traditional" online music providers offer are becoming active in the sale of mobile music and vice versa. This tends to indicate that borderlines between mobile and online music are blurring.
34. In conclusion, given the dynamic character of the sector, it can be left open whether licensing of music for online applications and for mobile applications are part of the

²⁴ Nokia, sold 80 million music phones in 2006, double the number in 2005. Sony Ericsson – which accounts for 8% of worldwide mobile phone sales in 2006 – sold 12 million Walkman phones in 2006. One out of every six Sony Ericsson mobile phones is a Walkman phone. In June 2007, Apple's iPhone has become available in the US exclusively through the operator Cingular (AT&T), and will be rolled out to Europe in 2007 and Asia in 2008.

²⁵ As reported by Enders analysis: Recorded Music and Music publishing - March 2007, page 23 - 25.

²⁶ Enders analysis: The Apple iPhone – beautiful but niche.

same (converged) product market or belong to separate product markets. In any case, as the concentration has not led to the creation or strengthening of a collective dominant position under any product market definition considered it is not necessary to decide whether or not online music distribution and mobile music distribution are distinct markets. The same applies to the question whether product markets could be differentiated according to the most common applications, such as downloads, subscription, streaming and mastertones.

B. RELEVANT GEOGRAPHIC MARKET

1. PHYSICAL RECORDED MUSIC

35. The notifying parties are of the opinion that the relevant geographic market for music recording is national. In support of this they submit that pricing (including discounts) and the sale of recorded music are carried out predominantly on a national scale. Furthermore, there is a strong local artist demand in all Contracting Parties to the EEA Agreement and, in addition, discovering and developing new artists is to some extent a local business. The notifying parties also point out that only a few major customers have an international presence, marketing mainly takes place nationally and the shares of different record companies vary among different Contracting Parties to the EEA Agreement. In addition, many independents are only present in one or a few Contracting Parties to the EEA Agreement.
36. In previous decisions the Commission found that the relevant geographic market has both national and international characteristics. In the 2004 decision the relevant geographic markets were considered to be national. In earlier decisions the exact scope of the geographic market was left open. The results from the market investigation still point in the direction of national markets. In particular, national repertoire (that is other than Anglo-American repertoire²⁷) is typically only attractive to a larger audience in the home Contracting Party to the EEA Agreement or the Contracting Parties to the EEA Agreement which have the same language; the pricing, as also submitted by the notifying parties, differs per Contracting Party to the EEA Agreement and the marketing is also done on a national basis.
37. Based on these considerations, the Commission concludes that the relevant product market for physical recorded music is national.

2. RECORDED MUSIC IN DIGITAL FORMATS

38. Some third parties have argued that the geographic scope of digital distribution of music should be considered larger than national as the internet does not recognise borders and allows music to be available to consumers ‘anytime, anyplace, and anywhere’. Whilst the market investigation has indicated – in line with the 2004 Decision - that the market is currently still national in scope, there are indications that the geographic scope of the market could in the future become larger than national.

²⁷ National repertoire account for up to 63% in France, 47% in Germany, 53% in Italy, 50% in the United Kingdom, and 46% in Spain.

39. On the wholesale level, the market investigation²⁸ has indicated that licences are mostly granted by the record companies to music online providers for the exploitation in a certain (national) territory. Respondents in the market investigation indicate that, although licences may increasingly be negotiated on an international basis, the geographic scope of the copyright licences and the management of these licences predominantly take place at a national level²⁹. Most digital music providers exploit the licences on a national basis and have developed specific websites or applications for the different Contracting Parties to the EEA Agreement in which they are active. Even those services that operate on a pan-European basis have agreed contractual provisions with the record companies that foresee that the specific Contracting Party to the EEA Agreement website/mobile download site can offer online music only to the residents in that Contracting Party to the EEA Agreement (the origin of the customer is verified through credit card or bank data). These geographical limitations in the recorded music licence agreements between record companies and digital music providers militate for national markets. In addition, for music publishing rights each collecting society currently only grants a licence for its respective Contracting Party to the EEA Agreement³⁰. The notifying parties confirm the national scope of the market, [...]*. Also, it should also be taken into consideration that the national scope of the market could widen to encompass a number of Contracting Parties to the EEA Agreement if the territorial restrictions were lifted. As a result of this, the national contracts would become multi territorial.
40. On the retail level, the market investigation has indicated differences in the structure, demand, evolution and dynamics of the digital market between the relevant Contracting Parties to the EEA Agreement that would support the finding of national markets. Firstly, national content is, in analogy with the physical market, also important for digital music³¹. Secondly, demand is concentrated on the mobile segment in some Contracting Parties to the EEA Agreement whilst more concentrated on the online segment in other Contracting Parties. Thirdly, the growth of the digital market also differs among the different Contracting Parties to the EEA Agreement, and is at least partly related to the degree of broadband penetration. Fourthly, whilst some digital retailers such as iTunes, Yahoo and OD2 have a wide presence in the EEA, their market position varies considerably from country to country. Also, a

²⁸ Two thirds of the respondents to the Commission's questionnaire considered that the geographic scope of copyright licenses is national. 21 of the 38 respondents indicate that these licenses are negotiated on a national basis.

²⁹ The trend towards a possibly wider dimension (EEA-wide) as described in Case COMP/M.4404 Universal /BMG relating to publishing rights for online applications is not perceived on the recording market.

³⁰ The reciprocal representation contracts signed at bilateral level by collecting societies in the framework of CISAC currently have the effect of limiting the licence of each collecting society to its domestic territory. CISAC - representing 210 member collecting societies in 109 countries - is a non-governmental, non-profit organisation that aims to promote the reciprocal representation among collecting societies by means of standard contracts on the basis of which they entrust the administration of their members' rights for the respective member territories.

³¹ IFPI (IFPI Report 2007 p.68) lists the importance of the domestic repertoire in 2006 as follows: France (63%), Finland (52%), Germany (47%), Italy (53%), United Kingdom (50%), Spain (46%), Denmark (48%), Sweden (40%), Portugal (39%), Norway (47%), Ireland (21%), Netherlands (25%), Belgium (21%), Austria (9%).

considerable part of the market is supplied by retailers that are present in only one Contracting Party to the EEA Agreement. Such local players can be strong players (for example Fnac and VirginMega in France, T-online / Musicload in Germany, Terra in Spain, Buongiorno in Italy and E-UK in the United Kingdom). Other than telecom operators with a wide presence (Vodafone, Orange, T-Mobile, Hutchison) different mobile phone operators are present in the various Contracting Parties to the EEA Agreement.

41. To conclude, whilst the market is currently national in scope, there are indications that licensing of digital music could potentially develop into a multi-territorial market in the future.

VI. COMPATIBILITY WITH THE COMMON MARKET AND THE EEA AGREEMENT

42. Considering the CFI judgment³², the Commission has made a thorough examination of the situation in order to find whether the alleged collective dominant position of the majors on the online and offline markets for recorded music was supported by any factual evidence. The Commission's assessment did not only consider the three conditions as defined by the Court of First Instance in *Airtours v Commission* but also other indicators that could in the present case have proved the existence of a collective dominant position. It results from the market investigation that the non-existence or strengthening of a collective dominant position in the relevant markets can be demonstrated. The online and physical markets will be analysed separately.

A. COMPATIBILITY WITH THE COMMON MARKET AND THE EEA AGREEMENT – RECORDED MUSIC IN DIGITAL FORMATS

1. MARKET CHARACTERISTICS

a) The digital market is an emerging and growing market

43. Since the Commission's 2004 Decision, revenues and consumers in the digital market have grown exponentially³³. Record companies have digitised and licensed the vast majority of their catalogue and are starting to make significant revenues from digital sales. Consumers increasingly use legal download services such as iTunes and Napster or buy music content from mobile telecom operators. Nonetheless, the digital market remains an emerging market. Whilst the digital market has grown exponentially over the past 3 years, it is still only reaching

³² See T-464/04 (Impala/Commission) paragraphs 251 and ff.

³³ Worldwide, digital sales accounted in 2006 for 11% of total music sales, up from 2% in 2004 and 5% in 2005 (IFPI recording industry in numbers 2007, page 9).

between 2% and 6% of total music sales in the relevant 15 EEA Contracting Parties compared with 17% in the US³⁴.

44. The five largest EEA Contracting Parties accounted in 2006 for more than 80% of the digital sales made in the relevant 15 EEA Contracting Parties. The United Kingdom is the strongest growing and most important digital market (33% of digital sales in the Members States assessed), followed by Germany (25%), France (14%), Italy (8%) and Spain (5%). The other Contracting Parties to the EEA Agreement each account for around 1%-2%³⁵.
45. Digital sales are forecast to continue to grow in the years to come. Forecasts provided during the market investigation vary widely, ranging from some market players that consider the digital music market likely to become larger than the CD market to others that forecast a much more limited importance. Enders³⁶ expects digital sales to reach 34% of total recorded music sales in 2012. EMI, one of the four major record companies, has indicated publicly that it believes that digital music sales (including both online and mobile sales) will represent approximately 25% of its overall recorded music sales by 2010.

b) The digital market is dynamic

46. The digital music market has changed rapidly over the past years through technological and other developments. Based on the current pace of change, the market considers that it is inevitable that the market players, business models, dynamics, and characteristics of the digital sector will evolve further in the future.
47. The digital market has evolved considerably since the adoption of the annulled decision as the majors have adapted their strategy with regard to digital sales. At first, the majors were hesitant to support the digital market and denied even established brands (such as FNAC and Virgin) to have access to their catalogues for digital retail and they limited digital access to their MusicNet and Pressplay subscription services. These latter services failed as consumers opposed the stringent usage restrictions. In mid 2001, US antitrust investigated the major's restrictive licensing behaviour and the impact of their joint ventures. At a second stage, as from 2003, the majors started to license their digital content to third parties. In Europe, the breakthrough was achieved at the beginning of 2004 with the re-emergence of Napster in the United Kingdom, Apple in some larger Contracting Parties to the EEA Agreement (United Kingdom, France and Germany) and a roll out of OD2 digital music intermediary supplying more than 50 European music portals.
48. The market investigation indicates that the majors are currently taking every opportunity to license their content, thereby continuously testing a variety of business models. An illustration of these - often innovative - business models is

³⁴ IFPI recording industry in numbers 2007, page 9, including online and mobile sales.

³⁵ IFPI recording industry in numbers 2007, page 8 and country chapters.

³⁶ Enders analysis: Recorded Music and Music publishing - March 2007.

Universal's deal to license content to YouTube. This agreement allows YouTube to access Universal's music and video content, artist interviews and other original programming in return for license fees that YouTube finances with advertising revenues³⁷. Another illustration is Microsoft's (US) deal with Universal. This deal provides Universal with a per-unit royalty on each Zune player³⁸ Microsoft sells. Universal³⁹ will thus receive a royalty on sold Zune players in exchange for licensing its recordings to Microsoft's new digital music service. Agreements such as these illustrate that the majors' drive to come up with innovative deals to monetise their content⁴⁰.

49. New business models are also being tested on social networking sites, including advertising-supported models on Yahoo! Music, YouTube, Google and MSN. Music video sales, which accounted for three per cent of total digital revenues in the first half of 2006, are expected to grow significantly, also through video licensing deals.

c) The digital market applies uniform prices vs. differentiated prices in the physical market

50. As in the physical market, the content accessed in digital form is highly heterogeneous, with every release being unique. Most digital retailers offer chart hits, domestic content and back catalogues and cover a number of genres. Mobile music (both download tracks and mastertones) is almost exclusively focussed on chart material whilst online music includes both chart material and catalogue. The latter category is specifically important for the growth of digital album downloads. However, this content heterogeneity is reflected to only a limited extent in pricing. Compared to the physical market there is much less (price) differentiation regarding genres, the release date, the popularity of an artist or the chart success of a specific release. The heterogeneity in the content therefore only has limited implications for the pricing of digital music.
51. The record labels have repeatedly called for Apple to change its policy of charging a flat rate of EUR 0.99/song and move to a tiered pricing system, where sought-after songs could sell for more than EUR 0.99. Such variable pricing would allow the majors to increase the price for downloads on new releases and increase their profits

³⁷ As reported by News.com : http://news.com.com/2100-1030_3-6123914.html.

³⁸ Zune is the name of a brand of digital music player products and services sold by Microsoft.

³⁹ Universal's David Geffen, justified the 'per-unit licensing fee' concluded with Microsoft as follows: "Each of these devices is used to store unpaid-for material. This way, on top of the material people do pay for, the record companies are getting paid on the devices storing the copied music."Source: http://daringfireball.net/2006/11/buy_that_for_a_dollar.

⁴⁰ Warner Music chief Edgar Bronfman Jr. previously said, "*We are selling our songs through iPod, but we don't have a share of iPod's revenue. We want to share in those revenue streams. We have to get out of the mindset that our content has promotional value only. We have to keep thinking how we are going to monetize our product for our shareholders.*" as reported by TheStreet.com in 'Warner Music is hitting a high note'; http://www.thestreet.com/_mktwrm/stocks/sandybrown/10245700.html.

for high demand releases, whilst at the same time allowing for lower pricing to push back catalogue and maturing releases. In the market investigation, record companies suggested that songs by top-selling bands should be priced higher while tracks by lesser-known artists should be discounted - essentially the same approach to wholesale pricing in place in the physical market. Apple has resisted so far, saying the flat pricing is crucial in helping the digital music business take off. iTunes / Apple considers that consumers are not likely to be willing to pay more to download music that many previously acquired for free. Whilst Apple does sell albums at different prices and some online music retailers offer song downloads below EUR 0.99, the bulk of single track download sales remains at EUR 0.99, a price seen as a key threshold for music fans.

52. The market investigation confirms that many digital service providers have followed Apple's "one size fits all" pricing model although some retailers that can cross subsidise prices are starting to apply more differentiated pricing policies. In any case, as explained further, digital sales have not (yet) come to adopt the price variation of physical sales, whereby retailers sell CDs at different pricing points that vary by release and over time.

d) DRM and usage restrictions are differentiators

53. Digital Music Retailers all sell mostly the same products, but in slightly different ways through the applied DRM. Examples of such implementations are: Self-disabling (timed) music files, transfer limitations to portable players, CD-burning limitations, user or computer specific operation, and different quality levels.

e) End consumers do not care about labels: online/mobile music providers need to have licences with all majors in order to be able to offer a repertoire which is as complete as possible

54. The majors control the essential inputs that digital music retailers need. Moreover, the investigation shows⁴¹ that these digital retailers need to have access to the content of all 4 majors to ensure the viability of their business (in particular for chart material which originates for around 90% from the majors).

f) The emergence of the digital sector creates growth opportunities – including for the independents

55. The majors have adopted as from 2004 - 2005 a strategy of supporting all credible platforms to promote the development of authorized digital services. For independents as well, the digital market has created a number of opportunities to get

⁴¹ The vast majority of the respondents (24 replies out of 32 replies) to the Commission's questionnaire have indicated that their digital music retail business is not viable without access to all majors. Specifically for the providers that offer chart hits, the ability to provide a full range of tracks is essential. For digital music retailers that concentrate on the domestic repertoire or independent music, access to all four majors is less determining success.

their content to market just as effectively as the majors and without the need to obtain access to distribution networks and compilation joint-ventures. Other than music service providers specialising in independent content (such as e-Music⁴²), independents have the same access to iTunes as the major record companies and obtain wholesale prices for their content that are close to those of the majors. The fact that Apple does not have the incentive to block record labels from accessing iTunes increases chances for the success of the independents, and this is reflected by the number of independents' records available on iTunes⁴³.

g) Uncertain development of the market

56. The digital market is characterised by a rapid entry of new players and a quick succession of business models that are being tested in the market. Both record companies and downstream music service providers appear to focus on the creation of a sustainable market for rights protected music, without guarantees that such business will become profitable in the short to medium term.
57. The market investigation has confirmed that the delivery of music in digital formats has transformed the music industry and that this transformation is ongoing, resulting in rapidly evolving technology. As consumer habits are changing in unpredictable ways, new types of services are being launched on a trial and error basis, both for online and mobile⁴⁴, and this is accompanied by new operators entering and exiting the market. The latest developments in the market point to fundamentally new business models – both online and mobile – including free download services financed partly by advertisement (Spiral frog, Deezer.com ...)
58. The uncertainty as to how the digital sector will develop leads to market participants experimenting with a wide array of services based on different business models and pricing policies.

⁴² eMusic is a subscription based service that was launched in Europe in September 2006, and which allows permanent downloads in an unprotected iPod compatible format (MP3) for EUR 29.99 per month. Its catalogue is composed of over two million songs from independent record companies. eMusic announced that it had achieved some 20 000 subscriptions during its first two months in Europe and has reported a global user base of 220 000.

⁴³ In a September 2005 press release, Apple indicated that the UK iTunes Music Store features more than 1.7 million songs from the major music companies and over 1 000 independent record labels. Source: <http://www.apple.com/pr/library/2005/sep/07itms.html>: iTunes Music Store Number One in the UK with 80 Percent Market Share.

⁴⁴ On 14 June 2007, the UK based mobile music company Omnifone announced the creation of MusicStation, an 'all-you-can-eat' full-track mobile music subscription service, allowing mobile phone users to gain unlimited access to full music tracks on industry-standard mobiles for a small weekly fee (EUR 2.99). Consumers can legally access and download an unlimited amount of music, from an international and localised music catalogue, supported by the whole music industry (all majors and the largest independent labels). Following the first launch in Sweden (Telenor), the service will be rolled out with 30 mobile operators all over Europe.

h) The business models are diverse and evolving

59. There are a number of different business models that have proven to be viable in the digital market. These models vary in importance over time and have significantly different characteristics.
60. With regard to online (internet based) downloads, "À-la-carte" track downloads allow consumers to buy tracks on an individual basis. Subscription services are based on a monthly or fixed fee in return for which consumers can access a catalogue of songs that include the latest releases. Subscription services so far have been less prominent⁴⁵ than downloading individual tracks services, and – other than in the US where subscription is gaining in importance – are eschewed by European consumers.
61. Play-lists are the digital equivalent of compilations as they offer pre-arranged song collections, composed by the digital retailer or consumers who recommend their favourite songs to other consumers. Streaming is the digital equivalent of broadcasting, whereby a music track is played without the user retaining a permanent copy of the track. Yahoo's Launchcast, which is a free streaming service, allows users to create personalized channels on the basis of preferred genres and artists. Musiwave's Smart Radio is such a streaming service for mobile phones. Internet radio exists in the form of Internet broadcast of a traditional radio program (simulcasting) or Internet-only broadcast (webcasting). In the area of mobile music, most sales are currently made in the form of ringtunes and full-track downloads. Among ring-tones it is possible to distinguish between mastertones, which are short excerpts of an original music recording, and polyphonic or monophonic ring-tones. Because the latter are not based on original music recordings, record companies generally generate revenues only from the sale of master tones.
62. The market investigation has indicated that there are manifest differences between the characteristics of the digital music applications offered, with download and subscription services being the most important services by value and volume. Tracks or albums can be sold individually and can be copied to a limited extent between a user's media devices. Subscription services by contrast offer a large collection of music to their customers for a regular fee, and the customer is not given rights to transfer the songs between different devices. The subscription service is also called an infinite bundle because customers are given access to the entire library of songs for the cost of (roughly) a CD per month. Depending on the price level, users may only copy songs a certain number of times, and possibly not be allowed to transfer them to a digital media player. Also, when a user's subscription expires, so do the songs. Hence, a subscription service is more akin to a rental than a purchase and would for this reason appear likely to compete mainly for customers with different demands and needs than the more traditional download from customers purchasing individual tracks.

⁴⁵ According to IFPI's Digital music report 2007, music subscription services such as Rhapsody, Napster are growing by 25 per cent in the last year, with the majority of subscribers located in the US. Music subscription services accounted for seven per cent of digital revenues in the first half of 2006 (worldwide).

63. The market investigation has also indicated that the importance of these individual applications differs in the various Contracting Parties to the EEA Agreement (for instance, online single track downloads account for 45% of the Dutch digital market compared to only 9% in Spain). The importance of these individual applications also changes rapidly over time, as they are partly driven by technological progress (for example the development of hardware capacity and transmission bandwidth) and evolving consumer preferences. As a result, the digital offer is becoming rapidly more differentiated and sophisticated with a new album being released in various digital formats including various video applications. By the same token, mobile customers are moving from monophonic and polyphonic ringtones to mastertones and video applications.

64. In sum, the market investigation indicates that there are different and evolving business models with distinct characteristics and DRM usage restrictions and that the market is too nascent to forecast which business models will survive in the long term.

i) The Digital Music Retailers

65. Digital Music Retailers provide an interface between the record company and the final customer.

Apple iTunes

66. Apple iTunes claims to be the leading music service provider worldwide, holding between 70% to 80% of the US online market and around 55% in the EU. Apple iTunes holds the first place in all relevant Contracting Parties to the EEA Agreement with a market share of at least 50%. iTunes offers a fully integrated system including an online shop (iTunes Store), play-back software (iTunes jukebox and QuickTime), DRM (Fairplay), and a portable music player (iPod), based on its own technologies⁴⁶. Music is encoded in Apple's proprietary audio compressing format AAC⁴⁷.

67. iTunes entered the US market in 2003, when Apple proposed a complete digital download solution with effective DRM protection at a USD 0.99 for individual tracks / USD 9.99 for albums retail price point in return for all 5 majors signing up to a wholesale agreement. iTunes started off very successfully in the US and when it was launched in Europe, it had already sold 70 million tracks in the US during its first year of activity, compared to the one million downloads that all prior services combined managed in the first two years of their existence⁴⁸. The reasons reported

⁴⁶ Due to Fairplay, Apple's digital rights management software, tracks bought on iTunes can only be stored in the music library managed by iTunes and the iPod music player. In order to store and play these tracks using other software or players, the user would first need to burn the tracks to CD and then convert them to the MP3 format. Likewise, a track bought from another music service provider cannot be directly stored and played on an iPod. Users first have to burn and copy their purchases before they can transfer them to their players.

⁴⁷ This is also used as the standard audio file for Sony's Playstation 3.

⁴⁸ <http://www.pro-music.org/viewpoints/billboard.htm>

for iTunes success are product specific such as DRM, price, ease of use; publicity; brand building such as product tie-ins with America Online and Pepsi Cola; and the broad market approach such as the success started off when Apple released iTunes also for Windows.

68. This strong sales record convinced the record companies that Apple could influence the music industry and allowed it to launch in Europe⁴⁹. The European stores were identical to the U.S. original, providing the user ease of use, a broad catalogue, easy to use and innovative software. In its first week following the launch of iTunes in the United Kingdom, France and Germany on 15 June 2004, it had sold 800 000 songs and outsold its nearest competitor, OD2, by a margin of sixteen to one⁵⁰. The strong early sales in the United Kingdom, France and Germany allowed iTunes to go for a pan-European launch.
69. The record labels are reported⁵¹ to have negotiated higher retail prices in the United Kingdom and Europe compared to those in the US. It is also reported⁵² that the majors were in a strong position to obtain this price increase because licence agreements had to be concluded for a number of countries and Apple wanted to keep the momentum of its US success for launching iTunes also in Europe. The higher prices relative to the US may be a result of pressure from the labels, an independent decision by Apple or economic conditions that make selling music both on and offline more expensive in Europe generally (such as the value-added tax), or some combination of such factors⁵³. An illustration of this is the fact that also the independents went through lengthy and intense negotiations with Apple before making their content available on iTunes⁵⁴. The independents and iTunes eventually came to an agreement, whereby the wholesale prices charged by the independents to iTunes are close to those of the majors - and generally higher than what independents charge to digital music retailers that compete with iTunes.

⁴⁹ As expressed by Roger Ames, chairman/CEO of Warner Music Group at that time, "Other people will build online music stores and [Apple's launch] will help us, so the quicker, the better," he says. "We'll license material to just about anyone who wants to license it, because we're in the business of selling music." <http://www.pro-music.org/viewpoints/billboard.htm>.

⁵⁰ <http://www.apple.com/pr/library/2004/jun/23itunes.html>

⁵¹ <http://www.macminute.com/2004/05/07/itms>

⁵² iTunes Europe: a preliminary analysis, Berkman centre for internet & society, Harvard Law School.

⁵³ Idem.

⁵⁴ "The UK launch of iTunes Music Store promises to be somewhat muted as the company has failed to license repertoire from the [...] European independent record sector to its new service," AIM states. AIM reports that negotiations between a number of its members and Apple have broken down, meaning "many significant labels will not be making their repertoire available to the new service. AIM chairman and CEO Alison Wenham said: "We welcome the arrival of iTunes in the UK, but are disappointed that our members have been unable to agree terms for licensing their repertoire to the service. iTunes has played a leading role in developing the download market in the US and we hope its European counterpart will soon be able to boast a more complete roster of European music". On <http://www.macworld.co.uk/news/index.cfm?NewsID=8910&Page=1&pagePos=3>.

70. iTunes has introduced a standard price of EUR 0.99 per track, called the “one size fits all” pricing model, on the basis of the idea that price variations are perceived by the consumer as unfair and undesirable. Apple considers the EUR 0.99 per track price point as a “sweet spot” in digital media sales and believes that the decline in demand for CDs can at least partly be explained by the fact that customers consider CDs to be overpriced. The only exception to the EUR 0.99 per track pricing rule relates to high quality DRM free track downloads, as iTunes started to offer EMI content in this format at EUR 1.29 per track. To encourage album sales, iTunes allows consumers to purchase entire artist albums for EUR 9.99 without regard to track numbers. Some back catalogue albums are sold below the EUR 9.99 price whilst albums of best selling renowned artists can be sold at a higher price. The iTunes' pricing strategy has been replicated by most of the other music service providers. The majors have attempted to renegotiate with Apple to set variable prices, which Apple has successfully resisted up to now. Whilst all majors have tried to use the re-negotiation of their supply agreement with iTunes as leverage to bring Apple to accept differentiated pricing, none of these attempts have succeeded. Apart from Universal, all majors have entered into a new supply agreement at conditions that are identical to the initial June 2004 contracts. Universal is reported⁵⁵ to have notified Apple that it will not renew its annual contract, instead marketing music to Apple at will, whereby Universal could remove its songs from the iTunes service on short notice if the two sides do not agree on pricing or other terms in the future.
71. Apple is not generating significant profits from its iTunes online music retail business. Record companies earn around 70% per track on iTunes and Apple keeps the remaining 30% to cover the costs of for example running the service, infrastructure, encoding, dealing with credit card companies. Apple's profit largely comes from the sale of iPods, PCs and related products. By marketing iPods and the iTunes service as integrated products, Apple is able to price these complementary goods interdependently. iTunes, is thus considered by market analysts⁵⁶ to act as a loss-leader for Apple's hardware as low track prices attract consumers to buy Apple's hardware. Whilst Apple's margins on hardware are significantly higher than those of iTunes, the latter is – following Apple's submissions in the market investigation – profitable in itself.

Other digital music retailers

72. The parties state that Apple's success has encouraged a wide array of new music service platforms to distribute online content, indicating that the number of digital music services in Western Europe is now ten times the number of services available globally in 2003. Other powerful operators have entered the market, including Microsoft, AOL, Vodafone, Deutsche Telekom, Hutchinson, Nokia, and France Télécom. According to IFPI⁵⁷, Europe now has 320 digital music services, with

⁵⁵ As reported by New York Times of 2 July 2007: <http://www.nytimes.com/2007/07/02/business/media/02universal.html?ex=1341028800&en=64687402344443f8&ei=5090>.

⁵⁶ See inter alia Enders analysis: Recorded Music and Music publishing - March 2007, page 2.

⁵⁷ IFPI 07: Digital music report.

more than 20 digital music services being active in more than one Contracting Party to the EEA Agreement.

73. A number of these players rely on “White label” services, such as Nokia's Loudeye/OD2 (serving amongst others MyCokeMusic, MTV and MSN), MusicLoad, Groove Mobile and 24-7 Musicshop (serving Tesco Downloads among others) that provide digital music retailers with access to an existing digital music catalogue and other services. Mobile phone operators are also diversifying into online music and increasingly become important players that contract directly with the record companies. Smaller telecom operators such KPN (through OD2) and Belgacom (through iTunes) continue to rely on white label providers.
74. Other than iTunes and OD2, the most important players in France are Virgin MEGA, FNAC and Yahoo, whilst in Germany the most important providers include MusicLoad/T- online, AOL, Napster, Arvato and Yahoo. For Italy, this list includes Libero, Yahoo and Buongiorno, whilst in Spain it is Yahoo and Terra. In the United Kingdom the most important providers include E-UK, Napster, Yahoo and Music net.
75. In the Contracting Parties to the EEA Agreement mentioned in the above paragraph, the leading mobile music service providers are Vodafone, SFR, Orange (France), Vodafone, Jamba, Arvato, T-Mobile and O2 (Germany), Hutchison, Nokia, Musiwave and Telecom Italia (Italy), Hutchison, O2, Vodafone, Orange and SonyEricsson (United Kingdom).
76. Digital music retailers are not considered to enjoy large profit margins at the current EUR 0.99 per track download price. These retailers can only remain long term viable players when they receive the input of the record companies at terms below those charged to iTunes or when they sell digital music at a retail price above that of iTunes. The market investigation has indicated that some digital music retailers have longer term objectives and are not focussing on short term profitability. Some sell music in order to establish a presence in a developing market (such as physical retailers), for establishing and promoting a brand (such as Coca Cola music) or to attract network traffic (telecom companies). White label providers earn revenues for the service they provide.
77. Whilst the majors also retail digital music direct to the consumer through artist websites (for example Madonna.com) and websites such as MSN, YouTube, Google and Yahoo, all majors have indicated in the market investigation that non-vertically integrated digital music providers will remain their most important channel to the market. The market investigation indicates several reasons for the majors' limited success in the retail market. Firstly, the success of a digital music provider depends to a large degree on the ability to offer content from as many record companies as possible, which requires broad licensing deals. The four major record labels all own a large fraction of the downloadable material provided by any of the retailers in the market. Faced with the failure of their initial MusicNet and Pressplay initiatives, the majors were hesitant to share their content with each other and preferred the entry of independent third parties. Secondly, the majors are confronted with concentration of demand through Apple's iTunes. Thirdly, as the margins in the upstream market are generally greater than in the downstream retail market, the majors have an incentive

to capture as much margin as possible at the wholesale level and not to expand in the more competitive downstream market.

j) The retail market for digital music attracts frequent new entry

78. The market investigation has indicated that entrance into the online music services retail market carries relatively low costs. Data management, including the storage system, rights management, transaction system, and network connection, are all pre-packaged items which can be purchased from hardware and software vendors. The main barrier to entry is the collaboration with the majors and the creation of a product catalogue. Record companies are only willing to work with retailers whom they trust for responsibly distributing their product in order to avoid their material being copied unlawfully. This entry barrier is reduced by the presence of white label providers, which are platforms that enable retailers to launch branded online and mobile music services with a minimum amount of effort and resources. Apart from providing access to an existing large and diverse digital music catalogue, white label providers perform the clearing of rights (obtaining licences from the record labels to sell the music catalogue digitally), the settling of technological issues, including digital rights management systems (DRMs), the creation of online music storefronts, secure billing systems and delivery networks. The main white label providers include 7 Digital, Nokia/OD2 and MusicLoad. These white label providers service many of the music services operated by Internet Service Providers and specialist bricks-and-mortar retailers. Also, there are aggregators that collect rights from a range of rights holders and supply them to digital music stores, as well as specialized digital distributors that retail and market music via online and mobile channels.
79. Companies that were traditionally not involved in the distribution of music are entering the digital market. Electronics hardware companies (such as Apple, Nokia and Microsoft) are moving upstream in order to sell hardware with new functionality and interoperability. Telecom companies and internet service providers ('ISPs') use interest in digital content to attract customers to their services. Content portals build Internet audience to attract traffic and advertising revenues. Consumer brands (such as Coca Cola) increase customer loyalty through digital music promotions. The record companies thus face a growing number of new players with business incentives to enter the market that may be different from the incentives of a classic retailer and this makes the digital market highly dynamic. Partnerships between the individual players or upstream/downstream players further increase that level of dynamism.
80. As reported by the digital market research company Screendigest⁵⁸, the profitability of digital music service providers is very low, with the major record companies holding margins of between 70% and 80% on retail prices (between 50% and 60% for independent record companies), in addition to the mechanical copyright on downloads of around 8%, credit card transaction fees, transaction costs and

⁵⁸ Interactive content and convergence, a study for the European Commission DG INFSO, 3 July 2006, http://ec.europa.eu/information_society/eeurope/i2010/docs/conf_wshop/workshop_slides.ppt#911.

payments to service providers⁵⁹. According to Screendigest, it may be expected that, as the digital market continues to grow, the major retailers will increasingly enter the market, thereby trying to leverage their physical sales clout to negotiate for digital content, while leaving the technical running of the store to a third party⁶⁰. Important retailers that have entered the digital market through white label providers include Cora (France through OD2/Loudeye), Media Markt and Saturn (Germany through 24-7 Music Shop), MediaWorld (Italy through OD2/Loudeye), Ahlens and Bengans (Sweden through InProdicon), Bilka / Fotex (Denmark through Phonofile), HMV and Virgin (United Kingdom through MusicNet), Tesco (United Kingdom through 24-7 Music Shop) and Woolworths (through DX3).

81. The most awaited entry in the market is that of Amazon.com⁶¹, which announced mid 2007 that it will launch a music download service competing with iTunes.

2. ABSENCE OF NON-COORDINATED EFFECTS

a) The recorded music industry is concentrated

82. The recorded music industry was already concentrated prior to the notification of the Sony/BMG merger in 2004, with then five major record companies, and all five majors had started licensing their music content to digital music providers. The merger of Sony and BMG further reduced the number of majors to four. Apart from the majors, there is a number of independent record companies with limited individual market shares and normally without a global presence but which collectively account for an important part of sales. Traditionally the majors have acquired successful independents on a regular basis, in particular to acquire their artists and repertoire line-up (for example the recent acquisition of Sanctuary by Universal). Overall, supply of digital content is covered by the majors to around 85%) in the EU with all independents combined accounting for the remaining 15%.
83. The majors also have a number of common characteristics that on a general level distinguish them as a group from the independents, such as a presence in all the Contracting Parties to the EEA Agreement, a vertically integrated organisation that

⁵⁹ Given that VAT on consumer use of electronic services in the EU is charged in the country of origin if the supplier is established in the EU, pan-European services such as iTunes have increased their profitability by establishing themselves in low VAT rate countries.

⁶⁰ Screendigest: Online Music in Europe - Market assessment and forecast, <http://www.screendigest.com/reports/06onlinemusiceuro>.

⁶¹ Amazon is considered as a possible contender to iTunes given that it holds the strongest brand in e-commerce, a powerful customer base, strong expertise in recommendation software, and opportunities to market through cross-selling. Source: MIT Sloan School of Management, Amazon in the Internet Music Business, <http://ocw.mit.edu/NR/rdonlyres/Sloan-School-of-Management/15-912Spring-2005/9E5BAE5B-9DE9-4470-89A0-389000720B4B/0/amazon.pdf>. As reported by the Financial Times (http://www.ifpi.org/content/section_news/20070516b.html), '[Amazon's] decision to enter the digital music market comes at a time when the record companies are desperate for a rival to iTunes. In spite of challenges from Microsoft, Yahoo and others, the Apple service still commands roughly 80 per cent of the online music market, which has allowed it to dictate terms to the music companies on pricing and other issues.'

provides a presence in all parts of the music recording value chain, significant financial strength and a large and diversified portfolio of artists.

b) The merger has not led to a position of single dominance in the national markets for digital distribution of music

84. According to IFPI⁶², Sony BMG's market shares of digital licences in 2006 vary considerably among the different Contracting Parties to the EEA Agreement. Overall, these market shares remain below a level that could generally be considered as constituting a single dominant position. In all Contracting Parties to the EEA Agreement, one or more competitors have similar or even higher market shares than Sony BMG.
85. Online and mobile music providers need licences for both recording and publishing rights. Sony is active in both areas through Sony BMG and Sony/ATV (a joint venture jointly controlled by Sony and the artist Michael Jackson). The Commission therefore analysed Sony's control shares, through its two joint ventures, in the top chart hits which are very important for online and mobile music. The control shares take into account both recording rights and co-publishing rights as a licence from all of these right holders is necessary to sell a given song. The Commission's analysis showed that Sony BMG and Sony/ATV do not (co-)control, in any of the relevant EEA Contracting Parties, such a large number of chart hits that could indicate a position of single dominance.
86. On the basis of the market shares that the merged entity holds in the affected Contracting Parties to the EEA Agreement (see further in the country analysis paragraphs 156 to 403), it can be concluded that the merger has not given rise to a position of single dominance in any of the national markets.

c) The merger has not led to competitive issues with regard to market foreclosure of digital music retailers and portable music player manufacturers

87. It has been investigated whether, as a result of the merger, Sony BMG could have used the control of the joint venture to foreclose competitors in the downstream market for distribution of digital music, in particular by denying digital retailers access to the Sony BMG library. Given that digital music retailers ideally need access to the catalogues of all the majors in order to be successful, Sony BMG would have had the ability to foreclose retailers. As to the incentive to foreclose, Sony is active in the retail market through SonyConnect.
88. Sony also markets digital (portable) music players with the proprietary compression/decompression format Atrac and the proprietary Open MusicGate DRM. Sony BMG would therefore have the ability to offer music only in formats which cannot be read by devices using competing formats and DRMs in order to increase the sale of its portable music players.

⁶² IFPI, Recording Industry in Numbers 2007.

89. According to the market investigation, these concerns have not materialised⁶³. Firstly, the market share of both Sony Connect as a digital music retailer and Sony music players is limited (below 10% on the national digital music retail market and below 5% on the EEA music player market). On both markets, Apple (through iTunes and the iPod music players⁶⁴) is considerably stronger. Secondly, by foreclosing competitors in the digital retail and music player markets, Sony BMG would forego considerable digital music licence revenues. As a result, it is unlikely that Sony BMG would attempt to engage in vertical foreclosure strategies.

d) The merger has not led to competitive issues with regard to market foreclosure of independent record companies

90. A third party put forward in the market investigation that the majors have applied a highly selective licensing policy and that they have used their control over licensing content to extract terms that have stifled the competitive development of the market to date. That third party also claims that the independent record companies cannot benefit from mobile, online and digital deals in the same way as majors, and specifically refers to the independents' lack of capacity to handle global deals (such as Google and YouTube) and their dependence on collective licensing solutions.

91. To assess this claim, the starting point is that the characteristics of the digital market are significantly different from those in the physical market. Given that in the digital market, there are near-zero costs for manufacturing, distribution, and returns, independents are less likely to have to decrease prices or increase discounts compared to the majors to have a channel to the market⁶⁵. Although promotion activities, signing up of new artists, vertical integration and international presence imply that the majors will be more able to exploit a given record, it can be considered that the internet represents a chance⁶⁶ for independents to reach demand without having to rely on traditional retailers. This is for example illustrated by the successful online music provider "e-music" which relies exclusively on the repertoire of independent labels.

⁶³ Only very few respondents to the Commission's questionnaire raised such foreclosure as a theoretic possibility and none of the respondents has considered Sony BMG or Sony to hold a significant position in those markets.

⁶⁴ The iTunes market share is above 45% in all Member States considered. According to market analyst Screen Digest, in 2007 iPod accounted for 38% of specialist portable players in Europe with higher figures when the installed base is considered.

⁶⁵ According to IFPI's 2007 digital sales report, the number of tracks available in the largest digital stores doubled from two million in 2005 to four million in 2006. This compares to a maximum of 150,000 CD titles physically available in the largest specialist music stores and far fewer in non-traditional stores such as supermarkets.

⁶⁶ As illustrated in 'Sony-BMG annulment good for business' on Billboard.com of 2 September 2006, Martin Mills (chairman of Impala), stated that 'our very success in the online worlds – where independents have seized opportunities – demonstrates how much more successful smaller labels and new artists can be when benefiting from a more level playing field.'

92. The existence of such a 'level playing field' has been confirmed by the market investigation, which points to easier access, and to conditions similar to those enjoyed by the majors. The existence of rights aggregators and digital distributors mean that independents have unrestricted access to music service providers that – for the vast majority – are independent from the majors.

3. CREATION OR STRENGTHENING OF A COLLECTIVE DOMINANT POSITION IN THE MARKET FOR DIGITAL DISTRIBUTION OF MUSIC

a) Introduction

93. Given the absence of non-coordinated effects, the Commission assessed whether the concentration has led to a creation or strengthening of a collective dominant position on the wholesale market for licensing of music to digital music providers. The question investigated is whether the Sony BMG merger could, in an already concentrated market, be seen to have enabled or significantly facilitated the majors to jointly control the wholesale licensing of digital music. Tacit collusion would, on the one hand, generally be considered incompatible with the dynamic, unstable and uncertain nature that characterises the emerging digital market. On the other hand, the market investigation assessed to what extent the majors have aligned price levels in their contracts with digital music providers, and where a certain degree of wholesale price alignment could be observed, whether this was the likely result of coordination or rather of competitive factors such as the bargaining power of large digital retailers or of the nascent state of the digital markets.
94. As a general remark, finding and isolating the causal influence of the merger on the digital market is particularly difficult since the digital music sector has changed rapidly since the merger was implemented in response to technological and other developments, and continues to evolve quickly.

b) Conditions for findings of collective dominance

95. In its *Airtours* judgment⁶⁷, the Court of First Instance ruled that a collective dominant position requires that the companies reach a common understanding about the terms of coordination and that the following three conditions are met in order for the co-ordination to be sustainable. Firstly, the coordinating firms must be able to monitor whether the terms of coordination are adhered to. Secondly, discipline requires that there is some form of deterrent mechanism in case of deviations. Thirdly, the reaction of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination. According to the Court of Justice⁶⁸ and the Court of First Instance⁶⁹, the assessment of the existence of these

⁶⁷ Case [T-342/99](#) (*Airtours plc v. Commission*), paragraph 59.

⁶⁸ Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* (hereafter "*Kali & Salz*"), ECR 1998, I-1375, paragraph 228.

elements shall be supported by a sufficiently cogent and consistent body of evidence.

96. The reduction from five to four majors as a result of the Sony BMG merger could potentially be considered as an element facilitating coordination, since the fewer the number of remaining firms in a market⁷⁰, the easier, in principle, it is to find and/or maintain a consensus, whilst at the same time reducing the countervailing buyer power of the majors' customers. It will be analysed in detail to what degree there is transparency in the market for digital licences, considering the current structure of wholesale pricing, limited differentiation in retail pricing, and usage conditions, of discounts and the importance of other forms of price sophistication. Also, it will be investigated to what degree the possibility to systematically observe retail prices via the Internet allows effective monitoring of the major's respective wholesale prices, which are negotiated with the music service providers separately and confidentially. In that sense, price coordination would only be possible when the level of transparency is sufficient to allow spotting deviations.
97. As set out by the CFI in the Impala judgment, the mere threat to apply a credible retaliation mechanism could constitute a sufficient deterrent mechanism for the colluding firms to remain within the boundaries of the agreed collusive scheme. In the market investigation, it was assessed what retaliation mechanisms could be considered as an example of a credible threat, taking into account that in the wholesale market for digital licensing of music itself, retaliation appears to be difficult to implement since more aggressive wholesale pricing appears ineffective for as long as uniform retail prices⁷¹ for all content (for example iTunes) prevail.
98. As for potential competition, independents exert only limited competitive pressure on the majors, in particular as they produce a relatively small number of chart hits which are very important for digital music services. Independent record labels thus offer as such little challenge against the stability of any potential coordination. With regards to the countervailing power of clients, digital music service providers, it is analysed to what degree iTunes may be attributed a certain degree of such bargaining power and what impact it may have had on the price structure regarding online music downloads.

c) Analysis of the market structure common to all affected markets

Price analysis of the different digital market segments

99. The Commission conducted an in-depth investigation of the contracts that all five majors (four after the implementation of the Sony BMG merger) have concluded with the 10 or more most important digital music service providers (generally five

⁶⁹ Case [T-342/99](#) (Airtours plc v. Commission), paragraph 63.

⁷⁰ A reduction from five to four firms would increase transparency by reducing the number of competitive relationships from 10 to 6.

⁷¹ German chart rules – recently abolished after investigation by the German competition authority – imposed a EUR 0.95 retail price limit in order to enter the on-line charts.

mobile and five online music providers) in each of the five largest Contracting Parties to the EEA Agreement covering the time period 2004 – 2007. This analysis has provided information on the level of transparency and the evolution of price structures, possible alignment between the majors in terms of price and other contractual conditions, and to what extent the merger has affected these contractual conditions.

100. The investigation has been completed by an analysis of the majors' agreements in time period 2004 – 2007 with the most important digital music service providers (generally five mobile and five online music providers) in each of the ten smaller Contracting Parties to the EEA Agreement where total digital sales were below EUR 10 million in 2006.
101. In the following analysis, the common findings which apply to all Contracting Parties to the EEA Agreement will be presented. In a second step, the characteristics of the relevant national markets will be analysed.
102. Overall, it appears from the pricing data that the majors – but also the independents – rather than coordinating, seek to individually maximise their returns on recorded music provided in digital form. Record companies apply different prices, different price structures and use different business models. This differentiation appears to be increasing.
103. The market investigation has shown that the agreements show varying prices and conditions with the main differentiators being (i) the platform (for instance online versus mobile), (ii) the types of service (for instance pay-per track, subscription), (iii) the product types (for instance singles or albums), (iv) differentiation between frontline and catalogue tracks, premium albums versus standard and mid-price albums, (v) the product packages (3-packs, 6-packs, digital EPs, mini-albums), (v) usage rights and DRM restrictions and (vi) for subscription services, the duration and early termination rights.
104. With regard to subscription services, streaming, tethered downloads and advertising based music services a wide variety of business models has developed. The market investigation has shown that the different majors reacted to each of these applications with different pricing conditions and discount structures, different user conditions and diverging DRM restrictions. For these applications, wholesale pricing and other contractual conditions are neither aligned nor transparent as input prices, revenue sharing arrangements and marketing cost sharing are significantly different from one contract to another and there is no alignment between the majors. The terms and conditions of these contracts are not transparent as they are negotiated bilaterally between record company and music service provider and protected by confidentiality clauses.
105. Also, with regard to mobile digital music, there is no observable price alignment with respect to mastertones. Whilst prices have stabilised over time in response to this market segment becoming more important in terms of volume and revenues⁷², there is no overall convergence of the major's pricing levels. First of all,

⁷² The market is evolving from monophonic or polyphonic ringtones to mastertones, which are excerpts of songs.

the majors apply different rates to the different mobile music providers within the same country. In addition, on the level of the individual mobile music provider, whilst it occurs that prices of one or two, exceptionally three majors are similar, than at least one (and not always the same) major shows considerable price differences also on that level. Moreover, wholesale prices are not transparent as, since 2005, prices have been increasingly differentiated on the basis of the volumes sold. Finally, mastertones are in large part supplied to the telecom operators through white label providers or aggregators (companies such as Arvato and Musiwave provide telecom companies access to an existing digital music catalogue). The data analysis shows that the majors charge significantly different wholesale prices to these white label providers depending on the Telecom operator and the Contracting Party to the EEA Agreement in which the latter operates, and charges also vary among the majors for the same telecom operator.

106. As to downloads⁷³, there is more price variability for mobile downloads than for online downloads. An in-depth price analysis has been made for both product segments in the country chapters. As the risk of price alignment is very remote for mobile downloads, and that part of the market is also significantly less important, the analysis on price alignment for mobile downloads is made in the country chapters.

107. For *online downloads* there is price differentiation according to the downloadable format, distinguishing between tracks, singles, maxi singles, EPs and albums. All majors apply a differentiated price structure in terms of content for both tracks and albums, using terms such as standard, mid-price and premium or differentiating between front line and catalogue content. These categories do not necessarily coincide with similar categories in the physical market. Some majors differentiate download tracks further, depending on length, genre, whether of local or international origin, the timing of the release (a single download is more expensive before than after physical release). Notwithstanding the existence of multiple price points for a given format, it appears from the market investigation that the majority of tracks and albums fall into the standard category. Most digital retailers and white label operators have indicated in the market investigation that – even when a wide variety of content price categories exist - the standard price applies for most of the major's content.

108. The focus of the investigation is on *standard online single tracks* as for premium and mid price single tracks and albums, there is a higher degree of price differentiation. Generally, there is a 10% - 20% higher price differentiation for premium and mid price tracks, as compared to standard tracks. The analysis on price alignment for these other segments is made in the country chapters.

The observed levels of price alignment for standard online single tracks

109. The market investigation has revealed significant differences regarding the wholesale price and other conditions applied by the majors for standard online single tracks to the various music providers active in a given Contracting Party to the EEA

⁷³ The focus of the investigation is on standard tracks as for premium / mid price tracks and albums there is a high degree of price differentiation.

Agreement. This implies that each of the majors regularly applies different prices to music providers, even for those with the same or a similar business model. This results in a different combination of the four majors' wholesale prices for virtually every music service provider. Also on the level of the individual music service provider, there is a relatively wide divergence on wholesale prices applied to most of them. Wholesale price differences applied by the majors to a given music service provider can vary significantly (up to 30%) and these differences also fluctuate over time.

110. The majors also increased or lowered their prices to a number of customers over time but the Commission did not observe parallelism in these price movements. The market investigation has pointed to cases where one major decreased its prices to a specific customer whilst another major increased its prices for that customer, leading to a significant difference between the wholesale prices of the majors in question.
111. Price coordination is further complicated by the fact that a given customer in a given Contracting Party to the EEA Agreement does not have the same importance for all majors. This is illustrated by the majors' lists of their top customers in terms of revenue in the different Contracting Parties to the EEA Agreement. These lists partly contain different music providers and frequently the relative importance (in other words the ranking as top customer) of a music provider varies from one major to another. The same also applies in a similar way to the various applications as one major can generate significant digital revenues in a given Contracting Party to the EEA Agreement from mobile mastertones whereas another major receives the bulk of its digital revenues in that Contracting Party from online downloads.
112. There is no indication that there is price alignment for any of the digital music retailers, or that prices have been influenced by the merger. A more detailed analysis of the price alignment is made at the country specific level.
113. For some digital music retailers some level of price similarity has been observed, in the sense that the currently applied wholesale prices show divergence of between 5% - 10%. These instances are described in the country analysis. However, also for these music service providers, no price alignment is found. Firstly, the ranges of price alignment vary considerably between the different providers. Secondly, there is no consistency in the price level applied by the different majors. Thirdly, these positions vary over time, whereby the most expensive major for a given music service provider becomes the least expensive for that provider over a period of 24 months. Such findings are not compatible with a theory of tacit collusion.
114. [...] The market investigation has indicated that these prices have been in place since 2004 and result from the price negotiations that were conducted with Apple when negotiating the US contract in 2003. The market investigation provided some indications that already in the contract negotiations in 2003 and 2004 Apple may have had some degree of bargaining power to the extent that it insisted on a

maximum wholesale price which would allow it to offer single tracks at the price of 99 cents⁷⁴.

115. In addition, as the wholesale prices charged by the majors to iTunes are in the lower tier of wholesale prices range, they are more likely the outcome of competition and of Apple's countervailing buyer power than of coordination. The market investigation also showed that the wholesale prices charged to iTunes have not always been minimum prices - as suggested by a third party complainant - since wholesale prices to iTunes have been undercut by different majors in several Contracting Parties to the EEA Agreement (more detail is provided in the country chapters).
116. Whilst the majors have insisted on differentiated retail prices when launching iTunes in Europe in order to increase prices for releases with high demand and to decrease prices for releases with low demand, Apple has reportedly refused to abandon its 'one price fits all' pricing policy.
117. [...] *This effect does not necessarily reflect an act of coordination but can also be explained by the higher value of the combined repertoire for iTunes and is likely to reflect Apple's increased willingness to pay for the enlarged repertoire of the new entity. This is in line with the observed fact that Apple is willing to pay wholesale prices to the independents that are close to those of the majors, despite the limited number of chart hits produced by the independents.

d) Transparency

118. The market investigation has indicated that digital wholesale prices are negotiated with each service provider on a confidential and bilateral basis. Digital retailers⁷⁵ notably indicate that they do not know the licensing rates of their competitors, and that they do not pass such information to the majors since the agreed terms and conditions are subject to confidentiality clauses.
119. In contrast, the fact that retail prices and promotional activities are visible on internet websites of the online and mobile music providers may be interpreted as providing a relatively high degree⁷⁶ of transparency. The digital retail market pricing is more standardised than in the physical market due to the importance of iTunes as a price setter that applies uniform pricing in the Eurozone, and due to the tendency of competing digital music providers to replicate iTunes' pricing policy.
120. In addition, an important difference with physical music is that digital prices for the vast majority do not differentiate to any great extent between individual releases. Strategic pricing whereby a major sets a release at a particular price per

⁷⁴ At that time Apple had already successfully launched the iPod; moreover, when the first European agreements were negotiated, iTunes had already proven its success on the U.S. market.

⁷⁵ As confirmed by all digital retailers that have responded to the Commission's questionnaire.

⁷⁶ The following analysis focuses on standard track prices as there is more price differentiation for the premium / mid-price categories.

download following its pre-release performance (airplay, advertising uptake, pre-release orders, tour ticketing, previous performance of the artist or singles ...) and then adjusts that pricing to keep a title as long as possible in the charts or re-launch a title in the charts are not features that can – at this stage of its development – be associated with the digital market. As indicated previously, the absence of price differentiation between individual releases can be explained by the nascent stage of the market and the “one size fits all” retail pricing model pioneered by Apple and followed by many other digital service providers.

121. It has been investigated whether the majors could reconstruct wholesale prices on the basis of retail pricing and whether they could identify any deviation regarding wholesale pricing on the basis of the observed retail prices (for example when a retailer that has been granted lower wholesale prices by one major would reduce its retail prices for content from that major).
122. On the basis of the contracts that the majors have concluded with digital retailers for the period 2004 – 2007, it appears that wholesale pricing structures and agreements have increasingly gained in diversity and complexity over that period. This increased complexity follows from the dynamics of negotiation between the majors and the digital retailers, leading to more customised contracts that reflect the market position of the retailer and the valuation of the service it provides (for instance, higher prices for online downloads in return for lower prices for mastertones). These price structures are also more frequently reviewed and renegotiated. Furthermore, there is increasingly more sophisticated differentiation between categories of content. Finally, there is increased differentiation between the contracts concluded with digital retailers on the national level as the local management of the majors in a given Contracting Party to the EEA Agreement obtains more influence in negotiating the contracts.
123. More precisely, the market investigation has pointed to a number of elements that would considerably limit the ability of the majors to identify deviation regarding any tacitly coordinated wholesale pricing on the basis of such observed retail prices. Overall, there is a tendency towards increased wholesale price sophistication such as (i) discounts and volume related prices; (ii) a two tier pricing system that charges the greater of a minimum price per download or a percentage of the retail price; (iii) advance payments; (iv) usage restriction variations; (v) bundled content. These features are discussed in the following paragraphs and analysed in detail in the country analysis where applicable.
124. The market investigation has pointed to the increased use of discounts which can take various forms such as introductory discounts, volume discounts and rebates. Such discounts are currently applied by [...] of the 4 majors, with [...] of the majors systematically providing discounts when the music service provider or white label operator meets a number of clearly defined requirements linked to certain objectives such as sales volumes and revenues) or linked to behaviour such as promotional activities at retail level and positioning on the website etc.). The other [...] majors restrict occasional discounts to certain segments (such as mastertones). Price reductions, whereby a new retailer is charged a reduced wholesale price or whereby the major pays the applicable VAT or publishing rights during an introductory period are also applied by [...] of the majors. Increasingly, the majors subsidise promotional offers at the retail level such as “three for the price of two” or

“complete the album” offers where consumers who have purchased a number of tracks from an album are offered the opportunity to buy the whole album at a reduced price.

125. Wholesale prices can also be volume related, whereby there is a certain price for the first 10 000 downloads within a given period, followed by another price for the following 10 000 downloads within a given period, etc.
126. [...] of the majors apply a two tier pricing system whereby the retailer pays the greater of a minimum price per download or a percentage of the retail price. Whilst the market investigation indicates that the retail price percentages applied by a given major are generally stable across the board, wholesale prices may as a result of such two tier pricing system vary depending on the price charged by the retailer. To the extent that retail pricing is differentiated (see further at the country analysis), a two tier pricing system therefore decreases the market's transparency.
127. All majors apply advance payments in various forms. Music service retailers can be required to pay fixed payments advances. Such advance fees may be payable annually or periodically or may comprise a single up-front payment that may or may not be recoverable against future payments to the record company. Whilst in the early stages of the market these payments were recoverable against future payments to the record company – in order to reduce the risk for the majors in obtaining licence payments from the retailer – more recent contracts indicate that the majors also negotiate non-refundable fixed advance payments in return for the retailer obtaining a lower price per download. The latter category makes the market less transparent as it further complicates to derive wholesale price information from observed retail pricing.
128. Usage restrictions can be loosened or severed when the contract is renegotiated⁷⁷ and such may have an influence on prices. Usage rights and DRM restrictions can be the subject of negotiation between the wholesaler and retailer and a lower price can be negotiated in return for stricter usage rights. The EMI/iTunes agreement relating to DRM-free downloads indicates that absence of DRM restrictions can be monetised as some consumers value less restrictive DRM.
129. Prices can apply to bundles of content (such as a combined online and mobile download, artist related bundles, tracks bundled with videos or special ‘complete the album’ prices).
130. Pricing can depend on contract duration. The market investigation has indicated that variable pricing can occur during the course of an agreement, whereby a certain price is negotiated for the first 6 months of the service, followed by a different price for the following 12 months etc.
131. In addition, the investigation has shown that majors increasingly use different prices per retailer in the different Contracting Parties to the EEA Agreement where the latter is active. As these wholesale price differences can also to some degree be

⁷⁷ The fixed duration of the contracts differs significantly between 1 to 3 years. For contracts with an undetermined duration, usage and DRM conditions can generally be re-negotiated at any given moment during the contract.

observed for digital music providers that apply a retail pricing structure similar to that of iTunes, the ability for majors to identify wholesale pricing deviations on the basis of observed retail prices is further reduced.

132. There are no Published Prices to Dealers (hereinafter "PPDs") in the digital market that could function as a focal point for coordination. However, the iTunes pricing model determines to a large extent the retail online download business.
133. A third party submits that the current online digital pricing structure applied by the majors allows only iTunes to survive in the retail market. Under the current conditions, this third party submits, online retailing is made unprofitable for companies that cannot cross-subsidise online sales with other revenues (such as Apple's hardware). Still according to this third party, the majors have imposed such parallel wholesale pricing arrangements with iTunes in order to better control the digital market's price evolution.
134. It has therefore been investigated whether the majors could engage in minimum pricing coordination using the iTunes pricing model as a focal point for other online download contracts. This has not been confirmed. The market investigation shows that – at this stage of the digital market development - the majors embrace almost every opportunity of expanding their activities in the digital markets. Moreover, the price data show important wholesale price differences between the majors that fluctuate over time. Such price differences are not compatible with a theory of minimum pricing coordination as such a theory would imply that certain majors, including the larger ones, would accept, even for a limited period, lower earnings compared to other majors. Furthermore, the fact that the majors do not more frequently go below the iTunes wholesale pricing point can be explained by Apple's strong bargaining power which enables it, as the largest customer, to get the best prices. In addition, the incentive of the majors to offer lower wholesale prices to retailers competing with iTunes is limited as they cannot be sure that such lower wholesale prices are passed on to end customers in order to increase the sales volume. Whilst some of these retailers might use the lower wholesale prices to decrease retail prices in order to gain market share, others will maintain their retail price aligned with that of iTunes and improve their retail margins through lower input costs.
135. In addition, even if the majors had adopted a collusive approach with regard to iTunes pricing in order to control pricing for other online download contracts, it is unlikely that such a situation would be stable given the dynamic and nascent character of the digital market. Indeed, in its submissions the third party confirms that the major's initially restrictive licensing policy has faded and that in future iTunes' dominance may be challenged by inter-operable mobile competitors and new digital business models as provided by YouTube, MySpace, Amazon and other emanating digital music sources. In doing so, this third party concedes that the major's alleged initial attempts to (collectively) monopolise the online market have failed and led to monopsonist demand that is, however, potentially less stable as new entrants with new business models, which are totally or partially based on advertising revenue, emerge. This market context renders it more difficult for the majors to agree on a mechanism on which they can coordinate. Indeed, the ability of the majors to reach a consensus on a common profit maximising strategy and the ability for the members of the oligopoly to detect deviations from that common

strategy in a market that does not yet have a mature business model appears very limited.

136. A third party has indicated in the market investigation that the majors have rendered the digital markets transparent through Most Favoured Nation clauses (hereinafter "MFN"). Such clauses ensure that record companies will obtain the highest price for their content. If one major obtains a better price, the major that has an MFN clause in its contract with the digital music retailer will obtain that better price as well. MFN clauses therefore enhance transparency. The market investigation has not provided proof of MFN clauses being applied systematically in Europe. Whilst some majors in some Contracting Parties to the EEA Agreement have incorporated MFN clauses in a limited number of contracts, the digital music retailers that were affected by these contracts have indicated⁷⁸ that these MFN clauses have not been implemented. [...] It therefore appears that MFN clauses do not seem to be a common characteristic of the European digital markets.

137. To sum up, in the digital music market there is not sufficient transparency that would allow the coordinating firms to monitor whether the terms of coordination are adhered to.

e) Retaliation

138. It has been investigated whether any possible retaliation mechanisms could make sustainable any potential coordinated behaviour among the majors. Such mechanisms could theoretically include a temporary returning to competitive behaviour, excluding the deviator from joint agreements in the digital market, or exclusion of the deviator from joint ventures and agreements in the physical market. The following analysis focuses specifically on the segments that account for most of the revenues in the digital music market (standard download tracks and albums and mastertones) as there the deterring potential of retaliation is the greatest.

139. Regarding the potential for deterrence through a temporary return to competitive behaviour in the online market, it is not clear how the individual majors could amend their current behaviour to achieve this. Firstly, assuming that the majors could find ways to increase profit maximisation at an individual firm level, this would be difficult to implement in the short term since most digital music retailers work with agreements of a certain duration that can only be terminated on notice or that may foresee restrictions on wholesale price modifications which could complicate the majors making swift corrective action through short term punishment strategies. Secondly, given that the demand structure is concentrated, a temporary return to competitive behaviour in the online market would need to address at least one or more of the largest digital music retailers in a given Contracting Party to the EEA Agreement. In case these retailers would be able to procure input at more competitive prices, it is questionable whether a return to supra-competitive prices would be possible at a later stage. Indeed, given the emerging nature of the digital market, the majors would not easily be able to predict the long-term effect of using such a punishment methodology and could not assume with any level of certainty

⁷⁸ In reply to the Commission's questionnaires to digital music retailers.

that they could, once the deviation has ended, implement a return to any tacitly agreed supra-competitive pricing. Thirdly, in order for retaliatory price cuts to represent a credible threat, the deviating major should be able to discern the link between its licensing behaviour in the online market and the price cuts. In case the retaliatory price cut would go unnoticed or would be interpreted as a mere adjustment of a pricing structure, the retaliatory action would have no effect. In that respect, it should be stressed that more aggressive wholesale pricing may remain unnoticed for as long as the uniform retail prices⁷⁹ introduced by iTunes continue to prevail.

140. A more direct form of retaliation would be to exclude the deviator from parts of the vertical chain of the digital market, or to threaten to do so. As the majors control a sizeable music catalogue, they could theoretically refuse to license rights or impose unattractive conditions on the deviators' downstream music service operations. However, as the majors have only a very limited presence in the downstream retail market, such action would not amount to an effective form of retaliation.

141. As the digital market currently does not account for more than 5-6% of the overall recorded music market in most Contracting Parties to the EEA Agreement, it has been investigated whether a credible and effective mechanism to retaliate against a major that deviates from the common understanding in the online market is more likely to take place in the physical market. Such retaliation could take place through the exclusion of the deviator from compilation joint ventures or otherwise by worsening the terms of its participation in these joint ventures. The market investigation has indicated that such retaliatory action would be ineffective. Firstly, as the success of a compilation depends on the popularity of the tracks included, exclusion of a major from the compilation could potentially hurt the retaliating major more than the deviating major. Such action would certainly be opposed when other companies such as retailers or media companies (for example NRJ, Bravo) – that have nothing to gain from the retaliatory action – participate in the compilation. Secondly, such exclusion might not be a sufficiently quick retaliation as compilations are only produced at intervals.

142. The market investigation has demonstrated that a number of divergences did not trigger retaliatory measures, which would suggest that each major is following its own individual pricing strategy. An illustration of a price based action by one of the majors is Universal's strongly mediatised value campaign⁸⁰ launched at the

⁷⁹ German chart rules – recently abolished after investigation by the German competition authority – imposed a 0.95€ retail price limit in order to enter the on-line charts.

⁸⁰ "Universal Music, the world's leading music company, is launching an aggressive European strategy to reduce permanently the digital download prices of 1,500 back catalogue albums. Universal Music Group International will drive the campaign across Europe through a reduction in the trade price of the 1,500 albums. This will enable online music services to lower the retail prices to their customers. The campaign, open to all Universal Music's digital business partners, will roll out during the next 12 months. "As the leading online record company, we are totally committed to expanding and developing the digital music market," said Max Hole, Executive Vice President, Marketing & A&R, at Universal Music Group International. The promise of the Internet has always been about making it easier for people to access music in new ways and at affordable prices, and that's what we are aiming to achieve." The exact campaign rollout by country is determined by the individual online music services, in conjunction with their own marketing, branding and promotion strategies. Source: Universal press release 30/10/2006.

beginning of November 2006. Universal significantly reduced download prices on 1 500 albums in order to encourage greater album sales and introduce more price differentiation. So far, the other majors have not launched initiatives similar to that of Universal, nor are there indications that they have retaliated against Universal's initiative.

143. Also, the market investigation has provided some recent examples of a single major engaging in new types of agreements that were not offered by the other majors. In 2007, EMI has acted independently from the other majors in two instances that could significantly alter the evolution of the digital market. Firstly, EMI decided to start a premium download service at iTunes whereby tracks can be downloaded in Apple's proprietary format, but DRM-free and at a better quality (256kbit rather than 128 kbit). Secondly, whilst EMI's initiative with Apple may be considered as addressing a niche market for users that are willing to pay premium prices in order to be able to download music at CD-quality, EMI's recent decision to sign up to Amazon.com's music service with DRM-free music downloads at prices that are foreseen to be competitive with those of iTunes must be seen as a disruptive development for the majors and a significant deviation from any coordinated approach that majors might potentially have developed. There appears to have been no attempt by any of the other majors to retaliate against these moves. Of the other majors, only Universal has started to offer DRM-free music downloads at a price comparable to that of iTunes via Amazon, Google, RealNetworks, and Wal-Mart but not via iTunes. The market investigation has not provided evidence explaining how such unilateral actions from certain majors would be compatible with a collusive scheme, or that these actions, that affect an important part of the digital market, would be left without retaliation. Other unilateral moves by majors concern early initiatives to introduce more use of discount schemes in their online contracts and Universal's refusal to enter into a long term contract with iTunes in as far as Apple continues to oppose differentiated pricing.

144. In conclusion, the market investigation has not demonstrated the existence of a credible retaliation mechanism that would constitute a sufficient deterrent mechanism for the majors to remain within the boundaries of any agreed collusive scheme. The fact that the wholesale prices of the majors can vary considerably in opposite directions without any observable reaction of the other majors is not indicative of a transparent market where deviation is easily detected and retaliation takes place to reinstate adherence to the tacit collusion. As reflected by the iTunes contract negotiations and DRM-free download strategies, the different majors have recently, applied more divergent short and long term strategies than in the past.

f) Countervailing abilities

145. As for potential competition, independents exert only limited competitive pressure on the majors, in particular as they produce a relatively small number of chart hits which are very important for digital music services. Independent record labels thus offer little challenge against the stability of any potential coordination. This is illustrated by data revealed in the market investigation: for example in the United Kingdom, all independents taken together accounted for about 16% of the download charts in 2006, and in most of the cases, did not make it into the top 10 sellers.

146. With regards to the countervailing power of customers, the larger digital music service providers and in particular iTunes, may be attributed a certain degree of market power that enables them to react to potential coordination among the majors. Overall, the presence of strong buyers may negatively affect the ability to reach a coordinated effect. If buyer power is substantial, buyers can offer firms incentives to deviate from a tacit agreement. If a buyer represents a significant portion of market demand and offers to buy at a price below the collusive market price but still above the marginal cost of supply, firms will have a considerable incentive to accept the buyer's offer. Therefore, in general, strong buyers can use their buyer power to stimulate competition among the majors and thus destabilise any potential coordination. This would appear to be the case here even though the effect of buyer power may be mitigated by the heterogeneous content nature of the recorded music industry, which requires digital music retailers to have access to as much content as possible. In the digital music market, owing to its nascent state, it appears that iTunes as the leading digital music retailer applies its buyer power to maintain the 'one price fits all' to end users through non-differentiated wholesale prices.
147. The market investigation indicates that iTunes can be considered as having a strong impact on the record companies' pricing structure decisions regarding the online download market. It appears from the market investigation that the relative closeness of the majors' wholesale prices to Apple since 2004 is likely to be, at least partly, also the result of Apple's bargaining power which has even increased since then. According to various statements by the majors, iTunes can be considered as having a strong demand position and has so far successfully objected to any wholesale price differentiation for single tracks.
148. On the other hand, the market investigation clearly indicates that a digital music service business without access to the repertoire of all the majors, and especially that of Universal and Sony BMG, is not viable in the long term. Customers emphasise the importance of being offered a complete range of tracks. The main motivation for a consumer to buy digital content is the availability of a certain track, and for the vast majority, the demand for such single tracks are chart hits. In order to be able to compete with other providers, a digital retail business is therefore - at least in the long term - only viable when access to the repertoire of all majors is guaranteed. Some replies indicate that Sony BMG and Universal are in any case required content as they make up the vast majority of hit material. Apart from music service providers that concentrate on niche segments where there is limited demand for chart material, a music service provider cannot afford to miss any of the majors. An example of a provider that concentrates on niche segments is the online music provider e-Music, which offers music downloads on its website exclusively from independent record labels. As there is no demand substitution for chart material, this dependency on the majors significantly affects the countervailing buyer power of music service providers. In that respect, Universal's attempt to leverage its position as a supplier of "must have" content vis-à-vis iTunes has not yet forced the latter to accept differentiated pricing. At the same time, Universal stands to lose a very significant part of its digital music revenues if iTunes is no longer available as a digital music retail channel.
149. It can be concluded that there is a balance of power between the majors and iTunes, and increasingly a number of strong players such as telecom operators. Taking into account that the degree of buyer power is still significantly greater than

buyer power in the physical market, the customers – and in particular iTunes – in the digital market could indeed jeopardise to a certain extent the benefits that any coordination could bring to the majors.

150. This balance of power added to the lack of transparency and the limited credible retaliation mechanism allow any theory of creation or strengthening of collective dominant position in the market for digital distribution of music to be ruled out.

4. IMPACT OF THE MERGER

151. The merger has led to a reduction in the number of major recording companies in each of the national markets from five to four. Greece is the only exception, where BMG had licensed its recorded music business to EMI since 2002. Whereas this reduction may facilitate the monitoring of the market and lead to the creation of a collective dominant position for the remaining players in markets that display certain features indicating conduciveness to collective dominance, the market investigation concluded that this is not the case in the market for digital distribution of music. None of the digital music retailers that have responded to the Commission's questionnaires indicated that there are changes that can be attributed to the merger with regard to any increased transparency and parallel behaviour. None of the replies have stated that the merger has reduced complexity in the market by eliminating elements of difference among the firms, or standardising the products. The Commission has found that the mere reduction of the number of competitive relationships has not enabled or facilitated tacit coordination through the creation or the strengthening of a collective dominant position of the four remaining majors in the national markets for licences for digital music.

152. Regarding wholesale prices to digital music providers, in some cases, namely where Sony or BMG had different prices pre-merger and one of them had been the cheapest or most expensive major, the merger narrowed the range of the majors' wholesale prices as it could be statistically expected from a reduction from five to four majors. [...]*

153. A third party has stated in the market investigation that, post transaction, Sony BMG has taken a market position closer to that of Universal. However, the theory of such an alleged duopoly has not been confirmed in the market investigation. In particular, the Commission found no evidence for any coordination between Universal and Sony BMG. Moreover, any such collective dominant position between Universal and Sony BMG would be exposed to competitive pressure by EMI and Warner which would be likely to destabilise any such coordination.

154. In fact, some respondents⁸¹ have replied that the merger has allowed them to obtain access to content, where that content (of either Sony or BMG) was not made available. [...]*. Therefore, it does not seem that the merger has allowed the majors

⁸¹ A number of digital music retailers have indicated in their replies to the Commission's questionnaires that they have obtained access to Sony BMG content where such access to content of Sony, BMG or both was lacking before.

to coordinate on prices higher than those sustainable on the pre-merger market or increased the sustainability of tacit coordination. Whilst a third party claims that Sony BMG did not fully implement their merger for nearly two years after approval, and that therefore the impact of the merger can only be felt now, the same is not true for the digital market. As indicated by the parties' contract and pricing data, Sony BMG acted as a single entity in the digital market as from 2006.

155. Most digital retailers in the market investigation consider overall wholesale prices as far too high for the digital market to be able to continue growing at the present rate. As a result of these high input costs combined with Apple iTunes' retail pricing strategy for digital music downloads, there would appear to be little possibility for price competition to emerge. However, there are no indications that the creation of Sony BMG has wholly or partly led to this market structure. In particular, the creation of Sony BMG has not affected the balance of power that currently exists between the majors and iTunes.

5. COUNTRY SPECIFIC ANALYSIS

156. The Commission analysed the price developments for the period 2004 – 2007 on the basis of data received from the majors. Data on the development of the digital market in these Contracting Parties to the EEA Agreement is based on IFPI market survey: Recording Industry in Numbers 2007. Market shares are calculated on the majors' revenues for the first half of 2007⁸².

157. It should be emphasised that the conducted price analysis focuses on the prices for an individual download or mastertone as mentioned in the contract of the majors with digital retailers. This analysis does not take account of temporary or introductory discounts, volume based discounts, tiered pricing (the greater of retail price percentage and price per track/album), release based price variations (where a major charges a higher price for a specific release) or any other wholesale price variation for which the contract does not foresee a general rule.

158. The price analyses focuses in particular on digital music retailers other than iTunes, as the latter was already discussed in the part that is common to all affected markets. Where the majors apply a wholesale pricing policy that differs from that applied to the Euro zone countries (in particular the United Kingdom), a separate analysis is provided.

a) United Kingdom

Introduction

159. The United Kingdom is the largest and most advanced digital European market. It has the highest proportion of regular online buyers in the EEA, currently

⁸² Due to reporting incompleteness, market shares for EMI and UMG were calculated on the second half 2006 revenues and therefore underestimate their market position to a slight extent. These figures do not include the independents.

at 8% of internet users, up from 4% in 2005. There were 53 million single-track downloads in the United Kingdom in 2006, double the number in 2005. Digital album sales have reached 2.2 million in 2006.

160. The United Kingdom digital music market generated trade (wholesale) revenues of EUR 154 million⁸³, up by 75% from 2005, and representing around 6% of the sum of all recorded music markets in 2006. One third of these revenues are online revenues, two thirds mobile revenues. The most important individual applications are online singles (38 % of trade revenues), online albums (21%), mastertones (16%) and mobile singles (8%). Mobile music videos (7%) are the fastest growing application. The remainder of 10% accounts for ringtones and various subscription and streaming applications.
161. Almost 50 digital music retailers are active on the United Kingdom market. In the online segment, Apple iTunes leads the market with a market share of between 70% and 80% followed by Napster, EUK, OD2, Yahoo and a number of smaller retailers such as Tesco and Music net. In the mobile segment, 'H3G' (Hutchison), Vodafone, Orange, T-Mobile and O2 Telefonica are the mobile telecommunication companies offering mobile music and video. Jamba and SonyEricsson are the most important mobile white label service providers. Mobile sales have shown less spectacular growth than online sales. Whilst the latter have doubled in 12 months compared to 2005, mobile only increased by 35%.
162. Universal is the most important digital music licensor (34%) in the United Kingdom and is followed by Sony BMG with 32%. EMI and Warner have comparable market shares (17%). For online downloads (both tracks and albums), Universal and Sony BMG are the leaders (both 32%) and are followed by Warner (19%). EMI is the smallest player (17%). With regard to the mobile segment, EMI and Warner are the smaller players (both 13%). Universal leads with 43%, followed by Sony BMG with 31%.
163. The United Kingdom is for all four majors the most important digital market.

Online price analysis

Single Tracks (standard and premium)

164. The Commission's price analysis shows that prices overall vary considerably among the majors. [...] out of 4 majors apply different prices to their customers. The difference between the highest price and the lowest price applied by a given major is generally around [0-10]*%. [...] No correlation can be observed between market shares and the applied prices. The price analysis does not show majors charging a higher price where they have a higher share of music downloads and a lower price where they have a lower share of music downloads.

⁸³ IFPI, Recording Industry in Numbers 2007, p.28 (70 million USD). IFPI applied an average exchange rate of 1.25 USD/EUR.

165. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing, and these price differences are more pronounced for the competitors to iTunes. The most pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [30-40]*%. The least pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [20-30]*%. [...]*
166. Prices for standard download tracks have fluctuated to only a very limited degree over the past 36 months, and this stability in prices has not been affected by the merger. Where prices of the majors have declined, they have not converged to a narrow price band. Rather, they have declined keeping the respective price variations intact. [...]*
167. The comments of the three above paragraphs apply to standard tracks as price variability is even greater for premium tracks. In addition, most of single tracks sold in the United Kingdom are sold as standard tracks.

Albums (standard and premium)

168. This also applies to standard albums, but is even more pronounced. The majors do not apply the same prices to all customers. On the contrary, prices are differentiated and can fluctuate significantly over time for a given major. Looking at specific customers, the price of major X compared to the price of major Y can be significantly different and in extreme cases, differences of close to 100% can be observed. [...]*Moreover, as in other national markets, to some degree all majors charge different prices on the basis of the expected popularity of the release (premium for top artists – standard for established artists – mid price for new artists or back catalogue) for different albums at the wholesale level.

Mobile price analysis

Mastertones

169. Mastertones are an important digital segment in the United Kingdom market. There is no tiered pricing (for instance premium versus budget) for mastertones.
170. All majors apply different prices for mastertones to the different mobile download retailers, and these differences can be very significant. The most important wholesale price variation that can be observed as being applied by a given major from one retailer to another retailer is as high as [250-260]*% and overall around [30-40]*%.
171. Differences between the cheapest and the most expensive major for an individual customer are usually within a 30% to 50% range with more pronounced differences in certain cases. Prices fluctuate more for some retailers and less for other retailers. This price evolution has not been affected by the merger. There is no correlation between market shares and applied pricing. [...]*.

Mobile downloads

172. The majors apply significantly different prices to the different mobile download retailers, with variation in the 30% to 40% range. This price variability remains stable over time as prices show little fluctuation. With regard to the mobile download prices applied by the different majors for a given customer, price differences are important (within a 30% to 50% range). None of these characteristics appears to have been affected by the merger.

Transparency

173. On the basis of this price variability, it can be concluded that wholesale prices are not aligned for any of the segments investigated.
174. With regard to iTunes, the similarity of wholesale prices that apply to Euro zone countries does not apply to the United Kingdom [...] leading to wholesale price differences of more than 20%. As the United Kingdom is the most advanced digital market in the EEA, and given that iTunes United Kingdom retail prices applies the same 'one price fits all' pricing structure (albeit at a higher price than in the EURO zone), it cannot be explained why [...] majors would accept a lower wholesale price under a collusive scheme, in particular seen that these price differences were maintained by the majors that have entered into new contracts with iTunes. In that respect it is also important to mention that the iTunes wholesale price differences [...] are also consistently reflected in the wholesale prices for other important United Kingdom digital music service providers such as E UK, OD2 and Napster.
175. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.
176. In addition, the market investigation indicated that retail prices vary to some degree, with price variations of around 10% for online downloads although greater variations can be observed for some tracks irrespective of their popularity or age of the release. Retail price variability for the other segments is higher.

Retaliation, countervailing abilities and the effect of the merger

177. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers, the general considerations above apply.
178. As to the effect of the merger on the United Kingdom wholesale digital music market, the market investigation showed that [...]
179. The Commission therefore concludes that on the United Kingdom wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

b) France

Introduction

180. The French digital market is the second largest digital market (slightly larger than Germany) with wholesale revenues of EUR 56,8 million, up by 250% compared to 2005. The French digital market represents 6% of all recorded music in France by value. 38% of these revenues are online based, 62% stem from mobile applications. The most important individual application is mastertones (32%), followed by online single tracks (19 % of trade revenues), online albums (11%) and mobile single tracks (8%). Mobile video has strongly entered the digital market in 2006. New subscription music services were launched in France in 2006 with the most important launch being FnacMusic Illimité as well as video streaming applications. The importance of these applications remains however limited.
181. Around 20 digital music retailers are active on the French market. In the online segment, Apple iTunes leads the market followed by Virgin Mega, Fnac.com, white label service provider OD2, Yahoo and E compil (a Universal subsidiary). In the mobile segment, Vodafone/SFR, Orange and Bouygues are the mobile telecommunication companies offering mobile music and video. 123 multimedia, Digiplus and Musiwave are the most important mobile white label service providers. Mobile sales have increased by almost 300% compared to 2005 (now accounting for the largest part of the market) as Orange, Musiwave and SFR all have introduced dual-delivery options (whereby a track can be downloaded and used on both a PC and a music player and a mobile phone), a simpler purchasing interface, better streaming and previewing and lower pricing.
182. Universal is the most important digital music licensor (34%) in France. The three other majors have comparable market shares, led by Warner (23%) and followed by Sony BMG (22%) and EMI (20%). For online downloads (both tracks and albums), EMI (34%) is the leader, followed by Universal (30%). Sony BMG (21%) and Warner (14%) follow at some distance. With regard to the mobile segment, EMI is the smallest player (7%). Universal leads with 37%, followed by Warner (31%). For mobile applications, Sony BMG is also a mid-size player with 24%.
183. France is for three out of four majors the third most important digital market. For one major, France is the second most important digital market.

Online price analysis

Single Tracks (standard and premium)

184. The Commission's price analysis shows that prices overall vary considerably among the majors. [...] the difference between the highest price applied in the market compared to the lowest price is more than [20-30]* %. No correlation can be observed between market shares and the applied prices.
185. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing, including the pricing applied by Sony

BMG. For some customers, the price differences between the cheapest and the most expensive major can amount to more than [20-30]*%. For other digital music retailers (other than iTunes), [...] of the four majors apply a similar price. It is however important to stress that [...] a price to these retailers that diverges by more than [10-20]*% compared to the [...] other majors. [...]*

186. For the digital retailer where prices of some of the majors have converged most, the retailer in question has increased its retail market share over time. In addition, without exception, prices of the different majors to that retailer have decreased [...]*. As such, the limited variation in pricing is more likely to be the outcome of competition and of the digital music retailer's bargaining position than of coordination. [...] cannot be explained as being compatible with coordination.

187. These comments apply to standard tracks as price variability is greater for premium tracks.

Albums (standard and premium)

188. Albums are sold in France at the standard rate and in the mid-price segment. For both there are strong price differences between the majors and there are also fluctuations over time.

189. Price differences between the cheapest and the most expensive major for an individual customer are in the 10% to 20% range, but can amount to up to [30-40]*% for some digital music retailers, including those digital music retailers (other than iTunes) that are leading players. Significant price fluctuations – both up and down – can be observed for some majors.

190. The price differences observed in the above paragraph between the majors apply to all digital music retailers, including white label service providers.

Mobile price analysis

Mastertones

191. Mastertones are the most important digital segment in France. There is no tiered pricing (for example premium versus budget) for mastertones.

192. Price differences between the majors are generally within a 10% to 15% range. Differences between the cheapest and the most expensive major for an individual customer are equally in the 10% to 15% range, but differences of up to 100% also exist. There are significant fluctuations over time [...]*. There is also no consistency with regard to price fluctuations. For some customers, a given major applies stable pricing, whereas for other customers it applies widely fluctuating prices.

193. There is no correlation between market shares and applied pricing [...]*.

Mobile downloads

194. With regard to the mobile download prices applied by the different majors for a given customer, price differences are significant. The most pronounced price difference between the cheapest and the most expensive major that could be observed for a given customer amounts to [30-40]*%. Generally, the input prices of the majors to mobile download retailers vary in a 10% to 20% price band.

Transparency

195. On the basis of the above analysis (paragraph 184 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated.
196. In addition, the market investigation indicated that retail prices vary to some degree, with price variations of generally 10% - 20% for online downloads although more significant variations can be observed. For example, Virgin Mega, iTunes' strongest competitor can be observed to price certain tracks as high as EUR 1,29 and other tracks at EUR 0,99. Retail price variability for the other segments is more important.
197. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

198. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. Concerning the countervailing abilities of customers, it should be underlined that the market investigation has shown that countervailing abilities in the market are not restricted to the largest digital music retailer such as for example. iTunes. Buyer power can also be observed for at least one of the other top 3 retailers [...]*.
199. Concerning the effect of the merger on the French wholesale digital music market, the market investigation showed that [...]*.
200. The Commission therefore concludes that on the French wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

c) Germany

Introduction

201. The German digital market qualifies as the third largest digital market in the EEA and shows sound growth, as it generated trade (wholesale) revenues of EUR

56 million,⁸⁴ up by 75% from 2005, and represents 5% of all recorded music in Germany by value. 60% of these revenues are online based, 40% stem from mobile revenues. The most important individual application is online single tracks (35 % of trade revenues), which have reached 24 million in 2006, up from 19 million in 2005. Online albums (20%), mastertones (25%) and mobile single tracks (6%) are the other important applications. This last category is the fastest growing application in the German digital market.

202. Around 30 digital music retailers are active on the German market. In the online segment, Apple iTunes leads the market followed by Musicload⁸⁵, a T-Online subsidiary owned by Deutsche Telekom, AOL, Napster, Yahoo and white label service provider 24/7. In the mobile segment, Vodafone, T-mobile and O2 are the leading retailers following their position in the mobile telecommunication markets. Jamba and Arvato (a Bertelsmann company) are the most important mobile white label service providers.
203. Universal is the most important digital music licensor (34%), closely followed by Sony BMG (31%). Warner (22%) and EMI (13%) are the smaller players. Specifically with regard to online downloads (both tracks and albums), Universal and Sony BMG are on an equal footing (both 34%). Warner (18%) and EMI (14%) account for the remainder. With regard to the mobile segment, Universal leads with 40%, followed by Sony BMG (31%), Warner (15%) and EMI (14%).
204. Germany is for three out of four majors the second most important digital market.

Online price analysis

Single Tracks (standard and premium)

205. The Commission's price analysis shows that prices vary considerably among majors and for a given major also from customer to customer. For instance, Sony BMG's wholesale prices to music providers with very similar services varied by [10-20]*%.
206. Regarding online downloads, the Commission found that the majors, including Sony BMG, have applied different prices to different customers. There is no correlation between market shares and wholesale prices.
207. On the level of the individual customers, the analysis shows price differences between the cheapest and the most expensive major of more than 5% - 10% for all online download music providers (except for iTunes), and sometimes price differences much greater than 5% - 10%. The majors also increased or lowered their

⁸⁴ IFPI, Recording Industry in Numbers 2007, p.28 (70 million USD). IFPI applied an average exchange rate of 1.25 USD/EUR.

⁸⁵ Besides Germany, Musicload also runs stores in Austria and Switzerland. In addition to its own brand stores, the service runs online stores for a number of third parties including CokeFridge (the German equivalent to the MyCokeMusic), and the German cable networks RTL and ProSieben.

prices to a number of customers over time but the Commission did not observe parallelism in these price movements.

208. These comments apply to standard tracks, as these account for the vast majority of tracks sold in Germany. Price variability is even more present for premium tracks.

Albums (standard and premium)

209. Most digital albums in Germany are sold at the standard rate or in the mid-price segment, and for the latter there are strong price differences between the majors and there are also fluctuations over time.
210. Also with regard to standard price albums, the price differences between the majors are important. Price differences between the cheapest and the most expensive major for an individual customer are in the 10% to 20% range, but can amount to up to [30-40]*% for some digital music retailers. Significant fluctuations (up to [40-50]*% within 24 months) can be observed for some majors [...]*.
211. The observed price differences between the majors also apply to white label service providers, although there is less price fluctuation over time for these digital retailers.

Mobile price analysis

Mastertones

212. There are very important price differences between the majors. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and can amount to up to [40-50]*% for some digital music retailers. There are significant fluctuations over time, as prices for mastertones have decreased significantly.

Mobile downloads

213. Price differences between the cheapest and the most expensive major for an individual customer and overall price differences between the majors are more pronounced for mobile downloads (in a 15% to 25% range) than for online downloads, but less significant than for mastertones. Prices decline as the market grows.

Transparency

214. On the basis of the observed price variability, it can be concluded that wholesale prices are not aligned for any of the segments investigated.
215. With regard to retail prices, the market investigation indicated a considerable degree of price variability. For example, Musicload, iTunes' strongest competitor in the German market can be observed to price certain tracks as high as EUR 1,39 and

other tracks as low as EUR 0,79. Retail price variability for the other digital music segments is even greater.

216. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

217. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. Concerning the reactions of customers, T-Online's online download service Musicload holds a relatively high market share on the retail music download market (just slightly lower than iTunes) and therefore also has some bargaining power, in particular together with its sister company T-Mobile, an important mobile music provider.
218. As to the effect of the merger on the German wholesale digital music market, the market investigation showed that, in some cases - namely where Sony or BMG had different prices pre-merger and one of them had been the cheapest or most expensive major - the merger narrowed the range of the majors' wholesale prices (as such could be statistically expected from a reduction from five to four majors). [...]*
219. The Commission therefore concludes that on the German wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

d) Italy

Introduction

220. Italy is the fourth most important mobile music market in the EEA after the United Kingdom, France and Germany, although growth is less pronounced than in the aforementioned larger markets. Italy is the largest single track mobile download market in the EEA, due to the high level of 3G penetration, operator marketing of advanced music handsets (which are noticeably more popular in Italy than in the rest of the EEA) and Italian consumers' enthusiasm for entertainment on mobile phones. In contrast, the online download market is not strongly developed.
221. The Italian digital music market generated trade revenues of EUR 30 million, up by 50% from 2005, and represents 6% of the sum of all recorded music markets in Italy. 29% of these revenues are online revenues, 71% mobile revenues. The most important individual applications are mastertones (26% of trade revenues), mobile single tracks (20%), online singles (16 %) and online albums (11%). Mobile music videos are the fastest growing application, accounting for 6% of the market in 2006.

A number of other applications, ranging from streaming to subscription, online videos and ringtones, account for the remainder.

222. Some 17 digital music retailers are active on the Italian market. In the online segment, Apple iTunes is a very pronounced market leader, at a great distance followed by Yahoo and a number of white label service providers including OD2, Buongiorno, Libero and Rossoalice. In the larger mobile segment, the mobile telecom operators TIM, Vodafone, Hutchison H3G and Wind lead the market. Jamba, Musiwave, Dada, Buongiorno and Nokia are the most important mobile white label service providers.
223. Sony BMG (35%) is the leader in the Italian digital market, followed by the three other majors that have comparable market shares in the 20% to 22% range. For online downloads (both tracks and albums), Sony BMG (36%) is the leader, followed by Universal (22%), EMI (22%) and Warner (21%). With regard to the mobile segment, Sony BMG (45%) is the largest player, followed by EMI (22%), Universal (19%) and Warner (14%).

Online price analysis

Single Tracks (standard and premium)

224. The Commission's price analysis shows that the majors apply different prices in Italy for single track downloads. When considering digital retailers other than iTunes, all majors' apply varying wholesale prices, albeit within a limited 5% to 10% range. [...]*
225. With regard to individual customers, the Commission found that the majors apply different prices. The analysis shows price differences between the cheapest and the most expensive major of 5% - 10% for all online download music providers, with greater differences for some customers. It should be emphasised that the customers for which most price variability can be observed are also the largest customers (other than iTunes). Moreover, the price differences that exist between the majors for these customers are greater than those for iTunes. In addition, for at least one of the top 5 customers, wholesale prices of some of the majors are below those charged to iTunes.
226. Price fluctuations in this segment of the Italian market are limited, but where such fluctuations take place, no parallelism can be observed in these price movements.
227. Price variability is greater for the premium and mid-price content categories than for standard tracks.

Albums (standard and premium)

228. For album downloads, the price differences between the majors, fluctuations of these prices over time and the degree to which majors' prices are different for a given digital music retailer, are all more pronounced than for single tracks.

229. All majors apply varying wholesale prices, within a 10% to 20% range. [...]*.
230. With regard to individual customers, the majors clearly apply different prices, as the price difference between the cheapest and the most expensive major is generally in the 15% - 20% range with differences up to [20-30]*% for some customers. Price variability can be observed for all digital retailers.

Mobile price analysis

Mastertones

231. All majors apply varying wholesale prices. The price differences between the majors are very pronounced. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and can amount to up to [40-50]*% for some digital music retailers. There are significant fluctuations over time as prices for mastertones have varied considerably. No parallelism can be observed in these price movements. The price of a given major can at the same time increase for some customers and decrease for other customers. [...]*.

Mobile downloads

232. The same observations as those provided for mastertones can be made for mobile downloads, with the exception of price fluctuations. The existing price differences (up to [40-50]*%) between the majors for a given customer remain stable over time.

Transparency

233. On the basis of the above analysis (paragraphs 224 and following), it can be concluded that wholesale prices are not aligned for any of the segments investigated.
234. The degree of price variability is significantly more pronounced in the mobile segments compared to the online single track segment. This observation could firstly be explained by the particularly strong position of iTunes in the Italian online segment. As a result, digital resellers replicate the retail pricing of iTunes [...]*. Secondly, the online segment is significantly smaller than the mobile segment, which could explain the more stable price setting in this segment. In any case, as price differences between the majors exist [...]*, there are no indications of price alignment or (increased) transparency in the market.
235. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

236. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. It can be observed that in the online segment the wholesale prices are particularly low compared to the other affected Contracting Parties to the EEA Agreement. Even in the smaller online segment, there are customers other than iTunes that can be attributed with a certain degree of bargaining power. Such customer buyer power is clearly a feature in the mobile segment as the mobile telecom operators are important revenue generators for the majors in Italy.
237. The Commission therefore concludes that on the Italian wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

e) Spain

Introduction

238. The Spanish digital market has grown by 400 % compared to 2005, with wholesale revenues of EUR 21.25 million, and represents 5% of all recorded music in Spain by value. 82% of these revenues stem from mobile revenues, 18% are online based. The most important individual application is mastertones (46%), followed by mobile single tracks (20 % of trade revenues) and online single tracks (16%). There are almost no online album sales. The remainder of the market is composed of ringtones, video and subscription and streaming based services.
239. Around 11 digital music retailers are active on the Spanish market. In the online segment, Apple iTunes leads the market followed by Yahoo. OD2, Melodeo and Terra networks account for the remainder. In the mobile segment, Vodafone, O2/Telefonica, and Orange/Amena are the mobile telecommunication companies offering mobile music and video. Aquamedia, Prisacom and Musiwave are the most important mobile white label service providers. Mobile sales have increased more than online sales in the time period under review.
240. Sony BMG (36%) is the leader in the Spanish digital market, followed by Universal (25%), Warner (21%) and EMI (17%). For online downloads (both tracks and albums), all majors hold a comparable part of the market: Sony BMG (29%) is the leader, followed by EMI (25%), Warner (24%) and Universal (21%). With regard to the mobile segment, Sony BMG (38%) is the largest player, followed by Warner (23%), Universal (21%) and EMI (18%).

Online price analysis

Single Tracks (standard and premium)

241. In the relatively small Spanish online market, [...] of the majors apply different prices to their customers, and the difference between the highest price and the lowest price applied by a given major is around [10-20]*%. No correlation can be observed between market shares and the applied prices. [...]*.
242. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing, and these price differences are more pronounced for the competitors of iTunes. The most pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [10-20]*%. The least pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [0-10]*%. [...]*.
243. Prices for standard download tracks have been decreasing over the past 36 months, and this downward evolution has not changed after the merger. Whilst prices of all majors have declined, they have not converged to a narrow price band. As indicated, the price variation remains around [10-20]*% although price differences were greater when the market was at its early stages. As such, the price evolution is more likely the outcome of competition and of the digital music retailer's bargaining position rather than of coordination.
244. These comments apply to standard tracks as price variability is greater for premium tracks.

Albums (standard and premium)

245. The number of online albums sold in Spain is too limited for a price analysis to be relevant.

Mobile price analysis

Mastertones

246. Mastertones are the most important digital segment in Spain. There is no tiered pricing (for example premium versus budget) for mastertones.
247. [...] Differences between the cheapest and the most expensive major for an individual customer are equally in the [10-20]*% price band, but more outspoken differences of nearly 100% exist. There are significant fluctuations over time and per customer as prices for mastertones have decreased significantly, with price declines of up to [30-40]*% over the past 24 months being no exception. This price evolution has not been affected by the merger. There is no correlation between the market share and applied pricing [...]*.

Mobile downloads

248. The majors apply different prices to the different mobile download retailers although differences are limited to a [10-20]*% variation. In addition, these

differences remain stable over time as prices show little fluctuation. With regard to mobile download prices applied by the different majors for a given customer, price differences are important (within a 10% to 20% range). None of the above characteristics appears to have been affected by the merger.

Transparency

249. On the basis of the above, it can be concluded that wholesale prices are not aligned for any of the segments investigated. Whilst the Spanish market shows more stability over time, it should be emphasised that wholesale prices (of both online/mobile downloads and mastertones) are in comparison to other affected Contracting Parties to the EEA Agreement particularly low, and such is particularly the case for mastertones.

250. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

251. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations above apply. Concerning the countervailing abilities of customers, buyer power can be observed in particular for the mobile telecom operators.

252. As to the effect of the merger on the Spanish wholesale digital music market, [...]*. Sony BMG pricing has followed the downward pricing trend in the Spanish digital market.

253. The Commission therefore concludes that on the Spanish wholesale market for digital music licensing, for all digital music or for online music or mobile music only, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

f) Belgium

Introduction

254. Compared to 2005, the Belgian digital market has grown by more than 300% in 2006. Wholesale revenues reached EUR 12,5 million. The Belgian digital market represents 6% of all recorded music in Belgium by value. 50% of these revenues are online based, 50% stem from mobile applications. The most important individual application is online single tracks (38 % of trade revenues), followed by mastertones (28%) and online albums (15%). Mobile single tracks, ringtones, subscription, streaming and video account for the remainder. In particular video has strongly entered the digital market in 2006. Whilst online sales doubled over 12 months, mobile sales grew by 500%.

255. 12 digital music retailers are active on the Belgian market. In the online segment, Apple iTunes is the clear market leader, followed at a great distance by white label service provider OD2, FRS and SonyConnect (a Sony BMG subsidiary). In the mobile segment, Vodafone (now Belgacom mobile) is the leading mobile telecommunication company offering mobile music and video. 123 multimedia, Mobivillage, Moustik and Jamba are the most important mobile service providers.
256. Universal is the most important digital music licensor (32%) in Belgium. Two other majors follow closely: Sony BMG (26%) and EMI (25%). Warner accounts for the remaining 17%. For online downloads (both tracks and albums), Universal (29%), Sony BMG (27%) and EMI (27%) have comparable market shares. Warner accounts for 17%. With regard to the mobile segment, EMI is the smallest player (17%). Universal leads with 46%, followed by Warner (19%) and Sony BMG (18%).

Online price analysis

Single Tracks (standard and premium)

257. The Commission's price analysis shows that iTunes' particularly strong position in the Belgian online market has put pressure on the wholesale prices of the majors to alternative retailers. Whilst prices have decreased over time, no alignment in price fluctuations can be detected, nor have prices converged to a comparable price for all majors.
258. Overall pricing varies among the majors. [...] the difference between the highest price applied in the market compared to the lowest price is more than [20-30]*%. No correlation can be observed between market shares and the applied prices.
259. With regard to prices applied by the different majors for a given customer, there are differences in pricing, including the pricing applied by Sony BMG. For some [...] customers, the price differences between the cheapest and the most expensive major can amount to up to [30-40]*%. For other digital music retailers (other than iTunes), that price difference is at least [10-20]*%. It is also important to stress that where prices to [...] retailers diverge by [10-20]*% or more, it is not consistently the same major that applies the lowest or highest price.
260. The degree of price variability is significantly greater for premium tracks than for standard tracks.

Albums (standard and premium)

261. In Belgium, albums are sold mostly at the standard rate and in the mid-price segment. For mid price albums there are strong price differences between the majors that fluctuate over time.
262. For standard albums, the level of price variability is comparable to that for single tracks. Price differences between the cheapest and the most expensive major for an individual customer are in the 10% to 15% range, and reach differences up to

[20-30]*% for some digital music retailers. Where price fluctuations can be observed, prices are without exception decreasing.

Mobile price analysis

Mastertones

263. Mastertones are a strongly growing segment in the Belgian digital market. There is no tiered pricing (for example premium versus budget) for mastertones.
264. The majors apply different prices, with variations up to [40-50]*%. Differences between the cheapest and the most expensive major for an individual customer are generally in the 15% to 20% range, but greater differences of up to [40-50]*% exist. There is some price fluctuation over time, but less than is observed in Contracting Parties to the EEA Agreement where the market is more mature.
265. There is no correlation between market shares and applied pricing, as the largest provider of mastertone content does not apply the highest prices.

Mobile downloads

266. Mobile downloads represent a rather small market segment in Belgium, which limits the relevance of a price analysis. In any case, the majors apply different prices and prices for individual customers do not converge. The levels of price variability are comparable with those for single track downloads.

Transparency

267. On the basis of the above analysis (paragraph 257 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated.
268. Notwithstanding iTunes' strong retail position in Belgium – both direct and indirect as iTunes also provides the content offer on the Belgacom Skynet portal – there is an important degree of price variability in the market.
269. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

270. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers, the general considerations apply. As to the effect of the merger on the Belgian wholesale digital music market, the market investigation has not shown that [...]*.
271. The Commission therefore concludes that on the Belgian wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant

position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

g) Netherlands

Introduction

272. The Dutch digital market has generated trade revenues of EUR 11,25 million, up by 80% from 2005, and represents 4% of all recorded music in the Netherlands by value. The Dutch market is to a large extent an online market, as only 22% of these revenues are mobile based. On the other hand, mobile revenues have doubled in 2006. The most important individual application is online single tracks (45 % of trade revenues). Online albums (33%) and mastertones (17%) are the other important applications. There are virtually no mobile downloads in the Dutch market. Ringtones, subscription, streaming and video account for the remaining 5% of the market.
273. Although the market is 5 times smaller than the German market, as many (32) digital music retailers are active on the Dutch market as in Germany. In the online segment, Apple iTunes leads the market, but is closely followed by white label service provider OD2 that serves amongst others the Dutch telecom incumbent KPN. FRS and Music Minute are two other important retailers. In the mobile segment, Vodafone, T-mobile and KPN are the leading retailers following their position in the mobile telecommunication markets. Jamba and Mobile Money are the most important mobile service providers.
274. Universal is the most important digital music licensor (31%), closely followed by Sony BMG (29%) and EMI (26%). Warner is the smallest player (15%). Specifically with regard to online downloads (both tracks and albums), Universal and EMI are on equal footing (both 31%). Sony BMG (24%) and Warner (14%) account for the remainder. With regard to the mobile segment, Sony BMG leads with 36%, followed by Universal (32%), Warner (22%) and EMI (10%).

Online price analysis

Single Tracks (standard and premium)

275. The Commission's price analysis shows that prices of a given major vary considerably from customer to customer. The highest degree of price variability can be observed for the [...] majors. The difference between the highest and the lowest price [...] is in the 15% - 20% range.
276. With regard to prices applied by the different majors for a given customer, there are differences in pricing, including the pricing applied by Sony BMG. For some customers, the price differences between the cheapest and the most expensive major can amount to up to [30-40]*%. For other digital music retailers (other than iTunes), that price difference is at least 10% - 15%. The more important price variations can be observed for the large retailers (other than iTunes).

277. Prices have decreased over time but the Commission did not observe that prices to the different retailers converge.

278. These comments apply to standard tracks as these account for the vast majority of tracks sold in the Netherlands. Price variability is even more pronounced for premium tracks.

Albums (standard and premium)

279. Most digital albums in the Netherlands are sold at the standard rate or in the mid-price segment, and for both there are strong price differences between the prices that majors charge to retailers. Price differences between the cheapest and the most expensive major for an individual customer are in the 10% to 20% range, but can amount to up to [30-40]*% for some digital music retailers. Price fluctuations over time are limited as wholesale album prices are lower than in most Contracting Parties to the EEA Agreement.

280. The observed price differences between the majors also apply to white label service providers, although there is less price fluctuation over time for these digital retailers.

Mobile price analysis

Mastertones

281. For mastertones, there are very important price differences between the majors. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and can amount to up to [40-50]*% for some digital music retailers. There are only limited price fluctuations over time.

Mobile downloads

282. Mobile downloads represent a too limited market segment in the Netherlands for a price analysis to be relevant. In any case, the wholesale prices that can be observed show very significant variation between the different majors.

Transparency

283. On the basis of the above described price variability (paragraphs 275 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated. Whilst there is only limited price fluctuation over time, most digital music prices are lower than in most Contracting Parties to the EEA Agreement. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

284. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. As to the effect of the merger on the Dutch wholesale digital music market, the market investigation showed that [...]*.
285. The Commission therefore concludes that on the Dutch wholesale market for digital music licensing, for all digital music or for online music or mobile music only, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

h) Sweden

Introduction

286. The Swedish market generated trade revenues of EUR 10 million, up by 250% from 2005, and represents around 6% of the sum of all recorded music markets in 2006. One third of these revenues are mobile revenues, two thirds online revenues. The Swedish market supports a wide range of applications. The most important individual applications are online singles (18 % of trade revenues), followed by online albums (10%), mastertones (8%), mobile single tracks (6%). Mobile music videos (9%) are the fastest growing application. The remainder of 44% accounts for ringtones and various subscription and streaming applications, including video streaming. Whilst mobile sales have doubled, online sales have tripled.
287. About 25 digital music retailers are active on the Swedish market. In the online segment, Apple iTunes leads the market, but is closely followed by white label service provider OD2, 24/7, CDON and Inprodicon. In the mobile segment, 'Tre' (Hutchison) and Vodafone are the mobile telecommunication companies offering mobile music and video. Aspiro, SonyEricsson and INPOC are the most important mobile service providers.
288. Sony BMG is the most important digital music licensor (32%) in Sweden, followed by EMI with 27%, Warner (24%) and Universal with 16%. For online downloads (both tracks and albums), Sony BMG is the leader (31%), followed by Universal (25%), Warner and EMI (both 22%). With regard to the mobile segment, EMI and Sony BMG lead (both 32%), followed by Warner (26%) and Universal (10%).

Online price analysis

Single Tracks (standard and premium)

289. The Commission's price analysis shows that all majors apply different prices to their downstream customers to varying degrees (5% to 20%). No correlation can be observed between market shares and the applied prices. The price analysis does not show majors consistently charging a higher price where they have a higher share of music downloads or a lower price where they have a lower share of music downloads.
290. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing. The most pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [30-40]*%. The least pronounced price difference between the cheapest and the most expensive major for a given customer (other than iTunes) amounts to [10-20]*%.
291. Prices for standard download tracks have fluctuated downward to some degree. Where prices of the majors have declined, they have not converged to a narrow price band.
292. These comments apply to standard tracks as price variability is even greater for premium tracks, although most single tracks sold in Sweden are sold as standard tracks.

Albums (standard and premium)

293. The results of the above analysis for single tracks (paragraph 289 and onwards) also applies to albums. The majors do not apply the same prices to all customers. Looking at specific customers, prices of the different majors can vary by as much as [40-50]*%. The same degree of price variability can be observed for online video streaming.

Mobile price analysis

Mastertones and video

294. Mastertones and mobile video are strongly growing digital segments in the Swedish market. There is no tiered pricing (for example premium versus budget) for these segments.
295. All majors apply different prices for mastertones and video to the different mobile download retailers, and these differences can be significant within a 15% - 30% range. Differences between the cheapest and the most expensive major for an individual customer are within a 20% to 30% range. These price differences have not been affected by the merger.

Mobile downloads

296. The price variability for mobile downloads reflects the observed price variability for online downloads

Transparency

297. On the basis of the above described price variability (paragraph 289 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated, including for the various streaming, video and subscription models that exist in the Swedish market. Prices and usage conditions for these applications vary to such extent that any alignment between the majors can be excluded.
298. In addition, it should be underlined that all majors in the Swedish market apply complex revenue sharing agreements which further decrease transparency in the market.

Retaliation, countervailing abilities and the effect of the merger

299. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply.
300. The major's wholesale prices for iTunes Sweden are broadly similar to those in the Euro zone, and the Commission's analysis of iTunes' countervailing buyer power is therefore the same as that for the Euro zone.
301. As to the effect of the merger on the Swedish wholesale digital music market, the market investigation showed that [...]*
302. The Commission therefore concludes that on the Swedish wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

i) Denmark

Introduction

303. The Danish digital music market generated trade revenues of EUR 8.75 million, up by 700% from 2005, and represents 6% of the sum of all recorded music markets in Denmark. 72% of these revenues are online revenues, 28% mobile revenues. The most important individual applications are online singles (37% of trade revenues) and online albums (28%), followed by mastertones (8%). Mobile music videos (7%) are the fastest growing application. A number of other

applications – ranging from streaming to subscription, online videos and ringtones account for the remaining 20%.

304. Some 32 digital music retailers are active on the Danish market. In the online segment, Apple iTunes is followed by Phonofile, TDC, Dansk Supermarked Gruppen and white label service providers including OD2 and 24/7. In the smaller mobile segment, the mobile telecom operator Hutchison H3G leads the market. Aspiro, Mediaplaza and INPOC are the most important mobile service providers.
305. Sony BMG (40%) is the leader in the Danish digital market, followed by the three other majors that have comparable market shares in the 20% to 22% range. For online downloads (both tracks and albums), Sony BMG (38%) is the leader, followed by EMI (28%), Universal (18%), and Warner (16%). With regard to the mobile segment, Sony BMG (55%) is by far the largest player, followed by Universal (16%), Warner (16%) and EMI (13%)

Online price analysis

Single Tracks (standard and premium)

306. The Commission's price analysis shows that all majors apply different prices in Denmark for single track downloads within a 10% to 15% range. With regard to individual customers, the Commission found that prices between the cheapest and the most expensive major vary in a 10% - 20% range for all online download music providers, without greater differences being observed.
307. There is no correlation between markets shares and applied prices [...]*.
308. Price fluctuations in this segment of the Danish market are limited. [...]*.

Albums (standard and premium)

309. For album downloads, the above comments for track downloads with regard to price differences between the majors and the degree to which majors' prices are different for a given digital music retailer also apply. These variations are more pronounced for premium and mid price albums and videos than for standard albums.

Mobile price analysis

Mastertones

310. All majors apply varying wholesale prices. The price differences applied by a given major to retailers in Denmark can be significant. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and greater differences can be observed. Price fluctuations over time are limited as prices for mastertones are relatively low compared to the other assessed Contracting Parties to the EEA Agreement. In any case, even when prices are relatively low, they have not converged to a common price point.

Mobile videos and mobile downloads

311. The same observations as those provided for mastertones can be made for mobile videos and mobile downloads. In respect of mobile downloads, it can be observed that there are very significant price differences [...]*.

Transparency

312. On the basis of the above analysis (paragraphs 306 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated. Further, with regard to the smaller segments such as streaming and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded. As observed for the Swedish market, all majors in the Danish market apply complex revenue sharing agreements which further decrease transparency in the market.

Retaliation, countervailing abilities and the effect of the merger

313. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. In all segments the wholesale prices are particularly low compared to the other affected Contracting Parties to the EEA Agreement.
314. The major's wholesale prices for iTunes Denmark are broadly similar to those in the Euro zone, and the Commission's analysis of iTunes' countervailing buyer power is therefore the same as that for the Euro zone.
315. As to the effect of the merger on the Danish wholesale digital music market, the market investigation showed that [...]*the merger has not led to increased transparency, a convergence of pricing [...]*.
316. The Commission therefore concludes that on the Danish wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

j) Austria

Introduction

317. The Austrian digital market has grown with 75 % compared to 2005, with wholesale revenues of EUR 8,75 million, and represents 5% of all recorded music in Austria by value. 72% of these revenues stem from mobile applications, 18% are online based. The most important individual application is mastertones (51%), followed by online single tracks (16 % of trade revenues) and online albums (14%). There are almost no mobile single track sales. The remainder of the market is composed of ringtones, video and subscription and streaming based services.

318. About 12 digital music retailers are active on the Austrian market. In the online segment, Apple iTunes leads the market by far followed by OD2, Afendis, Musicload and 24/7. In the mobile segment, Vodafone, Hutchison and T-mobile Austria are the mobile telecommunication companies offering mobile music and video.
319. Universal (36%) is the leader in the Austrian digital market, followed by Sony BMG (26%), Warner (19%) and EMI (13%). For online downloads (both tracks and albums), the market shares are comparable to the overall market. Universal (34%) leads, followed by Sony BMG (26%), Warner (19%) and EMI (21%). With regard to the mobile segment, Universal (47%) is the largest player, followed by Sony BMG (27%), Warner (18%) and EMI (8%).

Online price analysis

320. It should be emphasised that the very strong position of iTunes in the relatively small Austrian online market segments limits the relevance of a price analysis with regard to alternative online digital music retailers.

Single Tracks (standard and premium)

321. In the Austrian online market, [...] of the 4 majors apply different prices to their customers, and the difference between the highest price and the lowest price applied by a given major varies between 5% and 30%. [...].
322. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing. The most pronounced price difference between the cheapest and the most expensive major for a given customer amounts to [20-30]*%. The least pronounced price difference between the cheapest and the most expensive major for a given customer (other than iTunes) amounts to [0-10]*%.
323. Prices for standard download tracks have been decreasing considerably over time, and this downward evolution has not changed after the merger. Whilst prices of all majors have declined, they have not converged to a narrow price band, although price differences were greater when the market was at its early stages. Given that the average price variation remains around [10-20]*%, the lower price trend has levelled off the highest prices, [...].
324. Price variability is even greater for premium tracks.

Albums (standard and premium)

325. The above analysis for online tracks also applies to albums (both standard and premium). The majors apply different prices to their customers within a 5% to 30% range. Looking at specific customers, prices of the different majors can vary by as much as [30-40]*%.

Mobile price analysis

Mastertones

326. Mastertones are the most important digital segment in Austria. There is no tiered pricing (for example premium versus budget) for mastertones.
327. [...] * Differences between the cheapest and the most expensive major for an individual customer are generally equally in the 10% - 20% range, but greater differences of nearly up to 100% exist [...] *.
328. There is some fluctuation over time and per customer as prices for mastertones have generally decreased [...] *. The downward price evolution has therefore not been affected by the merger.

Mobile downloads

329. Mobile downloads represent a rather small market segment in Austria, which limits the relevance of a price analysis. In any case, all majors apply different prices that strongly fluctuate in time as the majors try different pricing models to increase demand.

Transparency

330. On the basis of the above analysis (paragraphs 320 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated. Whilst the Austrian market is characterised by a concentration of demand, the analysis shows that the majors try different pricing strategies to strengthen the presence of competitors to iTunes and to differentiate demand. It follows that the price evolution is more likely to be the outcome of competition rather than of coordination.
331. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to a large extent, excluding any alignment between the majors.

Retaliation, countervailing abilities and the effect of the merger

332. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers, the general considerations apply. Concerning the countervailing abilities of customers, buyer power can be observed in particular for iTunes, but less for mobile telecom operators. The market investigation has however shown that prices in the mobile segment can decrease significantly as a result of smaller telecom companies being able to source from pan-European deals concluded by their parent (telecom) companies and the majors.
333. Concerning the effect of the merger on the Austrian wholesale digital music market, the market investigation has shown that prices continue to decrease [...] *.

334. The Commission therefore concludes that on the Austrian wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

k) Portugal

Introduction

335. Wholesale revenues in the Portuguese digital market – which barely existed in 2005 – reached EUR 5 million in 2006 and represent 4% of all recorded music in Portugal by value. 75% of these revenues are mobile based, 25% are online based. The most important individual application is mastertones (64% of trade revenues), followed by mobile single tracks (12%), online single tracks (8 %) and online albums (6%). Ringtones, subscription, streaming and other applications account for the remainder.
336. Only 5 digital music retailers are active on the Portuguese market. In the online segment, Apple iTunes accounts for nearly all of the market. The only other online retailers are OD2 and Musica online. In the mobile segment, Vodafone and TMN are the leading mobile telecommunication companies offering mobile music and video. 123 multimedia and Musiwave are the most important mobile music service providers.
337. Universal is the most important digital music licensor (39%) in Portugal. Sony BMG (34%), EMI (16%) and Warner (11%) follow. For online downloads (both tracks and albums), Sony BMG leads (32%), followed by Universal (26%), EMI (23%) and Warner. With regard to the mobile segment, Warner is the smallest player (9%). Universal leads with 42%, followed by Sony BMG (32%) and EMI with 14%.

Online price analysis

338. It should be emphasised that the very strong position of iTunes in the relatively small Portuguese online market segments limits the relevance of a price analysis with regard to alternative online digital music retailers.

Single Tracks (standard and premium)

339. Wholesale prices to retailers other than iTunes are differentiated for [...] of the four majors and these prices vary considerably. Whereas the [...] majors apply a very comparable price to the online digital retailers that compete with iTunes, the other [...] not, and the difference between the highest price they charge retailers and their lowest price to customers can amount to [20-30]*%.
340. With regard to prices applied by the different majors for a given customer, there are significant differences in pricing [...]*. For some customers, the price differences between the cheapest and the most expensive major can amount to more than [30-40]*%. For other digital music retailers (other than iTunes), [...] of the

four majors apply a rather similar price (in the sense that there is price variation between the majors, but not more than can be observed for iTunes). However, as these retailers account for a de minimis part of the Portuguese online market, this does not affect the degree of price alignment in the Portuguese market.

341. The comments for the two paragraphs above apply to standard tracks, but price variability is more pronounced for premium tracks.

Albums (standard and premium)

342. Albums are sold in Portugal at the standard rate and in the mid-price segment. The observations for online tracks also apply to albums. [...]*

Mobile price analysis

Mastertones

343. Mastertones are the most important digital segment in Portugal. There is no tiered pricing (for example premium versus budget) for mastertones.
344. [...]*. Differences between the cheapest and the most expensive major for an individual customer are generally in the 15% to 25% range, but greater differences of up to [100-110]*% exist. There are fluctuations over time, with prices moving up and down. There is also no consistency with regard to price fluctuations. For some customers, a given major applies stable pricing, whereas for other customers it applies widely fluctuating prices. [...]*

Mobile downloads

345. With regard to the mobile download prices applied by the different majors for a given customer, price differences and price fluctuations are even greater than for mastertones. All majors apply differentiated prices. The most pronounced price difference between the cheapest and the most expensive major that could be observed for a given customer amounts to [100-110]*%. Price fluctuations are common for all majors.

Transparency

346. On the basis of the above analysis (paragraphs 338 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated. Particularly the widely varying prices in the mobile segment point to Portugal as a nascent market. As to online album downloads, it could be argued that the merger has increased alignment, [...]*. However, such is not the result of coordination as, firstly, the level of convergence is identical (but not more important) to that for iTunes and secondly, the part of demand that is represented by digital music retailers for which that alignment can be observed is insignificant.

Retaliation, countervailing abilities and the effect of the merger

347. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. Concerning the countervailing abilities of customers, the leading position of iTunes should be underlined.
348. The Commission therefore concludes that on the Portuguese wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

I) Ireland

Introduction

349. The Irish digital market has generated trade revenues of EUR 5 million, and represents 4% of all recorded music in Ireland by value. The market barely existed in 2005. Mobile and online revenues each account for 50% of the market. The most important individual application is online single tracks (32 % of trade revenues), followed by mastertones (30%) and online albums (21%). Mobile track downloads account for 11% of the Irish digital music market. Ringtones, subscription, streaming and video account for the remaining 6% of the market.
350. Eleven digital music retailers are active on the Irish market. In the online segment, Apple iTunes sales account for almost all of the market. The only other retailer of some importance is OD2. In the mobile segment, Vodafone, O2 Ireland and Hutchison H3G are the leading retailers following their position in the mobile telecommunication markets. Jamba, SonyEricsson and Musiwave are the most important mobile service providers.
351. Universal is the most important digital music licensor (37%), followed by EMI (25%) and Sony BMG. Warner is the smaller player (15%). Specifically with regard to online downloads (both tracks and albums), Universal and EMI are equal (both 30%). Sony BMG (24%) and Warner (16%) account for the remainder. With regard to the mobile segment, Universal leads with 46% followed by Sony BMG (22%), EMI (19%) and Warner (12%).

Online price analysis

352. It should be emphasised that the very strong position of iTunes in the relatively small Irish online market segments limits the relevance of a price analysis with regard to alternative online digital music retailers.

Single Tracks (standard and premium)

353. The Commission's price analysis shows that [...]*

354. On the level of the individual customers, the analysis shows price differences between the cheapest and the most expensive major that are sometimes significantly in excess of 5% - 10% for all online download music providers (except for iTunes). There is very limited price fluctuation in the market and the merger has not changed that.

355. The comments in the two above paragraphs apply to standard tracks as these account for the vast majority of tracks sold in Ireland. Due to the market position of iTunes, there is little tiered pricing in the Irish market.

Albums (standard and premium)

356. For albums, the same comments as for online single tracks apply.

Mobile price analysis

Mastertones

357. All majors apply significantly different pricing (10% - 60% ranges) to their retailers. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and can amount to up to [60-70]*% for some digital music retailers. There are significant fluctuations over time for mastertones, with both increasing and decreasing prices. [...]*.

Mobile downloads

358. The same analysis as for mastertones applies to mobile downloads. Prices to retailers differ significantly for a given major. Differences between the cheapest and the most expensive major for an individual customer are very significant (up to [100-110]*%). One of the smaller majors applies prices that are significantly [...]* than the other majors.

Transparency

359. On the basis of the above described price variability (paragraphs 352 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated. Whilst price variability in the Irish online market segment is to a large extent determined by the demand concentration in the hands of iTunes, prices are not aligned and the merger has not changed that.

360. In those segments where iTunes is not present, there is more price variability, which has not been reduced after the merger. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

361. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers – and in particular iTunes – the general considerations apply.
362. The Commission therefore concludes that on the Irish wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

m) Norway

Introduction

363. The Norwegian market generated trade revenues of EUR 5 million, up by 100% from 2005, and represents around 4% of the sum of all recorded music markets in Norway in 2006. Half of these revenues are mobile revenues, the other half are online revenues. The most important individual applications are mastertones (32% of trade revenues), followed by online singles (25 %), online albums (25%) and mobile single track downloads (13%). The remainder of 5% accounts for ringtones and various subscription and streaming applications, including video streaming.
364. About 16 digital music retailers are active on the Norwegian market. In the online segment, Apple iTunes leads the market by far, and is followed by white label service providers OD2 and CDON. In the mobile segment, Telenor and TeliaSonera are the mobile telecommunication companies offering mobile music and video. Aspiro, SonyEricsson and Paragallo are the biggest mobile service providers.
365. Sony BMG is the most important digital music licensor (33%) in Norway, followed by Universal with 27%. EMI and Warner both have 20%. For online downloads (both tracks and albums), Sony BMG is the leaders (33%), followed by Universal (26%), EMI (22%) and Warner (18%). With regard to the mobile segment, Sony BMG leads (33%), followed by Universal (28%), Warner (21%) and EMI (18%).

Online price analysis

Single Tracks (standard and premium)

366. The Commission's price analysis shows that iTunes' particularly strong position in the Norwegian online market has put pressure on the wholesale prices of the majors to alternative retailers.

367. Overall pricing varies to different degrees among the majors. Whereas [...] majors apply a comparable price to the most important online digital retailers (other than iTunes), the [...] other majors do not, and the difference between the highest price applied in the market compared to the lowest price is more than [20-30]*%. [...]*.
368. With regard to prices applied by the different majors for a given customer, there are differences in pricing [...]*. For some [...] customers, the price differences between the cheapest and the most expensive major can amount to up to [20-30]*%. For other digital music retailers (other than iTunes), that price difference is between 5% and 10%.
369. The level of price variability is greater for premium tracks than for standard tracks.

Albums (standard and premium)

370. The analysis for online tracks also applies to albums. For standard albums, the level of price variability is comparable to that for single tracks. Price differences between the cheapest and the most expensive major for an individual customer are in the 10% to 15% range, and reach a difference of up to [20-30]*% for some digital music retailers. Price variation for premium / mid price albums is greater.

Mobile price analysis

Mastertones

371. There is no tiered pricing (for example premium versus budget) for mastertones in the Norwegian market.
372. The majors apply different prices, with variations up to [30-40]*%. Differences between the cheapest and the most expensive major for an individual customer are generally in the 10% to 20% range, but greater differences of up to [40-50]*% exist.
373. There is no correlation between market shares and applied pricing [...]*.

Mobile downloads

374. For mobile downloads the majors apply significantly different prices to their customers (up to [40-50]*% difference). With regard to individual customers, the Commission found that prices between the cheapest and the most expensive major generally vary in a 10% - 20% range for all online download music providers, but more significant differences can be observed. There are also important price fluctuations over time and across the different retailers.

Transparency

375. On the basis of the above analysis (paragraphs 366 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated.

376. There is an important degree of price variability in the market that has not been affected by the merger. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions also vary significantly.

Retaliation, countervailing abilities and the effect of the merger

377. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. As to the effect of the merger on the Norwegian wholesale digital music market, the market investigation [...]*.
378. The major's wholesale prices for iTunes Norway are broadly similar to those in the Euro zone, and the Commission's analysis of iTunes' countervailing buyer power is therefore the same as that for the Euro zone.
379. The Commission therefore concludes that on the Norwegian wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

n) Greece

Introduction

380. The Greek market is the second smallest of the analysed markets. The Greek digital music market generated trade revenues of EUR 5 million, where no revenues were reported in 2005. Almost all revenues are mobile revenues. The most important individual applications are ringback tones (not covered by the investigation), mastertones (22%) and mobile single tracks (8%). A number of other applications – ranging from mobile subscription to various ringtones account for the remaining 22%. The Greek market is clearly an emerging and immature market as evidenced by its focus on (monophonic and polyphonic) ringtones. The fact that the online market is virtually non existent follows from the limited broadband penetration in Greece.
381. Less than 10 digital music retailers are active on the Greek market. The mobile telecom operators Vodafone and Cosmote lead the market. Buongiorno and SonyEricsson are important mobile service providers.
382. EMI, Universal and Sony BMG all have around 30% of the market. Warner (10%) accounts for the remainder.

Online price analysis

383. It should be emphasised that the very limited size of the Greek online market segment renders a price analysis with regard to alternative online digital music retailers irrelevant.

Mobile price analysis

Mastertones

384. All majors apply varying wholesale prices to their customers. These price differences can be very pronounced (up to [60-70]*%). Differences between the cheapest and the most expensive major for an individual customer are in the 15% to 30% range, and can amount to up to [50-60]*% for some digital music retailers. Where there are price fluctuations, no parallelism can be observed in these price movements. The price of a given major can at the same time increase for some customers and decrease for other customers. [...]*.

Mobile downloads

385. [...] differences between the cheapest and the most expensive major for an individual customer are in the 15% to 30% range, and can amount to up to [70-80]*% for some digital music retailers.

Transparency

386. On the basis of the above analysis (paragraph 383 and onwards), it can be concluded that wholesale prices are not aligned for any of the segments investigated.
387. Applications such as streaming, video and subscription models have not yet entered the Greek market.

Retaliation, countervailing abilities and the effect of the merger

388. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply.
389. As to the effect of the merger on the Greek wholesale digital music market, the market investigation showed that [...]*.
390. The Commission therefore concludes that on the Greek wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

o) Finland

Introduction

391. The Finnish digital market is the smallest of all markets analysed. The Finnish market provided wholesale revenues of EUR 2,5 million, representing 2% of all recorded music in Finland by value. The market barely existed in 2005. 50% of these revenues stem from mobile revenues, 50% are online based. The most important individual application is mastertones (36%), followed by online single tracks (31 % of trade revenues) and online albums (27%). There are almost no mobile track sales. The remainder of the market is composed of ringtones, video and subscription and streaming based services.
392. About 21 digital music retailers are active on the Finnish market. In the online segment, Apple iTunes leads the market by far followed by Antilla, 24/7, Inprodicon and Musicbrigade. In the mobile segment, WES, Jamba, Elisa and SonyEricsson are the most important mobile music service providers.
393. Sony BMG (38%) is the leader in the Finnish digital market, followed by Warner (25%), Universal (18%) and EMI (19%). For online downloads (both tracks and albums), Sony BMG (33%) leads, followed by Warner (26%), EMI (22%) and Universal (20%). With regard to the mobile segment, Sony BMG (33%) is the largest player, followed by Warner (26%), EMI (22%) and Universal (20%).

Online price analysis

Single Tracks (standard and premium)

394. The Commission's price analysis shows that prices of at least two of the four majors vary considerably from customer to customer. The highest degree of price variability can be observed for the [...]*major. The difference between the highest and the lowest price applied by that major is around [40-50]*%. The other major differentiates prices in the 15% - 20% range.
395. With regard to prices applied by the different majors for a given customer, there are differences in pricing [...]*. For [...]*customers, the price differences between the cheapest and the most expensive major can amount to up to [30-40]*%. For other digital music retailers (other than iTunes), that price difference is at least 10% - 15%. [...]*.
396. These comments apply to standard tracks as these account for the vast majority of tracks sold in Finland. Price variability is more pronounced for premium tracks.

Albums (standard and premium)

397. The same comments as to online tracks apply to online albums. There are strong price differences between the prices that majors charge to retailers. Price differences between the cheapest and the most expensive major for an individual customer are generally in the 10% to 20% range, but can amount to up to [30-40]*% for some digital music retailers. Price fluctuations over time are limited.
398. These observations also apply to premium and mid price albums.

Mobile price analysis

Mastertones

399. There are very important price differences between the majors. Differences between the cheapest and the most expensive major for an individual customer are in the 20% to 30% range, and can amount to up to [80-90]*% for some digital music retailers. One major[...] is the most expensive mastertone provider to one of the retailers whilst at the same time being the least expensive provider to another retailer.

Mobile downloads

400. Mobile downloads represent a too limited market segment in Finland for a price analysis to be relevant. In any case, the wholesale prices that can be observed show variation to the same degree as for online downloads.

Transparency

401. On the basis of the observed price variability, it can be concluded that wholesale prices are not aligned for any of the segments investigated. With regard to the smaller segments such as streaming, video and subscription models, prices and usage conditions vary to such an extent that any alignment between the majors can be excluded.

Retaliation, countervailing abilities and the effect of the merger

402. Regarding the retaliation mechanism and the countervailing abilities of competitors and customers the general considerations apply. As to the effect of the merger on the Finnish wholesale digital music market, the market investigation showed that [...]*
403. The Commission therefore concludes that on the Finnish wholesale market for digital music licensing, for all digital music or for online music or mobile music, the concentration has not led to the creation or strengthening of a collective dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

6. CONCLUSION

404. On the basis of all of the above, it can be concluded that the merger has neither led nor will lead to the creation or strengthening of a collective dominant position of the four remaining majors in the markets for licences for digital music in any of the Contracting Parties to the EEA Agreement, as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

B. COMPATIBILITY WITH THE COMMON MARKET AND THE EEA AGREEMENT - RECORDED MUSIC IN PHYSICAL FORMATS

1. GENERAL MARKET CHARACTERISTICS

1. Market players

a) Competitors

405. Since the implementation of the merger between Sony and BMG, the markets for recorded music in all Contracting Parties to the EEA Agreement have been characterised by the presence of four fully integrated major record companies (Sony BMG, Universal Music Group, Warner Music Group, and EMI) and a large number of significantly smaller record companies.

406. Majors are characterised by:

(i) A world-wide presence and a vertically integrated organisation. Majors or their affiliated companies also have publishing activities⁸⁶ and are active on various downstream markets, such as radio/TV broadcasting⁸⁷ and the online exploitation of music⁸⁸.

(ii) A presence at all levels of the value chain in music recording: from the signing of artists, the manufacture of CDs, to the distribution to retailers, although these two latter activities tend to be more and more outsourced.

(iii) Significant financial capacities, enabling them to offer artists and customers more attractive financial conditions than independents (for example higher advances for artists, much higher promotional and marketing expenditure).

(iv) A large diversified portfolio of artists and a large diversified repertoire, as well as significant back catalogues.

407. Independents are characterised by:

⁸⁶ Case COMP/M.4404 – Universal/BMG.

⁸⁷ Bertelsmann controls radio and TV stations in Germany, France and Benelux.

⁸⁸ Sony controls the platform www.sonyconnect.com; Universal controls the platform www.emusic.com.

- (i) Smaller organisations.
- (ii) A large number of players present on the market (thousands in the EEA).
- (iii) A focus on A&R⁸⁹ and recording. Manufacturing and distribution are often outsourced. Independents often depend on the distribution networks of majors. Only some large independent record companies have their own distribution facilities.
- (iv) A national presence although a limited number of successful independents also have international operations.
- (v) Limited budget for promotional and marketing expenditure, thus limiting the international promotion of artists and a more limited access to mass media.
- (vi) A focus on a particular repertoire (classical, dance music, etc.) or “niche” genres, although the largest independents generally cover several genres.
- (vii) Limited back catalogue, implying a higher dependency on new releases.

408. According to the data provided by the parties, the four majors accounted in 2006 for approximately 80% of the markets in the EEA in terms of so-called “owned content”⁹⁰, based on a product market definition comprising all genres of recorded music.

409. On an EEA-wide level and in most Contracting Parties to the EEA Agreement, Universal is the largest major with an EEA share of 29% in 2006 and national market shares ranging from 18% (Portugal) to 37% (France). Sony BMG is second to Universal with an EEA market share of 22% and national market shares ranging from 14% (Greece) to 32% (Italy). EMI is the third largest major in the EEA with a market share of 17% in 2006, and national market shares ranging from 12% (Germany) to 33% (Greece). Warner’s EEA market share was 12% in 2006, with its national market shares ranging from 7% (Greece and Portugal) to 22% (Italy).

⁸⁹ A & R stands for Artist and Repertoire, the activity of discovering and developing artists.

⁹⁰ According to the notification, IFPI defines “Owned Content” as trade sales of finished music product by the Member Company (that is that is the record company) to retailers or to intermediate wholesalers, net of returns and discounts and excluding exports (in accordance with IFPI Market Data Reporting Definitions).

TABLE 1 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Austria	104	22	35	9	14	20
Belgium	116	19	29	10	26	16
Denmark	85	20	23	11	18	28
Finland	59	23	19	18	19	22
France	842	22	37	16	19	6
Germany	1 122	21	26	8	12	33
Greece	46	14	22	7	33	24
Ireland	69	29	29	13	19	10
Italy	287	32	20	22	16	10
Netherlands	184	17	27	9	22	25
Norway	90	21	25	10	15	29
Portugal	59	16	18	7	17	42
Spain	248	26	24	17	18	15
Sweden	112	24	20	15	19	22
United Kingdom	1 526	21	31	10	18	20
TOTAL	4 949	22	29	12	17	20

Source: Notifying parties; IFPI; Commission analysis

410. Sony BMG is the market leader in Finland, Ireland, Italy, Spain and Sweden. However, only in Italy does Sony BMG lead the market significantly ahead of Universal. Nevertheless, even in those Contracting Parties to the EEA Agreement where Sony BMG is the leader, it is not in a situation to reach a dominant position that would impede effective competition.

411. The majors' market shares have been relatively stable in the EEA in the period 2000-2006 as the following table 2 illustrates:

TABLE 2 - EEA market shares – physical recorded music							
EEA	2000	2001	2002	2003	2004	2005	2006
BMG	11%	10%	11%	-	-	-	-
Sony	13%	13%	13%	-	-	-	-
Sony BMG	24%	24%	24%	25%	26%	22%	22%
Universal	26%	27%	27%	26%	28%	27%	29%
EMI	19%	19%	17%	18%	17%	17%	17%
Warner	13%	12%	12%	13%	12%	12%	12%
Independents	19%	19%	20%	19%	18%	22%	20%

Source: Notifying parties

412. Table 2 shows a limited volatility, with the largest changes occurring for Universal (+3% within 6 years) and EMI (-2% within 6 years), whilst Sony BMG lost 4% between 2004 and 2005, when the independents gained 4% in the same period, before losing another 2% in 2006. The notifying parties submit that Sony BMG's decline between 2004 and 2005 was an effect of the merger as the new entity has decreased its artist roster. It has also been argued by several competitors that the market share decline of Sony BMG was a normal consequence of the uncertainty associated with the implementation of the merger, and that their market share would grow back to its pre-merger level after a certain time. This latter assumption has

however not been confirmed by the analysis of Universal market shares before and after the purchase of Polygram⁹¹.

413. In addition, market share volatility differs between the Contracting Parties to the EEA Agreement, sometimes significantly. A difference in market share of more than 5 points in the period 2002-2006 was observed for at least one of the majors or combined independents in 11 out of the 15 Contracting Parties to the EEA Agreement analysed.

414. In almost all EEA markets, the 4 majors are the only large record companies enjoying a market share higher than 10-15%. By contrast, individual independent companies, only with isolated exceptions⁹², generally do not reach more than a maximum 2-3% market share in any of the national markets. Independent record companies account, according to the notification, altogether for approximately 20% of the EEA market in 2006. At a national level, the situation is diverse, with the combined strength of independents varying from as high as 42% in Portugal to as low as 10% in Ireland. Among the largest Contracting Parties to the EEA Agreement, the situation is also diverse with for example independents enjoying a combined 33% market share in Germany, whilst only a combined 5% in France. There is thus no clear pattern for independent penetration according to size of the market, success of national repertoire or other criteria.

b) Artists

415. The Commission received information from an independent market observer that the merger of Sony and BMG has had a negative impact on cultural diversity, in the sense that the merger furthered the strategy of the majors recording companies of reducing their catalogues and local language repertoire, as well as concentrating on 'promoting commoditised Anglo-American products through increasingly narrow retail channels', which affected consumer choice.

416. Sony BMG has significantly decreased the number of artists on its roster, declining from [...] in 2002 to [...] in 2006 at the EEA level⁹³. However, all majors decreased their number of artists during that period in the same magnitude, and this decrease followed the drastic decline in demand for physical recorded music, a decline which was stabilised between 2005 and 2006 (see table 4 below).

417. The notifying parties submit that when an artist leaves or joins a record company, this may be due to a number of factors, for example creative partnerships, strategic artist roster rationalization, genre expertise or specialisation. The artist's success with a new record company may similarly be affected by numerous factors

⁹¹ Comparison of market shares of Seagram + Polygram in 1997 and Universal in 1998-2000 does not lead to any clear conclusion on the evolution of market shares pre and post-merger. In many countries market shares have remained stable and do not seem to have been particularly affected by the merger.

⁹² In e.g. Portugal, two independent companies have a market share of respectively just over and under 10%, a higher market share than one of the four major recording companies in that country.

⁹³ Total number of artists signed with Sony BMG in all affected markets, excluding Sweden and Greece.

(in particular the creative partnership formed), and the level of success of an artist who joined Sony BMG does not necessarily reflect the level of success whilst signed to a previous record company, or vice-versa.

418. The notifying parties claim that given the market conditions, and in particular the declining demand for recorded music, competition among record companies in order to find and sign new artists and the search to attract growing and established artists whose contract are up for renewal remains intense.
419. It has also been confirmed by the market investigation that a majority of customers view the competition among major recording companies as intense for the discovery and signing of new artists⁹⁴.
420. Major record companies often try to sign artists originally signed with independent companies as soon as they become successful, as the majors are generally able to offer them better financial conditions. In this content-based industry, competition between record companies is intense for securing successful artists in their roster, and artists are attracted by the possibility to gain higher visibility and better financial conditions.
421. This fierce competition in discovering and signing artists can also be explained because of the rapid evolution of computer technologies in the recent years which has made it much easier and cheaper for artists to develop their 'home studios' and record music to a quasi-professional level without the help of recording companies.
422. At the same time, the increase in importance of the internet as a means for artists to showcase their music to a large audience by putting their music for free or even selling it directly through internet vehicles such as for example Myspace or Youtube, has made it possible for several artists to become very successful without the initial support of record companies and without initial presence in retailer's outlets, as the recent well-documented successes of for example Sandi Thom, Lilly Allen, the Arctic Monkeys or other artists testify.
423. Competition for artists is also illustrated through information submitted by the parties, and confirmed by the market investigation, showing that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in affected market⁹⁵, representing [20-30]*% of the total number of artists signed. In the same year, [...] artists left Sony BMG, representing [20-30]*% of all artists on its roster. This reveals a high rotation rate, characteristic of a fluid market. Of the 10 most important artists who joined Sony BMG between 2002 and 2006, [...] came from other majors; and out of the 10 most important who left, [...] joined other majors.
424. In terms of artists' remunerations, the notifying parties submit that they are engaged in two main types of contractual relationships with artists: contracts where

⁹⁴ Question n°17a – Questionnaire to customers 12 February 2007 – 60% of all customers who replied to the market investigation across the EEA submit that major record companies compete on artists offering and new releases.

⁹⁵ All affected markets, excluding Sweden and Greece.

the recorded music master rights are owned by the record company (most common in the United Kingdom) and contracts where the recorded music master rights are owned by the artist or a third party production company and licensed to the record company (most common in continental Europe). For both contracts, artists are generally paid a percentage of the "Royalty base price" -the list price less discounts and a packaging allowance- on all un-retained units. The royalty rate applied will vary between formats (albums or singles), price categories (full or mid or budget) and sales volumes. It is negotiated according to the stature and success of an artist and may significantly vary from one artist to the other.

425. Artists' remunerations are negotiated on a case by case basis and rely on forecast sales and expected potential of each artist. The market investigation has confirmed that there is no coordination between majors in terms of capping artist remuneration.

426. In conclusion, the competition for securing the best artists remains intense among all record companies -majors and independents. Artists can, and do, move from majors to / from/ and between other majors and independents. The share of local artists has also significantly increased in the past few years in the majority of Contracting Parties to the EEA Agreement. It can therefore be concluded that the merger of Sony and BMG has no negative impact on cultural diversity at the level of creation and recording.

427. In addition, the market investigation highlighted that for a majority of retailers, the merger, already implemented for one to two years depending on the national market did not change the market or competitive situation. Moreover, as outlined below (see Table 5), the share of local artists has also significantly increased in the past few years in all Contracting Parties to the EEA Agreement (except Greece⁹⁶) for all majors and since the sales of local artists have been made predominantly through traditional retail channels, there are no ground to believe that the merger did create a reduction of product variety at retail. Finally, the cost of recording and reaching end-customers through the use of new technologies has never been so low for artists of all genres, especially the ones with lesser sales potential. The recent growth of internet as a forum for known and unknown artists to display and sell their music directly to end-customers without the use of traditional retail channels, as well as the growing success of digital services such as e.g iTunes which offers some 6 million songs in Europe, the large majority of which come from artists that have signed with independents, also points towards the direction that no reduction or limitation of product variety of customers has taken place. In the basis of these considerations, it can be concluded that the merger of Sony and BMG had no negative impact on cultural diversity at the level of distribution/retail.

428. The Commission's analysis did not find that the merger between Sony and BMG led to the creation or strengthening of a dominant position in any affected

⁹⁶ According to the data provided by the notifying parties for the period 2002-2006, this decrease is however not significant and Greece had retained the 2nd highest share ([50-60]%) of domestic artists in the EEA in 2006. The IFPI "Recording industry in numbers" report of 2007 (on the same period – 2002-2006) has rather pointed to a stability of domestic repertoire for Greece and confirmed an increase in all the other Member States.

market and the above facts further underline that cultural diversity was not negatively affected by any creation or strengthening of a dominant position.

c) Customers

429. The notifying parties make a distinction between the following types of customers:

(i) Wholesalers and Rackjobbers: Act as intermediary between record companies and retailers. In addition to gross sales of albums they can also take care of album positioning in retail outlets. Supermarkets notably purchase music albums via their services.

(ii) Supermarkets: Supermarket and Hypermarket chains for example Carrefour, Tesco, Auchan, Lidl, etc.

(iii) Specialised music chains: Specialised Multiple (in other words specialized among others in music) for which music sales are a substantial part of their business (music roughly makes between 30% and 60% of their revenues). This type of customers would not be able to significantly reduce their shelf space for music without dramatically changing the nature of their business. Examples of specialised music chains are Virgin, FNAC, HMV, Mueller, etc

(iv) Department stores: General Multiple (in other words not specialized in music) for which music is not part of their core business (music roughly makes less than 10% of their revenues) for example Karstadt, El Corte Ingles, MediaMart, Saturn, etc.

(v) Independent music stores: Small chain retailers for whom selling music is the main business (music roughly makes 80% or more of their revenues) for example Tipo, Fopp, Andy's Records, etc.

(vi) Mail and Internet: Retailers that mainly sell music through Mail Order or Internet.

(vii) Clubs: Retailers that sell music only to club members. Clubs generally purchase music at discounted PPDs or at very high invoice discounts.

(viii) Exporters: Customers that purchase music mainly for exporting purposes.

(ix) Others: None of the above categories applies to the customer in question, for example kiosk retailers.

430. Sales of albums are mainly achieved through wholesalers and rackjobbers, supermarkets, specialised music chains and department stores. As outlined in table 3 below, the proportion of sales realised via these different types of retailers can vary significantly from one Contracting Party to the EEA Agreement to another, and in some of them, music will be predominantly sold via one or two types of retailers only, whereas in others, music will be sold via all the different types of above mentioned retailers. These four main categories of retailers nevertheless account for [80-90]*% of sales at the EEA level⁹⁷ and in most affected markets. Only Sweden is

⁹⁷ Based on Sony BMG sales to their top 10 customers in all affected markets. Top 10 customers account for [80-90]*% of total Sony BMG sales in all affected markets.

characterised by a different pattern where independent music stores and mail/internet retailers are particularly developed.

TABLE 3 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Country	Wholesaler/ Rackjobber	Supermarket	Specialised Music Chain	Department Store	Independent music store	Mail/Internet	Others
Austria	[10-20]*%	[0-10]*%	[0-10]*%	[70-80]*%	[0-10]*%	[0-10]*%	[0-10]*%
Belgium	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%
Denmark	[20-30]*%	[10-20]*%	[50-60]*%	[0-10]*%	[10-20]*%	[0-10]*%	[0-10]*%
Finland	[40-50]*%	[0-10]*%	[0-10]*%	[30-40]*%	[0-10]*%	[0-10]*%	[0-10]*%
France	[10-20]*%	[50-60]*%	[20-30]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Germany	[20-30]*%	[0-10]*%	[10-20]*%	[50-60]*%	[0-10]*%	[10-20]*%	[0-10]*%
Greece	[20-30]*%	[0-10]*%	[60-70]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%
Ireland	[20-30]*%	[0-10]*%	[50-60]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Italy	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[0-10]*%	[0-10]*%	[0-10]*%
Netherlands	[30-40]*%	[0-10]*%	[50-60]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Norway	[30-40]*%	[0-10]*%	[60-70]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Portugal	[0-10]*%	[50-60]*%	[30-40]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Spain	[10-20]*%	[30-40]*%	[10-20]*%	[20-30]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sweden	[40-50]*%	[0-10]*%	[0-10]*%	[10-20]*%	[10-20]*%	[20-30]*%	[0-10]*%
United Kingdom	[50-60]*%	[0-10]*%	[30-40]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Affected markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

431. Considering that wholesalers generally supply supermarkets or department stores which are not specialised in the music business, there is a significant proportion of sales of recording companies which are performed through non-specialist retailers (between 60% and 80%). This directly impacts the reduction of shelf space allocated to music goods in the recent years, both affected by the fall in demand for music albums and the allocation of more commercial space to other entertainment products (home video DVDs, games)⁹⁸.

2. Record companies distribution and licensing deals

432. Under licensing (or label) deals, repertoire owners (licensor) will grant a licence to a licensee to manufacture, distribute, sell, market and promote their own albums. The licensee sets the list prices and all other commercial conditions with customers. The licence is normally limited by territory and duration. The licensee has the obligation to exploit the rights granted and to pay the licensor a royalty.

433. In pure distribution deals, the distributor (licensee) will typically have responsibility for the physical distribution of the goods, whereas the record companies for which the goods are distributed will retain responsibility for, and

⁹⁸ Question n°50 – Questionnaire to customers 12 February 2007 – 65% of all customers who replied to the market investigation across the EEA submit that shelf space allocated to CDs has decreased to make place for DVDs and video games.

control over, list prices, discounts and other terms with customers, marketing, publicity and strategy.

434. In sales and distribution deals, the distributor, when having some influence over list prices and discounts, will assume sales functions and typically collect sales revenues and pay the supplier the proceeds of the sale less a sale and distribution fee.
435. When Sony BMG is appointed by a third party record company to sell and distribute its products, the list prices will usually be set by the supplier record company among Sony BMG's list prices, and discounts and other commercial conditions will normally reflect Sony BMG's terms with customers. Additional campaign discounts will be approved by the supplier record company on a case-by-case basis.
436. Companies acting as distributors can be major record companies, independent record companies, specialised distribution companies or logistics companies such as TNT or DHL, etc. In 8 Contracting Parties to the EEA Agreement (Austria, Belgium, France, Germany, Ireland, the Netherlands, Spain and the United Kingdom) for example, the notifying parties use Arvato (part of the Bertelsmann Group) as distribution logistics providers, and in Italy, they outsource their distribution to Log Service, a privately owned distribution company.
437. The notifying parties submit that they do not have any licensing deals with any major record company in any of the 15 EEA affected markets; they also submit that they generally do not distribute records on behalf of other major record companies (however they are part of two distribution joint ventures with other majors, one operating in Finland and the other operating in Denmark, Norway and Sweden; in addition, Arvato distributes Warner and Universal albums in Spain).

3. Staff Rotation

438. The Commission received information from an independent market observer that executives and sales representatives from major record companies change jobs rapidly between majors, carrying with them information with regard to the commercial conditions of their former employer.
439. The notifying parties submit that a low number of Sony BMG staff has been employed by another major in the past 5 years ([...]* out of [...]* senior staff in the 15 relevant EEA Contracting Parties). They also submit that they are not aware that such movements are more frequent than in any other industry, that these departing executives are subject to confidentiality obligations, and that information held by a moving executive will rapidly become obsolete.
440. The Commission indeed recognises that in an industry with four majors, which have been cutting staff because of the current downturn in sales, it is not abnormal that some [10-20]*% of senior staff has worked for a competitor in the past. During

the market investigation, several retailers⁹⁹ have claimed that commercial staff rotation also increased the transparency of commercial conditions granted by competitors. One Belgian retailer for example explained that after the move of their commercial contact from one major to another, the subsequent yearly commercial negotiations were much more difficult because this commercial contact knew the different conditions granted by the two majors to that retailer and because the conditions of the major he had moved to were more advantageous than the one he came from. This retailer nevertheless claimed that even though the yearly negotiations were harder, it was able, thanks to its bargaining power, to retain the same commercial conditions as for the past year and therefore did not lose out as a result of that commercial staff rotation.

441. It can be concluded that staff rotation does indeed take place and that when this happens, transparency of commercial conditions may be increased. This phenomenon, taking place in every industry, is however limited in scope and result, and the Commission found evidence that it does not take place on a widespread basis which would result in a significantly increased transparency with regard to the commercial conditions of all majors in all Contracting Parties to the EEA Agreement.

2. CHARACTERISTICS OF DEMAND FOR PHYSICAL ALBUMS

1. Evolution of demand

442. According to the notification, the recorded music industry enjoyed year-on-year growth from the mid-1980s until the late 1990s. Since 2001, the industry has been facing a drastic decline in sales: on the basis of the figures provided in the notification, the total market value in the EEA declined by 2% from 2000 to 2001 and by 4% from 2001 to 2002. According to the notification, after 2002, the total market value continued to decline by 27% between 2002 and 2006. As main reasons for the market decline the notifying parties identify counterfeiting, unauthorized CD burning and downloading, and a loss of retail space for CDs. In the context of the evaluation of the various potential theories of harm of this merger which will follow further in the text (paragraphs 530 and onwards), it is already relevant at this stage to note that the Court, in its judgment of 31 March 1998 *Kali and Salz*¹⁰⁰ ruled that "A falling market is generally considered to promote, in principle, competition between the undertakings in the sector concerned".

⁹⁹ Question n°33 – Questionnaire to customers 12 February 2007 – 4% (3 out of 75) of all customers who replied to the market investigation across the EEA submit that commercial staff rotation also increased the transparency of commercial conditions granted by competitors.

¹⁰⁰ Joined cases C-68/94 and C-30/95, *Kali and Salz*, ECR 1998, I-1375, paragraph 238.

TABLE 4 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Austria	143	129	125	116	111	104	-27
Belgium	173	158	142	139	129	121	-30
Denmark	130	110	97	93	91	85	-35
Finland	81	76	78	67	66	59	-27
France	1 319	1 373	1 176	1 016	999	862	-35
Germany	1 571	1 461	1 201	1 161	1 166	1 122	-29
Greece	59	66	59	53	50	46	-23
Ireland	90	83	70	72	73	69	-23
Italy	383	387	370	344	343	303	-21
Netherlands	286	266	253	230	197	184	-36
Norway	128	140	119	116	107	91	-29
Portugal	109	115	96	71	65	56	-48
Spain	464	393	353	311	295	263	-43
Sweden	198	188	161	133	119	112	-43
United Kingdom	2 030	1 939	1 777	1 804	1 739	1 525	-25
TOTAL	7 164	6 886	6 077	5 726	5 550	5 002	-30

Source: Notifying parties; IFPI; Commission analysis

443. The record industry is facing a significant challenge with the decline in CD sales and the development of digital music. The sales of CD still nevertheless accounted for 82%¹⁰¹ of global music sales in 2005 and record companies still largely depend on this traditional distribution format. Online and mobile music sales are expected to significantly grow, but they are however not expected to compensate for the decline in CD sales over the next few years. The notifying parties submit that the surge in online music could be significantly greater without wide-scale piracy and home CD burning, which is also confirmed by customers: illegal download, piracy and home CD burning are directly considered to be the main factors for the fall in demand for CD albums by 60% of customers¹⁰².

444. The notifying parties submit a segmentation of CD sales between three broad categories, international, domestic, and classical sales. As table 5 below shows, there are differences among EEA Contracting Parties and the domestic sales will account for as low as [10-20]*% (Belgium, Austria¹⁰³) to as high as [60-70]*% (France). With some exceptions (for example Contracting Parties to the EEA Agreement with the same language), there is usually little interest in the domestic releases of a Contracting party to the EEA Agreement by other Contracting Parties.

¹⁰¹ IFPI, world sales 2005.

¹⁰² Question n°46 – Questionnaire to customers 12 February 2007 – 60% of all customers who replied to the market investigation across the EEA submit that piracy, illegal CD download and home CD burning has caused major pressure to record companies, before and after the merger.

¹⁰³ French and Dutch artists are however popular in Belgium, whereas German singers are popular in Austria.

TABLE 5 - Origin of recorded music (% of total sales) – 2006			
Territory	Domestic pop rock	International pop rock	Classical
Austria	[10-20]*%	[70-80]*%	[10-20]*%
Belgium	[10-20]*%	[80-90]*%	[0-10]*%
Denmark	[40-50]*%	[50-60]*%	[0-10]*%
Finland	[50-60]*%	[40-50]*%	[0-10]*%
France	[60-70]*%	[30-40]*%	[0-10]*%
Germany	[40-50]*%	[40-50]*%	[0-10]*%
Greece	[50-60]*%	[40-50]*%	[0-10]*%
Ireland	[20-30]*%	[70-80]*%	[0-10]*%
Italy	[50-60]*%	[40-50]*%	[0-10]*%
Netherlands	[20-30]*%	[70-80]*%	[0-10]*%
Norway	[30-40]*%	[50-60]*%	[0-10]*%
Portugal	[30-40]*%	[60-70]*%	[0-10]*%
Spain	[40-50]*%	[50-60]*%	[0-10]*%
Sweden	[30-40]*%	[60-70]*%	[0-10]*%
United Kingdom	[50-60]*%	[40-50]*%	[0-10]*%

Source: Notifying parties

445. Apart for Greece, the share of domestic music (as a percentage of total sales) has increased in all other above mentioned markets in the period going from 2002 to 2006, in a proportion higher than 5 percentage points in 9 Contracting Parties to the EEA Agreement and higher than 10 percentage points in 3 Contracting Parties. This trend is confirmed by IFPI repertoire data¹⁰⁴ and is illustrative of the dynamism of a vibrant domestic music market.

446. Sony BMG music repertoire also includes a high proportion of purely domestic repertoire: in each of the 5 largest Contracting Parties to the EEA Agreement, sales of domestic repertoire account for more than 50% of Sony BMG total sales.

2. Concentration of sales

447. The sales of CDs are concentrated among a few retailers per Contracting Party to the EEA Agreement. As outlined in table 6 below, these figures vary per Contracting Party to the EEA Agreement. At the level of all affected markets, [80-90]*% of sales are achieved through the top 10 customers, and [70-80]*% through the top 5 customers. The only notable exception to this trend is Italy, where only [40-50]*% of the 2006 sales of Sony BMG were made through their top 10 customers.

¹⁰⁴ IFPI RIN 2007.

TABLE 6 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	top 5
Austria	[80-90]*%	[80-90]*%
Belgium	[70-80]*%	[50-60]*%
Denmark	[80-90]*%	[60-70]*%
Finland	[80-90]*%	[80-90]*%
France	[80-90]*%	[60-70]*%
Germany	[80-90]*%	[60-70]*%
Greece	[70-80]*%	[50-60]*%
Ireland	[80-90]*%	[70-80]*%
Italy	[40-50]*%	[30-40]*%
Netherlands	[80-90]*%	[50-60]*%
Norway	[90-100]*%	[70-80]*%
Portugal	[90-100]*%	[80-90]*%
Spain	[80-90]*%	[60-70]*%
Sweden	[70-80]*%	[50-60]*%
United Kingdom	[90-100]*%	[80-90]*%
Affected markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

448. The majority of the sales of a CD will typically take place in the first weeks after the release of a new album. The Commission calculated, and the notifying parties confirmed, that 70-80% of the total sales of a CD album over its life-cycle will be completed within the first 20 weeks of the release of a new album. It can however be noted that the sales are spread over a larger period in Greece, Ireland, the Netherlands and the United Kingdom.

TABLE 7 - Cumulative sales (units) – chart albums – 20 first weeks after release – 2002/2004					
Territory	Sony	BMG	Major A	Major B	Major C
Austria	[80-90]*%	[80-90]*%	[60-70]*%	[80-90]*%	[70-80]*%
Belgium	[80-90]*%	[80-90]*%	[50-60]*%	[80-90]*%	[60-70]*%
Denmark	[80-90]*%	[70-80]*%	[30-40]*%	[80-90]*%	[70-80]*%
Finland	[70-80]*%	[80-90]*%	[70-80]*%	[70-80]*%	[60-70]*%
France	[70-80]*%	[70-80]*%	[80-90]*%	[80-90]*%	[60-70]*%
Germany	[70-80]*%	[80-90]*%	[60-70]*%	[80-90]*%	[60-70]*%
Greece	[80-90]*%	-	[30-40]*%	[60-70]*%	[40-50]*%
Ireland	[60-70]*%	[60-70]*%	[70-80]*%	[60-70]*%	[60-70]*%
Italy	[80-90]*%	[70-80]*%	[70-80]*%	[80-90]*%	[70-80]*%
Netherlands	[70-80]*%	[70-80]*%	[50-60]*%	[70-80]*%	[50-60]*%
Norway	[80-90]*%	[80-90]*%	[80-90]*%	[80-90]*%	[60-70]*%
Portugal	-	[70-80]*%	[60-70]*%	[80-90]*%	[70-80]*%
Spain	[80-90]*%	[80-90]*%	[60-70]*%	[70-80]*%	[70-80]*%
Sweden	[70-80]*%	[60-70]*%	[70-80]*%	[70-80]*%	[60-70]*%
United Kingdom	[60-70]*%	[60-70]*%	[50-60]*%	[60-70]*%	[60-70]*%

Source: Notifying parties; Commission analysis

449. In 2005, [20-30]*% of the notifying parties' sales in Germany were generated by their 50 best selling artists versus up to [60-70]*% in the United Kingdom. Nevertheless several hundreds of albums are necessary to account for the majority of

sales of a major in a given Contracting Party to the EEA Agreement, as the above shares of total sales of major record companies is concentrated on albums only representing a limited proportion of catalogue (for instance, 50 albums would account for [<1]*% of total Sony BMG albums on sales in Germany).

TABLE 8 - Share of Sony BMG CD albums sold by top 50 sales (2005 – units)			
	Total number units sold	Top 50 highest sales- units sold	% of units sold by top 50
Germany	[...]*	[...]*	[20-30]*%
France	[...]*	[...]*	[20-30]*%
United Kingdom	[...]*	[...]*	[60-70]*%
Italy	[...]*	[...]*	[40-50]*%
Spain	[...]*	[...]*	[50-60]*%

Source: Notifying parties; Commission analysis

450. Whereas it therefore appears that the majority of the sales of record music companies are concentrated among a few customers, it is also apparent that the majority of these sales are spread among numerous albums for all majors in different Contracting Parties to the EEA Agreement.

3. Charts

451. Chart albums account for the majority of total sales of record companies. Chart album sales represented [60-70]*% of the sales of the notifying parties in 2005 (versus [50-60]*% in 2002). These figures are however different per Contracting Party to the EEA Agreement and sales from chart albums represent more than 70% of sales in Ireland ([80-90]*%), Italy ([70-80]*%), Spain ([70-80]*%), Sweden ([70-80]*%) and the United Kingdom ([80-90]*%), but less than 50% in the Netherlands ([30-40]*%) and France ([40-50]*%).

TABLE 9 - Share of Sony BMG gross sales from chart albums (%)						
Territory	2002	2003	2004	2005	2006 1st Half	Variance 2002-2006H1
Austria	[40-50]*%	[50-60]*%	[50-60]*%	[60-70]*%	[50-60]*%	[10-20]*%
Belgium	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[50-60]*%	-[0-10]*%
Denmark	[80-90]*%	[70-80]*%	[50-60]*%	[60-70]*%	[60-70]*%	-[10-20]*%
Finland	[60-70]*%	[60-70]*%	[60-70]*%	[60-70]*%	[50-60]*%	-[0-10]*%
France	[30-40]*%	[30-40]*%	[40-50]*%	[40-50]*%	[30-40]*%	[0-10]*%
Germany	[40-50]*%	[40-50]*%	[50-60]*%	[50-60]*%	[40-50]*%	[0-10]*%
Greece	N/A	[70-80]*%	[60-70]*%	[60-70]*%	[40-50]*%	-[30-40]*%
Ireland	[80-90]*%	[80-90]*%	[80-90]*%	[80-90]*%	[70-80]*%	-[0-10]*%
Italy	[50-60]*%	[50-60]*%	[50-60]*%	[70-80]*%	[60-70]*%	[0-10]*%
Netherlands	[30-40]*%	[20-30]*%	[30-40]*%	[30-40]*%	[30-40]*%	[0-10]*%
Norway	[30-40]*%	[50-60]*%	[60-70]*%	[60-70]*%	[70-80]*%	[30-40]*%
Portugal	[50-60]*%	[40-50]*%	[40-50]*%	[50-60]*%	[50-60]*%	-[0-10]*%
Spain	[50-60]*%	[60-70]*%	[60-70]*%	[70-80]*%	[60-70]*%	[0-10]*%
Sweden	[60-70]*%	[50-60]*%	[60-70]*%	[70-80]*%	[70-80]*%	[0-10]*%
United Kingdom	[70-80]*%	[80-90]*%	[80-90]*%	[80-90]*%	[70-80]*%	-[0-10]*%
TOTAL	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[50-60]*%	[0-10]*%

Source: Notifying parties; Commission analysis

452. The notifying parties submit that whilst it is the case in most Contracting Parties to the EEA Agreement that chart rules are decided by industry committees (which, given their role within the music industry, will usually include representatives of one or more of the majors), it is not the case that all majors are part of the chart rules decision-making process.

453. The chart rules, at least in 12 Contracting Parties to the EEA Agreement, set out minimum price limits¹⁰⁵ in order to define whether CD albums will enter and be rated in the charts (which usually will be edited on a weekly basis). These minimum prices are however generally set at such low values that they are unlikely to act as threshold for price setting of majors with regard to new releases.

4. Compilations

454. All majors cooperate in the framework of multi-artist compilations¹⁰⁶. These compilations can be developed by a unique record company, which will only include tracks of artists from its own labels¹⁰⁷, or they can be developed in cooperation between several record companies, being majors or independents. It appeared from the market investigation that the combination of artists from different labels makes it possible to cover a broader range of the charts, or of the genre to which the compilation refers. To do so, the record companies can enter into Joint Venture agreements or acquire licence rights to include tracks in their own compilations.

455. As shown in table 10 below, the compilation market is estimated at a value of EUR 771 M in 2006¹⁰⁸ in all affected markets, representing 16% of the total market value. France and the United Kingdom are ahead of other Contracting Parties to the EEA Agreement (23% and 20% of total market value respectively). Sony BMG revenues for compilation represent EUR [...] M in 2006¹⁰⁹ ([10-20]*% of Sony's total sales). Sony BMG compilation sales shares are the highest in Denmark and Austria ([20-30]*% and [20-30]*% respectively) and the lowest in Italy and Portugal ([0-10]*% each).

¹⁰⁵ 2006 investigation by German Competition Authority on minimum price for CDs in Germany.

¹⁰⁶ "Best of" compilations of unique artists are not treated under this part, as they do not require several majors to cooperate with each other.

¹⁰⁷ In the case of Sony BMG less than [10-20]*% of compilation sales are achieved through such compilations. [...]*.

¹⁰⁸ All affected countries excluding Greece.

¹⁰⁹ All affected countries excluding Greece.

TABLE 10 - Compilation market – 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations / total market value (MEUR)	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues (%)
Austria	104	19	18	[...]*	[...]*	[20-30]*%
Belgium	115	16	14	[...]*	[...]*	[10-20]*%
Denmark	85	5	6	[...]*	[...]*	[20-30]*%
Finland	59	9	15	[...]*	[...]*	[10-20]*%
France	842	196	23	[...]*	[...]*	[10-20]*%
Germany	1 122	80	7	[...]*	[...]*	[10-20]*%
Greece	46	N/A	N/A	[...]*	[...]*	N/A
Ireland	69	10	14	[...]*	[...]*	[10-20]*%
Italy	287	22	8	[...]*	[...]*	[0-10]*%
Netherlands	184	31	17	[...]*	[...]*	[10-20]*%
Norway	91	9	10	[...]*	[...]*	[10-20]*%
Portugal	59	11	18	[...]*	[...]*	[0-10]*%
Spain	248	42	17	[...]*	[...]*	[0-10]*%
Sweden	112	14	12	[...]*	[...]*	[10-20]*%
United Kingdom	1 525	306	20	[...]*	[...]*	[10-20]*%
TOTAL	4 949	771 ⁽¹⁾	16 ⁽¹⁾	[...]*	[...]*	[10-20]*% ⁽¹⁾

Source: Notifying parties; Commission analysis

⁽¹⁾ *Computation excluding Greece*

456. The notifying parties submit that the market for compilations is declining much faster than the overall record market. This will vary per Contracting Party to the EEA Agreement but generally, this decline in sales of compilation is principally attributed to the development of the online market, where customers can create their own compilations. IFPI confirms that the share of compilations as a percentage of album sales in Europe has been declining over the same period¹¹⁰.

3. PRODUCT CHARACTERISTICS

1. Pricing

457. The net wholesale price¹¹¹ of CDs is the net price at which record companies sell albums to retailers. It depends on two main factors, (i) PPDs and (ii) discounts granted on these PPDs. This net wholesale price itself ultimately impacts the retail price to end-customers. A PPD is attributed to an album and is applied to all customers. Conversely, discounts are different from one customer to the other.

458. The notifying parties submit that trade pricing for recorded music is highly complex and does therefore not enable the majors to monitor effectively each other's pricing behaviour. They refer to the large number of pre-defined list prices (PPDs),

¹¹⁰ According to IFPI, the share of compilations as a percentage of album sales has declined in all European countries but Poland.

¹¹¹ Net wholesale price = PPD – discounts.

which are the starting point for the negotiation, and variation of discounts. Each record company uses its own PPDs, as well as its own discount types and discount levels, which differ from those used by other record companies. The parties also submit that retail price is decided by retailers who apply irregular and unpredictable mark-ups¹¹² on net wholesale prices.

Published Prices to Dealers

459. Both majors and independents use a similar pricing system. As starting points, the criteria determining the PPD relate mainly to the categories (for example new album, compilation, full price/mid-price/budget categories) and type of product (for example CD, double CD, maxi-CD, number of tracks). But various other criteria come on top of this, such as for example the status of the artist, artist's sales history and potential, type of album, number of tracks on the album, the format and content of the CD leaflet, the terms of the artist's contract, the cost of marketing, the type of promotional campaign or marketing strategy of local affiliate, the seasonal factors, or the market reaction to higher or lower prices. These multiple factors therefore entail multiple possible combinations in order to set out a PPD, which can explain that the determination of PPDs can vary within a range of several Euros. The Commission investigation notably did not highlight any simple pattern that would enable a major to predict the level at which a competing major would set the PPD of its albums.

460. Sony BMG uses [...] different PPDs in the largest Contracting Parties to the EEA Agreement such as France, Germany, Italy and the United Kingdom. The number of PPDs accounting for the largest part of sales in 2006 was however significantly smaller, with the top 5 PPDs accounting for [50-60]*% (Austria and Germany) to as high as [80-90]*% (Finland and Norway) of total sales. When looking specifically at chart albums¹¹³, the level of concentration is even higher with 12 Contracting Parties to the EEA Agreement having more than 90% of sales achieved with 5 PPDs, and no Contracting Party to the EEA Agreement having less than [70-80]*% of sales achieved with 5 PPDs.

¹¹² To build CD albums retail price, retailers add their margin & V.A.T. to the net wholesale price.

¹¹³ Albums having reached national charts at any point in time.

TABLE 11 - SONY BMG PPDs - 2006			
Territory	Number of PPDs	% of sales on top5 PPDs (all sales)	% of sales on top5 PPDs (charts only)
Austria	[...]*	[50-60]**%	[90-100]**%
Belgium	[...]*	[70-80]**%	[80-90]**%
Denmark	[...]*	[80-90]**%	[90-100]**%
Finland	[...]*	[80-90]**%	[90-100]**%
France	[...]*	[60-70]**%	[80-90]**%
Germany	[...]*	[50-60]**%	[70-80]**%
Greece	[...]*	[60-70]**%	[90-100]**%
Ireland	[...]*	[70-80]**%	[90-100]**%
Italy	[...]*	[60-70]**%	[90-100]**%
Netherlands	[...]*	[80-90]**%	[90-100]**%
Norway	[...]*	[80-90]**%	[90-100]**%
Portugal	[...]*	[80-90]**%	[90-100]**%
Spain	[...]*	[70-80]**%	[90-100]**%
Sweden	[...]*	[70-80]**%	[90-100]**%
United Kingdom	[...]*	[70-80]**%	[90-100]**%

Source: Notifying Parties + Commission analysis

461. All competitors confirmed that the range of PPDs used varies from a handful (independents) to more than one hundred (for majors), although with a few PPDs (around 5) generally representing more than 50% of total sales in each EEA Contracting Party. The higher PPD concentration observed above for Sony BMG at the level of chart albums is also observed for the other major record companies. Similarly, there is also such a higher concentration when focusing on new releases (at the week of release).

462. The notifying parties have submitted that the PPD of each album changes several times within the life cycle of an album, leading to great difficulties for competitors to monitor this evolution of price. It appears from the analysis of chart album transactions that PPDs of albums remain generally stable over several weeks after release, period during which bulk of sales are realised¹¹⁴. The Commission analysis has indeed shown that the majority of albums have relatively stable PPDs in the first 5 weeks after release all across affected markets. For example in Italy, [more than 80]**% of Sony albums¹¹⁵ do not change PPD during the [0-10]* first weeks after release, whereas after [20-30]* weeks, [20-30]**% of albums changed their PPD. After one year, more than half of Sony albums in Italy changed their PPD. It should also be noted that other majors apply different strategies across affected markets with regard to the stability of PPDs. One major notably changes its PPDs significantly faster than Sony and BMG, whereas one major changes its PPDs significantly more slowly. More generally in all affected markets, between 10 and 25% of albums of all majors are re-priced in their first 20 weeks. In addition, as submitted by the notifying parties, PPD changes are generally strategic decisions taken at the level of national or European headquarters. As a consequence they are more stable than discounts which are negotiated with each retailer on a case by case basis.

¹¹⁴ See also Country analysis part.

¹¹⁵ Period January 2002 – October 2005.

463. The notifying parties submit that PPDs are no longer published in the large majority of affected markets and that this is an important change in the market since the Commission investigated the markets in 2004. PPDs are notably no longer published with sales charts, which they have been in the past in several Contracting Parties to the EEA Agreement. Given these statements, the Commission has investigated whether record companies may rely on other sources to collect information on competitors' PPDs.
464. In several Contracting Parties to the EEA Agreement, music information and electronic ordering providers exist, which collect information related to CD albums¹¹⁶. Such information is compiled under databases and provided to music retailers. Available information is generally (i) album title; (ii) artist; (iii) tracks; (iv) date of release; (v) PPD; (vi) PPD code¹¹⁷. Record companies can have a partial or full access to such databases as they contribute to provide the information contained therein. In Germany and Austria, only retailers have access to the complete set of information and record companies do not have access to PPDs nor PPD codes of their competitors' albums. In France and Sweden, majors have access to the PPD codes of their competitors through Titelive and Grammotex. In Norway, IFPI Norway provides a complete set of information, including the PPDs of competitors' albums, to all major record companies. In the Benelux, majors had the possibility to use Phononet Benelux to see the PPDs of their competitors' albums. This possibility was technically removed in January 2007, and the notifying parties submit that, both in the case of Norway and the Benelux, they do not use such databases to monitor prices of their competitors. In the United Kingdom, record companies can subscribe to Muze information services and access their competitors' PPDs. However, major record companies have not so far subscribed to this service. Such information is not available in other affected markets.
465. In several Contracting Parties to the EEA Agreement, affiliates of Sony or Bertelsmann are active in the field of selling music¹¹⁸. During the course of their normal business, these affiliates have access to all major record companies' prices. The notifying parties however submit that these affiliates do not provide Sony BMG or any third party with any information on the PPDs (or discounts) of record companies. In any case, only Sony and BMG's have such affiliates and not the other majors, which means that the other majors would not have access to the commercial conditions of their competitors.
466. 84% of all the independent competitors who responded to the market investigation and which are active throughout the great majority of Contracting Parties to the EEA Agreement consider that PPDs are transparent¹¹⁹. According to them, all PPDs remain accessible through catalogues, which can be obtained via

¹¹⁶ Titelive in France; Phononet in Germany and Austria; Muze in the United Kingdom; Phononet Benelux in Belgium, the Netherlands and Luxembourg; Grammotex in Sweden, IFPI in Norway.

¹¹⁷ Record companies generally attribute a PPD code to an album. This code corresponds to a list price.

¹¹⁸ Book clubs - Germany & Austria: Bertelsmann Club; France: France Loisir; Belgique: Belgique Loisir; The Netherlands: ECI; Spain: Circulo de Lectores; Italy: Mondolibri; Portugal: Circulo de Leitores.

¹¹⁹ Question 80 – Questionnaire to competitors 01 February 2007.

commercial contacts between retailers and record companies. All major record companies indeed publish folders, or send weekly e-mails, aiming at informing retailers about new releases and promotion programmes, including PPDs of each album, and some independent record companies submit that competitors can have access to these folders as some retailers agree to share them. Some 60% of all customers who replied to the Commission's investigation also believe that majors have access to the PPDs of their competitors¹²⁰.

467. Apart from one exception, all of the independents consulted claim that there is not a big difference in pricing strategy between record companies¹²¹. Additionally, some 60% of all the customers who responded to the market investigation claim that majors price their products similarly. Notably, some claim that prices are similar within price ranges (full price, mid, budget), and are rather similar for chart albums but less for catalogue. It should however be noted that the respondents did not qualify how closely the pricing strategies were aligned, and that this submission, in itself, may therefore not be that surprising and certainly not inconsistent with a perfectly competitive market, since most industries display a certain level of similarity in pricing for similar products.

468. According to several professionals, the market for recorded music is "a small world" where new initiatives are rapidly known to all. About two thirds of customers acknowledge that they use the commercial conditions negotiated with a record company, as an argument to negotiate with other record companies¹²². Among them, several also acknowledge that this information is subject to confidentiality.

469. Notwithstanding the fact that there is general knowledge of the pricing strategy between record companies, this does not mean that the constitutive elements of prices and / or commercial conditions are known to them. All majors and some 64% of independent record companies confirm that they have no knowledge of all the elements contributing to the price determination (including not only PPDs but also any type of discounts) of their competitors¹²³. This seems to reinforce the finding that readily available information regarding the exact PPDs of competitor's albums is not guaranteed for major record companies in the current market structure.

470. Overall, it cannot be argued that PPDs are largely and easily available, as they are no longer readily available to record companies. However, it also cannot be argued that PPDs are completely unavailable to competitors. The market structure is such (the PPD of a specific album applies to all customers in the same Contracting

¹²⁰ Question 31 – Questionnaire to customers 12 February 2007 – 61% of all customers who responded to the market investigation across the EEA think that majors know the PPDs of their competitors (as opposed to 17% who think they do not).

¹²¹ Question 52 – Questionnaire to competitors 01 February 2007.

¹²² Question 30 – Questionnaire to customers 12 February 2007 – 62% of all customers who responded to the market investigation across the EEA use conditions negotiated with a record company as commercial arguments to negotiate with other record companies (as opposed to 33% who do not).

¹²³ Question 57 – Questionnaire to competitors 15 February 2007.

Party to the EEA Agreement, there are regular contacts and deal negotiations between retailers and record companies) that record companies should be able to gather approximate information on some of their competitors' PPDs. Whilst it may, as stated by the notifying parties, be cumbersome to gather all such data on a systematic basis (for example weekly) in each Contracting Party to the EEA Agreement, it would appear likely that each major could follow PPDs of the other majors for some of those albums which at any point in time make up the largest proportion of chart sales, which can be easily determined by chart positioning. The information gathered in this way might nevertheless be incomplete, would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs are negotiated, and would need to be validated via observation of other parameters.

Discounts

471. Several types of discounts are used by record companies to diminish their PPDs: File discounts, campaign discounts, volume discounts, retrospective discounts (such as cash discounts, end-of-year discounts), co-operative payments, free goods, returns. Nuances exist behind the exact definition that each record company gives to these discounts; their usage is however rather similar. All discounts are negotiated separately with customers. Some discounts impact all albums sold, others only impact a limited set of identified albums. Discounts can be annual or short-term. File discounts account for approximately [40-60]*of total discounts granted by Sony BMG, while campaign and retrospective discounts represent approximately [10-30]* of total discounts each at the level of the largest EEA markets¹²⁴. This however does not reflect the importance of each type of discount in each affected market.

(i) *File discounts* are general discounts negotiated annually and which impact all albums sold to a particular customer. For each customer, the discount rate appears to be rather stable from year to year. Generally file discounts can be different for different categories of albums (hits, mid or budget prices, compilations). There are also important differences in the level of average file discounts given to different customers, ranging for example in the case of Sony BMG from [10-30]*to [10-30]*in the United Kingdom in 2005.

(ii) *Campaign discounts* are offered in relation to particular promotional campaigns. They are tied to a particular album or group of albums. They aim at maximising sales volume and/or act as an incitation for retailers to build stocks. They are negotiated on an ad-hoc basis and are applicable for a short period of time¹²⁵. In Spain, where campaign discounts are [...] important, they ranged in 2005 from [0-20]* to [10-30]*of total sales depending on the customer.

¹²⁴ In Germany, France, Spain, Italy and the United Kingdom, and based on sales to Sony BMG top 5 customers, file discounts account for [...] of all discounts, retrospective discounts account for [...]*, campaign discounts account for [...]*, cooperative payments account for [...]*, and other discounts account for [...]*. The category "other discounts" might however be slightly bigger as it is registered differently in financial documents.

¹²⁵ It also happens that some campaign discount rates are negotiated on an annual basis. Nevertheless, in such cases, the selection of affected albums still remains negotiated on an ad-hoc basis during the year.

(iii) *Volume discounts* are occasionally given on pre-order of particular new releases in order to securing the presence of high volumes in shops. They will be treated as campaign discounts in the following analysis, as they have a similar rationale.

(iv) *Retrospective discounts* are principally end-of-year bonuses, where rebates are negotiated with customers on the basis of the turnover in the preceding year. It also happens that end-of-year discounts are fixed and do not depend on past factors. Cash discounts are also retrospective discounts (but nevertheless represent a smaller part) and are given as a reward for prompt payments. In France, where retrospective discounts account for the bulk of total discounts, the top five customers were given retrospective discounts between [0-20]* and [10-30]* in 2005.

(v) *Co-operative marketing payments* are negotiated on an ad-hoc basis to support sales of an album or group of albums. Record companies provide the products for sales and the co-operative (hereinafter "co-op") advertising funds to promote them. Retailers provide the promotional programmes (in-store promotions and out-of-store advertising). Co-operative payments generally vary between [0-20]* [...] of total discounts.

(vi) *Free goods* can be distributed, generally after a large quantity of albums are purchased.

(vii) *Returns*. A record company may agree with a particular retailer that it will take back, free of charge, certain of its unsold CDs. This kind of agreement can be ad-hoc or can be based on an annual agreement. Returns can typically amount to [0-20]* to [10-30]* of sales in different Contracting Parties to the EEA Agreement, and are not included in the total amount of discounts in the following analysis.

472. The market investigation underlined that discounts are used with all customers, and that all albums receive at least one type of discount (at least a file discount). Budget and mid-price catalogue generally enjoy higher discounts than new releases.

473. Average total discounts account for approximately [10-30]* of the gross sales, ranging from [0-20]* in France to [10-30]* in the United Kingdom according to Sony BMG practices.

TABLE 12 - SONY BMG discounts 2005 – top 5 customers					
	France	Germany	Italy	Spain	United Kingdom
Discount/gross sales	[...]*	[...]*	[...]*	[...]*	[...]*
Maximum per customer	[...]*	[...]*	[...]*	[...]*	[...]*
Minimum per customer	[...]*	[...]*	[...]*	[...]*	[...]*

Source: Notifying Parties; Commission analysis

474. Average total discounts as a proportion of total sales are relatively stable over time, as for example [60-80]* of the top five customers of Sony BMG in France, Germany, Italy, Spain and the United Kingdom received an average total discount

which deviates by less than [0-20]*between 2005 and 2006¹²⁶. This relative stability over time is caused by the stability of file discounts which are negotiated annually and generally change only marginally from year to year.

475. For a specific year, however, differences of several percentage points can be observed within each Contracting Party to the EEA Agreement between different customers, with differences between retailers getting the best and worst conditions reaching for example [0-20]* points in France. It can be noted that such difference can also be observed between similar types of customers¹²⁷. However, the results have to be considered with care as a retailer focusing on budget albums will receive, on average, a higher discount. It therefore appears that the average total discount in terms of percentage over gross sales value varies between customer, and even within customer segments.

476. In addition, it can be noted that the data provided by another major record company showed that this record company granted relatively different average discounts per Contracting Party to the EEA Agreement than Sony BMG¹²⁸

477. File, campaign and retrospective discounts are the most important discounts, with nevertheless important differences between Contracting Parties to the EEA Agreement. For example, in Italy and the United Kingdom, file discounts constitute by far the leading category, whereas in Spain campaign discounts account for three quarters of all discounts. In France retrospective discounts account for about two-third of the total discounts, although a large share of these retrospective discounts follows the same economic rationale as file and campaign discounts. In Germany, the importance of the different discounts is distributed more evenly. For another major record company, the relative importance of the different types of discounts in each Contracting Party to the EEA Agreement was similar in magnitude to those granted by Sony BMG¹²⁹. The relative importance of discount granted by the two record companies could however reach a difference of up to [20-30]*points for the most important categories¹³⁰. At the level of each customer, significant differences are also observed.

¹²⁶ Based on sales realised by Sony BMG in 2005 and 2006 with its top five customers in each country. "Average discount does not deviate by more than 10%" means that a retailer getting in 2005 a 15% average discount would obtain in 2006 an average discount with a range of 13.5%to 16.5%.

¹²⁷ The analysis is based on sales realised by Sony BMG in 2005 with its top five customers in each country. In France for example, three supermarkets obtained respectively a [0-20]*, [10-30]* and [10-30]* average discount.

¹²⁸ This major reached the same average discount as Sony BMG in Germany, but had several percentage points' difference in the other largest affected markets, with up to [0-20]* point difference in the United Kingdom. The two largest UK customers notably received average discounts from Sony BMG and the other major that were significantly different (more than [0-20]* points difference for each customer).

¹²⁹ This means that for the two majors the first, second and third most important discount categories were the same. This however does not mean that the two majors proposed the same discounts in each category.

¹³⁰ In France for example, retrospective discounts of this major accounted for more than 85% of total discounts, as opposed to [60-70]*% for Sony BMG.

TABLE 13 - SONY BMG discounts 2005 – relative importance of discount categories						
	France	Germany	Italy	Spain	United Kingdom	Top 5 countries
file/discount	[10-20]*	[40-50]*	[80-90]*	[10-20]*	[70-80]*	[40-50]*
campaign/discount	[10-20]*	[20-30]*	[0-10]*	[70-80]*	[10-20]*	[20-30]*
retrospective/discount	[60-70]*	[10-20]*	[0-10]*	[0-10]*	[0-10]*	[20-30]*
Co-op/discounts	[0-10]*	[10-20]*	[0-10]*	[0-10]*	[0-10]*	[0-10]*

Source: Notifying Parties; Commission analysis

478. File discounts are negotiated annually with each retailer and account for the largest discount overall in most Contracting Parties to the EEA Agreement (with the exception of France and Spain in the largest affected markets). Their evolution from year to year is limited, implying that these discounts are relatively stable over time¹³¹. And even if the different majors generally grant similar file discounts to the same customers, these file discounts are different from each other. For instance, a retailer in [Country X]* received from three different majors, three different file discounts for full price albums: [that varied by over 12% from the highest to the lowest]*. Another retailer in [Country Y]* received [discounts that varied by over 16% from the highest to the lowest]* from three different majors. The Commission notably did not observe that a retailer receives the same file discount from all the majors. It might happen that one customer receives the same file discount from two majors, although this is not systematic with regards to all customers.

479. According to the notifying parties, such discounts are not transparent, as they are negotiated directly with each retailer and are considered as highly sensitive business secrets. Most of the independent record companies submitted that their competitors do not know the level of file discounts of their competitors.¹³²

480. Campaign discounts are negotiated with each retailer for specific time-limited operations linked to specific titles or groups of titles. In the notifying parties' view, campaign discounts are particularly difficult to monitor as they are associated to specific short-term promotions and while they may be visible in-store, their magnitude is difficult to evaluate with any precision. Campaign discounts are indeed transparent in the sense that when they are applied, they usually are visible in the market. This is not surprising as it is their objective. Conversely, they do not appear to be predictable and their magnitude seems difficult to evaluate with any precision.

481. Campaign discounts account for [20-30]* of the total discounts granted by Sony BMG at the level of the top five affected markets, therefore representing a non-negligible share of total discounts. In addition as they are not applied to all albums, their impact on price for concerned albums is important. They are

¹³¹ For example in [...] the file discounts for the full price category granted by Sony Music to its top 20 customers between 2002 and 2004 (three years) did not change. With regard to the mid price category, a change in its discount policy led Sony to change the file discount for [50-60]*% of its top 20 customers between 2002 and 2003. Following this modification, file discounts for mid price category did not change in 2003 and 2004.

¹³² Question 57 – Questionnaire to competitors 15 February 2007 – 64% of the all independents who replied to the market investigation across the EEA have no knowledge of file discounts granted to their customers by their competitors.

significantly more irregular than file discounts. [70-80]*of the top five customers of Sony BMG in France, Germany, Italy, Spain and the United Kingdom have an average campaign discount which deviates by more than [10-20]*points from year to year¹³³. It can be argued that the average campaign discount is largely affected by a change in the product mix between two years. However, the important evolution observed in the main markets would very unlikely take place if majors applied a stable campaign discount per category of album to constant proportion of albums on sales.

482. With regard to campaign discounts transparency, several independent record companies submitted that these discounts are also known by the majors as regular exchanges with the retailers give a good knowledge of the level of promotion received by promoted albums. Although it may generally be relatively easy to gather knowledge about the main promotion campaigns launched by competitors, there would, however, be limited means for majors to ascertain the magnitude of associated campaign discounts of their competitors, as retailers would have an incentive in providing 'inflated' information as regards the discounts granted by their other suppliers.

483. It has also been reported to the Commission that multi-label campaigns, associating several record companies, would also significantly contribute to the transparency of campaign discounts. However, this was not confirmed by the market investigation. The majority of retailers submitted that multi-label campaigns account for a minority of their promotional campaigns and that they generally received different campaign discounts from the majors¹³⁴.

484. Retrospective discounts are principally applied in France, but can also be observed in other Contracting Parties to the EEA Agreement. In France for example, these discounts partly replace file discounts as observed in other Contracting Parties to the EEA Agreement. They are generally relatively stable from year to year. They correspond to a fixed annual discount granted to a specific customer and their rate is only known at the end of fiscal year as their level depends on the overall sales of the retailer. Different majors will grant different retrospective discounts to the same customer¹³⁵.

485. Co-op payments are significantly more irregular from year to year, with high variations between 2005 and 2006 for [several]* Sony BMG customers in all largest markets. This finding is coherent with the submission from the notifying parties that

¹³³ This average would be [90-100]*% excluding Spain, where campaign discounts are partly used apparently in a similar way as file discounts in most other countries.

¹³⁴ Question 29 – Questionnaire to customers 10 May 2007 - 67% all of customers who responded to the market investigation across the EEA submit that majors use different campaign discounts during multi-label campaigns, as opposed to 25% who consider that they use similar campaign discounts and 8% who do not have any opinion.

¹³⁵ For instance, [two majors...]* granted retrospective discounts to one of the most important German retailer. One of the two majors granted a retrospective discount 50% higher than the other (in this particular example, retrospective discounts accounted for approximately 40-50% of total discounts).

co-op payments are applied on an irregular basis and are generally not foreseeable a long time in advance.

486. It appears that the wide differentiated use of various discounts by Sony BMG and the other majors militates against any discounts transparency. The notifying parties have also submitted, and this was not contradicted by the market investigation, that retailers do not communicate to the different record companies the discounts granted by their competitors on any systematic basis. Although a majority of customers submit that they may use their various suppliers' information to negotiate with them¹³⁶, any feed-back they get through retailers would be of limited value given the retailer's self interest in exaggerating statements about discounts received from other majors. In addition this kind of exchange will generally focus on elements related to a limited number of new releases and given the sheer volume of information certainly could not take place on anything approaching the level required for a systematic monitoring of competitors' discount policies. Taking into account the limited number of sales representatives Sony BMG has in each Contracting Party to the EEA Agreement it would not be realistic for this small number of personnel to attempt the sort of monitoring necessary to accumulate an accurate and systematic view of competitors rebate schemes.

487. An independent competitor submitted that distribution deals between record companies (it is frequently the case that independent companies' albums are distributed by majors in Contracting Parties to the EEA Agreement where they are not directly active) enable the licensor to know the average targeted discounts of the distributor. This submission is however contradicted by the fact that distribution deals stipulate that the discount policy is under the responsibility of the distributor, who is paid a percentage of gross sales to cover discounts and distribution fees. The licensor is therefore not informed about targeted discounts, if any. In any case, major record companies do not sign distribution deals with other majors, but only with independents.

Rock-bottom prices

488. The Commission has received information from an independent market observer that major record companies' prices can be capped by "rock-bottom prices", which each major can set for its own CDs (namely the PPD categories and maximum discounts under which CDs should not be sold). These rock-bottom prices are deemed to increase transparency with regard to the maximum commercial conditions that competing major record companies are ready to grant to their customers, which in turn, if known by all majors, may limit competition between themselves on net prices.

489. This practice is, however, not necessarily in itself anti-competitive, as it is the case in many industries that companies set boundaries for their sales force in order to streamline European or national sales strategies.

¹³⁶ Question 30 – Questionnaire to customers 12 February 2007 – 62% of all customers who responded to the market investigation across the EEA indicate that they use competitors' information to negotiate with their suppliers. However, they did not disclose exact figures as they are subject to confidentiality agreements.

490. During the market investigation, 49% of retailers claimed that they were informed about the existence of rock-bottom prices for major record companies and 41% claimed they were not¹³⁷. Those who claimed to know about the existence of such prices did not however know their levels. The Commission considers this to be as expected, given that major record companies are engaged in commercial negotiations with their customers and will therefore have no interest in disclosing their rock-bottom prices.

491. The notifying parties recognise the use of these rock-bottom prices and claim that these are non-binding indications, which are often not respected. As an illustration, they submit that the recommended maximum discount for full price albums¹³⁸ was not respected in most Contracting Parties to the EEA Agreement, concerning more than [10-30]*% of sales in 8 Contracting Parties to the EEA Agreement, including [...] among the larger Contracting Parties to the EEA Agreement.

492. In conclusion, the Commission considers that rock-bottom prices do exist for major record companies, but that the latter have no incentive to communicate them to retailers. In addition the Commission did not find any indication that this information is known between competing majors and could act as a focal point for tacit coordination. Moreover, in the event that all majors were to have knowledge of these prices for all their competitors, their ability to use this information would be limited by the fact that these minimum prices are not systematically respected.

Retail prices

493. When applying retail price to a particular album, retailers generally consider the net wholesale price¹³⁹, to which they add a mark-up in order to include V.A.T. and their own margin.

494. When asked if majors can estimate their competitors net wholesale prices from end-customer price, 48% of customers thought it would be possible to obtain a good estimation (however not qualifying the margin of error), 30% thought it would not be possible, and 20% did not know¹⁴⁰.

495. The notifying parties have submitted that they do not systematically monitor retail prices of their own albums or the retail prices of their competitors. The analysis of the sales force's reports provided by the notifying parties and other market participants also confirms this statement. They consider that monitoring such information is particularly irrelevant if seeking to derive net wholesale prices from

¹³⁷ Question 8 - Questionnaire to customers – 12 February /2007 - 49% of all customers who responded to the market investigation across the EEA claim that they are aware of the existence of majors' rock-bottom prices (without knowing their exact level), while 41% claimed they were not.

¹³⁸ Percentage of sales volumes of international full-price single pocket CD chart albums sold at more than maximum indicative invoice discounts to top 20 customers, January 2005 to June 2006.

¹³⁹ Some retailers also apply mark-ups on PPDs, rather than on net wholesale prices.

¹⁴⁰ Question 33– Questionnaire to customers 12 February 2007.

retail prices. The parties submitted an economic survey¹⁴¹ in support of this analysis, underlying that different retailers apply different mark-ups to different albums, or even to the same album, and that one retailer changes its mark-up on one album over time.

496. Over half of customers, on the other hand, confirmed that majors in general do actively check end-customer prices of their products¹⁴². Some customers provide this information every week at the request of majors, others only for campaigns, others claim that majors check retail prices in stores regularly via their sales representatives or for specific campaigns.

497. The market investigation has confirmed that retailers generally do not apply a simple similar mark-up to all albums, or even to certain categories of album¹⁴³. One of the reasons is notably that retailers apply "friendly" prices (such as EUR 9.99; EUR 14.99) and therefore apply different mark-ups to reach these target retail prices¹⁴⁴. Another reason is that some retailers set, as a commercial strategy, the retail price of some or all of their CDs at the same level as for example the lowest retail price of their direct retail competitors, hence affecting the margin for these albums.

498. Some albums also follow a pricing rule that differs from the one followed by a majority of albums, for various reasons. One retailer for example submitted that an album of Rod Stewart was a re-launched CD and that he wanted to sell stocks. Another retailer submitted that the mark-up applied to a specific title was very low as VAT on this album was paid by the record company. In other cases, the retailer decided to apply a specific mark-up reflecting its own perception of sales potential. In any case, whatever the country considered, the reason why an album is priced in a way that might appear deviant is not accessible to competitors, therefore largely limiting the transparency on mark-ups.

499. Generally, the Commission investigation found that retailers' mark-up policy becomes less and less transparent for albums which have been on sale for a certain period of time¹⁴⁵. Retail prices can be affected by campaign discounts which are only partly reported on retail prices, they can be affected by for example existing stocks, co-operative marketing operations. This leads to mark-ups for one album which can be different between two retailers, and to mark-ups applied to an album that can also be different at two different periods in the same retailer outlets.

¹⁴¹ RBB Economics – 2006 Retail Price Study.

¹⁴² Question 32 – Questionnaire to customers 12 February 2007 – 56% of all customers who responded to the market investigation across the EEA submitted that record companies monitor retail prices (as opposed to 27% who submitted they do not and 14% who did not have an opinion).

¹⁴³ See also Country analysis part.

¹⁴⁴ For example, a retailer gave the example of new releases from different major record companies with net wholesale prices ranging from EUR 10.80 to EUR 12.54, all sold at the retail price of EUR 13.99. Nevertheless, some albums, also among the new releases from the same major record companies, with net wholesale prices within this same range were sold at the retail prices of EUR 15.99 or EUR 16.99.

¹⁴⁵ See also Country analysis part.

500. By knowing the retail price of a competitor's album at a specific retailer's, one major could deduce the net wholesale price of other majors' albums, but not for all retailers, and only with a margin of error which is relatively wide, especially if they wish to exclude the additional doubt that an "unusual" retail mark-up might have been applied to this specific album.
501. In order to verify whether the mark-up policy of certain retailers with regard to new releases¹⁴⁶ was more stable (namely by applying a standard mark-up), the Commission asked retailers to provide the net wholesale prices and retail prices of their last 5 new releases for the four major record companies¹⁴⁷ in order to see whether it was more possible for majors to reverse-engineer the net wholesale prices of their competitors from the retail prices of their new releases, at the date of their releases.
502. It appears from the analysis of this data that most retailers indeed apply a relatively stable mark-up policy to new releases, and that when applied, this policy applies to albums from all majors (and presumably applies also to new releases from independents)¹⁴⁸. Mark-ups deviate on average by [0-10]*% from the average mark-up applied by a retailer, and [10-20]*% of albums deviate by more than [10-20]*% from the average mark-up. Therefore, for [80-90]*% of new releases, the net wholesale price of albums could theoretically be deduced from the retail price with a precision of approximately [10-20]*%, and a maximum precision of [10-20]*%. All majors could therefore have relatively good knowledge of the average mark-ups granted at the date of release by a retailer to their competitors by calculating them on the basis of prices of their own albums¹⁴⁹.
503. It must, however, be noted that record companies have no possibility to know whether a competitor's album sold in a retail outlet is part of the majority of new releases and is therefore affected by the "standard" mark-up of the retailer, or whether this album supports an "irregular" mark up. In addition, even a deviation of 5% can be considered relatively important as it represents a difference of approximately plus or minus EUR 0,50 (in the Euro zone), thus one Euro out of a PPD of 10-12 euros.
504. As a conclusion from all of the general description above¹⁵⁰, it can be noted that several retailers apply a stable mark-up policy to the majority of their new albums at the date of release, which could be used by record companies as a reference to monitor their competitors' net wholesale prices. However, as in the same time other retailers do not apply such a stable mark-up policy, this limited

¹⁴⁶ Albums newly released in the year.

¹⁴⁷ Question 34 – Questionnaire to customers 12 February 2007 – 30 responses were completed, covering 600 prices.

¹⁴⁸ See Country analysis part for specific national assessment.

¹⁴⁹ This conclusion remains valid when retailers apply several mark-ups depending on price category.

¹⁵⁰ See Country analysis part for specific national assessment.

transparency is certainly not sufficient to derive the net wholesale price of competitors' album on a regular basis.

505. It must also be noted that this stability has only been observed for new (charted or non-charted) releases and is not observed consistently after release of an album. After the release of new albums, retailer mark-ups are affected by a variety of factors and are therefore much less regular.

506. Finally, considering that "non-standard" mark-ups are applied to a proportion of new albums, even in the event of a collusion at the level of new releases, majors would be required to monitor a large number of references, in order to conduct some type of statistical analysis on competitors' prices. Although the market investigation confirmed that record companies are engaged in a general monitoring exercise of their sales (including price policy follow-up, but also shop positioning, success of albums, customer perception), the Commission did not find evidence that major record companies are systematically engaged in a regular and massive collection exercise, which would be necessary considering the above-described variations¹⁵¹.

2. Variety of albums and hits

507. The market for recorded music is characterised by the presence of a large number of products. Thousands of different albums are available in each of the affected markets. Sony BMG for example brings to the German and Austrian markets more than [10,000-15,000]* different albums. Considering the number of albums Sony BMG makes available to the market together with its market share, it can be estimated that between [10,000-15,000]* and [20,000-25,000]* albums are on sale in the smallest markets such as Portugal or Finland, and that more than [50,000-55,000]* albums are on sale in the largest markets (such as Germany, France and the United Kingdom).

¹⁵¹ See also Country analysis part.

TABLE 14 – Sony BMG albums on sale and new releases - 2006			
Country	Sony BMG albums on sale 2006	Sony BMG new releases 2006	New release/ albums on sale
Austria	[...]*	[...]*	[10-20]*%
Belgium	[...]*	[...]*	[10-20]*%
Denmark	[...]*	[...]*	[0-10]*%
Finland	[...]*	[...]*	[10-20]*%
France	[...]*	[...]*	[0-10]*%
Germany	[...]*	[...]*	[10-20]*%
Greece	[...]*	[...]*	[0-10]*%
Ireland	[...]*	[...]*	[10-20]*%
Italy	[...]*	[...]*	[0-10]*%
Netherlands	[...]*	[...]*	[0-10]*%
Norway	[...]*	[...]*	[0-10]*%
Portugal	[...]*	[...]*	[20-30]*%
Spain	[...]*	[...]*	[0-10]*%
Sweden	[...]*	[...]*	[10-20]*%
United Kingdom	[...]*	[...]*	[0-10]*%

Source: Notifying Parties; Commission analysis

508. In addition, many new albums are released every year. On average [10-20]*% of Sony BMG albums on sale are new releases (released during the year). This ranges from [0-10]*% in Spain to [20-30]*% in Portugal. The absolute number of new releases is particularly high in Austria¹⁵² and Germany, with more than [1,000-2,000]* new albums released in 2006.

509. Each album goes through several phases during its commercialisation. One or several singles are generally released several weeks before the album and contribute towards creating demand for this particular album. A significant number of albums are also purchased by retailers in the pre-release phase in order to build stocks. In the first weeks after release it is often the case that the bulk of sales are realised, first from pre-release stock and then from further orders by the retailers. The sales in this initial period are often supported by more or less intensive promotion of the artist and the album.

510. When sales start declining, several elements can contribute to reactivate demand from consumers, such as the release of new singles, additional marketing and promotion spending, organisation of a tour. More generally, when sales start seriously declining, the price of the album is often decreased by way of a general PPD reduction or an increase of discounts with the objective to attract additional customers, sometimes referred to widening the sales target beyond non-fan customers. After this first price decrease, price levels can fluctuate for a period, before the album is ultimately definitively classified in the mid or budget price category.

¹⁵² The number of albums on sale, as well as the number of news releases, in Austria are within the same range as in Germany as the two countries tend to be treated in the same way for marketing purposes.

511. Some albums can follow different patterns. The parties provided the example of [...] in Germany. This album was priced at the launch PPD of EUR [5.00-10.00]* and conversely to what is generally observed, its PPD was increased after several weeks, despite an evident lack of success. Other examples were submitted by the parties, where albums had success many weeks after their initial release. In the given examples such late success was notably due to a "re-release" of the album including new or modified tracks¹⁵³.

3. Cost structure – Incentive to decrease prices

512. A record company has to basically assume the following costs of product: manufacturing and purchase costs, royalties paid to artists, copyrights paid to publishing collecting societies, warehousing and distribution. In addition, a record company will have marketing and promotional expenditures and will cover its overhead costs.

513. The recorded music industry is not very capital intensive and total costs are normally fairly proportional to sales. Royalties to artists are generally payable as a percentage of PPD, net of approved discounts and free goods. "Overhead" is the only item that is not directly proportional to sales, although it is often considered as such in financial analyses.

514. Considering that the cost structure is principally proportional to sales, it may be estimated that a decrease in price by 20% should be followed by an additional demand of 25% to maintain the same net profit. Similarly, a decrease in price by 30% should be followed by an additional demand of 43%.

515. Additionally, starting to propose low prices for music albums could lead customers to anticipate a drastic market-wide price reduction and could lead to the danger of price downturn spiral for major record companies. It might explain why they have not tried to develop a significantly more aggressive pricing policy in the EEA than the current one, while it is recognised that customers react very positively to a temporary price decrease.

516. In addition, record companies have mixed feelings with regard to the impact of decreasing price of their albums. One company notably submitted that decreasing the price of CDs from for example EUR 15.90 retail to EUR 9 for new releases would not make a particular CD sell more, as the alternative is free illegal download from the internet, which would be unaffected by that sort of price decrease. In that context, it could be argued that it may be a sound business strategy for recording companies not to respond to the collapse of demand by a sharp decrease in price, especially at a time when the on-line market is still not providing enough revenues to compensate for the losses endured in the physical market.

¹⁵³ "Shakira – Oral Fixation Vol2" ranked No 6 in the German charts in November 2005, left the charts in May 2006 and then again ranked No 4 in June 2006. This unusual comeback was at least partly due to the modification of one or several tracks in the original album, combined with the artist performing at the Soccer world cup in Germany.

517. It can also be noted that in 2003, Universal launched in the United States its Jumpstart initiative aiming at decreasing retail prices of albums. This initiative is the largest initiative of this kind reported in recent years. However, it was not as successful as expected by Universal, notably because the lower net wholesale prices were not fully passed to end consumers, and because these end consumers did not increase their purchases of albums to such an extent as to cover the loss of profit margin on each CD¹⁵⁴. This experience on the US market has certainly contributed to the record companies limiting the testing of new low-price schemes in the EEA.

4. Budgets

518. Record companies establish budgets per Contracting Party to the EEA Agreement to forecast sales volumes and prices, costs and profits. These budgets are necessary instruments to conduct business and prepare financial statements, in the music recording industry as in any other business. Budgets generally report total sales at gross price, discounts, costs and net contribution to profit. National budgets are made of the aggregation of album budgets and estimations for albums which do not have their own detailed budget.

519. Record companies prepare budgets for some individual albums, which tends to be albums expected to reach high level of sales. These budgets are primarily focussed on assessing sales volumes, reasonable levels for marketing expenditure, but are also important tools for price strategies. Such budgets detail the total number of expected sales, average PPDs and discounts, as well as associated costs per Contracting Party to the EEA Agreement. They, however, will only present average values with regard to PPDs and discounts and do not differentiate per period (although PPDs can change over a long period) or per customer or customer categories (who obtain different discounts). Apart from isolated cases, the Commission found that record companies do not prepare budgets per customers, or customer types.

520. Budgets appear to be an imperfect instrument to control actual discounts on a regular basis, at customer's or at album's level.

521. Firstly, on a title by title basis, targeted and actual discounts can be significantly different¹⁵⁵. This variation is notably due to the difficulty to predict the success of an album, and therefore the need for promotional support. On a title by title basis, the differences between forecast and actual sales are huge¹⁵⁶. When

¹⁵⁴ The Wall Street Journal – 4 June 2004: "*For JumpStart to work, Universal Music needed to see a 21% lift in sales volume to offset the lower wholesale prices. A Universal executive says the company saw increases of just 8% to 13% most weeks.*"

¹⁵⁵ Top 20 sales of Sony BMG in 2006 – Realised and forecast discount have been different by the following maximum and minimum differences (F: forecast; R: realised): [...]*

¹⁵⁶ Top 20 sales of SonyBMG in 2006 – Realised and forecast sales have been different by the following maximum and minimum differences: [...]*

averaging the top 20 sales in 2006, the difference range from [20-30]*% for France and Spain to [60-70]*% for the United Kingdom.

TABLE 15 - SONY BMG 2006 top 20 sales – Gross sales					
	France	Germany	Italy	Spain	United Kingdom
	MEUR	MEUR	MEUR	MEUR	MGBP
Gross sales budget	[40,000-50,000]*	[40,000-50,000]*	[20,000-30,000]*	[20,000-30,000]*	[50,000-60,000]*
Gross sales actual	[50,000-60,000]*	[50,000-60,000]*	[40,000-50,000]*	[20,000-30,000]*	[90,000-100,000]*
Difference	[20-30]*%	[20-30]*%	[60-70]*%	[20-30]*%	[60-70]*%

Source: Notifying Parties; Commission analysis

522. Secondly, it also appears that the average discount per retailer fluctuates by several points from year to year. For example, in the United Kingdom, the average discounts granted by Sony BMG to each of its top five customers respectively [...] between 2005 and 2006, while in Spain, the average discounts of each of the top five customers respectively [...] over the same period.

523. Thirdly, the Commission found that Sony BMG or other majors do not systematically adjust monthly targeted discounts in order to compensate for actual discounts deviation of former months. Majors are also not generally less willing to agree to discounts towards the end of the financial year, which could be expected if there was a strong emphasis of ensuring compliance with discount budgets. Conversely, actual discounts as provided by the notifying parties in [some countries]*, were in the vast majority of cases higher than targeted discounts every month. No reduction of monthly targeted discounts has been observed in order to reduce the actual annual average discount.

4. COMMISSION ANALYSIS

1. Overall analysis

524. In order to conduct an in-depth analysis of the market for recorded music, the Commission has carried out an extensive market investigation, contacting notably customers and competitors in all affected markets.

525. The analysis has been significantly widened if compared to the similar one conducted in the original examination of the merger between Sony and BMG, when only data related to the top 100 sales was collected¹⁵⁷. The original examination focused on alignment of net and gross prices on average, whereas in order to respond to the Court of First Instance's comments, the Commission has widened the analysis by asking for transaction data, the most disaggregated level of information

¹⁵⁷ The examination conducted in 2004, based on top 100 sales, notably included albums specifically designed for supermarket customers and apparently following a different market rationale. The current analysis has the advantage of focusing on chart albums only, which follow similar economic rules and account for a significant proportion of sales.

available, notably to evaluate and measure the impact of discounts on net wholesale prices.

526. In the course of the current market investigation, the Commission collected from the four majors data related to all transactions of chart albums between January 2002 and June 2006 with their main 20 customers in the 15 affected national markets (hereafter referred to as the "transaction database" or "database")¹⁵⁸. Chart albums are single-pocket CDs which have been in the national charts at any point of their lifetime during that period. For each transaction, the majors have provided information on the title transacted (such as the artist name, the title of the CD, its release date and the format of the final product), on the customer (such as its name, the category in which it competes at the retail level), on the terms of the transaction (such as the nature of the transaction – sale or return, the invoice date, the gross price – PPD, the number of units sold or returned, the net price, the discount granted and, when available, the split between file discount and campaign discount), as well as the context of the transaction (such as the presence of the title in the chart at the date of transaction). Accordingly, the analysis performed in the course of this investigation is based, among other things, on a more detailed and representative dataset.

527. The different theories of harm analysed afterwards (paragraph 530 and onwards) have been rejected under both evidences that (i) the terms of coordination leave significant flexibility so that they are not compatible with tacit coordination; and (ii) that there is not sufficient transparency on the market for recorded music to verify that allegedly colluding major recording companies comply with the terms of coordination. In addition, the Commission has investigated the current market structure where the merger between Sony and BMG was already implemented one to three years ago depending on the territory. The need for a prospective analysis to evaluate the likelihood of the creation of a dominant position is therefore limited.

528. Nevertheless, as stated in the above paragraph, the different theories of harm have been rejected on grounds that apply to both the creation and strengthening of a collective dominance¹⁵⁹.

529. The Commission received a submission stating that the current concentration leads to a market with two leaders¹⁶⁰ (Sony BMG and Universal), that are clearly ahead of the other majors (EMI and Warner) and the independents, which is therefore conducive to a market structure where collusion could take place at the level of the two leaders only. It should first be noted that according to that theory, EMI and Warner would still remain significant 'mavericks' and would still have the power to jeopardy any attempt of collusion by the two other majors alone. In

¹⁵⁸ The Commission also attempted to collect data from seven independent record companies but only one of them replied to the Commission data questionnaire, and it did not reply to all questions.

¹⁵⁹ The current concentration is examined under the Council Regulation (EEC) No 4064/89. The competition test therefore aims at assessing the creation or the strengthening of a position of collective dominance.

¹⁶⁰ At the EEA level, Sony BMG and Universal together would have a 51% market share, and a combined market share superior to 50% in six affected markets including most of the largest markets (Austria, France, Ireland, Italy, Spain, and the United Kingdom).

addition, the various theories of harm have been rejected on grounds that would equally apply to a collusion of two or four majors. Therefore there is no need to particularly address a theory under which collusion would only take place between the two largest majors.

2. Theories of harm

530. The theories of harm developed under the current concentration focus on the issue of coordinated effects. Several theories of harm have been suggested during the market investigation, principally by Impala, the association of independent record companies. No other market player or observer than Impala and a very few number of its members have put forward theories of harm in the market investigation.

531. Several of those theories focus on coordination to stabilise the net wholesale prices of physical albums at a higher level than competitive price, while others focus on coordination by the major recording companies on other non price-related areas which, as an effect, would restrict independent record companies from accessing retailers¹⁶¹.

532. The following theories will be scrutinized in the below sections:

- (i) coordination at the level of budgets;
- (ii) coordination at the level of each title pricing;
- (iii) coordination at the level of pricing policy (stabilisation of current business model);
- (iv) coordination on prices at and shortly after the release date;
- (v) coordination at the level of non-price items.

533. In accordance with the Airtours judgment¹⁶², there must be easily recognisable terms of coordination for collective dominance to take place¹⁶³. In addition, the following cumulative elements are to be met to characterise collective dominance on the market:

¹⁶¹ This would not however imply that majors would not compete against each other.

¹⁶² Case [T-342/99](#) (Airtours plc v. Commission)

¹⁶³ As stated by the CFI in T-464/04 (Impala/Commission) "it should be observed that even quite a high number of rules, of apparent complexity, even, perhaps, difficult to list exhaustively, does not necessarily prevent a professional from determining relatively easily whether those rules are, a priori or taken as a whole, being observed. Thus, the rules of correct behaviour or of etiquette would require voluminous works in order to be described in detail, but a person only slightly familiar with those rules can none the less readily determine whether another person's conduct essentially complies with those rules".

- (i) there must be sufficient market transparency so that each member of the dominant oligopoly has the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy;
- (ii) there must be a means for other oligopoly members to retaliate against any departures from the common policy, so that members have an incentive not to depart from the common policy;
- (iii) the foreseeable reaction of current and future competitors, as well as consumers, would not jeopardize the results expected from the common policy.

534. In addition, the Commission analysed whether the three conditions defined by the Court of First Instance in *Airtours v Commission*, may, in this case, be established indirectly on the basis of what may be considered a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.¹⁶⁴

535. The criteria of transparency will be particularly analysed in each theory of price-related coordination, as each theory requires a specific level of transparency. It can be noted that all the theories are particularly weak in this regard. The criteria of the retaliation and reaction of competitors and consumers will be analysed separately, as they apply indistinctively to all these theories. It should, however, be noted that as these criteria are cumulative, ruling out one of them would be sufficient to dismiss coordination on the market.

a) Coordination at the level of budgets

Theory

536. Budgets are established by record companies to forecast sales volumes, prices, discounts, costs and profits, at album/project, or country level. This feature is not a characteristic of the recorded music industry and is observable in most other industries.

537. A market participant nevertheless suggested in a first submission that these budgets can be used as focal points of coordination for majors to control the average annual discounts of their competitors. This market participant submitted that the average discounts of majors are extremely stable from one year to another, and that such stability could not reflect proper competition on a market characterised by a high level of unpredictability regarding the success of albums.

538. In a subsequent submission, the same market participant also submitted that the budgets of major record companies were not, as such, the focal element of a tacit coordination between themselves, but rather a signal to all retailers (and through them to all competitors) that the tacit coordination that was taking place in a given year, was re-conducted for the following year (as budgets are fixed at the beginning of the year).

¹⁶⁴ Case T-464/04 (*Impala v. Commission*), paras 251 et seq.

Transparency

539. During the market investigation, the Commission found that budgets are not prepared for separate customers on a systematic or regular basis by record companies. Retailers have notably reported that they are not aware or informed of record companies preparing overall discount budgets to prepare the overall discount that they are ready to allocate to each customer¹⁶⁵.
540. The Commission also found that the budgets prepared by all record companies are purely internal documents containing confidential financial information, and the investigation did not provide any evidence that these budgets are disseminated between the majors or that they could otherwise be used as focal points for coordination at the level of budgets.
541. In addition, the Commission considers that whereas budgets are instruments to forecast sales and discounts, they are however not appropriated for controlling discounts granted to customers on a regular basis. Therefore, either one would have to consider budgets at the album level, and then the wide variations as described above would impede drawing any valid information from them, or alternatively, one would consider the overall annual budget, and then the instrument become meaningless as regards an accurate and timely monitoring. Finally, these budgets would only be of limited interest for hypothetical coordination purpose as the records companies often either overspend or underestimate the forecast discount budget.

An inappropriate theory

542. In addition to their confidential nature, budgets are not appropriate tools to control discounts, but instruments to forecast sales and discounts. For these reasons, tacit collusion at the level of budgets appears to be hardly sustainable.

b) Coordination at the level of each title pricing

Theory

543. The number of individual albums released on each national market amounts to several hundred every year, and might even reach thousands for some Contracting Parties to the EEA Agreement¹⁶⁶. If new releases are added to existing catalogue, Sony BMG alone proposes several thousands albums for sale in all Contracting

¹⁶⁵ Question 13 – Questionnaire to customers 10 May 2007 – 82% of all customers who responded to the market investigation across the EEA (and thus equally representative and conclusive for all the Contracting Parties to the EEA Agreement) submit that they are not aware / informed of such budgets. Only one customer active in several countries has submitted that a provisional discount budget is negotiated for the year.

¹⁶⁶ In 2005, 1 611 new albums were released in France by the entire record industry, 15 058 in Germany, and 2 000 in Spain. Source: Notifying Parties.

Parties to the EEA Agreement¹⁶⁷. Under the theory that collusion takes place on price at the level of each title, thousands of albums would need to be monitored.

Transparency

544. One of the criteria referred to in the *Airtours* judgement¹⁶⁸ in order to characterise collective dominance on a market, is that there must be sufficient market transparency so that each member of the dominant oligopoly has the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. This implies that colluding at the level of each title requires knowing with a certain level of precision the net wholesale price of all albums released by all the majors, as well as having the capacity to monitor the evolution of these prices.

545. Record companies and retailers certainly exchange information, including elements such as for example the release of albums from competitors, promotion strategies, PPDs. However, the market investigation does not support a finding that such communication of information is intended to or in fact provides a systematic overview of the very large number of new release or catalogue albums offered at any particular point in time by all record companies or even by the four majors. Whilst it may be feasible to collect sufficient feedback information on one or even a few specific albums by focusing discussion with retailers, it seems very unlikely that record companies could obtain exhaustive and precise information on the pricing of all their competitors' albums via information on PPDs and discounts. The apparent difficulty in collecting such data is also consistent with the fact that the investigation showed that the majors do not actually attempt to collect such information on anything approaching a systematic basis.

An inappropriate theory

546. Identifying the precise net wholesale price of an album, be it via knowledge of PPDs and discounts or via retail-price reverse-engineering, is not reproducible at the level of each album, and certainly not reproducible on a systematic basis considering the information that is publicly available. In addition, PPDs, campaign discounts and retail prices evolve constantly and would require daily or at least weekly monitoring requiring an extraordinary amount of information to be gathered. Such a database would be highly cost-consuming, whilst remaining, in all likelihood, largely incomplete and it would quickly become out of date as the information on price and discounts evolves constantly, thereby significantly limiting the interest in trying to produce such a database. It can, thus, be concluded that tacit collusion at the level of each album would not be sustainable on this basis alone.

¹⁶⁷ In 2005, Sony BMG had [several thousand]* albums on sale in France, [several thousands]* in Germany, and [several thousands]* in Spain. Source: Notifying Parties.

¹⁶⁸ Case [T-342/99](#) (*Airtours plc v. Commission*)

c) Coordination at the level of pricing policy (stabilisation of current business model)

Theory

547. One market observer submitted a theory based on the assumption that major record companies coordinate themselves at the level of their general pricing policy. According to this theory, the major record companies enjoy a stable and predictable business framework in the sense that pricing for similar new releases or for comparable catalogue titles will be relatively similar. According to the proponent of this theory, this is also a guarantee that the evolution of prices of albums will follow similar rules. Nevertheless, even if two similar albums are guaranteed to be released at similar prices, their price evolution may be completely dependent on their own success, and might rapidly diverge. This divergence would however be understandable from industry standard pricing policy. For example, a title declining in chart ranking will be re-priced, whereas titles still successful in the charts will remain at the same price level. Price evolution might also be influenced by other factors such as for example airplay, tour success, and advertising. These rules are nevertheless without prejudice of short term campaigns.
548. That theory, therefore, notably implies that all majors follow the same pricing patterns, and thereby accept a relatively high degree of flexibility which is necessary to adapt album prices to a variety of factors, such as lower than expected demand, fluctuating advertisement expenditures or short-term promotions. This flexibility is, according to the proponent of this theory, accepted to be inherent in the nature of the activity of selling products, the success of which cannot be known or accurately predicted in advance. It is also necessary as seasonal campaigns drive the market and are implemented by all record companies (such as the Christmas campaign, back to school, the January inventory or other campaigns).
549. According to this theory of collusion, the major record companies would be able to rely on other majors not to develop a substantially different pricing strategy. Sony BMG would therefore be guaranteed that it can continue to release international hit albums at stable and high PPDs and apply regular discounts without facing price competition from similar albums from other majors.
550. Some customers claim that prices of majors are similar within similar categories of albums (such as the top 20, full price, mid price, budget, back-catalogue). This theory would therefore be also relevant for a collusion which would only apply to one of those categories.
551. Under this theory, it is accepted that no major applies a predictable pricing policy, so that a real deviation from the common policy would only occur if a change in pricing policy were to imply a significant modification in the majors' pricing strategy. Small variations in the pricing policy cannot be distinguished from the flexibility margin within the agreed common policy. In particular, they cannot be distinguished from sales campaign based on short-term and important discounts.
552. A change in pricing policy should, therefore, firstly present systematic characteristics, such as for example a decrease of new launch PPDs for all or a certain category of albums from a specific major, an increase of discounts for all or a

certain category of albums, a higher magnitude or shorter delay than usual before first decrease of PPD for all albums. If the deviation does not concern all albums, a vast majority of albums, or at least the majority of a complete category of albums such as all new release or all back catalogue it is very likely that it might not be noticed by competitors or interpreted as a manifestation of the agreed pricing policy. A pricing innovation concerning one album or a small number of albums could certainly be considered as a phenomenon characteristic of the agreed flexibility within the general pricing policy.

Transparency

553. A deviation can only be characterised if it is observable. Therefore a modification in the pricing policy can only be characterised as a deviation from the commonly agreed pricing policy if it is of sufficient importance. For example, a new strategy whereby all new releases for international artists would be priced at EUR 8 PPD or a decrease of PPD by 15/20% would be sufficient in scope to be spotted by competitors (on the assumption that the discount policy does not change in the opposite direction to counterbalance the effect of a reduction of PPD). Similarly, a new pricing policy whereby the first decrease in the wholesale price (via PPD decrease or discount increase) would be systematic and take place much earlier after release would be spotted as a significant deviation in the commonly agreed pricing policy.
554. Those elements imply, for example, that a reduction of 2-3% of net wholesale prices of one major (via decrease of PPD or increase of discounts) would certainly be unnoticed by the other majors. Similarly, if a major launches one album of an international successful artist at a PPD of EUR 8, if this action is not replicated on other albums of this major it might be interpreted that this specific price lies within the commonly agreed policy. In particular, it might be understood that one of the monitoring elements used to fix initial PPDs was particularly negative. The example was given that the last album of "Arctic Monkeys" was priced at a significantly higher price than the last album of "Kaiser Chiefs" whereas the two British bands address a relatively similar public. However, the sales of tickets for the forthcoming tours had been more successful for "Arctic Monkeys", providing an indication of a larger fan base, and therefore of a higher potential for sales of albums.
555. According to the proponent of this theory, only a limited number of indicators, reflecting common industry rules, need to be monitored by majors in order to ascertain the factors which have an impact on competitors' prices. For example, the charts provide sufficient transparency to spot at which stage of their lifecycle all titles are currently at. A decline week-by-week in the charts indicates that the release is running out of audience (for example if demand falls by roughly 20% after the week of release, the record is likely to be fan-based rather than having a broader audience). A steep decline will trigger a decision to re-price the release. Other indicators followed by the record companies are the continued airplay, tour ticketing, the receptivity of the (subsequent) singles, and the effectiveness of television or radio advertising and press coverage.
556. According to the proponent of this theory, a deviation from the commonly agreed pricing policy, both systematically and sufficiently important, would be quickly identified in the retail outlets. Retailers will indeed either adjust their retail

prices by a significant reduction and/or grant significantly more shelf space (including in-front shelf space) to the deviating major. A precise reverse-engineering mechanism is therefore not necessary to identify the deviation. The proponent of this theory submits that such a deviation could be identified relatively quickly, between two to three weeks and two months, depending on its magnitude.

557. Customers are generally not aware of common industry rules. However, some 17% of them claim that educated guesses can easily be made, regarding for example price movements from one price range to another (full to mid, to budget), or the pattern of seasonal sales campaigns¹⁶⁹. In addition, a quarter of customers claim that majors would be able to spot deviations from these rules (as opposed to some 42% who claim that majors would not be able to)¹⁷⁰.

558. Deviations could notably be identified via the reports prepared by the sales forces of each major. These sales forces regularly meet the retailers in order to negotiate the shipping of new albums and take advantage of these regular contacts to report a variety of information (such as the success of own albums, traffic in shops, competitors' activity). The parties submit that sales forces are extremely limited in size and report competitors' activity in a limited scope, as a classical industry benchmark. Nevertheless, the proponent of this theory submits that a systematic and significant deviation from the commonly agreed pricing policy would be rapidly identified.

An inappropriate theory

559. The Commission considers that it is inappropriate to qualify this theory as a coordinated approach on the market for recorded music, notably because such a theory would leave sufficient margin for different majors to develop many alternative pricing schemes and thus it cannot be distinguished from competition on the merits. For example, for the proponent of this theory, a new pricing scheme applied by one major to a limited number of albums would not be considered as a deviation from the "commonly agreed policy".

560. The theory that majors coordinate their pricing policy is based on the following two main assumptions: (i) a certain level of transparency that exists in most markets; and (ii) a margin to price albums differently allowing many alternative pricing schemes (for example a new pricing scheme to be applied to a limited number of albums would not be systematic).

561. This level of transparency would be meaningless as any move on the market could be caught under the theory of coordination, including a perfectly competitive behaviour. It only has to be sufficient to identify a change in the pricing policy of

¹⁶⁹ Question 29c – Questionnaire to customers 12 February 2007 – 46% of all customers who responded to the market investigation across the EEA are not aware and 28% do not believe there are of any industry common rules, versus 17% who think there are common industry rules, including the possibility to easily guess for example when CDs move from full to mid to budget range, or seasonal sales.

¹⁷⁰ Question 29d – Questionnaire to customers 12 February 2007 – 27% of all customers who responded to the market investigation across the EEA claim that majors could spot a deviation, while 42% said no and 22% had no opinion.

competitors which would be almost equivalent to a change in business model. Indeed, a decrease of PPDs by 10-15% on all albums, or a shift to a low price for all albums after a shorter period following release, would be a significant change in the way to conduct business. Any change of a lesser magnitude, or relevant for a limited part of the catalogue would be likely to pass unnoticed or be considered as remaining within the boundaries of collusion.

562. With regard to flexibility, majors would have according to this theory of collusion a margin to test and develop new pricing schemes that would be so large that it is more likely to be a manifestation of competition on the market. For example, if a major would launch several albums at a "lower than usual" price, this would either be unnoticed among hundreds of releases or treated as a phenomenon within the coordination, such as for example lower than expected demand, unsold tour tickets, weak airplay. Similarly, majors would have within this theory of collusion sufficient margin to decrease PPDs of albums after their release whenever they consider it is more appropriate, as many factors have an impact on this decision (such as for example chart ranking, advertisement campaigns) and cannot be systematically monitored by their competitors.

d) Coordination on prices at and shortly after the release date

Theory

563. It has been reported to the Commission that the bulk of sales of major recording companies are realized by chart albums during the first weeks following release. Chart albums account for approximately [60-70]*% of Sony BMG gross sales at EEA level and the majority of chart album sales are indeed achieved within the first 20 weeks following release¹⁷¹. Based on this assumption, a coordination of majors covering chart album prices during the early post-release period would cover a significant part of the majors' activity and revenue. As a variant of the two precedent mentioned theory, the Commission explored the possibility for majors to coordinate the prices of their new album releases. Such a theory of price coordination at the release date would be based on the hypothesis that major record companies coordinate the prices of their new album releases at the date of release plus the following weeks covering the period when the bulk of sales are realised.
564. Such coordination would create a stable and predictable framework for record companies, who could therefore release new albums without any risk of facing aggressive price competition. This would be of particular interest in this industry where purchasing is not only conditioned by the price of albums, but also other factors, such as for example the artist, creativity, appeal, and advertising. Stabilising price of release would enable majors to focus on other factors supportive of purchasing reflex, and to maximise revenues.
565. The possible terms of any such coordination would have to address at least the following issues:

¹⁷¹ Considering a smaller number of weeks (for example 10 weeks) would not alter the assessment (but decrease its representativity).

- (i) How are PPDs selected by the majors?
- (ii) For what period of time following release do PPDs have to remain stable?
- (iii) What are the rules that are applied to discounts during that period?

- (i) How are PPDs selected by the majors?

566. With regard to point (i) – "selection of PPDs by majors" – the investigation shows that the majors do not all use the same PPDs. It also shows that the number of "main PPDs" used by each major varies over time¹⁷² and by Contracting Parties to the EEA Agreement. By way of illustration, table 16 indicates for each affected market the range of PPDs used by the four majors to price their chart albums during the first 20 weeks following their release. Only the PPD categories accounting for more than 10% of total sales¹⁷³ of each major are presented to avoid using under-represented PPDs. For Spain for example, Sony BMG uses PPDs in the price range EUR [10-15]* and other majors use different ranges (two majors also include EUR [5-8]* PPD in their most used PPD categories) with notably one major having only one PPD accounting for more than 10% of its sales. In Spain, the difference between the lowest and highest PPDs is as high as [60-70]*%. More generally, the main PPD categories used by the majors cover a large spectrum. With the exception of Norway and Finland, the difference between the lowest and highest main PPD categories is superior to 25%.

¹⁷² For Sony BMG for example, the proportional usage of each PPD was different from one month to another in Germany (in other words, whereas the most used PPD was the EUR [...]*, in October 2005 it accounted for 25% of total chart sales, versus 80% in June 2006).

¹⁷³ This 10% level usually encompasses the top 5 PPDs representing the vast majority of sales.

TABLE 16 - Variation of PPD main categories – Local currency - 2006¹⁷⁴						
Territory	Sony BMG	Major X⁽¹⁾	Major X⁽¹⁾	Major X⁽¹⁾	Max range	Δ%
Austria (EUR)	[12-14]*	10.25-13.25	12.8-13.5	13-15.5	10.25-15.5	[30-40]*%
Belgium (EUR)	[5-14]*	12.8-15.4	12.5-15.5	12.7-13.5	[5-15.5]*	[60-70]*%
Denmark (DKK)	[70-120]*	101-116	102-130	96-101	[70-130]*	[40-50]*%
Finland (EUR)	[12-14]*	12.8-13.4	13.45-13.75	12.75-15.5	[12-15.5]*	[10-20]*%
France (EUR)	[11-14]*	10.67-13.89	10.74-14.4	10.68-14.18	10.67-14.4	[20-30]*%
Germany (EUR)	[8-13]*	13.27-15.82	10.09-13.06	11.25-13.5	[8-15.82]*	[40-50]*%
Greece (EUR)	[12-14]*	10.92-14.2	12.33-13.06	12.5-15.5	10.92-15.5	[20-30]*%
Ireland (EUR)	[13-15]*	13.53	12.49-15.66	10.25-13.33	10.25-15.66	[30-40]*%
Italy (EUR)	[9-14]*	11.88-17.04	11.36-11.6	13.15-13.94	[9-17.04]*	[40-50]*%
Netherlands (EUR)	[8-15]*	12.7-13.25	11.3-13.5	9.75-16.5	[8-16.5]*	[40-50]*%
Norway (NOK)	[90-110]*	110	110	110-113.5	[90-113.5]*	[10-20]*%
Portugal (EUR)	[12-14]*	13.5-17.3	10.25-13.47	12.8-13.5	10.25-17.3	[40-50]*%
Spain (EUR)	[10-15]*	5.2-12.8	10-13.5	9.3	[5.2-15]*	[60-70]*%
Sweden (SEK)	[80-120]*	114-119	95-116	110-144	[80-144]*	[30-40]*%
United Kingdom (GBP)	[8-10]*	6.73-10.25	7.21-9.15	9.17	6.73-10.25	[30-40]*%

Source: Notifying Parties; Commission analysis ⁽¹⁾ Results for EMI, Universal and Warner are randomly distributed, one column might therefore contain information related to different majors.

567. In addition, it does not appear that there is a clear rule for exactly which of its main PPD a major allocates to each new release. It could be assumed that such coordination does not aim at aligning release prices of all albums for all majors. One major could therefore use several PPDs to launch new albums, and different majors could use different PPD sets. It is very unlikely that this level of "freedom" could be explained as compatible with tacit collusion.

(ii) For what period of time following release do PPDs have to remain stable?

568. With regard to point (ii) – "PPD stability period" – the market investigation has shown that PPDs are relatively stable during the early life of the album, namely during the first 10-20 weeks following release. Such a stability period would enable the majors to focus competition on non-price aspects (such as for example the date of release and airplay) during the sales period when the majority of sales are achieved.

569. However, that period is variable from one album to another and generally 10 to 25% of albums are re-priced within the first 20 weeks following release, which can represent a source of instability. Again, it is very unlikely that this level of "freedom" would be compatible with tacit collusion.

(iii) What are the rules that are applied to discounts during that period?

¹⁷⁴ First semester 2006; full year 2005 was also analysed by the Commission and similar conclusions were drawn for that period.

570. With regard to point (iii) – "application of discounts during coordination period" – the Commission has investigated the regularity and predictability of discounts applied to new releases, based on the analysis of Sony BMG and other majors' transactions between 2002 and 2006. This analysis, described in the section just below, has highlighted that campaign discounts vary significantly between albums and retailers, as well as during the life cycle of the album.

Stability of discounts

571. The transaction database has been used to test, first, if major's transactions were consistent with the above-mentioned theory of tacit collusion (paragraph 563 and onwards) and, second, the effect of the merger in this regard.

572. The theory of tacit collusion described in the previous section consists of coordination by the majors on prices of single-pocket CDs during the first part of their life-cycle, which is typically the first 20 weeks of transactions (namely from one or two weeks before the date of release, when the first transactions occur, up to around four month of presence in the market). The price of a single-pocket CD charged by the majors to their clients is driven by the PPD, which is identical for all clients at a certain date for each product. From PPDs, different types of individually negotiated discounts, such as file discounts and campaign discount, are deduced. Thus, the theory at stake requires that the net wholesale prices charged by each major to their clients follow some commonly agreed rules.

573. In some cases, the discount pattern is extremely simple. [...] However, in general, the discount pattern is far more complex and, in order to investigate the existence of such commonly agreed pricing rules, the Commission has tested if similar groups of single-pocket CDs were following similar discount patterns. In the following example, the total discount represents the percentage of PPD saved by the customer for each unit of a specific transaction. For example, if a retailer pays EUR 100 for 10 units of the same CD, and if this CD has a PPD per unit of EUR 15 at the time of the transaction, the net wholesale price per unit is EUR 10 and the total discount per unit is EUR 5, in other words 33% of the PPD.

574. In order to have an overall picture of the discount schemes that goes beyond limited examples, a statistical measure has been performed at the level of each Contracting Party to the EEA Agreement, for each major (as well as pre-merger and post-merger). This measure summarizes the number of single-pocket CDs units that follow a common discount scheme, as a percentage of the total number of units transacted by each major in each Contracting Party to the EEA Agreement.

575. For that purpose, the Commission has grouped transactions of single-pocket CDs along with information that is or has been argued to be easily observable: the Contracting Party to the EEA Agreement in which the product is sold, the major which sells, the client which buys, the presence of the CD in the chart at the time of the transaction, whether or not it is the first week of transaction of the CD¹⁷⁵, and its PPD at the time of the transaction. For example, all transactions of single-pocket

¹⁷⁵ In the early stage of a single-pocket CD, major give discounts in order to get large orders that will, ultimately, increase the likelihood that the CD goes into the chart.

CDs sold by Sony to MediaMarkt in Germany, at a PPD of EUR [...] in the first week of transaction, and not in the chart, form a distinct group; conversely, all transactions of single-pocket CDs sold by Sony to MediaMarkt in Germany at a PPD of EUR [the same PPD] after their first week of transaction and that are in the chart, form another group.

576. It must be emphasized that this analysis assumes that PPDs are fully observable by market participants. This is a conservative assumption because, as detailed above (paragraph 470), the market investigation has shown that PPDs are only partially transparent.

577. For each group of transactions, the Commission has measured the variation of total discount levels, weighted by transaction size (number of units sold in each transaction). If this variation is small, in other words, if all transactions in the group have close discount levels, then the group of transactions shares a common discount policy. If, on the contrary, this variation is large, in other words, if there are significant differences in the discount levels granted to transactions in the group, then these transactions do not share a common discount scheme.

578. The statistical summary of the stability of discount levels for each group of transaction is obtained by computing the share of units sold by each major, in each Contracting Party to the EEA Agreement, that belong to groups with a small variation of total discount levels. More precisely, for each group of transactions, the average discount level and the dispersion around this average (standard deviation weighted by transaction size) is computed. Then the groups of transactions are classified into two categories: those for which the dispersion is small (that is when the weighted standard deviation of the group is lower than 2)¹⁷⁶ and those for which it is large (that is when the weighted standard deviation of the group is larger than 2). For example, if one group of transactions has an average discount level of 10% and a weighted standard deviation around this average of 1.5 percentage points¹⁷⁷ the transactions of this specific group are considered to be "close" enough to each other so that the group exhibits a stable discount policy common to all its transactions. If, on the contrary, the weighted standard deviation was 3 percentage points then the transactions in this group would have discount levels that are too different for the group to share a common discount scheme.

579. Then the number of units of groups with low dispersion is summed by major for each Contracting Party to the EEA Agreement and compared against the total number of units sold by the same major in the same Contracting Party to the EEA Agreement, resulting for each Contracting Party to the EEA Agreement and each major in a percentage. For example, if each group contained transactions sold with exactly (or almost) the same discount level, then all the groups of transactions sold by one major in one Contracting Party to the EEA Agreement would have a low dispersion of discounts and the overall measure would be 100%. If, on the contrary, all discounts were randomly granted by the majors, then the individual discounts per

¹⁷⁶ The level of standard deviation chosen to identify groups of transactions with a small dispersion is, of course, a matter of judgment.

¹⁷⁷ In the given example, this means that the majority of discounts lie within the range of 8.5% and 11.5%.

transaction will not be close to the average discount of their respective group. Hence, no group of transactions would exhibit a small dispersion of discount levels, and the overall measure would be close to 0%. Thus, this percentage indicates whether the transactions segmented along the lines described above (paragraph 575) share a common and stable discount policy.

580. Table 17 below summarizes the result of this analysis¹⁷⁸.

Table 17 - Stability of discount granted by each major							
Country	Major	Pre-merger	Post-merger	Country	Major	Pre-merger	Post-merger
Austria	Bmg	[50-60]*%		Ireland	Bmg	[20-30]*%	
	Sony	[50-60]*%			Sony	[10-20]*%	
	Sonybmg		[40-50]*%		Sonybmg		[30-40]*%
	Major X	[50-60]*%	[50-60]*%		Major X	[60-70]*%	[20-30]*%
	Major X	[60-70]*%	[50-60]*%		Major X	[30-40]*%	[10-20]*%
	Major X	[50-60]*%	[50-60]*%		Major X	[20-30]*%	[30-40]*%
Belgium	Bmg	[60-70]*%		Italy	Bmg	[60-70]*%	
	Sony	[60-70]*%			Sony	[50-60]*%	
	Sonybmg		[80-90]*%		Sonybmg		[70-80]*%
	Major X	[80-90]*%	[80-90]*%		Major X	[60-70]*%	[80-90]*%
	Major X	[80-90]*%	[90-100]*%		Major X	[80-90]*%	[60-70]*%
	Major X	[70-80]*%	[80-90]*%		Major X	[60-70]*%	[60-70]*%
Germany	Bmg	[30-40]*%		Netherlands	Bmg	[20-30]*%	
	Sony	[20-30]*%			Sony	[40-50]*%	
	Sonybmg		[30-40]*%		Sonybmg		[50-60]*%
	Major X	[60-70]*%	[60-70]*%		Major X	[40-50]*%	[50-60]*%
	Major X	[30-40]*%	[30-40]*%		Major X	[20-30]*%	[50-60]*%
	Major X	[40-50]*%	[20-30]*%		Major X	[40-50]*%	[80-90]*%
Denmark	Bmg	[40-50]*%		Norway	Bmg	[70-80]*%	
	Sony	[10-20]*%			Sony	[60-70]*%	
	Sonybmg		[50-60]*%		Sonybmg		[60-70]*%
	Major X ¹⁷⁹	[30-40]*%	[40-50]*%		Major X	[80-90]*%	[80-90]*%
	Major X	[70-80]*%	[60-70]*%		Major X	[50-60]*%	[40-50]*%
	Major X	[30-40]*%	[40-50]*%		Major X	[20-30]*%	[30-40]*%

¹⁷⁸ The results of table 17 cover the 20 first weeks of transactions for Bmg, Sony and Sony BMG, but cover more weeks of transaction for some other majors. The results are not significantly changed when the number of weeks of transactions analysed is identical for all majors (from 20 to 50 weeks). For a few countries, some transactions did not include information on whether single-pocket CDs transacted were in the chart at the time of transaction. For these transactions, the segmentation was made as described except for the distinction regarding the presence of the CD in the chart at the time of the transaction.

¹⁷⁹ Source: Commission analysis. The reference to Major X indicates that results for EMI, Universal and Warner are randomly distributed. Accordingly, one column might contain information related to different majors.

Table 17 - Stability of discount granted by each major							
Country	Major	Pre-merger	Post-merger	Country	Major	Pre-merger	Post-merger
Finland	Bmg	[50-60]*%		Portugal	Bmg	[70-80]*%	
	Sony	[10-20]*%			Sony	(NA)	
	Sonybmg		[70-80]*%		Sonybmg		[60-70]*%
	Major X	[20-30]*%	[50-60]*%		Major X	[50-60]*%	[60-70]*%
	Major X	[30-40]*%	[20-30]*%		Major X	[60-70]*%	[90-100]*%
	Major X	[30-40]*%	[40-50]*%		Major X	[50-60]*%	[60-70]*%
France	Bmg	[50-60]*%		Spain	Bmg	[30-40]*%	
	Sony	[60-70]*%			Sony	[40-50]*%	
	Sonybmg		[60-70]*%		Sonybmg		[20-30]*%
	Major X	[10-20]*%	[30-40]*%		Major X	[20-30]*%	[20-30]*%
	Major X	(NA)	[70-80]*%		Major X	[30-40]*%	[60-70]*%
	Major X		[90-100]*%		Major X	[30-40]*%	[60-70]*%
Greece	Bmg	[20-30]*%		Sweden	Bmg	[60-70]*%	
	Sony	[0-10]*%			Sony	[0-10]*%	
	Sonybmg		[60-70]*%		Sonybmg		[10-20]*%
	Major X	[40-50]*%	[60-70]*%		Major X	[10-20]*%	[20-30]*%
	Major X	[30-40]*%	[70-80]*%		Major X	[40-50]*%	[40-50]*%
	Major X	[20-30]*%	[60-70]*%		Major X	[40-50]*%	[60-70]*%
				United Kingdom	Bmg	[70-80]*%	
					Sony	[40-50]*%	
					Sonybmg		[30-40]*%
					Major X	[10-20]*%	[10-20]*%
					Major X	[30-40]*%	[20-30]*%
					Major X	[40-50]*%	[50-60]*%

Source: Commission analysis

581. Table 17 shows that, pre-merger, for the vast majority of Contracting Parties to the EEA Agreement, the statistical measures of discounts stability is lower than 60% for at least three majors out of five. For these Contracting Parties to the EEA Agreement, the segmentation chosen does not allow a correct understanding of the discount levels granted by most majors to their clients for at least 4 CD albums out of 10. Only one Contracting Party to the EEA Agreement, Belgium, does not pass the same test with a threshold of 75%.

582. Table 17 shows as well that the merger did not have the same effect in all Contracting Parties to the EEA Agreement regarding the level of discounts stability. Whereas the stability of discount levels has globally decreased in some Contracting Parties to the EEA Agreement (for example Austria, Ireland, and the U.K.), in most Contracting Parties, it is the opposite situation in for example Belgium, Denmark, Finland, France, Greece, Italy, the Netherlands, Portugal, and Spain. Nevertheless, the results post-merger suggest that the magnitude of the merger effect on discounts stability is limited. Whereas the number of Contracting Parties to the EEA

Agreement where at least three majors have a discount stability lower than 60% drops from 12 pre-merger to 8 Contracting Parties post-merger, the change is limited for a level of 75% with a drop from 14 pre-merger to 13 Contracting Parties post-merger. Belgium and France are the remaining Contracting Parties with, respectively, 4 and 2 majors with a discount stability level above 75%.

583. With regard to France, the discount stability results are to be treated with some caution as the transaction database does not completely reflect all transaction specific discounts. Usually, in France, some campaign discounts are negotiated between the majors and their clients, for a certain period of time but the corresponding discount is not invoiced in the invoices of the sale transactions that are made during this period. Such discount, which is known by the client at the time of the transaction, is paid later in a separate invoice. Some majors were not able to provide a transaction dataset which reflects those delayed campaign discounts. For some majors, a significant number of transactions do not have any discount. The presence of these non-discounted transactions inflates the discount stability results, which should then be interpreted with care.
584. Table 17 also shows that, for most Contracting Parties to the EEA Agreement, the level of discounts stability varies significantly from one major to another (for example Denmark, Finland, France, Germany, Greece pre-merger, Ireland pre-merger, Italy pre-merger, the Netherlands post-merger, Norway, Portugal, Spain post-merger, Sweden, and the United Kingdom all have at least a difference of 25 percentage points between two majors). In these Contracting Parties to the EEA Agreement, the chosen segmentation of transactions does not fit the discount policies of all majors, which suggests that majors' discount policies are significantly different from each other.
585. The question arises whether the assessment of tacit coordination should allow for more dispersion of discount levels within a group of transactions. The mechanics of the analysis is such that, all other dimensions remaining unchanged, the higher the allowed dispersion, the higher the overall measure of stability. In practice, labelling groups as stable whenever they exhibit a standard deviation of two already allows for a certain level of variety within each group. A further widening of the threshold would run the risk of labelling as close, transactions with quite diverse discount levels.
586. Another question also arises as to whether the assessment of tacit coordination should allow for a more complex segmentation of transactions, for example by taking into account variations of sales from one week to another. Ultimately, each title could be defined as a group. The measured stability would be higher, but the theory tested would then be tacit coordination at the level of each title pricing. This theory has already been dismissed. A fair assessment of the theory of harm tested here requires a certain level of aggregation of titles into groups by a simple classification of transactions based on information that is available to a knowledgeable market participant. Moreover, such classification should have a reasonable level of complexity. The proposed segmentation, by country, major, customer, PPD level, presence in charts and with a specific emphasis for the first week of transaction, is appropriate in that it allows a fine description of transactions that occur in the early life cycle of a CD album.

587. In conclusion, the theory of tacit coordination in question requires that all majors engaged in this coordination adopt sufficiently stable discount policies in a given territory. For most of the affected Contracting Parties to the EEA Agreement, the segmentation of transactions studied did not permit a finding of sufficient recurrent patterns behind the application of discounts in the early life of albums. Thus, taken in isolation, the analysis of discount stability suggests that, for most Contracting Parties to the EEA Agreement, it is unlikely that tacit coordination has taken place amongst the majors.

588. Such discounts have a significant impact on the net price charged to majors' clients. By way of illustration, table 18 below shows the proportion of chart albums having received campaign discounts greater than 5% or 10% during their first 20 weeks following release in the year 2005. In particular, it can be concluded from this analysis that a significant proportion of new releases are affected by campaign discounts greater than 5%, and even greater than 10% in many Contracting Parties to the EEA Agreement, therefore having a strong impact on the final net wholesale price. For example, in the Netherlands, [20-30]*% of chart albums have received a campaign discount superior to 10% during the first 20 weeks following their release. It can also be noted that the two majors present significant difference in many Contracting Parties to the EEA Agreement. The situation in France is different in the sense that retrospective discounts account for the vast majority of discounts.

TABLE 18 - Proportion of chart albums receiving campaign discount superior to 5 or 10% – chart albums – 20 first weeks after release – 2005				
	Campaign discount ≥ 5%		Campaign discount ≥ 10%	
Territory	Sony BMG	Major X	Sony BMG	Major X
Austria	[20-30]*%	[60-70]*%	[0-10]*%	[0-10]*%
Belgium	[20-30]*%	[10-20]*%	[10-20]*%	[0-10]*%
Denmark	[70-80]*%	-	[0-10]*%	-
Finland	[20-30]*%	-	[10-20]*%	-
France	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%
Germany	[30-40]*%	[10-20]*%	[0-10]*%	[0-10]*%
Greece	[30-40]*%	-	[10-20]*%	-
Ireland	[30-40]*%	[20-30]*%	[20-30]*%	[10-20]*%
Italy	[10-20]*% ⁽¹⁾	[0-10]*%	[0-10]*% ⁽¹⁾	[0-10]*%
Netherlands	[40-50]*%	[40-50]*% ⁽¹⁾	[20-30]*%	[10-20]*% ⁽¹⁾
Norway	[70-80]*%	-	[20-30]*%	-
Portugal	[20-30]*%	[10-20]*%	[0-10]*%5%	[0-10]*%
Spain	[90-100]*%	[80-90]*%	[40-50]*%	[40-50]*%
Sweden	[40-50]*%	-	[30-40]*%	-
United Kingdom	[20-30]*%	[0-10]*%	[20-30]*%	[0-10]*%

Source: Notifying Parties; Commission analysis ⁽¹⁾ 2006

589. Irrespective of the elements strongly questioning the likelihood of coordinated effects, if it is was to be assumed that coordination on prices covering the early post-release period would take place at the level of PPDs or net wholesale prices, which would act as focal points according to the Airtours criteria, these focal points should be observable in order to sustain tacit coordination.

Transparency

590. PPDs are only partially transparent and the Commission found that they are not systematically monitored by the majors. PPDs are generally not publicly available but are printed in promotional material distributed to retailers. These retailers could in theory share such material with other record companies. The market investigation has however not provided evidence showing any systematic resorting to such practices.
591. Many retailers nevertheless acknowledged that they partly use pricing information from one major to negotiate with other majors¹⁸⁰. As a result, although it seems possible for Sony BMG to collect PPD information through contacts with retailers, the information that could be gathered in this way would likely be incomplete and its reliability would be dubious and / or not precise.
592. In several Contracting Parties to the EEA Agreement, PPDs or PPD codes are also available via websites accessible by record companies and retailers¹⁸¹. However, Sony BMG submitted that it does not use information distributed via these websites. Bertelsmann also has subsidiaries active as music retailers, namely book clubs in France, Belgium, Germany, Italy, Spain, Portugal and the Netherlands. However, these subsidiaries confirmed that they do not transfer PPD information to Sony BMG. The Commission did not find any evidence to contradict the notifying parties' submission. Moreover, were these subsidiaries to transmit PPD information to Sony BMG, only Sony BMG would have access to this information, the other majors being excluded. Finally, it can also be noted that there has not been a higher level of potential coordination observed in all Contracting Parties to the EEA Agreement where PPD information may be available via websites.
593. It cannot therefore be concluded that PPDs can be a reliable focal point for a theory of coordination in most Contracting Parties to the EEA Agreement.
594. Discounts are even less transparent. They are negotiated directly by each major with each customer on a bilateral basis. Although retailers use commercial information from one major to negotiate with its competitors, the majority of retailers acknowledge that majors do not know each other's discounts¹⁸². In addition, contracts signed between the majors and one same retailer generally contain different clauses in terms of discount structure (that is some majors propose different file discounts for new releases and back catalogue, other majors have a single file discount for all their albums) and discount rates. It could be argued that file discounts granted to customers are very stable from one year to another and might be more easily observable.

¹⁸⁰ Question 30 – Questionnaire to customers 12 February 2007 – 62% of all customers who responded to the market investigation across the EEA submit that they use information of major's prices to negotiate with other majors.

¹⁸¹ PPDs are available in the United Kingdom; PPD codes are available in Denmark, Sweden and France.

¹⁸² Question 31 – Questionnaire to customers 12 February 2007 – 50% of all customers who responded to the market investigation across the EEA submit that majors do not know the discount of their competitors (as opposed to 33% who believe that they do).

595. With regard to campaign discount, the Commission did not find any recurrent predictable pattern for the way in which the different majors apply campaign discounts and campaign discount levels to different retailers (for new albums as well as for mature catalogue albums). 50% of retailers confirm this finding¹⁸³.
596. In addition, such campaign discounts are only partly observable at the retail level. The objective of campaign discounts is either to push retailers to build stock, or to decrease the retail price for the campaign period. Volume discounts (similar to campaign discounts) are also granted to retailers in the pre-release period in order to motivate retailers to build stock for the date of release and stimulate demand. Campaign discounts are not systematically passed on to final consumers and as such are not systematically observable with regard to their application. They are even less observable with regard to their magnitude.
597. It can be concluded that the limited transparency, in particular of campaign discounts, renders any monitoring of a tacit coordination very difficult.
598. With regard to the possibility to reverse-engineer the net wholesale price of CD albums from their retail prices, the notifying parties submitted an economic survey¹⁸⁴ in order to determine whether actual invoice prices for CD albums of Sony BMG could be reverse engineered from retail prices. A survey of retail prices was conducted by an independent research-based consultancy in France, Germany, Italy, Spain and the United Kingdom, as well as Belgium, collecting prices at different points in time, for each of their top 10 customers in each Contracting Party to the EEA Agreement, of all Sony BMG albums that were listed in the official album charts in the week before the first collection or in either week before subsequent collections. This survey concludes that "retailers do not systematically apply the same mark-ups to the same chart releases and individual retailers do not apply standard mark-ups to different chart releases"¹⁸⁵. In the notifying parties' view, this implies that "no record company could infer or deduce its rivals' invoice prices with any reasonable degree of accuracy simply by observing prices [...]"¹⁸⁶. Despite reserves on the methodology used by these studies, the Commission's review of the study confirmed the results for the sample provided by the study.
599. That survey has been complemented by the market investigation, which showed that after the release of a new album, the retailer mark-ups are affected by a variety of factors (such as for example stock, campaign promotions, and retailer strategy) and are therefore not sufficiently regular. This implies that reverse-engineering is very difficult for albums in general, as confirmed by a majority of retailers.

¹⁸³ Question 23a – Questionnaire to customers 12 February 2007 – 48% of all customers who responded to the market investigation across the EEA submit that campaign discounts are not predictable (as opposed to 46% who submit that they are).

¹⁸⁴ RBB Economics – 2006 Retail Price Study (15 Feb 2007) and Belgium Retail Price Study (31 Aug 2007).

¹⁸⁵ RBB Economics – 2006 Retail Price Study, p. 1.

¹⁸⁶ RBB Economics – 2006 Retail Price Study, p. 2.

600. When looking at the first week following release only, where mark-ups applied by retailers are more stable, the level of transparency would not allow deducing the net wholesale prices of competitors' albums with a sufficient degree of precision, as 15% of albums have a mark-up deviating significantly (more than 10%) from the average mark-up applied by a specific retailer. In addition, as mark-ups are irregular for a proportion of albums, major record companies would indeed need to collect a large amount of retail price information to engage in a statistical analysis, whereas the Commission did not find any evidence that major record companies are engaged in systematic monitoring of competitors' retail prices.

An inappropriate theory

601. Generally, the investigation indicates that the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices might be sufficient to spot whether a record company is changing its business model, as is the case in most industries. This level of transparency, however, does not permit a sufficient level of precision necessary in order to verify that the other majors are respecting any commonly agreed pricing policy for all albums, even during the period following the initial release.

602. To summarise, the market investigation found that there was no coordination at the level of the selection of PPDs; the study of the discount stability suggests that, even based on the conservative assumption of full transparency of PPDs, most of the time, a significant number of sales transactions do not follow a simple and stable discount pattern that could be inferred by a knowledgeable market participant based on public information; PPDs are only partially transparent. There are also indications that it is not possible to reverse engineer net wholesale prices from retail prices with the necessary level of certainty. These elements lead the Commission to conclude that it is unlikely that majors tacitly coordinated on single-pocket album prices at and shortly following their release date.

603. As this theory is the most likely if coordination was to take place, in the sense that it concerns the period when a high proportion of sales is achieved and the best selling albums category (chart albums), it will be developed further below (paragraphs 661 and onwards) for each affected market.

e) Coordination at the level of non-price items

604. A market participant submitted that majors also coordinate on non-price aspects of the market for recorded music, notably by limiting independent competitor's access to retailers, foreclosing independent competitors from access to radio airplay, influencing chart rules, and coordinating on release dates or coordinating on publishing and recording activities. It is however not clear that these topics would restrict competition between majors.

(1) Access to retailers

605. During the market investigation, 47% of retailers submitted that majors compete on marketing and promotion of their artists, including access to shelf-space

of retailers¹⁸⁷. The analysis conducted by the Commission with regards to the discounts granted by the different majors to retailers in all EEA Contracting Parties – discounts which affect the net wholesale price of CDs but also the access to shelf-space of retailers - shows that the majors grant different discounts to the same retailers, both in terms of level and in terms of timing, which suggests that majors do indeed compete for access to retail space.

606. All retailers also submitted that shelf space allocation is their own decision and that it is based on their perception of potential sales of each album. Record companies can have an influence by promoting albums and proposing high rebates, like in any industry, although the final decision remains within the staff of the retailer. No coordinated approach from record companies has been reported on this matter.

607. Likewise, retailers submitted that independents and majors have the same level of access to their shops. The vast majority submitted that independents do not have more difficulties than major record companies in gaining access to shelf space and promotion space¹⁸⁸, as they are offered the same conditions as majors.

608. Several retailers acknowledged that they promote albums of majors more than those of independents, but they referred to the higher success rate and higher potential of albums released by majors as a reason for their choice. A number of independent retailers also indicated that they largely open their shelf space to independents, some with significant market presence, in order to differentiate their offer from hits proposed by supermarkets. More generally, the market investigation confirms that retailers focus on the sales potential of albums rather than on the record company, be it a major or an independent one.

609. One market observer suggested that major record companies "bundle" their products, by proposing to retailers to promote a new artist in exchange for obtaining a privileged access to an album of a famous artist. During the market investigation, all retailers without exception confirmed that such practice was not taking place¹⁸⁹. Therefore, independents are not foreclosed from retail space by majors leveraging their repertoire. In addition, such a leveraging could affect relations between the major and the established artist whose albums are used in such an operation.

610. It is the objective of retailers to maximise their sales. Therefore, it is logical from their perspective to grant major record companies better access to shelf space, as they produce more hits selling large volumes. Nevertheless, the market

¹⁸⁷ Question 17a – Questionnaire to customers 12 February 2007. 47% of all customers who responded to the market investigation across the EEA submitted that recording companies compete on marketing and promotion of their artists (60% submit that majors also compete on A&R, 25% on price, and 12% submit that there is no competition between majors).

¹⁸⁸ Question 19 – Questionnaire to customers 12 February 2007. 71% of all customers who responded to the market investigation across the EEA claim that it is not more difficult for independents to access shelf space, while 74% claim that it is not more difficult for independents to access promotion space.

¹⁸⁹ Question 12 – Questionnaire to customers 10 May 2007 *"Do majors leverage strength of established artists to promote their new artists?"* 100% of customers who responded to the market investigation across the EEA responded that they have never observed such behaviour.

investigation confirmed that hits released by independent record companies benefit from similar conditions as hits released by major companies¹⁹⁰. Shelf space is allocated independently by retailers, on the basis of their own evaluation of the potential sales of albums. It can therefore be concluded that there is no coordinated approach from major record companies with regard to access to retail space.

(2) Access to airplay

611. Most successful radios in the EEA broadcast music on the basis of a playlist. A number of music titles are on the playlist and are regularly broadcasted, generally several times a day. Other titles, not on the playlist, are also broadcasted on an irregular basis. Therefore, all record companies compete to be registered on such playlists as regular and sustained airplay is one of the factor supporting sales.
612. As for access to retail space, majors have a privileged access to radio airplay, reflecting the number of hits they release every year. It has also been submitted by one competitor that radio programmers prefer to work with the majors as they propose hits regularly, as opposed to the independents who propose one or two hits a year. Similarly one competitor submitted that majors have the financial capacity to advertise hits on TV or on radio, therefore increasing the demand for advertised titles and ultimately the likelihood that radio programmers put these titles on their playlists.
613. An analysis of the percentage of airplay for all majors and independent record companies in all EEA Contracting Parties between 2003 and 2005 showed that the percentage of combined airplay for independent record companies in fact increased in 10 out of the 15 EEA Contracting Parties analysed during that period¹⁹¹.
614. It can therefore be concluded that there is no coordinated approach from major record companies with regard to access to airplay.

(3) Chart rules

615. The Commission received information from independent competitors that major record companies, whose representatives are members of charts executive committees at national level, have on several occasions, notably in France in 2005, changed the rules of the charts in order to favour their artists and deny access to artists of independent record companies to the charts.
616. The notifying parties submit that whilst it is the case in most Contracting Parties to the EEA Agreement that chart rules are decided by committees within the

¹⁹⁰ Question 19 b – Questionnaire to customers 12 February 2007 – 78% of all customers who responded to the market investigation across the EEA submit that it is not more difficult for independents to access promotional space.

¹⁹¹ Source: submission from notifying parties based on top 999 airplay charts of Nielsen Music Control: % points increase between 2003-2005: Austria: +2; Belgium: +4; Denmark: +7; Greece: +5; Ireland: +2; Norway: +1; Portugal: +2; Sweden, +7; Germany: +6; Italy: +1.

music industry (which, given their role within the music industry, will usually include representatives of one or more of the majors), it is not the case that all majors are part of the chart rules decision-making process nor is it necessarily the case that all majors take part in the process.

617. The 2005 chart executive committee meetings minutes for France, Germany, Spain and the United Kingdom show that the four majors, as well as the main independent record companies, are all part of the chart rules decision-making process in these Contracting Parties to the EEA Agreement, but did not show any obvious coordinated behaviour from the majors to change chart rules with the objective of handicapping artists from independent record companies.
618. In France, the chart rules were indeed changed in 2005 and independent record companies formally complained that the new criteria defining new releases as albums on sales for less than two years and with a PPD higher than EUR 5 meant that mid-price albums would be included in new releases charts, a situation that would favour major record companies which have large mid-price catalogues, as opposed to independent record companies. Chart rules published on the website of the Syndicat National de L'Edition Phonographique, the SNEP, the organisation responsible with the Institut français d'opinion publique, the IFOP, for managing the charts publications, stipulate that the new rules voted indeed define new releases as being albums on sales for less than two years, but with PPDs being higher than EUR 10 and not EUR 5, thereby excluding mid-price CDs of the new release category.
619. The Commission also received information that chart rules can potentially increase transparency and alignment in prices as in 12 Contracting Parties to the EEA Agreement, minimum price limits exist in chart rules in order to define whether albums will enter and be rated in the charts¹⁹². Whereas it is true that given the importance of charts albums in the total sales of recording companies, all of them will ensure that for a certain period of time after the release of the majority of their new CD albums, the price of these albums will be higher than the minimum price set in the chart rules. The minimum price level to enter charts is however fixed at a low level if compared with PPDs generally used to price albums having the potential to realize high sales (EUR 10-13). This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.
620. It was also indicated to the Commission that the weekly publication of chart rankings also contributes to the transparency of the market as it provides regular information about the evolution of the popularity of different releases at any given point in time. While it may be true that the upwards and downwards movements of CD albums in the charts can represent a transparent proxy for their sales increase and decrease, it should, however, be noted that this practice of publishing weekly chart rankings, whose primary aim is to provide customers with information about

¹⁹² For example, an investigation by the German Competition Authority into the practice of the German chart committee to set minimum prices for different categories of CDs (EUR 8.50 for single pocket CD albums) and on-line downloads (EUR 0.95 for one track download) to enter the charts led to a change – implemented from July 2007 – in the chart rules. The notifying parties indeed note in their submission that the German chart committee has agreed a rule change leading the chart system to switch to a sales turnover-based system (without list price limits).

the success of the releases of artists at any given point in time, is not specific to this market¹⁹³.

621. To conclude, while the existence of charts can indeed increase the market transparency by providing regular information to all observers, including major record companies, on how the CDs albums of their competitors perform in terms of sales, the Commission's investigation did not find any evidence that majors are using chart rules as an opportunity to deny access to the charts by artists of independent record companies. In addition, the Commission notes that minimum prices exist in 12 Contracting Parties to the EEA Agreement for CD albums to enter the charts, but consider that these prices are too low to hinder competition between record companies on setting different gross prices and constitute focal points for a possible coordinated approach by majors on PPDs.

(4) Release date

622. It has been reported to the Commission that the majors together control a number of competitive parameters, including release dates, thereby suggesting that they could coordinate the release of their respective albums.

623. It has indeed been submitted by the notifying parties that ideally a new album should be released when competition with similar albums is not too fierce, but also when there are sufficient novelties on the market to generate traffic in retail outlets. The notifying parties however qualify this statement by submitting that it is not unusual that announced release dates of new CD albums are postponed, sometimes by several months, for example because artists have not finished the recording of the album in time, making this possible management of their own album's release dates by comparison with competitors' release dates more difficult in practice.

624. Sony BMG has nevertheless recognised that decisions with regard to release dates are influenced by the release dates of competitors' albums. In addition, release dates of albums are largely publicised and therefore completely transparent sometimes several months in advance.

625. It should, however, be noted that the behaviour of majors in this regard can hardly be qualified as collusion and seems more based on competition, following the rule "first come, first served". It can be assumed that the objective of such behaviour would be more aimed at avoid for example two albums addressing the same audience being released on the same date, and to maximize ranking in charts.

(5) Coordination at the level of publishing and recording activities

626. All major record companies have a sister company active in music publishing. Sony BMG is, however, in a different position than its competitors as Bertelsmann sold in 2007 its publishing division to Universal¹⁹⁴, and Sony/ATV is a publishing

¹⁹³ Rankings also exist for books, movies, DVDs, even for cars although on a monthly rather than weekly basis.

¹⁹⁴ COMP/M.4404 Universal/BMG.

joint venture between Sony and the artist Michael Jackson reaching a significantly lower market share than its competitors (less than 8% compared to more than 15% for the other three major publishing companies at the EEA level). Generally, the fact that the different majors all have quite different positions within the publishing market makes it more unlikely that they would manage to coordinate their actions between themselves.

627. The following different types of publishing copyrights exist, each of which addresses different needs and applies for different uses:

(i) mechanical rights: for reproduction of a work in a sound recording (for example CDs);

(ii) performance rights: for commercial users such as broadcasters (television or radio stations), concert halls, theatres, night clubs, restaurants etc;

(iii) synchronisation rights: for commercial users such as advertising agencies or film companies (that is when the music is synchronised with the visual image);

(iv) print rights: for the reproduction of work in sheet music.

(v) online rights: are a fifth category of rights to be considered; they constitute a specific combination of mechanical and performance rights for online applications, such as music downloading services.

Recording of albums and mechanical copyrights: two vertically affected markets

628. Recording and publishing markets are vertically affected markets as mechanical publishing copyrights are a necessary input to produce an album. When producing an album, a record company has to purchase the copyright of the music (lyrics and composition) that will be recorded by the artist. This mechanical copyright is purchased from a collecting society¹⁹⁵. Authors write the lyrics and the composition of a song and generally transfer the management of the associated copyright to a publisher. Both authors and publishers transfer to collecting societies the right to license mechanical copyrights to third parties (record companies principally). Copyrights are licensed by collecting societies on a non discriminatory basis and all customers have therefore access to mechanical copyrights on the same conditions and cannot be refused access to a licence.

629. Generally there are no unilateral relations between sister companies. On the other hand, in the majority of cases major record companies purchase copyrights that are controlled by publishers belonging to competing music companies. The copyright and the recording right of a title are therefore, in most cases, not owned by the same music company.

630. Considering the obvious interrelation between recording and publishing activities, it could be argued that major record companies could coordinate their

¹⁹⁵ Collecting societies are national organisations. Their role is to license copyrights of songs for a variety of applications, such as recording albums, concerts, radio. After payment of a collection fee, they pay royalties directly to authors and publishers.

activities in both areas. However, this assumption is not confirmed by the facts, as publishing companies do not fix prices or licence conditions to customers in the area of mechanical copyrights. This role still lies with the collecting societies in the physical market, whereas the role of publisher is focused on managing financial flows, and promoting and discovering authors. Therefore, although mechanical copyrights are an input for recording companies, publishers can exercise hardly any influence on the market for recorded music.

Recording of albums and other publishing copyrights: both rights are needed, on a pair

631. For other applications such as radio airplay or the inclusion of music in videos, customers need to purchase a licence for the copyrights and a licence for the recording rights¹⁹⁶. Both licences are necessary but neither can be considered as an input for the other, therefore they cannot be considered as vertically integrated markets. In such cases the licence for the recording right is purchased directly from the record company. The copyright is directly purchased from collecting societies for performance rights (for radio airplay notably), and is purchased from the publishing company for synchronisation rights (to synchronize a musical work with a video).
632. As licence conditions and prices for performance copyrights are fixed by collecting societies, it can be concluded that publishers would not be in a position to exercise market power through the control of performance copyrights.
633. With regard to synchronization rights, music companies could in theory leverage the sale of recording and publishing rights, by for example bundling sales of both rights or by imposing on customers the purchase of titles which are both recorded and published by major music companies. However these assumptions are very unlikely. The Commission concluded in Universal/BMG that the market for synchronization rights was characterized by effective competition, notably because synchronization customers only have to purchase one title, unlike usual record customers who have to purchase a large catalogue. From the synchronization customers' perspective, titles are therefore substitutable, thereby creating incentive for majors to propose the best possible financial conditions. In addition when financial conditions negotiated with the record company are not satisfactory, a synchronization customer can produce a cover version¹⁹⁷. As the music is generally not the main product, but rather an accompanying element, this is frequently observed in television advertisements for example. It can therefore be concluded that publishers would not be in a position to exercise market power in the market for recorded music through the control of synchronization copyrights.
634. Generally, for all the above theories of coordination, no occurrence of actual coordination has been revealed in the market investigation, and that the vast majority of respondents have indicated that the Sony BMG merger did not, in any event, change the market or competitive situation in the recorded music industry.

¹⁹⁶ With regard to print rights, these rights are needed to print music sheets. This application does not require any recording licence.

¹⁹⁷ A recorded version of a song is produced by an unknown artist.

f) Airtours criteria - Retaliation and reaction of competitors and customers

635. In order to prove collective dominant position, the coordination would need to meet the Airtours criteria: sufficient transparency to spot deviations, existence of a credible retaliation mechanism and impossibility for customers or competitors to jeopardize the collusion. These criteria are cumulative. The transparency criterion set out in the Airtours judgment is not met in any of the theories of harm developed in the above former chapters. This would be enough in itself to rule out any (creation or strengthening of) collective dominant position effects brought by the Sony BMG transaction and hence rendering any assessment of retaliation and competitors and/or customers reaction as superfluous. Nevertheless, for the sake of completeness, the Commission investigated the last two Airtours criteria.

(1) Retaliation

636. With regard to retaliation, the Court of First Instance set out in the Impala judgment that the mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction”.¹⁹⁸ The court considered that the threat to apply a credible retaliation mechanism would constitute a sufficient deterrent mechanism in the context of the Airtours criteria in the framework of the creation as well as the strengthening of a collective dominant position. The Court further clarified that in order for the fact that no retaliatory measures have been employed to be taken to mean that the condition relating to retaliation is not satisfied, two cumulative elements must be satisfied, namely proof of deviation from the common course of conduct, without which there is no need to consider the use of retaliatory measures, and then actual proof of the absence of retaliatory measures.

637. Two potential retaliation mechanisms are evaluated within the market investigation: first, the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

Compilations

638. All majors cooperate in the framework of multi-artist compilations. The appearance of artists from more than one record company appears to be a key factor for the success of a compilation. A hypothetical retaliation mechanism would therefore be to exclude any deviating company from the compilation joint-venture agreements or from licence agreements, or otherwise worsen the terms of participation for the deviator.

639. Although the market for compilation is declining much faster than the overall record market, making such a retaliation mechanism less likely, Sony BMG revenues derived from compilation sales have been stable over the period 2003-2006. The sales of compilation CDs have remained stable in proportion to the total revenue of Sony BMG, and, as shown in table 19 below, represent [10-20]*% of its

¹⁹⁸ Case T-464/04 Impala/Commission, recital 466; see further discussion in Recitals 468 and seq.

revenue in the period between 2003 and 2005 in all affected markets. The relative importance of the compilation business therefore appears to have remained stable over this period.

TABLE 19 - Sony BMG revenue from compilations (% of total sales)					
Territory	2002	2003	2004	2005	2006
Austria	[20-30]*%	[30-40]*%	[20-30]*%	[20-30]*%	[20-30]*%
Belgium	[10-20]*%	[10-20]*%	[0-10]*%	[10-20]*%	[10-20]*%
Denmark	[20-30]*%	[10-20]*%	[10-20]*%	[20-30]*%	[20-30]*%
Finland	[10-20]*%	[0-10]*%	[10-20]*%	[10-20]*%	[10-20]*%
France	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%	[10-20]*%
Germany	[20-30]*%	[10-20]*%	[10-20]*%	[20-30]*%	[10-20]*%
Greece	-	[0-10]*%	[0-10]*%	[0-10]*%	-
Ireland	-	[0-10]*%	[10-20]*%	[0-10]*%	[10-20]*%
Italy	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Netherlands	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%
Norway	[0-10]*%	[20-30]*%	[20-30]*%	[20-30]*%	[10-20]*%
Portugal	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Spain	[0-10]*%	[0-10]*%	[10-20]*%	[0-10]*%	[0-10]*%
Sweden	[20-30]*%	[20-30]*%	[10-20]*%	[10-20]*%	[10-20]*%
United Kingdom	[10-20]*%	[0-10]*%	[10-20]*%	[10-20]*%	[10-20]*%
Affected markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

640. Compilation sales nevertheless only account for a limited share of major sales and therefore being excluded from compilations would not be a significant deterrent. In addition, compared to the situation in 2004, the credibility of any threat to exclude a deviating major from compilations has decreased, as many industry insiders consider that online sales directly threaten sales of compilation CDs, online purchasers directly making their own compilations.

641. In addition, in the event of a major be excluded from compilation deals with the other majors, it could still develop compilation deals with independents, even if significantly more limited in scope as the latter could not provide a catalogue as large as those of the majors. Nevertheless, there are regular examples of compilation joint ventures or licensing deals between Sony BMG and independent record companies. Depending on the Contracting Party to the EEA Agreement, up to [40-50]*% of tracks belong to independents on Sony BMG-led Joint Ventures and Sony BMG-owned compilations.

642. Exclusion from compilations is therefore not an effective deterrent mechanism.

Price war

643. The majors could retaliate against a deviating company by for example entering into a price war, which would partly annul the benefits for the deviating company. Indeed, the deviating company can attract attention to its albums where it is the only one to propose a completely innovative pricing system. If other companies retaliate in a coordinated way, the deviating company might lose the

advantage of this attraction and ultimately lose the expected additional sales necessary to compensate for the loss of margin on each album in this case.

644. In 2003, Universal launched the "Jumpstart" initiative aiming at decreasing prices of new albums in the United States. Universal changed its pricing system by decreasing PPDs. The objective was to diminish retail prices in order to attract customers and fight against the already significant drop in demand.
645. That operation was widely advertised by Universal but was not as successful as expected. One of the reasons for the lack of success was the reluctance of some retailers, notably independent music shops, to decrease retail prices without compensation by way of increased co-operative payments. Therefore the impact of lower prices was not completely passed on final consumers.
646. Another reason for the lack of success was that some competitors increased their product-placement payments in order to compensate for the price decrease proposed by Universal to retailers. Some retailers might have reacted by proposing more front shelf space to Universal Competitors, therefore partly limiting the visibility of Universal albums. The current analysis does not, however, allow qualifying this response by Universal competitors as retaliation within a collusion system or as a competitive behaviour.
647. In addition, a market observer suggested several instances where deviation from the terms of the tacit collusion between majors could be observed, namely in Germany in 2002-2003 and in France in January 2005. The Commission conducted a detailed investigation, down to the level of individual transactions, for all majors at the time and place indicated by the market observer¹⁹⁹, but this investigation did not reveal any particular change in the way majors were pricing their CDs.
648. In conclusion, the Commission did not identify any action in any affected Contracting Party to the EEA Agreement that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(2) Reaction of competitors and customers

Competitors

649. Majors face competition from a very large number of small or very small independent record labels. Some independent record companies have a presence in several Contracting Parties to the EEA Agreement, but for the vast majority of them, these independents do not have an EEA-wide presence and their individual EEA-

¹⁹⁹ For these analysed countries as well as the others, cf. infra relevant country's description (paragraphs 659 and onwards).

wide market shares are below 1%. Most of the independent labels are focused on national repertoire and only very few of them reach market shares of 1-5% on a national level. In addition, they only have a minor presence in the charts, which are largely dominated by the majors. The competition to sign international artists is fierce, and only very few independents have financial capacities to compete in this field. Similarly, independents have less financial capacity to launch costly marketing operations necessary to support international artists who generally make best-selling hits.

650. The market investigation indicates that the charts are not only an important mirror for an album's success but that they also play an important role in the relations between record companies and retailers. Many supermarkets generally align their record shelves to the charts albums which they purchase from record companies directly or from wholesalers. Conversely, independents can be a source of differentiation and diversity for specialised music retailers.
651. Independents are therefore considered as a different category of suppliers from the perspective of some retailers, not able to provide large quantities of chart hits or a large back catalogue but rather focusing on niche markets or single hits. Independents would notably not have the capacity to propose an alternative catalogue of the same value as majors' catalogues.
652. In terms of pricing, independent are generally price-followers, implying that they either apply similar price than majors, or that they propose slightly lower prices in order to differentiate their offer. Nevertheless, independent do not seem to be in a position to propose significantly innovative pricing policies.
653. It therefore appears that independent record companies are unlikely to effectively react to any potential coordination among the majors and they are therefore unlikely to jeopardise the expected outcome from any coordinated behaviour.

Customers

654. Albums are generally distributed to end-customers by mainly three types of retailers: (i) specialised multiples such as HMV, FNAC, Virgin Stores and Saturn, (ii) supermarkets such as Carrefour and Tesco and (iii) independent specialists. The parties submit that the specialised multiples and supermarkets account for the largest share of CD sales and enjoy increasing market power, which could jeopardise the results expected from any potential coordination between the majors.
655. The parties argue that specialised multiples stores depend less and less on music products, moving flexibly shelf space to DVDs or other entertainment products, depending on customer demand. This evolution has indeed been observed in the recent years in reaction to the declining music market. However, music remains an important part of the activity of these stores and contributes towards attracting customers, who once in the outlet may also purchase non-music goods. Multiples stores are still largely dependent on majors to propose an attractive minimum music package, including famous artists, new success releases and large back catalogue, although they might develop some alternative music offers through independent labels.

656. Customers confirmed that in case of disagreement with a major, they could order less from them, promote their products less, or even not take some back catalogues. They however also confirmed that this strategy could not be applied to key new / chart releases, and would, in any case, only be temporary and would not be sustainable in the long term²⁰⁰. Several customers responded that in case of strong disagreement with a major, an alternative would be to focus sales on other majors' catalogue.
657. In addition, customers claimed that having a stronger focus on independent record companies in case of disagreement with a major could not be a viable long term option, as retailers need to offer comprehensive catalogues which need to include top selling albums, which are sourced mainly from majors.
658. There are some indications that large retailers such as supermarkets can exert more leverage in relation to the majors, compared to smaller retailers. Some even claimed that they could, and in fact did, exclude majors from their shops when they could not reach a commercial agreement with them. However, although supermarkets, as opposed to specialists, may not rely on selling music as their core business, it is an important tool for them to attract customers into their stores. In addition, their business strategy requires supermarkets to offer a rather complete range of chart records and thus to purchase those records represented in the charts necessarily from all majors. Therefore, supermarkets would have to rely on all majors for their offer of music and their ability, to effectively react to any potential coordination among the majors could be limited.
659. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore unlikely that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.
660. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, being rejected, only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

3. Country analysis

661. The analysis in respect of each Contracting Party to the EEA Agreement has been split between large and small Contracting Parties to the EEA Agreement. The 5 largest EEA Contracting Parties alone (United Kingdom, Germany, France, Italy and Spain) represent 81% of the total market value of recorded music in 2006. Although each Contracting Party to the EEA Agreement has been analysed in detail, the

²⁰⁰ Question 49 –Questionnaire to customers 12 February 2007. 67 % of all customers who responded to the market investigation across the EEA submitted that they could not switch to independent catalogues in case of disagreement with the pricing policy of a major – 74% of customers submitted they could not exclude a major in case of disagreement with its pricing policy (but could reduce its exposure, order less, or exclude non major artists).

Commission has focused its analysis on those 5 largest Contracting Parties to the EEA Agreement, as it is assumed that if coordination was to take place between major record companies, it would most likely take place in large Contracting Parties to the EEA Agreement which represent a significant part of their sales, and most likely not in Contracting Parties that only represent 2%, or 3% of their sales.

a) United Kingdom

(1) Characteristics of the market

(a) Market players

Competitors

662. Universal Music Group continued to increase its leadership in the United Kingdom market for recorded music reaching a 31% market share in 2006 (versus 28% in 2002). After an increase in market share of up to 24% in 2004, Sony BMG returned to its 2002 level with a 21% market share in 2006. Independents continued to lose market shares, achieving a combined market share of 20% in 2006, versus 23% in 2002. The main independent record companies in the United Kingdom are the Ministry of Sound (2%), V2 music²⁰¹ (1%), Demon Music Group (1%), Beggars group (1%) and Dramatico (1%). Some independents are part of wider corporate groups (for example Demon is part of a joint-venture created by Woolworth and BBC Video).

TABLE 20 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
United Kingdom	1 526	21	31	10	18	20
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

663. Sony BMG is not the market leader, and it can be concluded that it is not in a position to achieve a single dominant position.

Artists

664. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in the recent years. In the United Kingdom, Sony BMG kept the number of artists on its roster stable, from [...] in 2002 to [...] in 2006.

²⁰¹ Universal announced on 10.08.2007 its purchase of V2 Music (currently under review by the United Kingdom Office of Fair Trading).

665. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in the United Kingdom, representing about [20-30]*% of its total number of artists who were under contract with it in the previous year. In 2006, [...] artists also left Sony BMG, representing [10-20]*% of the total number of artists signed by it in the previous year.

666. The market investigation highlighted that 75% of British customers view the competition among major recording companies as strong for the discovery and signing of new artists²⁰².

Customers

667. Contrary to some other Contracting Parties to the EEA Agreement where music is largely sold directly via supermarkets (France [50-60]*%, Portugal [50-60]*%), music in the United Kingdom is principally sold by record companies to wholesalers ([50-60]*%) and specialised music chains ([30-40]*%).

TABLE 21 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
United Kingdom	[50-60]*%	[0-10]*%	[30-40]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

668. The physical distribution of music in the United Kingdom is undertaken by a variety of companies engaged in bringing music products from record labels to retailers. The primary distributors include independent companies (for example Vital) as well as a number of companies specialising in particular types of music such as Select (classical), Proper (folk, jazz and roots) and Southern (dance). Other significant independent distributors include Disky Communications (Budget & Mid Price titles), Solo Music, Plastic Head (punk and metal) and Shellshock. Furthermore, there are some significant secondary distributors and wholesalers with particular specialities (for example exclusive supply channels for large retailers, “one-stop” suppliers for small retailers, or sellers to non-traditional retail outlets). These companies include Entertainment UK, Total Home Entertainment (“THE”) and Handelman UK.

669. The notifying parties submit that they do not have any distribution logistics contracts with any other major record company, and the market investigation has confirmed that there are no distribution logistics deals between majors in the United Kingdom. In that Contracting Party to the EEA Agreement, (as well as in Austria, Belgium, France, Germany, Ireland, the Netherlands, Portugal and Spain) Sony BMG

²⁰² Question n°17a – Questionnaire to customers 12 February 2007 – 75% of United Kingdom customers submit that major recording companies compete on recruiting best artists, 62% of customers also claim that competition takes place on marketing and promotion, and only 13% of customers claim that competition takes place on price.

obtains its distribution logistics services from Arvato (part of the Bertelsmann Group) and Vital in cooperation with The Entertainment Network ("TEN") for physical distribution services.

670. Other majors either have their own distribution logistics facilities or rely on third party warehouses and delivery systems for which they pay a standard fee. In both cases, majors usually also sell and distribute products of several independents.

(b) Characteristics of demand for physical albums

Evolution of demand

671. The United Kingdom has followed, albeit at a slightly lower rate, the general downward trend identified at the EEA level with a 25% decrease in total market value between 2001 and 2006.

TABLE 22 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
United Kingdom	2 030	1 939	1 777	1 804	1 739	1 525	-25 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

672. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 23 below shows, online and mobile music sales in the United Kingdom, as in the rest of the EEA, have recently increased, however not to an extent where the decrease in physical sales is - or can be forecast to be - compensated by online and mobile music sales.

TABLE 23 - Sony BMG sales (MEUR)						
United Kingdom	2002	2003	2004	2005	2006	% changes 2004-2006
Total digital (Online + Mobile + others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums + others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[20-30]*%

Source: Notifying parties; Commission analysis

673. The market survey reveals that some 25% of customers consider that the introduction of on-line download triggered different reactions from the different majors, while 13% thought that major record companies reacted similarly to this new phenomenon²⁰³.

²⁰³ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 63% of customers believe that legal on-line download is a competitive pressure to majors (none do not); 75% of customers believe that illegal on-line download and piracy are a competitive pressure to majors (none do not); 25% of customers believe that on-line download created a different reaction from the different majors (versus 13% which do not and 50% who have no opinion).

Concentration of sales

674. The notifying parties have submitted that in the United Kingdom, domestic artists accounted for [50-60]*% of sales in 2006, versus [40-50]*% for international pop rock albums and [0-10]*% for classical music.

675. A significant proportion of total sales of CDs are concentrated among a few retailers. In the United Kingdom, [90-100]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [80-90]*% of Sony BMG sales, which, after Portugal, represents the highest sales concentration of all affected markets.

TABLE 24 - Concentration of Sony BMG sales on top customers – 2006		
Territory	top 10	Top 5
United Kingdom	[90-100]*%	[80-90]*%
Sum of all affected EEA markets	[80-90]*%	[65-75]*%

Source: *Notifying parties; Commission analysis*

676. In terms of new releases and number of albums on sale, the United Kingdom is only the [...] largest market in the EEA, with [...] Sony BMG new releases in 2006 and a total of [...] Sony BMG albums on sale in the same year.

677. Among the largest markets, the United Kingdom is one of those where sales of CDs are the most concentrated among a few successful releases. The Parties submit that their 50 highest British sales represented [60-70]*% of the total number of units sold in 2005, versus for example [20-30]*% in Germany.

Charts

678. Chart albums²⁰⁴ generally account for slightly more than half of total sales of record companies. According to submission from the notifying parties, the proportion of Sony BMG sales which chart albums account for is in fact increasing in the EEA. In the United Kingdom, chart album sales represented [80-90]*% of the sales of the Parties in 2005 (versus [70-80]*% in 2002). Non-chart albums account for a much smaller share of Sony BMG sales than in most other affected markets.

TABLE 25 – Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
United Kingdom	[70-80]*%	[80-90]*%	[80-90]*%	[80-90]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: *Notifying parties; Commission analysis*

²⁰⁴ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

679. According to the notifying Parties, the Official United Kingdom Chart Company (OCC/Millward Brown²⁰⁵) has two industry committees, each formed of representatives from retailers and record companies:

(i) the Charts Technical Committee which is responsible for advising on technical / research matters; and

(ii) the Charts Supervisory Committee (CSC) which votes on significant rule changes and is made up of 10 members: four from record companies; four from retailers; one from Radio 1; and one from the Official United Kingdom Charts Company itself.

680. Record company and retailer members are nominated by their respective trade associations – the BPI and ERA – and those nominated are “representative of the membership” of each and will refer to the wider views of their membership in voting at CSC meetings. The notifying parties submit that there will always be an independent record company representative and an independent retailer representative. In 2005, the three majors forming part of the BPI representation were EMI, Warner and Sony BMG. Universal was not directly represented on the CSC in 2005.

681. Some of the 2005 minutes of OCC meetings refer to an investigation by the Office of Fair Trading (OFT). That investigation was prompted by AIM (the Association of Independent Music) who alleged that independent record companies were adversely affected by rule changes allowing digital sales to be included in the singles chart. The OFT followed-up on this complaint but in May 2005 concluded that, based on the information provided by AIM and other information generally available, there were no reasonable grounds to suspect that the Official UK Charts Company had infringed the competition rules and closed its file on this matter.

682. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in the United Kingdom, only CDs albums with a list price higher than GBP 6 will be allowed to enter and be rated in the full-price albums charts²⁰⁶. However, the minimum price level to enter United Kingdom charts is fixed at a low level if compared with PPDs generally used to price albums having the potential to realize high sales [GBP 8-10.3]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors. This conclusion remains valid when considering average wholesale prices (rather than the PPD) because of their lack of transparency.

Compilations

683. As shown in table 26 below, the value of the sales of compilations is estimated to have been EUR 306 M in 2006 in the United Kingdom, representing 20% of the total market value for recorded music. Compilations represent a share of Sony BMG revenue which [...] reaching only [10-20]*% of its total revenues.

²⁰⁵ www.theofficialcharts.com

²⁰⁶ The UK chart rules specify minimum qualifying PPDs based on format: Cassette: budget: GBP 0.50-GBP 2.69 – mid-price: GBP 2.70-GBP 3.69 – full price: GBP 3.70 and over; LPs, CDs and DVDs: budget: GBP 0.50-GBP 4.24 – mid-price: GBP 4.25 - GBP 5.99 – full price; GBP 6 and over; Digital albums: GBP 3.75.

TABLE 26 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
United Kingdom	1 525	306	20%	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

684. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In the United Kingdom, the overall sales of compilation CDs have indeed decreased since 2002 (in value and as percentage of sales). The sales of compilation albums in proportion of Sony BMG sales [...]*, as table 27 below shows.

TABLE 27 - SONY BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
United Kingdom (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
United Kingdom (% total sales)	[10-20]*%	[0-10]*%	[10-20]*%	[0-10]*%	[10-20]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

685. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

686. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in the United Kingdom. It then analysed the three Airtours criteria which characterize collective dominance with respect to the market in the United Kingdom.

687. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in the United Kingdom, making collusion at the level of release prices unlikely.

688. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors²⁰⁷. Even though the number of these main PPDs may seem very concentrated in United Kingdom (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is

²⁰⁷ In 2006, Sony BMG used [...]* PPDs like another major and the two remaining majors 1 and 3 PPDs respectively for the majority of their sales in the first 20 weeks after release.

unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than GBP [0-5]* , meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

689. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. For example in the United Kingdom more than [20-30]*% of Sony BMG albums are re-priced before the end of this period. The other majors follow a similar policy with the exception of one company for which only 5 % of albums are re-priced within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

690. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in the United Kingdom, [20-30]*% of Sony BMG albums and for example 4% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [20-30]*% and 3% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place. It can also be noted that the two majors follow completely different strategies with regard to the application of campaign discounts in the early post-release phase.

691. In addition, the Commission carried out an analysis of the market to determine whether the Airtours criteria were fulfilled. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

692. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

693. In 2006, Sony BMG used [200-250]* PPDs in the United Kingdom. [...]*. Nevertheless, despite an important number of PPDs, the 5 most used PPDs account for [70-80]*% of gross sales in 2006 (charts and back catalogue). This proportion is however only the [...]*. highest of all affected markets.

694. Concentrating on chart releases only, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the

first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [70-80]*%.

695. In addition, differences, not revealed by aggregated figures, exist between majors which are unlikely to be consistent with coordination. the following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG and another major used [...] PPDs, and the two remaining majors 1 and 3 PPDs respectively for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs from [8]*to [10]*and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively GBP 6,73-10,25, GBP 8,99-9,15 and GBP 9,17 giving a maximum range of main PPDs of GBP 6,73-10,25, a variation of [30-40]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

696. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems to the Commission that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

697. In the United Kingdom, OCC, the chart compiler, publishes two formats of its charts for industry members. The on-line version has never included PPD data, but the hard copy has in the past included PPD information. This is however no longer the case and the notifying parties submit that they in any case did not subscribe to the hard copy version.

698. The notifying parties also submit that in the past, they have provided list price information to Muze, a commercial database which supplies release data to online retailers. They however never subscribed to that database and stopped providing list price information to Muze, pending confirmation that price information would only be made available to retailers and not to other record companies.

699. In the United Kingdom, Sony BMG has [...] key account managers responsible for the largest customers, and [...] sales representatives together responsible for [...] accounts representing [...] stores. The notifying parties submit that this low number of sales representatives makes it difficult to collect a

comprehensive amount of information and data on their competitors' commercial conditions and activities.

700. The notifying parties submit that they do not systematically monitor other record companies' list prices and that their sales representatives do not prepare reports on customer or store visits. The company, however, receives weekly information from major customers on "in-store charts" and on retail prices. In 2005, Sony BMG also received information on media spend from the agency OMD and from IntelligentMedia.

701. During the market investigation, a majority of customers have submitted that they believe that record companies generally know about PPDs of their competitors²⁰⁸. This belief seems to be based on the habit among the majority of retailers to use information on competing majors' prices when negotiating with other record companies²⁰⁹. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

702. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a database with assumed PPDs of all or even a significant proportion of competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in the United Kingdom, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, would majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would not be up to date, implying that a major would only know the PPDs of its competitors one or two weeks after such PPDs were negotiated.

²⁰⁸ Question n°31 – Questionnaire to customers 12 February 2007 – 63% of United Kingdom customers submit that record companies know PPDs of their competitors, versus 25% who believe it is not possible, and 13% who have no opinion.

²⁰⁹ Question n°30 – Questionnaire to customers 12 February 2007 – 88% of UK customers submit that they use information on other majors' prices when negotiating with one record company, 13% had no opinion.

703. The Commission has demonstrated the lack of transparency of discounts by illustrating that discounts are not aligned between majors, and by underlying that there is no reliable source of information to collect competitors' discounts. The demonstration of a lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers, difference in discounts contractually negotiated by different majors with a same customer, difference in average discounts granted by all majors to a same customer); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.
704. In the United Kingdom, the notifying parties submit that Sony BMG occasionally provides special discounts [...]*.
705. As regards the Sony BMG discount policy, the Commission investigation shows that Sony BMG grants similar, but different, discounts to each of its top 5 customers. In 2005, the total discounts granted varied from [10-20]*% to [20-30]*%. [...]*.
706. With regards to the four majors, the analysis of the contracts between the different majors and their main customers shows that one retailer generally obtains a different discount offer from the different majors in terms of discount percentage and discount structure (relative importance of file discounts, returns, etc.). As regards file discounts for example, in addition to the distinct file discount rates granted to a common customer by the majors, there are also differences related to the product to which the rate applies (one rate for all or several rates depending on whether it is a new release, a compilation or depending on the repertoire).
707. It could be argued that the diversity in discounts is only apparent and ultimately leads to similar average discounts. This assumption was however not confirmed by the market investigation. The United Kingdom is the affected market where the differences between customers are greatest. Indeed, although financial years of the different majors are not fully comparable, it appears that Sony BMG and one of its main competitors among the majors grant significantly different average discounts to their customers, with a difference which can be as high as [10-20]* points for some customers²¹¹.
708. Unlike for example in Germany where many categories of discounts are widely used, the United Kingdom is in line with some other large Contracting Parties to the

²¹⁰ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

²¹¹ [...]*.

EEA Agreement where a single category of discount appears to prevail. File discounts account for [70-80]*% of total discounts granted by Sony BMG to its top 5 customers in the United Kingdom, versus [0-20]*% for campaign discounts, [0-10]*% for retrospective discounts and [0-10]*% for co-op payments.

709. File discounts are rather less stable in the United Kingdom from one year to another than in the other affected markets (meaning that the most commonly used file discount rates can vary significantly in proportion from one year to another). Different majors also provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG principally granted [three different discounts ranging from 0-15]*% file discounts to one of the top 5 customer (70% of its chart sales to that customer), whereas another major exclusively granted file discounts of 12% of PPD. This also applies to several other main customers among the top 5 customers in the United Kingdom.

710. In addition, campaign discounts are particularly fluctuant from one year to another. Of the top 5 Sony BMG customers in the United Kingdom, none received the same average campaign discount (as a proportion of gross sales) in 2005 and 2006, with average campaign discounts diverging by more than [40-50]*% from one year to another for four out of these five customers. Although the average campaign discount can be affected by a change in the product mix between two years, this cannot explain a [40-50]*% difference in evolution between the top customers.

711. Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2005, one important customer mainly received campaign discount rates of [three different discounts ranging from 0-50]* % from Sony BMG ([60-80]*% of its chart sales to that customer), whereas the same customer received very few campaign discounts from another major (4% campaign discount accounting for 11% of chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that the company does not apply a stable easily predictable campaign discount policy per category of album or retailer.

712. The Commission has also investigated the regularity and predictability of discounts applied to new releases, based on the analysis of Sony BMG and other majors' transactions between 2002 and 2006. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in the United Kingdom apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

713. Retrospective discounts are almost inexistent in the United Kingdom.

714. Co-op payments are irregular from year to year with variation for each of the top 5 Sony BMG customers ranging from [10-20]*% to [40-50]*% between 2005 and 2006. This is coherent with the submission from the notifying parties that co-op payments are applied on an irregular basis and are generally not foreseeable long in advance.

715. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. This seems to be confirmed by a large majority of customers (75%) who submit that Customers do not know the discounts applied by their competitors²¹². As for PPDs, retailers use information on majors' prices when negotiating with one record company. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

716. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in the United Kingdom, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

717. A large majority of British customers (75%) believe that major record companies monitor retail prices²¹³, some believe that monitoring is done daily or weekly.

718. Like in other affected markets, retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, the majority of customers do not believe that it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices²¹⁴.

719. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In the United Kingdom three customers provided retail and net wholesale prices for their new releases. It appears that customers there apply more irregular mark-ups to new releases²¹⁵ than customers from the rest of the EEA. The information available to the Commission indicates that any possibility to reverse-engineer prices would be limited to the very early life of an album (around its date of release). The parties notably submitted an analysis of retail prices in the United Kingdom²¹⁶ showing that already 4

²¹² Question n°31 – Questionnaire to customers 12 February 2007 – 75% of United Kingdom customers submit that record companies do not know discounts of their competitors, versus 13% who believe they know, and 13% who have no opinion.

²¹³ Question n°32 – Questionnaire to customers 12 February 2007 – 75% of UK customers report that record companies monitor retail prices and 25% have no opinion.

²¹⁴ Question n°33 – Questionnaire to customers 12 February 2007 – 63% of United Kingdom customers submit that record companies cannot reverse-engineer retail prices to deduct net wholesale prices, versus 38% who have no opinion.

²¹⁵ Based on 5 last new releases of all majors, the three united Kingdom customers apply a mark-up which deviates from the average mark-up by 7 or 9% on average. Maximum deviation can however reach 31%.

²¹⁶ RBB 2006 retail price study – 14 February 2007.

or 5 weeks after release, mark-ups were irregular, therefore confirming the view among retailers mentioned in the above paragraph.

720. In conclusion, the investigation indicates that in the United Kingdom the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so much room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) to sustain tacit coordination between major record companies.

721. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in the United Kingdom, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in the United Kingdom. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of caution.

(b) Retaliation

722. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

723. In the United Kingdom, Sony BMG revenues stemming from compilation albums account for [10-20]*% of total revenue, in line with the average proportion observed at the level of all affected markets ([10-20]*%). The importance of compilation revenue is however under threat because of the development of online self-made compilations.

724. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

725. In conclusion, the Commission did not identify any action in the United Kingdom that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

726. In the United Kingdom, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Some independent competitors have achieved a higher size than what can be observed in other Contracting Parties to the EEA Agreement but nevertheless, they are still too small and cannot propose enough hit albums to retailers or other customers.
727. The vast majority of customers still realize a significant proportion of their turnover with music albums, which weakens their buyer power. On the other hand, the market survey also highlighted that the growing importance of supermarkets as a way of selling music in the United Kingdom (supermarkets are supplied by wholesalers/rackjobbers) has been instrumental in the recent years in decreasing the retail price of CDs, an apparent testimony to their strong buying power.
728. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
729. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of United Kingdom customers to destabilise potential coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

730. The Commission found that coordination on the market for recorded music is unsustainable. These conclusions, which were found for a sub-segment of total record sales (new chart releases), are even more applicable when all sales are considered.
731. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model. The level of transparency is however not sufficient to allow the majors to verify that the other ones would be respecting a commonly agreed pricing policy which would be based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the United Kingdom market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major uses a different set of main PPDs for its new chart releases.

732. It can therefore be concluded that on the United Kingdom market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

b) Germany

(1) Characteristics of the market

(a) Market players

Competitors

733. In 2005 Universal Music Group became the largest record company in Germany, before Sony BMG. Universal still led the market in 2006 with a 26% market share. Sony BMG stabilised its market share at 21% in 2006 after a period of decline started in 2003, when the combined share of Sony and BMG reached 30%. Independents continued to increase their combined market share (23% in 2003) to reach 33% in 2006. The main independent record companies in Germany are Edel (4%), SPV (3%) and Naxos (0.5%). Edel and SPV, the two largest independents in Germany, are also among the largest independents in the EEA.

TABLE 28 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Germany	1 122	21	26	8	12	33
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

734. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

735. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Germany, Sony BMG decreased the number of artists on its roster, from [...] in 2002 to [...] in 2006. However, this decline was stabilised in 2005 and the number of artists increased again in 2006.

736. Information submitted by the notifying parties shows that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Germany, representing [45-55]% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [40-50]% of its total number of artists signed on the previous year.

737. The market investigation highlighted that half of German customers view the competition among major recording companies as strong for the discovery and signing of new artists²¹⁷.

Customers

738. Contrary to some other Contracting Parties to the EEA Agreement where music is largely sold via supermarkets (France [50-60]*%, Portugal [50-60]*%), music in Germany is principally sold through department stores ([50-60]*%). Nevertheless, like in the rest of the EEA, a significant proportion of sales is achieved through non-specialised retailers.

TABLE 29 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Germany	[20-30]*%	[0-10]*%	[10-20]*%	[50-60]*%	[0-10]*%	[10-20]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

739. The notifying parties submit that they do not have any distribution logistics contracts with any other major record company, and the market investigation has confirmed that there are no distribution logistics deals between majors in Germany. In that Germany, (as well as in Austria, Belgium, France, Ireland, the Netherlands, Portugal, Spain, and the United Kingdom), Sony BMG obtains its distribution logistics services from Arvato (part of the Bertelsmann Group). Other majors either have their own distribution logistics facilities or rely on third party warehouses and delivery systems for which they pay a standard fee. In both cases, majors usually also distribute products of several independents. Other independent labels, notably SPV and Edel, also have their own distribution organisation and offer these services to other independents in Germany.

(b) Characteristics of demand for physical albums

Evolution of demand

740. Germany has followed the general downward trend identified at the EEA level with a 29% decrease in total market value between 2001 and 2006.

²¹⁷ Question n°17a – Questionnaire to customers 12 February 2007 – 54% of German customers submit that major recording companies compete on recruiting best artists (18% claim there is no competition), 54% of customers also claim that competition takes place on marketing and promotion.

TABLE 30 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Germany	1 571	1 461	1 201	1 161	1 166	1 122	-29 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

741. The record industry is facing significant challenges with the decline in CD sales, piracy and the development of digital music. As table 31 below shows, online and mobile music sales in Germany, as in the rest of the EEA, have recently increased, however not to an extent where the decrease in physical sales is - or can be forecast to be - compensated by online and mobile music sales.

TABLE 31 - Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2004-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[20-30]*%

Source: Notifying parties; Commission analysis

742. The market survey reveals that only 35% of German customers believed that legal on-line download had a negative impact on majors' physical sales. Conversely, illegal download, piracy and home CD burning are directly considered by a vast majority of customers to be the main factors for the fall in demand for CD albums. Half of the customers consider that the introduction of on-line download triggered different reactions from the different majors, while 40% though that major record companies reacted similarly to this new phenomenon²¹⁸.

Concentration of sales

743. The notifying parties have submitted that in Germany domestic artists accounted for [40-50]*% of sales in 2006, versus [40-50]*% for international pop rock albums and [0-10]*% for classical music.
744. A significant proportion of total sales of CDs are concentrated among a few retailers. In Germany [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [60-70]*% of Sony BMG sales, largely aligned with the average sales concentration observed in all affected markets.

²¹⁸ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 36% of customers believe that legal on-line download is a competitive pressure to majors (versus 54% which do not); 75% of customers believe that illegal on-line download and piracy are a competitive pressure to majors (versus 16% which do not); 50% of customers believe that on-line download created a different reaction from the different majors (versus 40% which did not).

TABLE 32 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Germany	[80-90]*%	[60-70]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: *Notifying parties; Commission analysis*

745. In terms of new releases and number of albums on sale, Germany is the [...] market in the EEA, with [...] Sony BMG new releases in 2006 and a total of [...] Sony BMG albums on sale in the same year.

746. Among the largest markets, Germany is the one where sales of CDs are the least concentrated among a few successful releases. In Germany, the notifying parties submit that their 50 highest sales represented [20-30]*% of the total number of units sold in 2005, versus up to [60-70]*% in the United Kingdom or [50-60]*% in Spain. Nevertheless, the focus on the biggest titles is clear, as the 50 albums that accounted for [20-30]*% of all sales only represented [0-10]*% of Sony BMG total German catalogue, or [0-10]*% of its new releases in 2005.

Charts

747. Chart albums²¹⁹ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is in fact increasing in the EEA. This is also the case in Germany where chart album sales represented [50-60]*% of the sales of the notifying parties in 2005 (versus [40-50]*% in 2002). Non-chart albums account for a larger share of Sony BMG sales than in most other affected markets.

TABLE 33 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Germany	[40-50]*%	[40-50]*%	[50-60]*%	[50-60]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: *Notifying parties; Commission analysis*

748. The chart committee is the executive body of the third party organisation responsible for collecting the necessary data and providing information for the publishing of the official weekly music charts in Germany. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts. According to the notifying parties, there were five chart committee meetings in Germany in 2005 (on 28 February, 13 April, 8 July, 22 September and 24 November). Independent record companies also participate in chart committee meetings. The Commission analysis of the minutes of the chart committee meetings shows that the four majors are all part of the chart rules decision-making process, together with three main independent record companies. The minutes do not indicate any coordinated behaviour to change chart rules with the possible objective to promote artists from major record companies at the expense of others.

²¹⁹ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

749. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Germany, minimum prices for different categories of CDs and on-line sales exists in order to define whether albums will be allowed to enter and be rated in the charts²²⁰. The notifying parties note that, since the notification on 31 January 2007, the German chart committee has agreed a rule change; the chart system is going to switch to a sales turnover-based system (without list price limits) although the precise details of this change have not yet been finalised.

Compilations

750. As shown in table 34 below, the value of sales of compilations is estimated to have been EUR 80 M in 2006 in Germany, representing 7% of the total market value for recorded music. However, compilations represent a share of Sony BMG revenue[...]*, reaching [10-20]*% of its total revenues. It can be noted that in 2002, the proportion of Sony BMG sales achieved through sales of compilation albums was as high as [20-30]*%.

TABLE 34 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Germany	1 122	80	7%	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

751. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In Germany, the sales of compilation CDs have indeed decreased [...]*, falling from [20-30]*% to [10-20]*%.

TABLE 35 - SONY BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Germany (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Germany (% total sales)	[20-30]*%	[10-20]*%	[10-20]*%	[20-30]*%	[10-20]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

752. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

²²⁰ An Investigation by the German Competition Authority into the practice of the German chart committee to set minimum prices for different categories of CDs (e.g. €8.50 for single pocket CD albums) and on-line downloads (e.g. €0.95 for one track download) to enter the charts led to a change – implemented from July 2007 – in the chart rules, as outlined in paragraph 16.

753. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Germany. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Germany.
754. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Germany, making collusion at the level of release prices unlikely.
755. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs is not strictly identical between the different majors²²¹. Even though the number of these main PPDs may seem very concentrated in Germany (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.
756. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. For example in Germany approximately [20-30]* of Sony BMG albums are re-priced before the end of this period. The other majors follow different policies with majors re-pricing 5%, 10% or 50% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.
757. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Germany, [30-40]*% of Sony BMG albums and for example 19% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [0-10]*% and 4% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

221 In 2006, Sony BMG used [...] PPDs and the three remaining majors 3 PPDs respectively for the majority of their sales in the first 20 weeks after release.

758. In addition, the Commission has also analysed the Airtours criteria²²² to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

759. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

760. In 2006, Sony BMG used [100-150]* PPDs in Germany. [...] Nevertheless, despite an important number of gross prices, the 5 most used PPDs account for [50-60]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is the lowest of all affected markets, significantly smaller than in the United Kingdom ([70-80]*%) or the Netherlands ([80-90]*%).

761. Concentrating on chart releases only, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [70-80]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [90-100]*%.

762. In addition, differences, not revealed by aggregated figures, exist between majors which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...] PPDs, and the remaining majors 3 PPDs accounting each for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs from [8-13]* EUR, and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 13,27-15,82, EUR 10;09-13;06, EUR 11;25-13;5, giving a maximum range of main PPDs of EUR [8-15,82]*, a variation of [40-50]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

²²² See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

763. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.
764. In Germany, record companies, including the four majors, transmit information relative to their albums to Phononet²²³. The information comprises at least for each album: title, artist, number of tracks, date of release, PPD and PPD codes. This information is sold by Phononet to music retailers as general package information, regularly updated, and covering the large majority of albums on sale. A public version of the Phononet database is accessible via their website, however not disclosing information on PPDs or PPD codes. Phononet has the obligation to provide price data only to retailers, therefore excluding record companies.
765. Bertelsmann owns "Der Club" in Germany which sells music albums. As a retailer, Der Club has access to PPDs of all albums, including PPDs of Sony BMG competitors. Der Club notably has access to the complete Phononet database, which does not impose a formal confidentiality clause intending to restrict the supply of information to third parties. Nevertheless Der Club has confirmed that it does not disclose any record company pricing (PPDs or discounts) information to Sony BMG or other third parties. In addition, other majors do not have retail activities and therefore would not have access to competitors' PPD via this potential information source.
766. In Germany, Sony BMG has [...] * key account managers responsible for the largest customers. In addition [...] * sales representatives are each responsible for [...] * stores. [...] * telesales representative are in charge of the customer relationship with smaller retailers. Members of the sales force are principally responsible for negotiating prices and new shipments to retailers. The notifying parties submit that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.
767. During the market investigation, the majority of customers have submitted that they believe that record companies generally know about PPDs of their competitors²²⁴. This belief seems to be based on the habit among the majority of retailers to use information on competing majors' prices when negotiating with other record companies²²⁵. It therefore appears that the sales representatives of Sony BMG and

²²³ www.phononet.de

²²⁴ Question n°31 – Questionnaire to customers 12 February 2007 – 60% of German customers submit that record companies know PPDs of their competitors, versus 20% who believe it is not possible, and 20% who have no opinion.

²²⁵ Question n°30 – Questionnaire to customers 12 February 2007 – 75% of German customers submit that they use information on other majors' prices when negotiating with one record company, versus 25% who state that they do not.

other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

768. Therefore, it would appear possible for Sony BMG and the other majors to collect a certain amount of PPD information through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their scarce resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them, for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Germany, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*²²⁶

769. The Commission has demonstrated the lack of transparency of discounts by illustrating that discounts are not aligned between majors, and by underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers, difference in discounts contractually negotiated by different majors with a same customer, difference in average discounts granted by all majors to a same customer); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

770. Based on sales realized by Sony BMG with its top 5 customers in 2005, the total discount range varies from [10-20]*% to [20-30]*%. [Several retailers]*receive similar average discounts at around [20-30]* % reduction compared to PPDs²²⁷.

²²⁶ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

²²⁷ In 2006 these [...] retailers also received similar average discounts from Sony BMG [...]*

Nevertheless, within these similar overall discounts, the discount structure of these [...]retailers is significantly different. Some receive higher file discounts, other higher campaign or retrospective discounts. These [...]retailers are partly comparable [...]*.

771. One customer receives different discounts from different record companies. With regards to the four majors, the analysis of the contracts between the different majors and their main customers shows that one retailer generally obtains a different discount offer from the different majors in terms of discount percentage and discount structure (relative importance of file discounts, retrospective discount, etc.). As regards file discounts for example, in addition to the distinct file discount rates granted to a common customer by the majors, there are also differences related to the product to which the rate applies (one rate for all or several rates depending on whether it is a Pop single, CD, maxi CD). Discounts based on turnover are also calculated in different formula.
772. It could be argued that this diversity in discounts is only apparent and ultimately leads to similar average discounts. This assumption was, however, not confirmed by the market investigation. Indeed, although the investigation has brought some examples of Italian customers receiving similar average total discounts from several majors, this is not true for all customers. Observed differences on average discount among the top five customers are as high as [0-10]*% for some customers²²⁸.
773. As regards invoice (end year) discounts, there are significant differences related to the product to which the rate applies. Germany is a Contracting Party to the EEA Agreement where many categories of discounts are widely used, by opposition to some other large Contracting Parties to the EEA Agreement where a single category of discount appears to prevail. File discounts account for [40-50]*% of total discounts granted by Sony BMG to its top 5 customers, versus [20-30]*% for campaign discounts, [10-20]*% for retrospective discounts and [10-20]*% for co-op payments.
774. Like in most other Contracting Parties to the EEA Agreement, file discounts are very stable from year to year. [...]This stability of file discounts has been confirmed by other record companies and customers.
775. Different majors also provide different levels of file discounts to a same customer. For instance, in 2006, Sony BMG granted exclusively [two different discounts ranging between 0-20]* % file discounts to one of the top 5 customer, whereas another major principally granted file discounts of 7% and 10% of PPD. This also applies to several other main customers. Conversely campaign discounts are particularly fluctuant from year to year. Of the top 5 Sony BMG German customers, only [...] received the same average campaign discount (as a proportion of gross sales) in 2005 and 2006. The other four received average campaign discounts diverging by [10-20]*% to more than [30-40]*% between those years. Although the average campaign discount can be affected by a change in the product mix between two years, this cannot explain the difference in evolution between the top customers, ranging from stable to a [30-40]*% change.

²²⁸ [...]*.

776. Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer principally received campaign discount rates of [three different discounts ranging between 0-10%]* % from Sony BMG ([40-60]*% of its chart sales to that customer), whereas the same customer principally received 4% and 23% campaign discount from the other major ([20-40]*% of chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that the company does not apply a stable easily predictable campaign discount policy per category of album or retailer.

777. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts. The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Germany apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums. Even for those retailers applying only one or two levels of campaign discounts the Commission did not find any recurrent pattern behind the application of these campaign discounts in the early life of albums, therefore indicating that any ongoing coordination among majors is unlikely.

778. Retrospective discounts are relatively stable but are not significant for all customers. They generally correspond to a fixed annual discount granted to a specific customer. Their rate is only known at the end of fiscal year and their level depends on overall sales of the retailer. Nevertheless, it can be assumed that retrospective discounts are relatively stable from year to year. Majors grant different retrospective discounts to a same customer²²⁹.

779. Co-op payments are conversely significantly more irregular from year to year, with variation for each of the top 5 Sony BMG customers ranging from [10-20]*% to [40-50]*% between 2005 and 2006. This is coherent with the submission from the notifying parties that co-op payments are applied on an irregular basis and are generally not foreseeable long in advance.

780. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. Customers have a mixed view on this issue. 30% believe that major record companies know discounts applied by their competitors and 70% believe that majors do not know discount policy of their competitors or have no opinion²³⁰. However among those retailers who believe

²²⁹ For instance, Sony BMG and another major have both granted retrospective discounts to one of the most important German retailers. One of the two majors granted a retrospective discount 50% higher than the other one (in this particular example, retrospective discounts account for approximately 40-50% of total discounts).

²³⁰ Question n°31 – Questionnaire to customers 12 February 2007 – 40% of German customers submit that record companies do not know discounts of their competitors, versus 30% who believe they know, and 30% who have no opinion.

that majors know about the discounts granted by their competitors, several submit that majors can know the discount policy of their competitors for some discount categories only. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

781. Sony BMG and the other majors claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Germany, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

782. German customers have a mixed view on whether record companies monitor retail prices²³¹. Only Der Club (subsidiary of Bertelsmann) has reported that it actively exchanges its price catalogue with record companies.

783. Like in other affected markets, German retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, the majority of customers do not believe it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices²³².

784. As already described, the Commission focused its analysis on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Germany it appears that department stores apply relatively regular and stable mark-ups to new releases²³³. Conversely, other types of retailers (book clubs, internet) apply much more irregular mark-ups. The information available to the Commission indicates that the possibility to reverse-engineer prices is also limited to the very early life of an album (around its date of release) and reduces as the album matures.

²³¹ Question n°32 – Questionnaire to customers 12 February 2007 – 40% of German customers report that record companies monitor retail prices, versus 40% who submit that record companies do not do so, and 20% who have no opinion.

²³² Question n°33 – Questionnaire to customers 12 February 2007 – 60% of German customers submit that record companies cannot reverse-engineer retail prices to deduct net wholesale prices, versus 30% who believe it is possible to do so, and 10% who have no opinion.

²³³ Based on 5 last new releases of all majors, the largest department stores apply a mark-up which deviates from the average mark-up by 3 or 4% on average. Maximum deviation can however reach 10% for a number of albums.

785. The parties notably submitted an analysis of retail prices in Germany²³⁴ showing that mark-ups were already irregular 4 or 5 weeks after release, , therefore confirming the above-mentioned view among retailers (paragraph 783).

786. In conclusion, the investigation indicates that in Germany the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so much room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Germany to sustain tacit coordination between major record companies.

787. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Germany, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Germany. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of caution.

(b) Retaliation

788. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

789. In Germany, Sony BMG revenues stemming from compilation albums account for [10-20]*% of total revenue, slightly above the average proportion observed at the level of all affected markets ([10-20]*%). The importance of compilation revenue is however diminishing because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

790. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

791. In conclusion, the Commission did not identify any action in Germany that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

²³⁴ RBB 2006 retail price study – 14 February 2007.

(c) Reaction of competitors and customers

792. In Germany, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.
793. Customers are very concentrated [...]*. These [...]*retailers only realize a small proportion of their turnover with music albums and could therefore be considered as benefiting from significant buyer power.
794. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
795. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of German customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

796. The Commission found that coordination on the market for recorded music is unsustainable. That conclusions, which were found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.
797. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that other majors would be respecting a hypothetical commonly agreed pricing policy which would be based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the German market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.
798. It can therefore be concluded that on the German market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

c) **France**

(1) **Characteristics of the market**

(a) **Market players**

Competitors

799. In 2006 Universal Music Group remained the largest record company in France, before Sony BMG. Universal still led the market in 2006 with a 37% market share (increasing from 32% in 2005). Sony BMG's market share has been falling since 2004 from 30% to 22% in 2006 (26% in 2005). When the market shares of EMI and WMG increased (respectively from 15 to 19% and 13 to 16% from 2004 to 2006), the market share of the independents fluctuated from 7% in 2004, 11% in 2005 to 5% in 2006. The main independent record companies are Naïve, Wagram Music and PIAS.

TABLE 36 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	EMI (%)	WMG (%)	Independents (%)
France	862	22	37	19	16	5
Sum of all affected EEA markets	4 949	22	29	17	12	20

Source: Notifying parties; Commission analysis

800. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

801. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the recent years' decline in demand for recorded music, as a rationalisation exercise. In France, Sony BMG decreased the number of artists on its roster, from [...] in 2003 to [...] in 2006.

802. Information submitted by the notifying parties shows that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists and [...] artists left, representing broadly a rotating roster of [10-20]*%.

803. The merger in itself cannot be seen as having a direct impact on this trend as, [...]*.

Customers

804. Unlike in some Contracting Parties to the EEA Agreement where music is largely sold via department stores, a large proportion of recorded music sales in France are made directly to hypermarkets. [...] is the largest of them, accounting for [40-50]*% of the hypermarket sector in 2005. As regard specialist outlets, accounting for [40-50]*% of recorded music sales, [...] accounted for over [10-20]*% of sales.

TABLE 37 - Proportion of Sony BMG sales to different customers categories (top 10) – 2005						
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Independent music store	Mail/ Internet	Others
France	[10-20]*%	[30-40]*%	[40-50]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[40-50]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

805. Figures from the French Observatoire de la Musique confirmed this market structure with hypermarkets representing [40-50]*% of musical CD distribution (in value, 1st quarter 2007) and specialized stores accounting for [40-50]*%. Compared to the 1st quarter 2006, the hypermarket channel has lost around [30-40]*% in volume (and [20-30]*% in value) of its sales when the decrease in specialized stores was slower.

Record companies distribution and licensing deals.

806. The notifying parties submit that they do not have any distribution logistics contracts with any other major record company, and the market investigation has confirmed that there are no distribution logistics deals between majors in France. In France (as well as in Austria, Belgium, Germany, Ireland, the Netherlands, Portugal, Spain, and the United Kingdom), Sony BMG obtains its distribution logistics services from Arvato (part of the Bertelsmann Group). One major (Universal) has its own distribution logistics facilities. Majors usually also distribute products of several independents. Sony BMG for example distributes some labels such as Restaurants du Coeur, Scorpio or V2. Independent labels also have their own distribution organisation (notably Naïve, Wagram, Night and Day and Harmonia Mundi) and can offer these services to other independents.

(b) Characteristics of demand for physical albums

Evolution of demand

807. France has followed the general downward trend identified at the EEA level with a 35% decrease in total market value between 2001 and 2006.

TABLE 38 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
France	1 318	1 373	1 175	1 015	999	862	-35 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis²³⁵

808. The record industry is facing significant challenges with the decline in CD sales, piracy and the development of digital music. As table 39 below shows, online

²³⁵ Figures confirmed by the French Observatoire de la musique.

and mobile music sales in France, as in the rest of the EEA, have recently increased, however not to an extent where the decrease in physical sales is - or can be forecast to be - compensated by online and mobile music sales.

TABLE 39 - Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2004-2006
Total digital (Online+Mobile)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[30-40]*%

Source: Notifying parties; Commission analysis

809. The parties mention a 2006 GfK CD-burning and downloader Study stating that 1 billion songs were downloaded in France in 2005, of which only 2% were via authorised downloading sites.

810. The market survey reveals that only 20% of customers consider that the introduction of on-line download triggered different reactions from the different majors, such as specific strategies (cutting prices, developing legal downloading, developing more attractive CDs) whereas 50% have no opinion²³⁶.

Concentration of sales

811. The notifying parties have submitted that in France domestic artists accounted for [60-70]*% of sales in 2006, versus [30-40]*% for international pop rock albums and [0-10]*% for classical music.

812. A significant proportion of total sales of CDs are concentrated among a few retailers. In France [90-100]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [60-70]*% of Sony BMG sales, largely aligned with the average sales concentration observed in all affected markets.

TABLE 40 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
France	[90-100]*%	[60-70]*%
Sum of all affected EEA markets	[80-100]*%	[70-80]*%

Source: Notifying parties; Commission analysis

813. In terms of new releases and number of albums on sale, France is the [...]* market in the EEA [...]*, with [...]* Sony BMG new releases in 2006 [...]* and [...]* Sony BMG albums on sale in the same year.

814. Among the largest markets, France is the one where sales of CDs are the most concentrated among a few successful releases. In France, the 50 highest sales of the parties represented [70-80]*% of the total number of units sold in 2005 ([60-70]*% in the United Kingdom or [50-60]*% in Spain).

²³⁶ Question n°45-46-47 – Questionnaire to customers 12 February 2007.

Charts

815. Chart albums²³⁷ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is in fact increasing in the EEA. This is also the case in France where chart album sales represented [40-50]*% of the sales of the notifying parties in 2005 (versus [30-40]*% in 2002). Non-chart albums account for the largest share of Sony BMG sales when comparing with most other affected markets.

TABLE 41 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
France	[30-40]*%	[30-40]*%	[40-50]*%	[40-50]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

816. The chart committee ("comité de distribution") is responsible for collecting the necessary data and providing information for the publishing of the official weekly music charts in France. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts. According to the notifying parties, there was one chart committee meeting in France in 2005 (on 31 March). Independent record companies are also represented in the chart committee. The Commission analysis of the minutes of the chart committee meeting shows that the four majors together with one independent record company and representatives of professional and survey organizations (SNEP, IFOP) were involved in the chart rules decision-making process. The minutes do not indicate any coordinated behaviour to change chart rules with the possible objective to promote artists from major record companies at the expense of others.
817. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in France, only CDs albums with a list price higher than EUR 5 will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter French charts is fixed at a low level if compared with PPDs generally used to price albums having the potential to realize high sales [12-17]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors. This conclusion remains valid when considering average wholesale prices (rather than the PPD) because of their lack of transparency.

Compilations

818. As shown in table 42 below, the value of sales of compilations is estimated to have been EUR 196 M in 2006 in France, representing 23% of the total market value for recorded music. However, compilations only represented a share of Sony BMG revenue [...] reaching [10-20]*% of its total revenues.

²³⁷ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

Table 42 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
France	862	196	23%	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

819. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In France, the sales of compilation CDs have indeed decreased since 2003, but have rather slightly increased [...] during that period.

Table 43 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
France (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
France (% total sales)	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%	[10-20]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

820. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

821. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in France. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in France.

822. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in France, making collusion at the level of release prices unlikely.

823. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors²³⁸. Even though the number of these main PPDs may seem very concentrated in France (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute

²³⁸ In 2006, Sony BMG and 2 majors used [...] PPDs and the one remaining major 4 PPDs for the majority of their sales in the first 20 weeks after release.

a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [0-5]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

824. Secondly, the period after release during which an album PPD is stable varies from album to album and major to major. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. [...] in France [...] about [10-20]*% of Sony BMG albums which are re-priced before the end of this period. The other majors follow a similar policy. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

825. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a number of albums. In 2005 in France, [10-20]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release. This proportion is significantly smaller in France than in the other affected markets due to the more intensive use of retrospective discounts (a proportion of these retrospective discounts is however used by the majors in the same way as campaign discounts -in other words to temporarily push sales- and are therefore irregular and hardly predictable). As previously discussed, the discount stability results regarding France are to be taken with some caution as the transaction database used for this purpose does not completely reflect all transaction specific discounts such as the retrospective discounts. Overall, the investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

826. The Commission has also analysed the Airtours criteria²³⁹ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination. These three aspects are further analysed below.

²³⁹ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

(a) Transparency

827. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

828. In 2006, Sony BMG used [150-200]* PPDs in France. [...] Nevertheless, despite an important number of gross prices, the 5 most used PPDs account for [60-70]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is in the lower average of all affected markets, smaller than in the United Kingdom ([70-80]*%) but higher than in Germany ([50-60]*%).

829. Concentrating on chart releases only, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [80-90]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [60-70]*% and [60-70]*%.

830. In addition, differences, not revealed by aggregated figures, exist between majors which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG and two majors used [...] PPD, and the remaining majors 4 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs from [11-14]*EUR[...] and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 10.67-13.89, EUR 10.74-14.4 and EUR 10.68-14.18 giving a maximum range of main PPDs of [10.67-15]*, a variation of [20-30]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

831. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

832. In France, Sony BMG prints an annual catalogue of its products including the list price code. Ad hoc updates of temporary list price, new release reports and weekly updates are sent to customers by e-mail as list price changes and new release are frequent. Sony BMG is not aware of any industry website including list price information which customers can access.
833. Bertelsmann owns "France Loisirs" in France which sells music albums. As a retailer, France Loisirs has access to PPDs of all albums, including PPDs of Sony BMG competitors. Nevertheless France Loisirs has indicated that majors do not know about PPDs offered to it by the other majors. In addition, other majors do not have retail activities and therefore would not have access to competitors' PPD via this potential information source.
834. In French, Sony BMG has [...] sales representatives responsible for [...] major customers. Members of the sales force are principally responsible for negotiating prices and new shipments to retailers. The notifying parties submit that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.
835. During the market investigation, two customers submitted that they believe that record companies generally know about PPDs of their competitors²⁴⁰. This belief seems to be based on the habit among the majority of retailers to use information on competing majors' prices when negotiating with other record companies²⁴¹. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.
836. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their scarce resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the at any point in time competing albums. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in France, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small

²⁴⁰ Question n°31 – Questionnaire to customers 12 February 2007 – Two French customers submit that record companies know PPDs of their competitors, versus one who believes it is not possible (and three who have no opinion).

²⁴¹ Question n°30 – Questionnaire to customers 12 February 2007 – 60% of French customers submit that they use information on other majors' prices when negotiating with one record company, versus 10% who state that they do not.

number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*²⁴²

837. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers, difference in discounts contractually negotiated by different majors with a same customer, difference in average discounts granted by all majors to a same customer); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

838. As regards the Sony BMG discount policy, the Commission investigation shows that Sony BMG grants similar, but different, discounts to each of its top 5 customers. In 2005, the total discounts granted varied from [10-20]*% to [20-30]*%. [Several comparable retailers]*included in the top [...] customers [...] receive different average discounts [between 10-20%]*reduction compared to PPDs²⁴³.

839. One customer receives different discounts from different record companies. With regards to the four majors, the analysis of the contracts between the different majors and their main customers shows that one retailer generally obtains a different discount offer from the different majors in terms of discount percentage and discount structure. This is the case for example as regards discounts based on turnover.

840. It could be argued that this diversity in discounts is only apparent and ultimately leads to similar average discounts. This assumption was, however, not confirmed by the market investigation. Indeed, although the investigation has brought some examples of customers receiving similar average total discounts from several majors, this is not true for all customers. Observed differences on average discount among the top five customers are as high as [0-10]*% for some customers²⁴⁴.

841. France is a Contracting Party to the EEA Agreement where many categories of discounts are used. The retrospective discounts however appear to prevail. As a

²⁴² Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

²⁴³ [...]*.

²⁴⁴ [...]*.

proportion of total discounts, they account for [60-70]* of all discounts applied in value. [...]*

842. Unlike in other Contracting Parties to the EEA Agreement, file discounts are relatively unimportant. They are largely replaced by retrospective discounts. Campaign discounts are fluctuant from year to year. Of the top 5 Sony BMG French customers, only [...]* received the same average campaign discount (as a proportion of gross sales) in 2005 and 2006. The other [...]* received average campaign discounts diverging by [10-20]*% to more than [110-120]*% between those years. Although the average campaign discount can be affected by a change in the product mix between two years, this cannot explain the difference in evolution between the top customers, [...]*. This level of change over time and variation between customers indicates that the company does not apply a stable easily predictable campaign discount policy per category of album or retailer.
843. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts. The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in France apply significant campaign discounts or retrospective discounts (representing more than 5 or 10% of the PPD) to a proportion of their albums (it can however be noted that among all affected markets, this proportion is among the lowest in France with only 16% of albums concerned). Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.
844. Retrospective discounts are not stable and their significance varies widely across customers (from [0-10]* to [10-20]*% of gross price across comparable Sony BMG customers). They generally correspond to a fixed annual discount granted to a specific customer. Their rate is only known at the end of fiscal year and their level depends on overall sales of the retailer. As such they are therefore not directly linked to each transaction. Majors grant different retrospective discounts to a same customer. For instance, the four majors granted in 2005 to one of the most important French customer retrospective discounts ranging from [5-10]*% to [10-15]*% of PPD. Other significant differences ([50-60]*%) between same retailers have also been noticed, however proposals from different majors are not systematically comparable as retrospective discounts may depend on the annual sales of each major.
845. Co-op payments are conversely less significant [...]* but irregular from year to year.
846. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. Customers have a mixed view on this issue. 30% believe that major record companies know discounts applied by their competitors and 70% believe that majors do not know discount policy

of their competitors or have no opinion²⁴⁵. However among those retailers who believe that majors know discounts of their competitors, several submit that majors can know the discount policy of their competitors for some discount categories only. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

847. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in France²⁴⁶, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

848. French customers have a rather clear view on whether record companies monitor retail prices²⁴⁷.

849. Like in other affected markets, French retailers apply a mark-up on the net (or sometimes gross) wholesale price of albums to fix retail prices. According to the market investigation, a minority of customers does believe it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices²⁴⁸.

850. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In France, it appears that supermarkets apply relatively regular and stable mark-ups to new releases²⁴⁹. Conversely, other types of retailers (book clubs, internet) apply much more irregular mark-ups. The information available to the Commission indicates that the possibility to reverse-engineer prices is limited also in the very early life of an album (around its date of release) and reduces as the album matures.

²⁴⁵ Question n°31 – Questionnaire to customers 12 February 2007 – Three French customers submit that record companies do not know discounts of their competitors, versus two who believe they know.

²⁴⁶ Some sales representatives prepare written reports on customer visits which are mainly related to the success of Sony BMG albums with particular retailers.

²⁴⁷ Question n°32 – Questionnaire to customers 12 February 2007 – Six French customers report that record companies monitor retail prices, versus one who submits that record companies do not do so (and three who have no opinion).

²⁴⁸ Question n°33 – Questionnaire to customers 12 February 2007 – 30% of French customers believe it is possible to do so, and 70% have no opinion.

²⁴⁹ [...]*

851. The parties notably submitted an analysis of retail prices in France²⁵⁰ showing that already 3 or 4 weeks after release, mark-ups were irregular.

852. The Commission received information from an independent market observer that in 2005, Sony BMG dropped the list price of some of its CD albums to [8-10]*on the week of 23-29/01, and that this was followed by a drop in list price for some albums of another major to [8-10]*on the week of 13-19/02, and a return by the latter major to its album's initial list prices on the week of 27/03-02/04. The market observer claimed that this was an example of deviation by one major from the tacit price collusion of major record companies, followed by the retaliation from another major record company.

853. After a detailed investigation, the Commission could confirm that Sony BMG indeed decreased the price to [8-10]*for 4 of its albums. The Commission could also confirm another major decreased its prices in week 13-19/02, from an initial price in week 23-29/01 then increased its prices again to the original price in week 27/03-02/04, but for 2 albums only²⁵¹.

854. Given the very low number of albums involved in the supposed retaliation (4 out of 59 albums in the charts for Sony BMG, 2 out of 35 for the other major), given their low sales volumes, given that these albums were already released for quite a long time when the supposed deviation took place (a time where record companies are generally more prone to frequent price changes to try and squeeze out additional sales), given that the prices of the biggest selling albums of the supposedly deviating major did not move during the alleged retaliation period, and given that only two out of the four majors were involved in that supposed event, the Commission cannot conclude that the event mentioned in the two above paragraphs constitutes a likely occurrence of a 'deviation-retaliation' mechanism between majors.

855. In conclusion, the investigation indicates that in France the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so much room for competition that it would not be possible to verify that the other majors are respecting any common pricing policy for all albums, or even during the period after initial release. Moreover, the life cycle of the release has been sharply shortened, which would complicate the follow-up of such policy (16 weeks are needed in 2006 to achieve 80% of the turnover of one release, compared to 19 weeks in 2005 and 27 weeks in 2004²⁵²). There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in France to sustain tacit coordination between major record companies.

²⁵⁰ RBB 2006 retail price study – 14 February 2007.

²⁵¹ From an initial level of different PPDs in week 23-29 January, the other major dropped the PPD on 4 of its 35 titles registered in the top 200 CD charts to [...] in week 13-19 February. Of these 4 titles, two went back in week 27 March-02 April to their earlier level of week 23-29 January, and two others went back to different levels. In addition, one title had already a PPD of [...] in week 23-29 January, and 5 other titles also had a PPD of [...] in week 13-19 February, but were not ranked in the charts either in the weeks before or after so no comparison could be made.

²⁵² Observatoire de la musique « Les marchés du support musical », 2006 report (GfK study from Top 50 titles).

856. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in France, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in France. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of caution.

(b) Retaliation

857. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

858. In France, Sony BMG revenues stemming from compilation albums account for [10-20]*% of total revenue, slightly under the average proportion observed at the level of all affected markets ([10-20]*%). The importance of compilation revenue is however diminishing because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

859. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

860. In conclusion, the Commission did not identify any action in France that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

861. In France, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers, although the share of independent labels has increased for new songs broadcast on radio. In its 2006 annual report relating to radio broadcasting of music, the French Observatoire de la Musique indicates that their broadcasting share reached 15% (81% for majors), increased by one third when compared to 2003.

862. Customers are very concentrated [...]*. Three of these retailers only realize a small proportion of their turnover with music albums and could therefore be considered as benefiting from significant buyer power.

863. Nevertheless one of these retailers (department stores) also heavily depends on the majors for their offer of music and it is unclear whether it could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

864. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of French customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) *Conclusion: coordination is unlikely on the market for recorded music*

865. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found in respect of a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

866. It is not enough that it may be assumed that the level of relative transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model. The level of transparency is however not sufficient to allow the majors to verify that the others respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the French market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

867. It can therefore be concluded that on the French market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

d) Italy

(1) *Characteristics of the market*

(a) Market players

Competitors

868. Following the merger, Sony BMG has been the market leader on the Italian market with a 32% market share in progression from its 28% combined market share in 2002. Warner (22%) and Universal (20%) were second and third on the market in 2006, significantly behind Sony BMG. Universal was the market leader in 2002 with a

27% market share. EMI has remained stable (17% in 2002 – 16% in 2006), and Warner gained market share (17% in 2002 – 22% in 2006). The strongest independent record company in Italy is Edel (5%) which is also among the largest independent in the EEA; the other independents are Universo, Sugar, Deltadisch, SelfTime and Halidon and other smaller companies.

Table 44 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Italy	287	32	20	22	16	10
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

869. In Italy Sony BMG is the market leader, with a market share which is 10% higher than the one of its closest competitor. With only a 32% market share and 3 other majors highly active on the Italian market, it can however be concluded that the merged entity is not in a position where it enjoys a single dominant position.

Artists

870. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Italy, Sony BMG decreased the number of artists on its roster from [...] in 2002 to [...] in 2006.

871. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] in Italy, representing [0-10]*% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [10-20]*% of its total number of artists signed on the previous year.

872. The market investigation highlighted that 44% of Italian customers interviewed consider that competition among major recording companies takes place on the discovery and offer of artists, and 33% believe that competition takes place on marketing and promotion²⁵³.

Customers

873. Unlike in some Contracting Parties to the EEA Agreement where music is predominantly sold via one or two types of retailers, music is sold in Italy via different channels which include non-specialised retailers as well as specialized music chains. In particular, in the recent years direct music sales by Sony BMG to supermarkets or hypermarkets have increased, to account for [20-30]*% of the record sales in 2006.

²⁵³ Question n°17a – Questionnaire to customers 12 February 2007 – 44% of Italian customers submit that major recording companies compete on offering best artists, 33% of customers also claim that competition takes place on marketing and promotion, 11% mention price as a competitive factor, and 11% believe there is no competition.

Ultimately, it appears that the large majority of sales ([70-80]*%) is achieved through non-specialised retailers

TABLE 45 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Italy	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

874. The notifying parties submit that there are no joint ventures between majors for distribution logistics services in Italy, and the market investigation has confirmed that there are no distribution logistics deals between majors. In Italy the majors outsource parts of their distribution activities to independent third parties. In particular, Sony BMG has outsourced logistics and warehousing to Log Services, a privately owned distribution company. Arvato, the subsidiary of Bertelsmann that distributes Sony BMG in several Contracting Parties to the EEA Agreement, does not have distribution activities in Italy. Independents also use a number of distribution companies present in Italy -Self, Level One, Venus, Audioglobe, and Disco+- to distribute their products.

(b) Characteristics of demand for physical albums

Evolution of demand

875. Italy has followed the general downward trend observed in the whole EEA to a lower extent, with a 21% decrease in total market value between 2001 and 2006.

TABLE 46 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Italy	383	387	370	344	343	303	-21 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

876. The record industry is facing significant challenges with the decline in CD sales, piracy and the development of digital music. As table 47 below shows, online and mobile music sales in Italy, as in the rest of the EEA, have recently increased, however not to an extent where the decrease in physical sales is - or can be forecast to be - compensated by online and mobile music sales.

TABLE 47 - Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2003-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[20-30]*%

Source: Notifying parties; Commission analysis

877. The market survey reveals that only 22% of Italian customers believe that legal on-line download had a negative impact on majors' physical sales. Conversely, 67% of Italian customers consider that illegal download, piracy and home CD burning are the main factors for the fall in demand for CD albums; they however do not have a clear opinion on whether the introduction of on-line download triggered different reactions from the different majors or not²⁵⁴.

Concentration of sales

878. The notifying parties have submitted that in Italy domestic artists accounted for [50-60]*% of sales in 2006, versus [40-50]*% for international pop rock albums and [0-10]*% for classical music.

879. As for the concentration of sales, Italy does not follow the trend of most other affected Contracting Parties to the EEA Agreement, since only [40-50]*% of the 2006 sales of Sony BMG were made through their top 10 customers and the top 5 customers accounted for only [30-40]*% of Sony BMG sales, whilst the respective averages in the other affected markets are much higher, as evidenced in table 48 below.

TABLE 48 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Italy	[40-50]*%	[30-40]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

880. In terms of new releases, Italy is the [...] largest market in the EEA for Sony BMG with [...] new releases in 2006; [...].

881. Among the largest markets, Italy is the one where sales of CDs are the [...] most concentrated among a few successful releases. In Italy, the notifying parties submit that their 50 highest sales represented [40-50]*% of the total number of units sold in 2005, a lower proportion than the [60-70]*% observed in the United Kingdom, but higher than the [20-30]*% observed in Germany.

²⁵⁴ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 44% of customers believe that legal on-line download is not a competitive pressure to majors (versus 22% which believe it is); conversely, 67% of customers believe that illegal on-line download and piracy are a competitive pressure to majors (versus 11% which believe it is not); 67% of customers do not know if on-line download created a different reaction from the different majors or not (versus 11% which believe that on-line download created a different reaction from the different majors and 22% which do not believe so).

Charts

882. Chart albums²⁵⁵ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is in fact increasing in the EEA. This is also the case in Italy where chart album sales represented [70-80]*% of the sales of the notifying parties in 2006 (a sharp increase from the [50-60]*% of 2002).

TABLE 49 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Italy	[50-60]*%	[50-60]*%	[50-60]*%	[70-80]*%	[10-20]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[0-10]*

Source: Notifying parties; Commission analysis

883. In Italy, the Federazione Industria Musicale Italiana ("FIMI") is responsible for collecting the necessary data and providing information for the official weekly music charts. It has agreed with Nielsen Music Control ("NMC"), a company specialized in gathering market information, on rules which have to be respected in order to compile the charts, for example criteria to select albums that can enter the charts.

884. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement when for example requirements exist that different categories of CDs and on-line sales must have a minimum price in order to be allowed to enter and be rated in the charts. The Commission analysis of the projects and of the agreement between FIMI and NCM submitted by the parties do not reveal the existence of any rules concerning minimum prices.

Compilations

885. As shown in table 50 below, the value of sales of compilations is estimated to have been EUR 22 M in 2006 in Italy, representing 8% of the total market value for recorded music, a lower proportion than what is observed at EEA level. For Sony BMG, compilations represented an even lower share of revenue with [0-10]*% of its total revenues in 2006.

TABLE 50 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues (%)
Italy	287	22	8 %	[...]*	[...]*	[0-10]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

886. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In Italy, the proportion of compilations within

²⁵⁵ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

Sony BMG revenue has been irregular since 2002, although still at low levels compared with what is observed at the EEA level. ([0-10]*% in Italy versus [10-20]*% in the EEA in 2006).

TABLE 51 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Italy (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Italy (% total sales)	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

887. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

888. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Italy. It then analysed the three Airtours criteria which characterize collective dominance, with respect of the market in Italy.

889. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Italy, making collusion at the level of release prices unlikely.

890. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors²⁵⁶. Even though the number of these main PPDs may seem very concentrated in Italy (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

891. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not

²⁵⁶ In 2006, Sony BMG used [...] PPDs like another major and the two remaining majors 3 and 4 PPDs respectively for the majority of their sales in the first 20 weeks after release.

been challenged by any market participant. For example in Italy more than [20-30]*% of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the two other have re-priced only 10% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

892. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2006 in Italy, [10-20]*% of Sony BMG albums and for example 5% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [0-10]*% and 4% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place. It can however be noted that campaign discounts are relatively less used in Italy during the first 20 weeks after release of an album than in other affected markets.

893. In addition, the Commission has also analysed the Airtours criteria²⁵⁷ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

894. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

895. In 2006, Sony BMG used [100-150]* PPDs in Italy, [...] Despite an important number of list prices, the 5 most used PPDs accounted for [60-70]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is nevertheless the [...] lowest of all affected markets, with the highest values being observed in Norway and Finland ([90-100]*%).

896. Concentrating on chart releases only, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [80-90]*% and [80-90]*%.

²⁵⁷ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

897. In addition, differences, not revealed by aggregated figures, exist between majors which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG and another major used [...] PPDs, and the two remaining majors 3 and 4 PPDs respectively for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs is also different between the different majors. Sony BMG used PPDs from [9]* EUR to [14]* and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 11,88-17,04, EUR 11,36-11,60 and EUR 13,15-13,94 giving a maximum range of main PPDs of EUR [9 -17,04]*, a variation of [40-50]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

898. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behavior could be compatible with collusion between the majors.

899. In Italy, customers and record companies did not report the existence of any internet platform collecting information on PPDs of all albums, such as is the case in France (www.titelive.fr) or in Germany (www.phononet.de), all the more limiting potential transparency. PPD information is directly transmitted by each record company to its customers.

900. Bertelsmann owns "Mondolibri" in Italy which sells music albums (club business). As a retailer, Mondolibri has access to PPDs of all albums, including PPDs of Sony BMG competitors. Nevertheless Bertelsmann has confirmed that Mondolibri does not disclose any record company pricing (PPDs or discounts) information to Sony BMG or other third parties. In addition, other majors do not have retail activities and therefore would not have access to competitors' PPD via this potential information source.

901. In Italy, Sony BMG has [...] national sales representatives responsible for largest customers and [...] regional sales representatives in charge of smaller customers. Members of the sales force are principally responsible for negotiating prices and new shipments to retailers. The notifying parties submit that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

902. During the market investigation, one-third of customers have submitted that they believe that record companies generally know about PPDs of their competitors²⁵⁸. This belief seems to be based, at least partly, on the habit among the majority of retailers to use information on competing majors' prices when negotiating with other record companies²⁵⁹. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is in any case merely a starting point for negotiations.

903. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the at any point in time competing albums. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Italy, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*²⁶⁰

904. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers, difference in discounts

²⁵⁸ Question n°31 – Questionnaire to customers 12 February 2007 – 33% of Italian customers submit that record companies know PPDs of their competitors, versus 11% who believe they don't, and 56% who have no opinion.

²⁵⁹ Question n°30 – Questionnaire to customers 12 February 2007 – 44% of Italian customers submit that they use information on other majors' prices when negotiating with one record company, versus 33% who state that they do not, and 22% who did not answer.

²⁶⁰ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

contractually negotiated by different majors with a same customer, difference in average discounts granted by all majors to a same customer); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

905. The Commission investigation shows that Sony BMG grants similar, but different, discounts to each of its top 5 customers. In 2005, the total discounts granted varied from [10-20]*% to [20-30]*%²⁶¹. [...]*.

906. One customer receives different discounts from different record companies. With regards to the four major, the analysis of the contracts between the different majors and their main customers shows that one retailer generally obtains a different discount offer from the different majors in terms of discount percentage and discount structure (relative importance of file discounts, delivery charge, retrospective discount, etc.). As regards file discounts for instance, in addition to the distinct file discount rates granted to a common customer by the majors, there are also differences related to the product to which the rate applies (one rate for all or several rates depending on whether it is a new release, or depending on the repertoire). Discounts based on turnover are also calculated in different formula.

907. It could be argued that this diversity in discounts is only apparent and ultimately leads to similar average discounts. This assumption was however not confirmed by the market investigation. Indeed, although the investigation has brought some examples of Italian customers receiving similar average total discounts from several majors, this is not true for all customers. Observed differences on average discount among the top five customers are as high as [0-10]*% for some customers²⁶².

908. Unlike for example in Germany where many categories of discounts are widely used, Italy uses some categories of discounts more predominantly than others. File discounts account for [80-90]*% of total discounts granted by Sony BMG to its top 5 customers, versus [0-10]*% for campaign discounts and [0-10]*% for retrospective discounts.

909. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Italy from year year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). Although the examination of contracts signed between the majors and one same client shows that some clients receive different file discount conditions from different majors, the examination of transaction data has shown that file discounts granted by the different majors are rather aligned. Conversely campaign discounts are particularly fluctuant from year to year. [...]*.

910. Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer mainly received campaign

²⁶¹ [...]*.

²⁶² [...]*.

discount rates of [two different discounts ranging from 0-10]*% from Sony BMG [...] ([30-50]*% of its chart sales to that customer), whereas the same customer mainly received [two different discounts ranging from 0-10]*% campaign discount from another major [...] ([50-70]*% of chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that the company does not apply a stable easily predictable campaign discount policy per category of album or retailer.

911. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts. The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Italy apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a proportion of their albums (it can however be noted that among all affected markets, this proportion is the lowest in Italy with only 10% of albums concerned). Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they could predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums. Even for those retailers applying only one or two levels of campaign discounts, the Commission did not find any recurrent pattern behind the application of these campaign discounts in the early life of albums, therefore indicating that any ongoing coordination among majors is unlikely.

912. Retrospective discounts are relatively stable but are not significant for all customers. They generally correspond to a fixed annual discount granted to a specific customer. Their rate is only known at the end of fiscal year and their level depends on overall sales of the retailer.

913. Co-op payments are [...]*. They are also very limitedly used by other majors.

914. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. A majority of customers (44%) believe that major record companies can know about some of the discounts categories applied by their competitors, while 11 % believe that majors do not know discount policy of their competitors and 44 % have no opinion²⁶³. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

915. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not collect such

²⁶³ Question n°31 – Questionnaire to customers 12 February 2007 – 44% of Italian customers submit that record companies can know some discounts of their competitors, versus 11% who believe they do not know, and 44% who have no opinion.

information in any systematic way in Italy, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

916. Italian customers have a mixed view on whether record companies monitor retail prices²⁶⁴.

917. Like in other affected markets, Italian retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, a majority of customers do not have an opinion on whether it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices²⁶⁵. Nevertheless, a little under half of Italian customers believe it is feasible to do so.

918. The information available to the Commission generally indicates that the possibility to reverse-engineer prices is limited to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Italy five customers provided retail and net wholesale prices for their new releases. Three of them apply relatively regular and stable mark-ups to new releases, whereas two apply more irregular mark-ups²⁶⁶.

919. It could thus be argued that net wholesale prices could at least be deduced to some extent in those retail outlets belonging to customers applying stable mark-ups. This would however only apply to a fraction of the total market and considering the low concentration of retail in Italy would be particularly time consuming. In addition, this would only prove to be possible for the first weeks after the release of an album and would be far from covering the majority of sales. The parties notably submitted an analysis of retail prices in Italy²⁶⁷ showing that mark-ups were already irregular 4 or 6 weeks after release for many albums, therefore confirming that reverse-engineering retail prices rapidly becomes highly unreliable a short time after release.

920. In conclusion, the investigation indicates that in Italy the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so

²⁶⁴ Question n°32 – Questionnaire to customers 12 February 2007 – 33% of Italian customers report that record companies monitor retail prices, versus 22% who submit that record companies do not do so, and 44% who have no opinion.

²⁶⁵ Question n°33 – Questionnaire to customers 12 February 2007 – 44% of Italian customers submit that record companies can reverse-engineer retail prices to deduct net wholesale prices versus 56% who do not have an opinion.

²⁶⁶ Based on 5 last new releases of all majors, three retailers apply a mark-up which deviates from the average mark-up by 2 or 3% on average, with a maximum deviation of 5%. Two retailers apply a mark-up which deviates from the average mark-up by 4 or 6%, with however a maximum deviation which can reach more than 20%.

²⁶⁷ RBB 2006 retail price study – 14 February 2007.

much room for competition that it would not be possible to verify that the other majors were respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Italy to sustain tacit coordination between major record companies.

921. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Italy, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in that Contracting Party to the EEA Agreement. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of caution.

(b) Retaliation

922. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

923. In Italy, Sony BMG revenues stemming from compilation albums account for [0-10]*% of total revenue, about half the average proportion observed at the level of all affected markets ([10-20]*%). This clearly limits the credibility of such a retaliation mechanism. In addition the importance of compilation revenue is under threat because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

924. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

925. In conclusion, the Commission did not identify any action in Italy that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(c) Reaction of competitors and customers

926. In Italy, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

927. The notifying parties submit that the concentration of retailers in Italy is continuing, with 300 retailers at most in Italy today versus some 3,000 in 1993. Customers are still, however, the least concentrated among Contracting Parties to the EEA Agreement for Sony BMG, with the top 10 customers making [40-50]*% of sales only. Out of them, the majority realizes only a small proportion of their turnover with music albums and could therefore be considered as benefiting from significant buyer power.
928. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
929. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Italian customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) *Conclusion: coordination is unlikely on the market for recorded music*

930. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.
931. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model. The level of transparency is however not sufficient to allow the majors to verify that the others respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Italian market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.
932. It can therefore be concluded that on the Italian market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

e) Spain

(1) *Characteristics of the market*

(a) Market players

Competitors

933. Sony BMG has been the leader on the Spanish market since the merger was implemented. Universal purchased Vale, the largest Spanish independent record company, in 2006 and consequently increased its market share by almost 10%, becoming the closest competitor of Sony BMG. Warner, who led the market previous to the merger, is now on a par with EMI. The market share of independents significantly declined between 2002 (35%) and 2006 (15%), half of the decline being attributed to the purchase of Vale by Universal. The main independent record companies in Spain are Blanco y Negro (3%), and Divucsa (2%) who are principally active in the compilation business.

TABLE 52 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Spain	248	26	24	17	18	15
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

934. Sony BMG is the market leader; however it is almost on a par with Universal and reaches a market share below 30%. It can thus be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

935. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Spain, Sony BMG decreased the number of artists on its roster, from [...] in 2002 to [...] in 2006. However it can be noted that this decline was stabilised in 2005 and that the number of artists remained stable between 2005 and 2006.

936. Information submitted by the notifying parties shows that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Spain, representing [20-30]% of its total number of artists signed. In the same year, [...] artists left Sony BMG.

937. The Commission did not find any evidence that majors coordinate their behaviour to sign artists. Conversely customers submitted that record companies compete in this respect²⁶⁸. This information was supported by elements provided by the notifying parties showing that artists have left Sony BMG over the last 2-3 years to sign with independents or other majors.

²⁶⁸ Question n°17a – Questionnaire to customers 12 February 2007 – All Spanish customers have submitted that record companies compete in one way or the other (notably through signing artists, marketing, selection of repertoire, price).

Customers

938. Music in Spain is principally sold through supermarkets (supermarkets and wholesalers account for [50-60]*% of Sony BMG sales). Adding department stores to supermarkets and wholesalers, it appears that the large majority of sales ([70-80]*%) are achieved through non-specialised retailers.

TABLE 53 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Spain	[10-20]*%	[30-40]*%	[10-20]*%	[20-30]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

939. In Spain, (as well as in Austria, Belgium, France, Germany, Ireland, the Netherlands, Portugal and the United Kingdom), Sony BMG obtains its distribution logistics services from Arvato (part of the Bertelsmann Group). Arvato also provides logistics services to Universal and Warner in Spain. This situation is relatively exceptional and not observed in other larger European markets. Nevertheless, the notifying parties have submitted that Arvato is subject to strict confidentiality provisions as regards all the information it gathers within the course of performing its distribution function for record companies.

(b) Characteristics of demand for physical albums

Evolution of demand

940. Demand for recorded music in Spain has decreased significantly faster than in the EEA in general, with a 43% decrease between 2001 and 2006.

TABLE 54 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Spain	464	393	353	311	295	263	-43 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

941. The record industry is facing significant challenges with the decline in CD sales, piracy and the development of digital music. As table 55 below shows, online and mobile music sales in Spain, as in the rest of the EEA, have recently increased, however not to an extent where the decrease in physical sales is - or can be forecast to be - compensated by online and mobile music sales.

TABLE 55 – Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2004-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[20-30]*%

Source: Notifying parties; Commission analysis

942. The market survey reveals that only half of Spanish customers believed that legal on-line download had a negative impact on majors' physical sales. Conversely, illegal download, piracy and home CD burning are directly considered by a vast majority of customers to be the main factors for the fall in demand for CD albums. The majority of customers also consider that the introduction of on-line download triggered different reactions from the different majors²⁶⁹.

Concentration of sales

943. The notifying parties have submitted that in Spain domestic artists accounted for [40-50]*% of sales in 2006, versus [50-60]*% for international pop rock albums and [0-10]*% for classical music.

944. A significant proportion of total sales of CDs are concentrated among a few retailers. In Spain [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [60-70]*% of Sony BMG sales, largely aligned with the average sales concentration observed in all affected markets.

TABLE 56 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Spain	[80-90]*%	[60-70]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

945. In terms of new releases and number of albums on sale, Spain is comparable in size to smaller Contracting Parties to the EEA Agreement such as Sweden or Denmark, with [...] Sony BMG new releases in 2006 and a total of [...] Sony BMG albums on sale in the same year.

946. Among the largest markets, Spain is one of those where sales of CDs are the most concentrated among a few successful releases. In Spain, the notifying parties submit that their 50 highest sales represented [50-60]*% of the total number of units sold in 2005, versus up to [60-70]*% in the United Kingdom or as low as [20-30]*% in Germany. The focus on the biggest titles is clear, as the 50 albums that made up for [50-60]*% of all sales only represented a mere [0-10]*% of Sony BMG total Spanish catalogue, or [10-20]*% of its new releases in 2005.

²⁶⁹ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 2 Spanish customers out of 4 believe that legal on-line download is a competitive pressure to majors (versus 2 who do not); 3 customers out of 4 believe that illegal on-line download and piracy are a competitive pressure to majors (versus 1 who does not); 3 customers out of 4 believe that on-line download created a different reaction from the different majors (versus 1 who does not).

Charts

947. Chart albums²⁷⁰ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is in fact increasing in the EEA. This phenomenon has even been amplified in Spain where chart album sales represented [70-80]*% of the sales of the notifying parties in 2005 versus [50-60]*% in 2002. Non-chart albums account for a smaller share of Sony BMG sales than in most other affected markets.

TABLE 57 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Spain	[50-60]*%	[60-70]*%	[60-70]*%	[70-80]*%	[30-40]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

948. In Spain, albums with a PPD of less than EUR 7,50 do not qualify for the charts²⁷¹. This rule is fixed and can be reviewed by the chart committee ("Comité directivo de promusicae"). The chart committee is the executive body of the third party organisation responsible for collecting the necessary data and providing information for the publishing of the official weekly music charts. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts. All majors are represented in the committee which regularly organizes sessions. The Commission analysis of the minutes of the chart committee meetings does not indicate any coordinated behaviour to change chart rules with the possible objective to promote artists from major record companies at the expense of others.

949. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Spain, minimum prices for different categories of CDs exist in order to define whether albums will be allowed to enter and be rated in the charts. However, the minimum price level to enter Spanish charts is fixed at a low level if compared with PPDs generally used to price albums having the potential to realize high sales [EUR 9-14]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors. This conclusion remains valid when considering average wholesale prices (rather than the PPD) because of their lack of transparency.

Compilations

950. As shown in table 58 below, the value of sales of compilations is estimated to have been EUR 42 M in 2006 in Spain, representing 17% of the total market value for recorded music. However, compilations represent a share of Sony BMG revenue [...] reaching [0-10]*% of its total revenues.

²⁷⁰ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

²⁷¹ 7,50 € for single CD albums; 10,00 € for double CD albums; 12,00 € for triple CD albums.

TABLE 58 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Spain	248	42	17%	[...]*	[...]*	[0-10]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

951. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In Spain, the sales of compilation CDs have indeed decreased since 2003, [...] in proportion to the total revenue of Sony BMG during that period.

TABLE 59 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Spain (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Spain (% total sales)	[0-10]*%	[0-10]*%	[10-20]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

952. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

953. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Spain. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Spain.

954. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Spain, making collusion at the level of release prices unlikely.

955. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors²⁷². Even though the number of these main PPDs may seem very concentrated in Spain (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new

272 In 2006, Sony BMG used [...] PPDs like another major when the two remaining majors used respectively 1 and 4 PPDs for the majority of their sales in the first 20 weeks after release.

chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [0-5]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

956. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and not been challenged by any market participant. For example in Spain more than [20-30]*% of Sony BMG albums are re-priced before the end of the 20 weeks' period. The other majors follow a similar policy with the exception of one company for which only 10% of albums are re-priced within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

957. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Spain, [90-100]*% of Sony BMG albums and for example 86% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [40-50]*% and 47% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

958. In addition, the Commission has also analysed the Airtours criteria²⁷³ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

959. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

960. In 2006, Sony BMG used [50-100]* PPDs in Spain. They range from [...] to [...]*. Nevertheless, despite an important number of gross prices, the 5 most used PPDs account for [70-80]*% of Sony BMG's sales in 2006 (charts and back

²⁷³ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03)".

catalogue). This proportion is among the highest of all affected markets, close to the United Kingdom ([70-80]*%) or the Netherlands ([80-90]*%).

961. Concentrating on chart releases only, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [80-90]*%, [80-90]*% and [60-70]*%.

962. In addition, differences, not revealed by aggregated figures, exist between majors which are unlikely to be consistent with coordination. It is worth noting that the following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG and another major used [...] PPDs, and the two remaining majors used 1 and 4 PPDs respectively for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs from [10]*to [15]*and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 5,2-12,80, EUR 10-13,50 and EUR 9,30 giving a maximum range of main PPDs of EUR [5,2 -15]*, a variation of [60-70]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

963. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

964. In Spain, customers and record companies did not reports that the existence of any internet platform collecting information on PPDs of all albums, such as is the case in France (www.titelive.fr) or in Germany (www.phononet.de). PPD information is directly transmitted by each record company to its customers.

965. Bertelsmann owns "Circulo de Lectores" in Spain which sells music albums (club business). As a retailer, Circulo de Lectores has access to PPDs of all albums, including PPDs of Sony BMG competitors. Nevertheless Circulo de Lectores has confirmed that it does not disclose any record company pricing (PPDs or discounts) information to Sony BMG or other third parties. In addition, other majors do not have retail activities and therefore would not have access to competitors' PPD via this potential information source.

966. In Spain, Sony BMG has [...] sales representatives. They are in charge of the customer relationship with retailers and are principally responsible for negotiating prices and new shipments to retailers. The notifying parties submit that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

967. During the market investigation, half of customers have submitted that they believe that record companies generally know about PPDs of their competitors²⁷⁴. This belief seems to be based on the habit among the majority of retailers to use information on competing majors' prices when negotiating with other record companies²⁷⁵. Surprisingly, one customer who indicated that he did not transmit competitors' information submitted that he thought that majors knew their competitors' PPDs, and conversely. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

968. Therefore, it would appear possible for Sony BMG and the other majors to collect a certain amount of PPD information through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their scarce resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them, for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Spain, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

²⁷⁴ Question n°31 – Questionnaire to customers 12 February 2007 – 2 Spanish customers out of 4 submit that record companies know PPDs of their competitors, versus 1 who believes it is not possible, and 1 who has no opinion.

²⁷⁵ Question n°30 – Questionnaire to customers 12 February 2007 – 2 Spanish customers out of 3 submit that they use information on other majors' prices when negotiating with one record company, versus 1 who states that he does not.

969. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers, difference in discounts contractually negotiated by different majors with a same customer, difference in average discounts granted by all majors to a same customer); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

970. Based on sales realized by Sony BMG with its top 5 customers in 2005, the total discount range varies from [10-20]*% to [20-30]*%. [Several retailers]* all receive similar average discounts at around [10-20]*% reduction compared to PPDs²⁷⁷. Nevertheless, within these similar overall discounts, the discount structure of these [...] retailers is significantly different. Some do not receive file discounts; other only receive campaign or retrospective discounts. These [...] retailers are only partly comparable [...]*.

971. One customer receives different discounts from different record companies. With regards to the four majors, the analysis of the contracts between the different majors and their main customers shows that one retailer generally obtains a different discount offer from the different majors in terms of discount percentage and discount structure (relative importance of file discounts, co-op payments, etc.).

972. It could be argued that this diversity in discounts is only apparent and ultimately leads to similar average discounts. This assumption was, however, not confirmed by the market investigation. Indeed, although the investigation has brought some examples of Spanish customers receiving similar average total discounts from several majors, this is not true for all customers. Observed differences in average discount among the top five customers are as high as [0-10]*% for some customers²⁷⁸.

973. Among the largest affected markets, Spain is the only Contracting Party to the EEA Agreement where campaign discounts account for the bulk of total discounts. Campaign discounts account for [70-80]*% of total discounts granted by Sony BMG to its top 5 customers, versus [10-20]*% for file discounts and [0-10]*% for

²⁷⁶ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

²⁷⁷ In 2006 these [...] retailers also received similar average discounts from Sony BMG [...]*.

²⁷⁸ [...]*.

retrospective discounts. The notifying parties did not provide information on co-op payments.

974. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Spain from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). Different majors also provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG exclusively granted [0-10]*% file discounts to one of the top 5 customer, whereas another major exclusively granted file discounts of 5% and 6% of PPD. This also applies to several other main customers among the top 5 customers in Spain.

975. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer principally received [two different discounts ranging from 10-20]*% campaign discounts from Sony BMG ([50-70]*% of its chart sales to that customer), whereas the same customer principally received 5%, 6%, 14% and 17% campaign discount from another major (86% of chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

976. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts. The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Spain apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

977. Retrospective discounts are not significant for all customers. They generally correspond to a fixed annual discount granted to a specific customer. Their rate is only known at the end of fiscal year and their level depends on overall sales of the retailer. They are generally stable from year to year, [...] * Majors grant different retrospective discounts to a same customer.

978. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. Most Spanish customers believe that major record companies do not know discounts applied by their competitors²⁷⁹. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can

²⁷⁹ Question n°31 – Questionnaire to customers 12 February 2007 – 3 Spanish customers out of 4 submit that record companies do not know discounts of their competitors, versus 1 who has no opinion.

however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

979. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Spain, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

980. Spanish customers have a mixed view on whether record companies monitor retail prices²⁸⁰. Nevertheless, no retailer reported to actually participate in such a monitoring via exchange of price information.

981. Like in other affected markets, Spanish retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, customers do not have a firm view on whether it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices²⁸¹.

982. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Spain, two customers provided retail and net wholesale prices of their new releases. It appears that they apply relatively regular and stable mark-ups to new releases, however one of the retailer (supermarket) applied "irregular" mark-ups to 2 of the 20 new releases²⁸².

983. The information available to the Commission indicates that the possibility to reverse-engineer prices is also limited in the very early life of an album (around its date of release) and reduces as the album matures. The parties notably submitted an analysis of retail prices in Spain²⁸³ showing that mark-ups were already irregular 8 or 10 weeks after release, therefore confirming the view among retailers.

²⁸⁰ Question n°32 – Questionnaire to customers 12 February 2007 – 2 Spanish customers out of 4 report that record companies monitor retail prices, versus 2 who submit that they believe that record companies do not do so.

²⁸¹ Question n°33 – Questionnaire to customers 12 February 2007 – 1 Spanish customer out of 4 submits that record companies cannot reverse-engineer retail prices to deduct net wholesale prices, versus 1 who believes it is possible to do so, and 2 who have no opinion.

²⁸² Based on 5 last new releases of all majors, one retailer applies a mark-up which deviates from the average mark-up by 5% on average with a maximum deviation of 10%. The second retailer applies a mark-up which deviates from the average mark-up by 4% on average with a maximum deviation which can however reach 28%.

²⁸³ RBB 2006 retail price study – 14 February 2007.

984. In conclusion, the investigation indicates that in Spain the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so much room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Spain to sustain tacit coordination between major record companies.

985. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Spain, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Spain. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of caution.

(b) Retaliation

986. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

987. In Spain, Sony BMG revenues stemming from compilation albums account for only [0-10]*% of total revenue, significantly below the average proportion observed at the level of all affected markets ([10-20]*%). This clearly limits the credibility of such a retaliation mechanism. In addition the importance of compilation revenue is under threat because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

988. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

989. In conclusion, the Commission did not identify any action in Spain that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

990. In Spain, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.
991. Customers are concentrated [...]*. These [...]*retailers only realize a small proportion of their turnover with music albums and could therefore be considered as benefiting from significant buyer power.
992. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
993. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Spanish customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) *Conclusion: coordination is unlikely on the market for recorded music*

994. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.
995. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model. The level of transparency is however not sufficient to allow the majors to verify that the others respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Spanish market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.
996. It can therefore be concluded that on the Spanish market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

f) Austria

(1) Characteristics of the market

(a) Market players

Competitors

997. Universal has led the Austrian market for several years with a 35% market share. Since the merger was implemented, Sony BMG has been second on the market with a 2006 market share of 22%, a slight increase versus the 2002 market share of 21% achieved by Sony and BMG altogether. EMI and Warner, respectively 3rd and 4th, continued in 2006 with their downward market share trend (EMI with a 14% market share in 2006 versus 16% in 2002, and Warner with a 9% market share in 2006 versus 12% in 2002). Independents have enjoyed as stable combined market stable (23% in 2002 – 22% in 2006). The main independent record companies in Austria are Ech-Zyx Music, Edel Musica, Hoanzl, Lotus records and Soul Seduction.

TABLE 60 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Austria	104	22	35	9	14	20
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

998. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

999. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Austria, after a [...] decrease in 2003 (Sony and BMG combined roster fell from [...] artists in 2002 to [...] artists in 2003), Sony BMG has kept the number of artists on its roster stable, with [...] artists in 2006.

1000. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Austria, representing some [50-60]*% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [20-30]*% of its total number of artists signed on the previous year.

1001. During the market investigation, the Commission found that record companies are competing with regard to the discovery and signing of artists²⁸⁴.

Customers

1002. The Austrian sales of Sony BMG are overwhelmingly performed through Department Stores ([70-80]*% in 2006). The remaining sales are mainly done through wholesalers ([10-20]*%), and the rest is split between specialised music chains and independent music stores ([0-10]*% each). Almost all sales are achieved through non-specialised retailers.

TABLE 61 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Austria	[10-20]*%	[0-10]*%	[0-10]*%	[70-80]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0- 10]*%	[0- 10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1003. The notifying parties submit that they do not have bilateral distribution arrangements with other majors, and the market investigation has confirmed that there are no distribution logistics deals between majors in Austria.

1004. Sony BMG distributes its records through Arvato, a subsidiary of Bertelsmann. Other majors either have their own distribution logistics facilities or rely on third party warehouses and delivery systems for which they pay a fee. In both cases, majors usually also distribute products of independents and Sony BMG confirmed that it distributes the records of several independent labels in Austria.

(b) Characteristics of demand for physical albums

Evolution of demand

1005. Austria has witnessed a slightly smaller decrease than the general downward trend identified at the EEA level, with a 27% decrease in total market value between 2001 and 2006.

TABLE 62 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Austria	143	129	125	116	111	104	-27 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

²⁸⁴ Question n°17a – Questionnaire to customers 12 February 2007 – 1 out of 4 (25%) Austrian customers submit that major recording companies compete on artists offering, 3 out of 4 (75%) did not have a view.

1006. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 63 below shows, online and mobile music sales in Austria, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 63 - Sony BMG sales (MEUR)						
Austria	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [10-20]* %

Source: Notifying parties; Commission analysis

1007. Austrian customers have a mixed view on whether the introduction of on-line download did trigger different reactions or not from the different majors²⁸⁵.

Concentration of sales

1008. The notifying parties have submitted that in Austria, domestic artists accounted for [10-20]*% of sales in 2006, versus [70-80]*% for international pop rock albums and [10-20]*% for classical music. The share of domestic artists in Austria is the [...]* lowest in the EEA, after Belgium. It should however be noted that German artists are considered as international artists, although they generally sing in German, and could rather be considered as local artists.

1009. A significant proportion of total sales of CDs are concentrated among a few retailers. In Austria, [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [80-90]*% of Sony BMG sales, which is higher than the average sales concentration observed in all affected markets.

TABLE 64 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Austria	[80-90]*%	[80-90]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1010. In 2006, Austria was the market for Sony BMG with the [...]* highest number of new releases [...]*, and a total of [...]* Sony BMG albums on sale in the same year. This does not reflect the real size of the Austrian market, but rather the fact that Germany and Austria are close markets.

²⁸⁵ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 1 out of 4 (25%) Austrian customers believe that legal on-line download is not a competitive pressure to majors, another (25%) believe it is to some extent and two (50%) have no view; conversely, 1 out of 4 (25%) customers believe that illegal on-line download and piracy are a competitive pressure to majors, another (25%) believe it is only to some extent and two (50%) have no view; 1 out of 4 (25%) customers believe that on-line download did not create a different reaction from the different majors, 1 (25%) believes it did, and two (50%) have no views.

Charts

1011. Chart albums²⁸⁶ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Austria, the proportion of Sony BMG sales accounted for by chart albums is indeed increasing, and Austria has the [...] * highest percentage of Sony BMG sales realised through chart albums ([60-70] *% in 2005) in the whole EEA.

TABLE 65 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Austria	[40-50] *%	[50-60] *%	[50-60] *%	[60-70] *%	[10-20] *
Sum of all affected EEA markets	[50-60] *%	[50-60] *%	[50-60] *%	[60-70] *%	[10-20] *

Source: Notifying parties; Commission analysis

1012. The chart compiler in Austria is Media Control Austria²⁸⁷. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Austria. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1013. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Austria, only CDs albums with a list price higher than EUR 8,50 for the 8 weeks prior to the 1st chart week will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Austrian charts is fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [EUR 10-15] *. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1014. As shown in table 66 below, the value of sales of compilations is estimated to have been EUR 104 M in 2006 in Austria, representing 18% of the total market value for recorded music. For Sony BMG, compilations represented a higher share of revenue with [20-30] *% of its total revenue.

TABLE 66 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Austria	104	19	18 %	[...] *	[...] *	[20-30] * %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...] *	[...] * ⁽¹⁾	[10-20] * % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

²⁸⁶ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

²⁸⁷ www.austriatop40.at

1015. The notifying parties submit that the market for compilations is declining much faster than the overall record market in the EEA. This is notably the case in Austria, where the sales of compilation CDs have decreased since 2002 (27% of total Austrian sales in 2002, versus 18% in 2006). Sales of compilation albums in proportion to Sony BMG sales [...]*.

TABLE 67 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Austria (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Austria (% total sales)	[20-30]* %	[30-40]*%	[20-30]* %	[20-30]* %	[20-30]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) *Theories of harm – Airtours criteria*

1016. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1017. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Austria. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Austria.

1018. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Austria, making collusion at the level of release prices unlikely.

1019. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors²⁸⁸. Even though the number of these main PPDs may seem very concentrated in Austria (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

²⁸⁸ In 2006, Sony BMG used [...] PPD, another major 2 PPD and the two remaining majors 3 PPDs for the majority of their sales in the first 20 weeks after release.

1020. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. For example in Austria more than [20-30]*% of Sony BMG albums are re-priced before the end of this period. The other majors follow a similar policy with the exception of one company for which only 10 % of albums are re-priced within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1021. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Austria, [20-30]*% of Sony BMG albums and for example 68% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [0-10]* and 4% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1022. In addition, the Commission has also analysed the Airtours criteria²⁸⁹ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1023. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1024. In 2006, Sony BMG used [100-150]*PPDs in Austria. [...] Despite an important number of gross prices, the 5 most used PPDs account for [50-60]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is the [...] of all Contracting Parties to the EEA Agreement.

1025. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [80-90]*%.

²⁸⁹ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

1026. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...] PPD, another major 2 PPDs and the two remaining majors 3 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs is also different between the different majors. Sony BMG used the PPD of EUR [12-14]*, but the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 10.25-13.25, EUR 12.80-13.5 and EUR 13.5-15.5, giving a maximum range of main PPDs of EUR 10.25-15.50, a variation of [30-40]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1027. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

1028. The notifying parties submit that in Austria, Sony BMG has [...] sales representatives, who are responsible for more than [...] stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1029. During the market investigation, Austrian customers interviewed have a mixed view on whether record companies generally know about PPDs of their competitors or not²⁹⁰. For those who believe that record companies generally know about PPDs of their competitors, this belief may partly be based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as 3 out of 4 Austrian customers interviewed submit that they are sometimes engaged in such practices²⁹¹. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain

²⁹⁰ Question n°31 – Questionnaire to customers 12 February 2007 – 1 out of 4 (25%) Austrian customers submit that record companies know the PPDs of their competitors, 1 (25%) submits they do not, and two (50%) have no opinion.

²⁹¹ Question n°30 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) Austrian customer submit that they use information on other majors' prices when negotiating with one record company, 1 (25%) submits that it does so, but not regularly, and the last one (25%) has no opinion.

amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is in any case merely a starting point for negotiations.

1030. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Austria, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*²⁹²

1031. The Commission has demonstrated the lack of transparency of discounts by illustrating that discounts are not aligned between majors, and by underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

1032. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [10-20]*% of gross price. Among the top three customers, the total discount range varies from [10-20]*% to [20-30]*%. In Austria, file discounts account for approximately [50-60%]* of total discounts and campaign discounts for approximately [20-30%]* for Sony BMG. The company however grants different level of total discounts to its different customers.

1033. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Austria from one year to the other (meaning that the most

²⁹² Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised during a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

commonly used file discount rates do not vary significantly in proportion from year to year). Different majors also provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG granted [two different discounts ranging from 0 to 20]*% file discounts to one of the top 5 customer (for [80-100]*% of its chart sales to that customer), whereas another major granted file discounts of 7% and 8% (for 90% of the other major's chart sales to that customer). This also applies to several other main customers among the top 5 customers in the Contracting Party to the EEA Agreement.

1034. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer received [0-10]*% campaign discounts from Sony BMG ([40-60]*% of its chart sales to that customer), whereas the same customer also received 5% campaign discount, but in addition campaign discount of 3% and 6% from another major (39% of that other major's chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

1035. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts²⁹³. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Austria apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1036. Discounts therefore contribute to limiting the transparency on the market, as confirmed by the market investigation, where none of the 4 customers interviewed believe that major record companies know the discounts applied by their competitors²⁹⁴.

1037. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Austria, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

293 The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

294 Question n°31 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) Austrian customers submit that record companies do not know the discounts of their competitors, two (50%) have no view.

Retail prices

1038. 50% (2 out of 4) of Austrian customers submit that record companies do monitor retail prices²⁹⁵.

1039. Like in other affected markets, Austrian retailers apply a mark-up on the net wholesale price of albums to fix retail prices. Only 1 out of 4 (25%) Austrian customers interviewed believe it is feasible for the majors to deduce –but only roughly- net wholesale prices of their competitors through the knowledge of retail prices²⁹⁶.

1040. The information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Austria, one customer provided retail and net wholesale prices of its new releases. This customer applied an irregular mark-up to new releases²⁹⁷. Although the analysis has been conducted on one retailer only, the Commission did not find any evidence that mark-ups applied by other retailers should be more regular and predictable.

1041. In conclusion, the investigation indicates that in Austria the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Austria to sustain tacit coordination between major record companies.

1042. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Austria, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Austria. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

²⁹⁵ Question n°32 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) of Austrian customers report that record companies do monitor retail prices, 1 (25%) believes it is possible, and 1 (25%) has no views.

²⁹⁶ Question n°33 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) Austrian customers do not have a view, 1 (25%) submits that record companies know the general conditions of their competitors through staff rotation between majors, and 1 (25%) believes that it is possible, but only very roughly, as there are too many unknown factors.

²⁹⁷ Based on 5 last new releases of all majors, the retailer applies a mark-up which deviates from the average mark-up by 6% on average. Maximum deviation however reaches 22% and 4 albums out of 20 are priced with a mark-up deviating from the average by more than 10%.

(b) Retaliation

1043. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1044. In Austria, Sony BMG revenues stemming from compilation albums accounted in 2006 for [20-30]*% of total revenue, a much higher proportion than what is observed at the level of all affected markets ([10-20]*%). It could therefore be argued that in Austria, a retaliation mechanism excluding a deviating company from compilation deals would be particularly credible. Nevertheless it should also be noted that the importance of compilation revenue is under threat because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

1045. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1046. In conclusion, the Commission did not identify any action in Austria that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(c) Reaction of competitors and customers

1047. In Austria, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1048. Customers are more concentrated in Austria than in other Contracting Parties to the EEA Agreement, with the top 5 Sony BMG customers accounting for [70-90]*% of its sales in 2006. Like in most other Contracting Parties to the EEA Agreement, these customers are not music specialists, which can theoretically strengthen their buyer power.

1049. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1050. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Austrian customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1051. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which is found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1052. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Austrian market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1053. It can therefore be concluded that on the Austrian market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

g) Belgium

(1) Characteristics of the market

(a) Market players

Competitors

1054. Universal Music Group retained its position of largest record company in 2006 in Belgium with a market share of 29% (30% in 2002). EMI was the second largest record company with a 26% market share and Sony BMG continued to see its market share reduce, from 23% in 2002 to 19% in 2006. Independent record companies continued to decrease their combined market share (22% in 2002) to reach 15% in 2006. The main independent record companies in Belgium are PIAS and V2.

TABLE 68 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Belgium	116	19	29	10	26	16
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1055. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1056. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Belgium, Sony BMG decreased the number of artists on its roster, from [...] in 2002 to [...] in 2006.

1057. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Belgium, representing almost [20-30]*% of its total number of artists signed on the previous year. In the same year, [...] left Sony BMG, representing some [10-20]*% of its total number of artists signed on the previous year.

1058. The market investigation highlighted that half of Belgian customers view the competition among major recording companies taking place on the discovery and signing of new artists²⁹⁸.

Customers

1059. A significant proportion of the Belgian sales of Sony BMG is performed through wholesalers ([30-40]*% of sales with 5 wholesalers [...]). The rest of sales are mainly concentrated among [...] which have together a share of sales of [30-40]* while direct sales to supermarkets have recently increased and represented [10-20]*% of total sales in 2006.

TABLE 69 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/Internet	Others
Belgium	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

²⁹⁸ Question n°17a – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) Belgian customers submit that major recording companies compete on artists offering, 1 out of 4 (25%) claim there is no competition, and 1 out of 4 (25%) claim that competition takes place on space in shop / visibility / promotion.

Record companies distribution and licensing deals.

1060. The notifying parties submit that they do not have any distribution logistics joint ventures or bilateral distribution arrangements with any other major record company in Belgium. In Belgium (as well as in Austria, Belgium, France, Ireland, the Netherlands, Portugal, Spain, and the United Kingdom), Sony BMG obtains its distribution logistics services from Arvato (part of the Bertelsmann Group). Other majors either have their own distribution logistics facilities or rely on third party warehouses and delivery systems for which they pay a fee. In both cases, majors usually also distribute products of independents. Other independent labels also have their own distribution organisation and offer these services to other independents in Belgium.

(b) Characteristics of demand for physical albums

Evolution of demand

1061. Belgium has followed the general downward trend identified at the EEA level with a 30% decrease in total market value between 2001 and 2006.

TABLE 70 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Belgium	173	158	142	139	129	121	-30 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1062. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 71 below shows, online and mobile music sales in Belgium, as in the rest of the EEA, have recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 71 - Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-[40-50]*%

Source: Notifying parties; Commission analysis

1063. Three out of four (75%) customers consider that the introduction of on-line download triggered different reactions from the different majors towards this new phenomenon²⁹⁹.

²⁹⁹ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 4 out of 4 (100%) Belgian customers believe that legal on-line download is not a competitive pressure to majors; 2 out of 4 (50%) customers believe that illegal on-line download and piracy are a competitive pressure to majors (versus 1 out of 4 which do not); 3 out of 4 (75%) of customers believe that on-line download created a different reaction from the different majors.

Concentration of sales

1064. The notifying parties have submitted that in Belgium, domestic artists accounted for [10-20]*% of sales in 2006, versus [80-90]*% for international pop rock albums and [0-10]*% for classical music.[...]*. It should however be noted that French artists are considered as international artists, although they generally sing in French, and could rather be considered as local artists.

1065. A significant proportion of total sales of CDs are concentrated among a few retailers. In Belgium, [70-80]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [50-60]*% of Sony BMG sales. This concentration is lower than the average sales concentration observed in all affected markets.

TABLE 72 - Concentration of Sony BMG sales on top customers – 2006		
Country	Top 10	Top 5
Belgium	[70-80]*%	[50-60]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1066. In 2006, Belgium was the market for Sony BMG with the [...] highest number of new releases [...] and a total of [...] Sony BMG albums on sale in the same year.

Charts

1067. Chart albums³⁰⁰ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. This is also the case in Belgium where chart album sales represented [60-70]*% of the sales of the notifying parties in 2005 (versus [50-60]*% in 2002). Chart albums account in Belgium for about the same share of Sony BMG sales as in other affected markets.

TABLE 73 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Belgium	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1068. The chart compiler in Belgium is Ultratop/AC Nielsen. Belgium has 3 national album charts: Flemish, Walloon, and National, each recording the top 200 albums within each grouping. The chart committee is the executive body of the third party organisation responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Belgium. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

³⁰⁰ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

1069. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Belgium, only CDs albums with a list price higher than 8,50 EUR will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Belgium charts is fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [10-16]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1070. As shown in table 74 below, the value of sales of compilations is estimated to have been EUR 16 M in 2006 in Belgium, representing [10-20]*% of the total market value for recorded music. Compilations represent a slightly higher share of Sony BMG revenue, with [10-20]*% of its total revenues.

TABLE 74 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Belgium	115	16	14%	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1071. The notifying parties submit that the market for compilations is declining much faster than the overall record market. In Belgium, the sales of compilation CDs have indeed decreased from 2002 to 2004, but have increased again to come back to their 2002 level in 2005 and 2006. Sales of compilation albums in proportion to Sony BMG sales [...]*.

TABLE 75 – Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Belgium (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Belgium (% total sales)	[10-20]* %	[10-20]* %	[0-10]* %	[10-20]* %	[10-20]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1072. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1073. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Belgium. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Belgium.

1074. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. Although the drawbacks observed in Belgium are the least clear cut of all Contracting Parties to the EEA Agreement analysed, they still make collusion at the level of release prices unlikely.

1075. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³⁰¹. Even though the number of these main PPDs may seem very concentrated in Belgium (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1076. Secondly, contrary to the situation observed in other affected markets, a significant proportion³⁰² of new releases have relatively stable PPDs within the first 20 weeks after their release [...]*.³⁰³ Several independent competitors and 2 out of 4 Belgian customers interviewed suggested that it was surprising that prices of major record companies were so stable given the severe fall in demand for CDs in Belgium (-30% between 2001-2006 overall, although chart album sales did not experience such a drop). One however submitted that decreasing the price of CDs from for example EUR 15.90 retail to EUR 9 for new releases would not make this CD sell more, as the alternative is free illegal download from the internet, which would be unaffected by that price decrease. In that context, it could be argued that it may be a logical business strategy for recording companies to maintain a certain level of price stability in a market that seems to be collapsing, especially at a time when the most probable future market for the sale of music -the on-line market- is still at an infant stage and is not providing enough revenues to compensate for the losses endured in the physical market.

1077. Thirdly, a finding of campaign discounts applied also to new releases would not seem consistent with tacit collusion. The analysis of all four majors' transactions has highlighted that campaign discounts are only applied to some albums and that their level varies between albums and between retailers, as well as during the life cycle of the album. They however can apply to a significant proportion of new releases and can impact net wholesale prices³⁰⁴.

301 In 2006, Sony BMG used [...] PPDs, and the three other majors respectively used 2, 4, and 3 for the majority of their sales in the first 20 weeks after release.

302 [...]*.

303 [...]*.

304 [...]*.

1078. In addition, the Commission has also analysed the Airtours criteria³⁰⁵ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1079. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics. The Belgium market was especially carefully examined as, as will be developed, discounts might appear to be more transparent than in the other affected markets.

Published Prices to Dealers

1080. In 2006, Sony BMG used [50-100]* PPDs in Belgium. [...] Nevertheless, despite an important number of gross prices, the 5 most used PPDs account for [70-80]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is in the average of the majority of other Contracting Parties to the EEA Agreement.

1081. When concentrating on chart releases only, however, this proportion increases further. In 2006, the 5 most used PPDs of Sony BMG represented [80-90]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [70-80]*% and [80-90]*%.

1082. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...] PPD, and the three other majors respectively 2, 4 and 3 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG main PPDs ranged between [5]* and [14]*, while the three other majors used main PPDs ranging from EUR 12.8-15.4, EUR 12.5-15.5, and EUR 12.7-13.5, giving a maximum range of main PPDs of EUR [5-15.5]*, a variation of [60-70]*%.

³⁰⁵ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

(iii) Finally, the number and level of main PPDs used by the different majors vary over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1083. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

1084. The notifying parties submit that in Belgium, Sony BMG has [...] sales representatives, who are responsible for [...] customer accounts, representing some [...] stores (excluding non-traditional retailers), and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1085. In Belgium, record companies, including the four majors, transmit information relative to their albums to Phononet³⁰⁶. The notifying parties submit that the Benelux version of the “Phononet” online database includes the names of all releases, the artist, the composer, the release date and list prices. Access to the database is password restricted and retailers will generally obtain a password to the database. According to the notifying parties, only one individual within Sony BMG (active in logistics and responsible for managing the software interface with Phononet) has a password, but in practice, Sony BMG does not use the password to monitor list prices. Phononet also stated that since the beginning of 2007, the possible access of majors to the PPDs of their competitors has been technically completely removed. In addition, list prices of individual albums are occasionally published in trade magazines, although the notifying parties submit that this is not systematic and not monitored by Sony BMG.

1086. The notifying parties submit that Bertelsmann's Belgian affiliate company Belgique Loisirs does not have access to the Benelux Phononet system. All Belgique Loisirs' recorded music purchases are conducted through its French sister company – France Loisirs – which does not have online access to record company list price information in any Contracting Party to the EEA Agreement.

1087. In Belgium, Sony BMG also has a subscription to GfK website that provides weekly and monthly market information on total retail sales per record company, album sales and average retail price of chart albums across all retailers and market share.

1088. During the market investigation, half of Belgian customers have submitted that they believe that record companies generally know about PPDs of their competitors³⁰⁷. This belief seems to be based on the habit among the majority of retailers to use

³⁰⁶ www.phononet.be

³⁰⁷ Question n°31 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) of Belgian customers submit that record companies know the PPDs of their competitors and the other 2 customers (50%) have no opinion.

information on competing majors' prices when negotiating with other record companies³⁰⁸. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

1089. Therefore, it would appear possible for Sony BMG and the other majors to collect a certain amount of PPD information through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs.

1090. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Belgium, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*³⁰⁹

1091. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to the other, majors grant different campaign discounts to a same customer); and (iv) other discounts.

³⁰⁸ Question n°30 – Questionnaire to customers 12 February 2007 – 3 out of 4 (75%) of Belgian customers submit that they use information on other majors' prices when negotiating with one record company; 1 out of 4 (25%) has no opinion.

³⁰⁹ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

1092. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varies from [20-30]*% to [20-30]*%. In Belgium, file discounts account for approximately [20-30%]* of total discounts and campaign discounts for approximately [50-60]* for Sony BMG. The company however grants different level of discounts to its different customers [...]*.

1093. Unlike in other Contracting Parties to the EEA Agreement, file discounts do not appear to be so stable in Belgium from year to year (meaning that the most commonly used file discount rates vary significantly in proportion from year to year). Different majors do however also, as in other Contracting Parties to the EEA Agreement, provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG granted [0-10]*% file discounts to one of the top 5 customer (for [80-100]*% of its chart sales to that customer), whereas another major also granted to that customer file discounts of [0-10]*%, but also of 12% (for 39% of chart sales). This also applies to several other main customers among the top 5 customers in the Contracting Party to the EEA Agreement.

1094. Campaign discounts are also particularly fluctuant in Belgium from year to year (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer received [two different campaign discounts ranging from 0 to 20%]* from Sony BMG (accounting for [20-40]*% of the majors chart sales to that customer), whereas the same customer received campaign discounts of 2%, 3% and 4% from another major (accounting for 77% of the other major's chart sales to that customer). This also applies to several other main customers within the top 5 customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

1095. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³¹⁰. In apparent contradiction with statement in the precedent paragraph, this analysis has highlighted that discounts seem relatively more predictable in Belgium than in other Contracting Parties to the EEA Agreement. [...]*The Commission analysis at the level of transaction data shows that (i) the PPD of an album, (ii) the major record company producing the album, (iii) the album chart presence, (iv) the album release date and (v) the concerned customer are elements that determine the level of discounts of an album (for a certain customer) in the first 20 weeks of sales with a precision of ± 2 points of percentage in 81-94% of the instances.

1096. Nevertheless, this does not necessarily imply that that an external market participant would be able to deduce the discount granted to a specific album. Such market participant would only be able to deduce that all albums having similar characteristics with regard to the 5 elements as stated in the above paragraph will have

³¹⁰ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

a similar discount. In the absence of reference level of discount for such a group of album, the discount level would not be transparent.

1097. In addition, this causal relation between the 5 elements and the discount level of albums is stronger for Belgium than for other Contracting Parties to the EEA Agreement notably because the most important customer, which acts both as a wholesaler and as a retailer, has a very simple discount structure. The discounts granted to a growing customer (around 10% of the titles sold in Belgium), prove to be more complex than, for example, those of other customers. These two elements chasten the level of predictability of discount levels.

1098. It is however worth emphasizing that, as such, the evidence brought upon by the analysis of retail transactions in Belgium is not in itself evidence that discounts are transparent between the majors, as each major's ability to predict discount levels granted by their competitors crucially depend on its ability to observe, amongst other things, PPDs of its competitors' albums,.

1099. Customers have a mixed view on this issue. 50% believe that major record companies know discounts applied by their competitors and 50% have no opinion³¹¹. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

1100. It thus appears that Sony BMG and the other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest to exaggerate statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Belgium, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1101. Like in other affected markets, Belgian retailers apply a mark-up on the gross or net wholesale price of albums to fix retail prices.

1102. In the market investigation, two Belgian retailers believe that it is easily possible for majors to reverse-engineer the net wholesale price of CD albums from their retail prices by calculating the coefficients taken by the different retailers in the market. Others, given their discount structure or commercial strategy (one retailer aligns its retail prices on the lowest price of its competitors which has a result affects its margin for each individual CD), believe that such reverse engineering would be difficult, and / or un-precise. One of the top 5 retailers explained that they apply a

³¹¹ Question n°31 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) of Belgian customers submit that record companies know the discounts of their competitors and the other 2 customers (50%) have no opinion.

standard mark-up of between 1.59 to 1.63 to PPD, on which they apply a 15% discount for new albums (and more for really big artists such as for example U2); if PPDs were fully observable, such reverse engineering could indeed be performed, but this is not systematically the case. Belgian customers have a mixed view on whether record companies monitor retail prices³¹², with 50% of them reporting that record companies do not do so, and the Commission's attempt to reverse engineer the net price of different majors based on the general mark-up formula of this retailer, or from the retail price of competing majors, gave a margin of error of several euros, too much to allow for monitoring the terms of a possible tacit collusion between majors.

1103. The Commission has also tested whether reverse-engineering was feasible in Belgium using (an updated version of) the retail price study performed by the Parties in 2004, during the first procedure, as well as some data very recently collected by the Parties in Belgium³¹³. Despite reserves on the methodology used by these studies, it can be concluded that reverse-engineering cannot be performed with enough precision to provide a sufficient level of transparency on mark-ups and, ultimately, on discounts.

1104. In conclusion, the investigation indicates that in Belgium, the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices is higher than in other Contracting Parties to the EEA Agreement, but that it is still not sufficient to allow for coordination in Belgium, in as much as it does not allow to spot deviations with sufficient precision to sustain tacit coordination between major record companies.

1105. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Belgium, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies. This finding is further strengthened when considering the asymmetry of market shares between Sony BMG (declining 19%) and Universal, the market leader on the Belgian market (one third stronger). The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1106. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

³¹² Question n°32 – Questionnaire to customers 12 February 2007 – 1 out of 4 (25%) of Belgian customers report that record companies monitor retail prices, versus 2 out of 4 (50%) who submit that record companies do not do so, and 1 out of 4 (25%) who has no opinion.

³¹³ Belgium Retail Price Study (8 June 2004 and 31 August 2007).

1107. In Belgium, Sony BMG revenues stemming from compilation albums account for [10-20]*% of total revenue, above the average proportion observed at the level of all affected markets ([10-20]*%). It could therefore be argued that in Belgium, a retaliation mechanism excluding a deviating company from compilation deals would be particularly credible. Nevertheless it should also be noted that the importance of compilation revenue is under threat because of the fall in sales of such albums ([10-20]*% of total Belgian revenues in 2002 to [10-20]*% in 2006), which again is linked to the development of online, customer-made, compilations.
1108. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.
1109. In conclusion, the Commission did not identify any action in Belgium that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1110. In Belgium, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.
1111. Customers are less concentrated than in other Contracting Parties to the EEA Agreement, with the top 5 customers accounting for [40-60]*% of Sony BMG sales. Among them, super markets such as Carrefour or Colruyt, and to a lesser extent MediaMarkt (a department store) only realize a small proportion of their turnover with music albums and could therefore be considered as benefiting from more significant buyer power.
1112. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
1113. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Belgian customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1114. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1115. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Belgian market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1116. It can therefore be concluded that on the Belgian market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

h) Denmark

(1) Characteristics of the market

(a) Market players

Competitors

1117. Sony BMG lost its number one position in Denmark to Universal in 2005, and reached a market share of 20% in 2006. Warner and EMI continued to loose market share to reach respectively 11% in 2006 (14% in 2002) and 18% in 2006 (21% in 2002). Independents increased their market share versus 2002 (24%) to reach 28% in 2006. The main independent record companies in Denmark are Bonnier Music, CMC and Copenhagen Records.

TABLE 76 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Denmark	84	20	23	11	18	28
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1118. Sony BMG is not the market leader and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1119. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Denmark, however, Sony BMG increased the number of artists on its roster, from [...] in 2002 to [...] in 2006.

1120. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Denmark, representing some [20-30]*% of its total number of artists signed on the previous year. In the same year, [...] left Sony BMG, representing [0-10]*% of its total number of artists signed on the previous year.

Customers

1121. Contrary to some other Contracting Parties to the EEA Agreement, [50-60]*% of the Danish sales of Sony BMG are done through Specialized Music Chains. [20-30]*% is done through wholesaler, and around [10-20]*% directly to respectively supermarkets and independent music stores.

TABLE 77 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Denmark	[20-30]*%	[10-20]*%	[50-60]*%	[0-10]*%	[10-20]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1122. The notifying parties submit that until 1st of March 2007, Sony BMG, one major and 3 other independents were distributed by GDC³¹⁴. Since then, Sony BMG moved its distribution to a new hub and the company, together with two other majors and independents are now using the distribution services of ENS, the same distribution company as in Norway and Sweden. The notifying parties also submit that these arrangements are purely related to distribution and do not involve any sales or pricing functions. The remaining major remains distributed in Denmark through its German subsidiary. Independent record companies use external distribution companies or their own distribution services.

³¹⁴ According to the notifying parties, GDC has been investigated by the Danish Competition Authority, which decided in 1988 that GDC did not raise any competition concerns.

(b) Characteristics of demand for physical albums

Evolution of demand

1123. Denmark has witnessed a slightly higher decrease than the general downward trend identified at the EEA level, with a 35% decrease in total market value between 2001 and 2006.

TABLE 78 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Denmark	130	110	97	93	91	84	-35 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1124. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 79 below shows, online and mobile music sales in Denmark, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is - or can be forecast to be- compensated by online and mobile music sales.

TABLE 79 - Sony BMG sales (MEUR)						
Denmark	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [30-40]* %

Source: Notifying parties; Commission analysis

Concentration of sales

1125. The notifying parties have submitted that in Denmark, domestic artists accounted for [40-50]*% of sales in 2006, versus [50-60]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Denmark is the [...]* highest in the EEA.

1126. A significant proportion of total sales of CDs are concentrated among a few retailers. In Denmark, [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [60-70]*% of Sony BMG sales. This level of concentration is in line with the average sales concentration observed in all affected markets.

TABLE 80 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Denmark	[80-90]*%	[60-70]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1127. In 2006, Denmark was the market for Sony BMG with the [...] lowest number of new releases [...]*, and a total of [...] Sony BMG albums on sale in the same year.

Charts

1128. Chart albums³¹⁵ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Denmark, the proportion of Sony BMG sales accounted for by chart albums is decreasing from a high [80-90]*% of sales in 2002, to reach a percentage of sales more similar ([60-70]*% in 2006) to what can be seen in the whole EEA.

TABLE 81 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Denmark	[80-90]*%	[70-80]*%	[50-60]*%	[60-70]*%	-[20-30]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1129. The chart compiler in Denmark is the IFPI Denmark, the music industry's association, with AC Nielsen. The chart committee is the executive body of the companies responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Denmark. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1130. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Denmark, only CDs albums with an average retail price including VAT higher than 75 DKK will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Danish charts is fixed at a low level if compared with retail price generally used for price albums having the potential to realize high sales [90 – 130 DKK]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors. In addition, the Danish Competition Authority declared in a decision of 17 May 2001 that the Danish Chart Rules were compatible with competition rules and subsequently approved changes in the pricing eligibility criteria.

Compilations

1131. As shown in table 82 below, the value of sales of compilations is estimated to have been EUR 85 M in 2006 in Denmark, representing 6% of the total market value

³¹⁵ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

for recorded music. Compilations represent a higher share of Sony BMG revenue with [20-30]*% of its total revenues.

TABLE 82 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Denmark	85	5	6 %	[...]*	[...]*	[20-30]* %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[20-30]* % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1132. The notifying parties submit that the market for compilations is declining much faster than the overall record market in the EEA. This is also the case in Denmark, where the sales of compilation CDs represented 6% of the total market value of CDs in 2006, versus 11% in 2002. Sales of compilation for Sony BMG have however[...]*, from [20-30]*% of sales in 2002 to [20-30]*% in 2006. Noticeably, Sony BMG represented almost [90-100]*% of the compilation market in Denmark in 2006 ([...]*).

TABLE 83 – Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Denmark (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Denmark (% total sales)	[20-30]*%	[10-20]*%	[10-20]*%	[20-30]*%	[20-30]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1133. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1134. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Denmark. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Denmark.

1135. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Denmark, making collusion at the level of release prices unlikely.

1136. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the

different majors³¹⁶. Even though the number of these main PPDs may seem very concentrated in Denmark (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than [50-100 DKK]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1137. Secondly the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. For example in Denmark more than [50-60]*% of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the two other majors only re-priced 10% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1138. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Denmark, [70-80]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures was [0-10]*% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1139. In addition, the Commission has also analysed the Airtours criteria³¹⁷ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

³¹⁶ In 2006, Sony BMG used [...] PPDs, and the three other majors respectively 3, 2, and 2 PPDs for the majority of their sales in the first 20 weeks after release.

³¹⁷ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

(a) Transparency

1140. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1141. In 2006, Sony BMG used [50-100]*PPDs in Denmark. [...]The 5 most used PPDs account for [80-90]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is the [...] highest, [...] in the EEA.

1142. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [80-90]*%, [90-100]*% and [90-100]*%.

1143. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. It is worth noting that the following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...] PPDs, another major 3 PPDs and the two remaining majors 2 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used [70-120]*, but the range between the highest and lowest of these main PPDs for the 3 other majors was respectively 101-116 DKK, 102-130 DKK and 96-101 DKK, giving a maximum range of main PPDs of [70-130]* DKK, a variation of [40-50]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1144. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

1145. The notifying parties submit that in Denmark, Sony BMG has [...] responsible for [...] stores which account for most of their sales, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.
1146. In Denmark, record companies, including the four majors, transmit information relative to their albums to Grammotex³¹⁸. Grammotex is an online database aimed at providing information from recording companies to music retailers. The information provided included for each album: its title, the name of the artist, the number of tracks per album, the release date, the genre, the record label, the PPD code and list prices of the album. A part of the information provided is fully public³¹⁹, but that information does not contain price information. Otherwise, access to the database is password restricted and retailers will generally obtain a password to the database. According to Grammotex, record companies will only have access to PPD information on their own catalogue, on request, and will only be able to see PPD code information related to their competitors, but not the PPDs themselves. In addition, list prices of individual albums are occasionally published in trade magazines, although this is not systematic.
1147. Although no information was found to confirm or infirm whether this is the case or not, there is a possibility, as it is a practice taking place on some Contracting Parties to the EEA Agreement, that Sony BMG and the other majors are in a position to collect a certain amount of PPD information through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Denmark, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

³¹⁸ www.grammotex.se

³¹⁹ www.hitlistan.se

*Discounts*³²⁰

1148. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to the other, majors grant different campaign discounts to a same customer); and (iv) other discounts.
1149. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount ranges from [20-30]*% to [30-40]*%. In Denmark, file and campaign discounts account for approximately [80-100]*% of total discounts for Sony BMG³²¹. The company however grants different level of discounts to its different customers.
1150. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Denmark from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). [...]*
1151. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). [...]*
1152. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³²². This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, majors in Denmark apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

³²⁰ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

³²¹ [...]*

³²² The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

1153. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market.

1154. Although no information was found to confirm or infirm whether this is the case or not, there is a possibility, as it is a practice taking place in some Contracting Parties to the EEA Agreement, that Sony BMG and the other majors are in a position to collect a certain amount of feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Denmark, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1155. Like in other affected markets, Danish retailers apply a mark-up on the net wholesale price of albums to fix retail prices.

1156. The information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Denmark, no customers confirmed whether or not it was possible for record companies to reverse-engineer the net whole sale price of CDs from their retail prices, nor provided retail and net wholesale prices of its new releases. The Commission was therefore not in a position to test whether or not customers applied an irregular mark-up to new releases. It will however be assumed, as the findings in other Contracting Parties to the EEA Agreement analysed points towards the same results, that reverse-engineering cannot be performed with enough precision to provide a sufficient level of transparency on mark-ups and, ultimately, on discounts.

1157. In conclusion, the investigation indicates that in Denmark the level of transparency that characterises PPDs, discounts and possibly mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, possibly mark-ups) in Denmark to sustain tacit coordination between major record companies.

1158. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Denmark, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Denmark. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1159. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1160. In Denmark, Sony BMG revenues stemming from compilation albums accounted in 2006 for [20-30]*% of its total revenue, more than [...]the average proportion observed at the level of all affected markets ([10-20]*%). Unlike in other Contracting Parties to the EEA Agreement, the importance of compilation revenue has actually increased in Sony BMG's revenues ([20-30]*% in 2006 versus [20-30]*% in 2004). It could therefore be argued that in Denmark, a retaliation mechanism excluding a deviating company from compilations deals would be particularly credible. It should however be noted that [...]It would therefore seem that other majors are [limitedly]* involved [...]in compilations in Denmark, hereby reducing the threat of potential retaliation.

1161. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1162. In conclusion, the Commission did not identify any action in Denmark that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1163. In Denmark, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1164. Customers are rather concentrated with the top 5 customers accounting for [60-70]*% of Sony BMG sales, in line with the EEA average. A majority of retailers also still realize a high proportion of their turnover with music albums, which weakens their buyer power.

1165. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1166. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Danish customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1167. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1168. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Danish market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1169. It can therefore be concluded that on the Danish market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

i) Greece

(1) Characteristics of the market

(a) Market players

Competitors

1170. Unlike in other Contracting Parties to the EEA Agreement, EMI has led the Greek market with a 33% market share in 2006, up from 26% in 2002. Universal is second to EMI with a 2006 market share of 22% (a two percentage points increase versus 2002). Sony BMG and Warner have enjoyed relatively stable market shares since 2002 and reached respective market shares in 2006 of 14 and 7%. Independents have seen their combined market decrease from 33% in 2002 to 24% in 2006. One independent -Heaven- however has a higher market share than Warner.

TABLE 84 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Greece	46	14	22	7	33	24
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1171. Sony BMG is not the market leader and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1172. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the recent years' decline in demand for recorded music. In Greece, although figures for BMG's roster were unavailable, but the Commission expects that the company reduced its roster [...]*.

1173. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Greece, representing some [10-20]*% of its total number of artists signed on the previous year. In the same year, artists left Sony BMG, representing [0-10]*% of its total number of artists signed on the previous year.

1174. During the market investigation, the Commission did not find evidences that record companies do not compete with regard to the discovery and signing of artists³²³.

Customers

1175. The Greek sales of Sony BMG are performed in majority through Specialised Music Chains ([60-70]*% in 2006). The remaining sales are mainly achieved through wholesalers ([20-30]*%) and Department Stores ([10-20]*%).

TABLE 85 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/Internet	Others
Greece	[20-30]*%	[0-10]*%	[60-70]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

³²³ Question n°17a – Questionnaire to customers 12 February 2007 – One Greek customer submits that major recording companies compete on artists offering and on price. The Commission only received one contribution from Greek customers. The responses of this customer will be quoted in the following for the sake of completeness, however this customer may not be deemed to be representative of Greek customers overall.

Record companies distribution and licensing deals.

1176. The notifying parties submit that there are no distribution joint-ventures between majors for the distribution of music in Greece. Sony BMG out-sources parts of its distribution activities such as warehousing to an independent third-party, Kininis, which also distributing another major. The two other majors use their own sales and distribution facilities. Independents have several distribution options. Some have their own sales and distribution facilities, while others are distributed either by independents or other majors.

(b) Characteristics of demand for physical albums

Evolution of demand

1177. Greece has witnesses a slightly smaller decrease than the general downward trend identified at the EEA level, with a 23% decrease in total market value between 2001 and 2006.

TABLE 86 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Greece	59	66	59	53	50	46	-23 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1178. The record industry is nevertheless facing significant challenges with the decline in CD sales and the development of digital music online and mobile music sales in Greece which, as in the rest of the EEA, have only recently increased and remain significantly smaller than sales of physical albums. Contrary to the situation in most of the other Contracting Parties to the EEA Agreement, Sony BMG physical sales have not declined over the 2002-2006 period

TABLE 87 - Sony BMG sales (MEUR)						
Greece	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	+ [0-10]* %

Source: Notifying parties; Commission analysis

Concentration of sales

1179. The notifying parties have submitted that in Greece, domestic artists accounted for [50-60]*% of sales in 2006, versus [40-50]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Greece is the [...]* highest in the EEA, [...]*.
1180. A significant proportion of total sales of CDs are concentrated among a few retailers. In Greece, [70-80]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [50-60]*% of Sony

BMG sales, which is lower than the average sales concentration observed in all affected markets.

TABLE 88 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Greece	[70-80]*%	[50-60]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: *Notifying parties; Commission analysis*

1181. In 2006, Greece was the market for Sony BMG with the [...] lowest number of new releases [...] and a total of [...] Sony BMG albums on sale in the same year.

Charts

1182. Chart albums³²⁴ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Greece, the proportion of Sony BMG sales accounted for by chart albums is in fact decreasing, and the Contracting Party to the EEA Agreement has the [...] lowest percentage of Sony BMG sales realised through chart albums ([60-70]*% in 2005) in the whole EEA.

TABLE 89 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Greece	N/A	[70-80]*%	[60-70]*%	[60-70]*%	- [20-30]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: *Notifying parties; Commission analysis*

1183. The chart compiler in Greece is IFPI Greece/Deloitte. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Greece. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1184. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Greece, only single CDs albums with a PPD higher than EUR 8,66 (double CDs EUR 12,00) will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Greek charts is fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [10-15]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1185. There is no information available regarding the total market value of compilations in Greece, and therefore of its share in the total market value for

³²⁴ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

recorded music in Greece. For Sony BMG, compilations represented [0-10]*% of total revenues in 2005, [...]*

TABLE 90 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (2005 - MEUR)	SONY BMG compilations revenues (2005 - MEUR)	SONY BMG Compilations / total revenues (2005 - %)
Greece	46	N/A	N/A	[...]*	[...]*	[0-10]* %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

(2) Theories of harm – Airtours criteria

1186. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1187. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Greece. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Greece.

1188. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Greece, making collusion at the level of release prices unlikely.

1189. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³²⁵. Even though the number of these main PPDs may seem very concentrated in Greece (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [0-5]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1190. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some

³²⁵ In 2006, Sony BMG and two other majors used [...] PPDs, while the remaining major used 3 PPDs for the majority of their sales in the first 20 weeks after release.

albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and not been challenged by any market participant. For example in Greece around [20-30]*% of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the two other majors respectively re-priced 75% and 5% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1191. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Greece, [30-40]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures was [10-20]*% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1192. In addition, the Commission has also analysed the Airtours criteria³²⁶ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1193. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1194. In 2006, Sony BMG used [100-150]* PPDs in Greece. [...]Despite an important number of gross prices, the 5 most used PPDs account for [60-70]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is the [...]lowest of all Contracting Parties to the EEA Agreement.

1195. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [80-90]*% of sales.

1196. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination.

³²⁶ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG and two other majors used [...] PPDs, while the remaining major used 3 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG main PPDs ranged between [EUR 12-14]*, while the range between the highest and lowest of the main PPDs of the 3 other majors was respectively EUR 10.92-14.20, EUR 12.33-13.06 and EUR 12.5-15.5, giving a maximum range of main PPDs of EUR 10.92-15.50, a variation of [20-30]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1197. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises questions as to how this behaviour could be compatible with collusion between the majors.

1198. The notifying parties submit that in Greece, Sony BMG has [...] sales representatives, who are responsible for [...] customer accounts, representing some [...] stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1199. During the market investigation, one Greek retailer submitted that record companies generally know about PPDs of their competitors³²⁷. This belief may partly be based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as the market survey highlighted that the Greek retailer having responded to the market investigation is sometime engaged in such practices³²⁸. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide

³²⁷ Question n°31 – Questionnaire to customers 12 February 2007 – 1 Greek customers submits that record companies know the PPDs of their competitors.

³²⁸ Question n°30 – Questionnaire to customers 12 February 2007 – 1 Greek customer submits that retailers use information on other majors' prices when negotiating with one record company.

unreliable information about PPDs, as this data is in any case merely a starting point for negotiations.

1200. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Greece, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*³²⁹

1201. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [10-20]*% of gross price. Among the top three customers, the total discount range varies from [10-20]*% to [10-20]*%. In Greece, file discounts account for approximately [20-30%]* of total discounts and campaign discounts for [40-50%]* for Sony BMG. [...]*

1202. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Greece from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). [...]*

1203. Conversely, campaign discounts are particularly fluctuant from year to year (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). [...]*

1204. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³³⁰. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, Sony BMG applies in Greece significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know

³²⁹ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

³³⁰ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1205. Discounts contribute to limiting the transparency on the market. The Greek retailer having contributed to the market investigation nevertheless believes that major record companies know the discounts applied by their competitors³³¹. As for PPDs, retailers may occasionally use information on majors' prices when negotiating with other record companies.

1206. It thus appears that Sony BMG and the other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Greece, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1207. One Greek customer interviewed believes that it is feasible for the majors to deduce the net wholesale prices of their competitors through the knowledge of retail prices³³².

1208. Like in other affected markets, Greek retailers apply a mark-up on the net wholesale price of albums to fix retail prices.

1209. However, the information available to the Commission indicates that the possibility to reverse-engineer prices is limited to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Greece, no customers provided retail and net wholesale prices of its new releases and the Commission was therefore not in a position to test whether or not customers applied an irregular mark-up to new releases. It will however be assumed, as the findings in other Contracting Parties to the EEA Agreement analysed points towards the same results, that reverse-engineering cannot be performed with enough precision to provide a sufficient level of transparency on mark-ups and, ultimately, on discounts.

1210. In conclusion, the investigation indicates that in Greece the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that

³³¹ Question n°31 – Questionnaire to customers 12 February 2007 – 1 Greek customer submits that record companies know the discounts of their competitors.

³³² Question n°33 – Questionnaire to customers 12 February 2007 – 1 Greek customer submits that record companies can know very closely the conditions of their competitors.

the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Greece to sustain tacit coordination between major record companies.

1211. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Greece, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Greece. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1212. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1213. In Greece, Sony BMG revenues stemming from compilation albums accounted in 2005 for [0-10]*% of total revenue, a significantly lower proportion than what is observed at the level of all affected markets ([10-20]*%). This seriously limits the credibility of such a retaliation mechanism.

1214. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1215. In conclusion, the Commission did not identify in Greece any action that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1216. In Greece, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1217. Since 2006, customers are rather less concentrated in Greece than in other Contracting Parties to the EEA Agreement, with the top 5 Sony BMG customers accounting for [50-60]*% of its sales in 2006 (in 2005, however, the figure was [70-

80]*%). Contrary to other Contracting Parties to the EEA Agreement, however, these customers still realize a significant proportion of their turnover with music albums, which weakens their buyer power. On the other hand, it can be considered that piracy through illegal CD burning or illegal downloading exerts a significant pricing constraint on record companies and provides additional arguments to retailers to drive music prices down.

1218. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1219. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Greek customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) *Conclusion: coordination is unlikely on the market for recorded music*

1220. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1221. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Greek market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1222. It can therefore be concluded that on the Greek market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

j) Ireland

(1) *Characteristics of the market*

(a) Market players

Competitors

1223. Sony BMG remained the number one record company in Ireland in 2006, with a market share of 29%, on par with Universal which gained a 29% market share that year. Sony BMG was already number one in Ireland in 2002 with a market share of 32%, but it has since reduced its market share while universal has increased its share from the 24% it had in 2002. EMI decreased its market share from 22% in 2002 to 19% in 2006, while Warner kept its share of the market stable (12% in 2002 versus 13% in 2006). Independents kept their combined market stable (11% in 2002 – 10% in 2006). The main independent record companies in Ireland are Dolphin, Prism, Interactive, Vital and Beggars Banquet.

TABLE 91 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Ireland	69	29	29	13	19	10
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1224. Although Sony BMG is the market leader, it is so together with Universal, and both groups have a market share below 30%. It therefore can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1225. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. This was not the case in Ireland, where Sony BMG increased the number of artists on its roster from [...] in 2002 to [...] in 2006.

1226. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Ireland, representing some [30-40]*% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [40-50]*% of its total number of artists signed on the previous year.

1227. The market investigation highlighted that Irish customers view the competition among major recording companies as taking place on the discovery, signing, and marketing of artists³³³.

Customers

³³³ Question n°17a – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Irish customers interviewed submit that major recording companies compete on artists offering, 2 out of 2 (100%) submit that major recording companies also compete on marketing and promotion.

1228. The Irish sales of Sony BMG are in majority performed through specialised music chains ([50-60]*% in 2006) and wholesalers ([20-30]*%). The remaining sales are mainly done through independent music stores ([0-10]*%), and department stores ([0-10]*%).

TABLE 92 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Ireland	[20-30]*%	[0-10]*%	[50-60]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1229. The notifying parties submit that there are no distribution joint-ventures between majors in Ireland, and that all of the major's Irish distribution is sourced from the United Kingdom. Sony BMG is distributed by Arvato, a subsidiary of Bertelsmann. Sony BMG itself has distribution contracts with a small number of independent labels, the physical distribution of which is carried out by Arvato.

(b) Characteristics of demand for physical albums

Evolution of demand

1230. Ireland has witnessed a smaller decrease than the general downward trend identified at the EEA level, with a 23% decrease in total market value between 2001 and 2006.

TABLE 93 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Ireland	90	83	70	72	73	69	-23 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1231. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 94 below shows, online and mobile music sales in Ireland, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 94 - Sony BMG sales (MEUR)						
Territory	2002	2003	2004	2005	2006	% changes 2002-2006
Ireland						
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [10-20]* %

Source: Notifying parties; Commission analysis

1232. Irish customers interviewed believe that the introduction of on-line download did trigger similar reactions from the different majors, in the sense that they all put less emphasis on single CDs³³⁴.

Concentration of sales

1233. The notifying parties have submitted that in Ireland, domestic artists accounted for [20-30]*% of sales in 2006, versus [70-80]*% for international pop rock albums. The share of domestic artists in Ireland is the [...] lowest in the EEA, [...] The notifying parties however submit that such a low share of local artists may not necessarily reflect the relative importance of the domestic market, since several local artists are signed in the United Kingdom.

1234. A significant proportion of total sales of CDs are concentrated among a few retailers. In Ireland, [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [70-80]*% of Sony BMG sales, which is in line with the average sales concentration observed in all affected markets.

TABLE 95 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Ireland	[80-90]*%	[70-80]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: *Notifying parties; Commission analysis*

1235. In 2006, Ireland was the market for Sony BMG with the [...] highest number of new releases [...] and with a total of [...] Sony BMG albums on sale in the same year.

Charts

1236. Chart albums³³⁵ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Ireland, the proportion of Sony BMG sales accounted for by chart albums is much bigger, and is indeed increasing ([80-90]*% in 2002 – [80-90]*% in 2005). Ireland has the [...] highest percentage of Sony BMG sales realised through chart albums in the whole EEA, [...]*.

³³⁴ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Irish customers interviewed believes that legal on-line download, as well illegal on-line download and piracy are a competitive pressure to majors, the other had no views; 1 out of 2 (50%) customers believes that on-line download did not create a different reaction from the different majors, as they all put less emphasis on single CDs, the other (50%) had no opinion.

³³⁵ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

TABLE 96 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Ireland	[80-90]*%	[80-90]*%	[80-90]*%	[80-90]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1237. The chart compiler in Ireland is IRMA/Chart Track Ireland³³⁶. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Ireland. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts. Unlike in some other Contracting Parties to the EEA Agreement, the chart rules do not impose minimum prices under which CDs albums cannot enter the charts.

Compilations

1238. As shown in table 97 below, the value of sales of compilations is estimated to have been EUR 69 M in 2006 in Ireland, representing 14% of the total market value for recorded music. For Sony BMG, compilations represent a slightly lower share of revenue with [10-20]*% of its total revenues.

TABLE 97 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Ireland	69	10	14 %	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1239. The notifying parties submit that the market for compilations is declining much faster than the overall record market in the EEA. This is also the case in Ireland, where the sales of compilation CDs have decreased since 2002 ([40-50]*% of total Irish sales in 2002, versus [20-30]*% in 2006). Sales of compilation albums in proportion to Sony BMG sales have however followed a reverse pattern, increasing from a low [0-10]*% in 2003 to [10-20]*% of sales in 2006.

TABLE 98 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Ireland (MEUR)	N/A	[...]*	[...]*	[...]*	[...]*
Ireland (% total sales)	N/A	[0-10]*%	[10-20]*%	[0-10]* %	[10-20]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

³³⁶ www.irma.ie

(2) Theories of harm – Airtours criteria

1240. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.
1241. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Ireland. It then analysed the three Airtours criteria which characterize collective dominance, with regards to the market in Ireland.
1242. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Ireland, making collusion at the level of release prices unlikely.
1243. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³³⁷. Even though the number of these main PPDs may seem very concentrated in Ireland (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [3-5]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.
1244. Secondly, the period after release during which an album PPD is stable varies from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and not been challenged by any market participant. For example in Ireland only [10-20]*% of Sony BMG albums are re-priced before the end of this period. Conversely the other majors follow significantly different policies with respectively 95%, 25% and 1% of albums re-priced within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.
1245. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in

³³⁷ [...]*.

Ireland, [30-40]*% of Sony BMG albums and for example 23% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [20-30]* and 14% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is also not consistent with a hypothesis that coordination among the majors has taken place.

1246. In addition, the Commission has also analysed the Airtours criteria³³⁸ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1247. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1248. In 2006, Sony BMG used [100-150]* PPDs in Ireland. [...] Despite an important number of gross prices [...]*, the 5 most used PPDs account for [70-80]*% of Sony BMG's sales in 2006 (charts and back catalogue). This proportion is the [...] highest of all Contracting Parties to the EEA Agreement.

1249. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [80-90]*%.

1250. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories differs between the different majors. In 2006, Sony BMG used [...] PPDs, another major 1 PPD and the two remaining majors 3 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG main PPDs ranged between EUR [13 – 15]*, while one major used the PPD of EUR 13.53, and the range between the highest and lowest

³³⁸ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

of the main PPDs for the 2 remaining majors was respectively EUR 12.49-15.66, and EUR 10.25-13.33, giving a maximum range of main PPDs of EUR 10.25-15.66, a variation of [30-40]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1251. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

1252. The notifying parties submit that in Ireland, Sony BMG has [...] and [...] sales representatives, who are responsible for [...] customer accounts, representing some [...] stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1253. During the market investigation, one Irish customer interviewed submitted that record companies generally know about PPDs of their competitors³³⁹. This belief may be based, at least partly, on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as 1 Irish customer interviewed submitted that it is sometimes engaged in such practices³⁴⁰. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is in any case merely a starting point for negotiations.

1254. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Ireland, whilst acknowledging that sales representatives may occasionally comment on

³³⁹ Question n°31 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Irish customers interviewed submits that record companies know the PPDs of their competitors; the other (50%) had no opinion.

³⁴⁰ Question n°30 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Irish customers interviewed submits that it uses information on other majors' prices when negotiating with one record company, the other (50%) submits that it does not.

statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*³⁴¹

1255. The Commission has demonstrated the lack of transparency of discounts by illustrating that discounts are not aligned between majors, and by underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to the other, majors grant different campaign discounts to a same customer); and (iv) other discounts.

1256. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varied from [10-20]*% to [20-30]*%. In Ireland, file discounts account for the majority ([70-100]*%) of total discounts and campaign discounts for approximately [0-20]*% for Sony BMG. The company however grants different level of discounts to its different customers.

1257. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Ireland from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). Different majors moreover provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG granted [three different discounts ranging from 0-20]*% file discounts to one of the top 5 customer (for [80-100]*% of its chart sales to that customer), whereas another major granted file discounts of 8% and 9% (for 60% of the other major's chart sales to that customer). This also applies to several other main customers among the top 5 customers in Ireland.

1258. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2005, one important customer received [two different discounts ranging from 0-15]*% campaign discounts from Sony BMG (for [50-70]*% of its chart sales to that customer), whereas the same customer received 14% and 21% campaign discounts (for 39% of the other major's

³⁴¹ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

1259. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³⁴². This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Ireland apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1260. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. One customer interviewed believed that major record companies do not know the discounts applied by their competitors, while another one submitted that majors may have an idea of the campaign discounts of their competitors³⁴³. As for PPDs, one retailer state that it does not use information on majors' prices when negotiating with other record companies, and one submitted that it does so.

1261. It thus appears that Sony BMG and the other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Ireland, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1262. Like in other affected markets, Irish retailers apply a mark-up on the net wholesale price of albums to fix retail prices. The two (100%) Irish customers interviewed believe it is feasible for the majors to deduce -one believes very closely- the net wholesale prices of their competitors through the knowledge of retail prices³⁴⁴

³⁴² The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

³⁴³ Question n°31 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Irish customers interviewed submits that record companies do not know the discounts of their competitors, the other (50%) submits that they may have an idea about campaign discounts.

³⁴⁴ Question n°33 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Irish customers submit that record companies can estimate the net wholesale price of their competitors from their end-customer prices, one of them submitting that this could be done very closely.

and 100% (2 out of 2) of Irish customers also submit that record companies do monitor retail prices³⁴⁵.

1263. However, the information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Ireland, the two customers provided retail and net wholesale prices for their new releases. These customers applied an irregular mark-up to new releases³⁴⁶. Although the analysis has been conducted on two retailers only, the Commission did not find any evidence that mark-ups applied by other retailers should be more regular and predictable.

1264. In conclusion, the investigation indicates that in Ireland the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Ireland to sustain tacit coordination between major record companies.

1265. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Ireland, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Ireland. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1266. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1267. In Ireland, Sony BMG revenues stemming from compilation albums accounted in 2006 for [10-20]*% of total revenue, [...]*.

³⁴⁵ Question n°32 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Irish customers report that record companies do monitor retail prices on a regular basis.

³⁴⁶ Based on 5 last new releases of all majors, the retailer applies a mark-up which deviates from the average mark-up by 6% on average. Maximum deviation however reaches 22% and 4 albums out of 20 are priced with a mark-up deviating from the average by more than 10%.

1268. The Commission also did not find any indication of deviation (be it sudden decrease of PPDs or increase of discounts) or retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1269. In conclusion, the Commission did not identify any action in Ireland that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(c) Reaction of competitors and customers

1270. In Ireland, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1271. Customers are rather less concentrated in Ireland than in other Contracting Parties to the EEA Agreement with the top 5 Sony BMG customers accounting for [50-60]*% of its sales in 2006. Contrary to other Contracting Parties to the EEA Agreement, however, these customers still realize a significant proportion of their turnover with music albums, which weakens their buyer power. On the other hand, it can be considered that piracy through illegal CD burning or illegal downloading exerts a significant pricing constraint on record companies and provides additional arguments to retailers to drive music prices down.

1272. These retailers nevertheless also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1273. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Irish customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) *Conclusion: coordination is unlikely on the market for recorded music*

1274. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1275. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Irish market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1276. It can therefore be concluded that on the Irish market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

k) The Netherlands

(1) Characteristics of the market

(a) Market players

Competitors

1277. Universal Music Group became the largest record company in the Netherlands in 2006, overtaking Sony BMG with a market share of 27% (25% in 2002). EMI was the second largest record company in 2006 with a 22% market share and Sony BMG continued to see its market share reduce, from 28% in 2002 to 17% in 2006. Independents regained ground from a low 20% combined market share in 2004 (24% in 2002) to reach 25% in 2006. The main independent record companies in the Netherlands are Rough Trade, PIAS, Artists & Company, Princess records and CNR.

TABLE 99 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
The Netherlands	184	17	27	9	22	25
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1278. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1279. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In the Netherlands, Sony BMG decreased the number of artists on its roster, from [...] in 2002 to [...] in 2006.

1280. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] * new artists in the Netherlands, representing some [10-20] *% of its total number of artists signed on the previous year. In the same year, [...] * artists left Sony BMG, representing [50-60] *% of its total number of artists signed on the previous year.

1281. The market investigation highlighted that 57% of Dutch customers view the competition among major recording companies as taking place on the discovery and signing of new artists³⁴⁷.

Customers

1282. The Dutch sales of Sony BMG are mainly concentrated around two types of retailers. [50-60] *% of their sales are performed through specialised music chains [...]*, while another significant proportion ([30-40] *%) is performed through wholesalers [...]*.

TABLE 100 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
The Netherlands	[30-40] *%	[0-10] *%	[50-60] *%	[0-10] *%	[0-10] *%	[0-10] *%	[0-10] *%
Sum of all affected EEA markets	[30-40] *%	[10-20] *%	[20-30] *%	[10-20] *%	[0-10] *%	[0-10] *%	[0-10] *%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1283. The notifying parties submit that they do not have any distribution logistics joint ventures or bilateral distribution arrangements with any other major record company in the Netherlands. In the Netherlands (as well as in Austria, Belgium, France, Germany, Ireland, Portugal, Spain, and the United Kingdom), Sony BMG obtains its distribution logistics services from Arvato (part of the Bertelsmann Group). Other majors have all outsourced their distribution logistics facilities or rely on third party warehouses and delivery systems for which they pay a fee. In both cases, majors usually also distribute products of independents. Other independent labels, notably PIAS and Munich, also have their own distribution organisation and offer these services to other independents in the Netherlands.

³⁴⁷ Question n°17a – Questionnaire to customers 12 February 2007 – 4 out of 7 (57%) of Dutch customers submit that major recording companies compete on artists offering, 2 out of 7 (29%) submit that they compete on marketing / promotion, claim there is no competition, 2 out of 7 (29%) submit that they compete on prices (cheaper in back catalogues), and 2 out of 7 (29%) have no opinion.

(b) Characteristics of demand for physical albums

Evolution of demand

1284. The Netherlands has witnessed an even higher decrease than the general downward trend identified at the EEA level, with a 36% decrease in total market value between 2001 and 2006.

TABLE 101 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
The Netherlands	286	266	253	230	197	184	-36 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1285. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 102 below shows, online and mobile music sales in the Netherlands, as in the rest of the EEA, have recently increased, however not to an extent where the significant decrease in physical sales is - or can be forecast to be- compensated by online and mobile music sales.

TABLE 102 - Sony BMG sales (MEUR)						
The Netherlands	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [50-60]*%

Source: Notifying parties; Commission analysis

1286. The market survey revealed that 43% of the customers consider that the introduction of on-line download triggered different reactions from the different majors, while only 14% thought that major record companies reacted similarly to this new phenomenon³⁴⁸.

Concentration of sales

1287. The notifying parties have submitted that in the Netherlands, domestic artists accounted for [20-30]*% of sales in 2006, versus [70-80]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in the Netherlands is the [...] smallest in the EEA.

³⁴⁸ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 1 out of 7 (14%) Dutch customer believes that legal on-line download is not a competitive pressure to majors versus 1 out of 7 (14%) who believes it is (5 out of 7 did not know or replied besides the question); 3 out of 7 (43%) customers believe that illegal on-line download and piracy are a competitive pressure to majors (versus 4 out of 7 which did not know or replied besides the question); 3 out of 7 (43%) of customers believe that on-line download created a different reaction from the different majors, versus 1 out of 7 (14%) who thought not.

1288. A significant proportion of total sales of CDs are concentrated among a few retailers. In the Netherlands, [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top 5 customers accounted for [50-60]*% of Sony BMG sales, largely aligned with the average sales concentration observed in all affected markets.

TABLE 103 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
The Netherlands	[80-90]*%	[50-60]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1289. In 2006, the Netherlands was the market for Sony BMG with the [...] highest number of new releases [...]*, and a total of [...] Sony BMG albums on sale in the same year.

Charts

1290. Chart albums³⁴⁹ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. If the proportion of Sony BMG sales accounted for by chart albums is indeed increasing in the Netherlands, the Contracting Party to the EEA Agreement has the [...] percentage of Sony BMG sales realised through chart albums ([30-40]*% in 2006) in the whole EEA.

TABLE 104 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
The Netherlands	[30-40]*%	[20-30]*%	[30-40]*%	[30-40]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1291. The chart compiler in the Netherlands is GfK Megacharts BV, with the Dutch charts recording the top 200 albums at any time. The chart committee is the executive body of the third party organisation responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Belgium.

1292. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in the Netherlands, CDs albums with list prices lower than EUR 9,40 will not be allowed to enter and be rated in the charts. However, the minimum price level to enter Dutch charts is fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [12-16]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

³⁴⁹ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

Compilations

1293. As shown in table 105 below, the value of sales of compilations is estimated to have been EUR 31 M in 2006 in the Netherlands, representing 17% of the total market value for recorded music. Compilations represented a somewhat similar share of Sony BMG revenue, with [10-20]*% of its total revenues.

TABLE 105 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
The Netherlands	184	31	17%	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]* % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1294. The notifying parties submit that the market for compilation is declining much faster than the overall record market. In the Netherlands, the sales of compilation CDs have indeed been halved from 2002 to 2006 and as a percentage of total market value ([20-30]*% in 2002 – [10-20]*% in 2006). Sales of compilation albums in proportion to Sony BMG sales have in fact [...] after 2004, as table 106 below shows.

TABLE 106 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
The Netherlands (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
The Netherlands (% total sales)	[10-20]* %	[10-20]* %	[10-20]* %	[10-20]* %	[10-20]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1295. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1296. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in the Netherlands. It then analysed the three Airtours criteria which characterize collective dominance, with regard to the market in the Netherlands.

1297. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in the Netherlands, making collusion at the level of release prices unlikely.

1298. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³⁵⁰. Even though the number of these main PPDs may seem very concentrated in the Netherlands (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1299. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and not been challenged by any market participant. For example in the Netherlands about [20-30]*% of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the two other majors only re-priced 10% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1300. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in the Netherlands, [40-50]*% of Sony BMG albums and for example 46% of another major's³⁵¹ albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [20-30]* and 18% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is also not consistent with a hypothesis that coordination among the majors has taken place.

1301. The Commission has also analysed the Airtours criteria³⁵² to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

350 In 2006, Sony BMG used [...] PPDs and the three other majors respectively 2, 3, and 5 PPDs for the majority of their sales in the first 20 weeks after release.

351 For this other major, figures were only available for 2006.

352 See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

(a) Transparency

1302. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1303. In 2006, Sony BMG used [50-100]* PPDs in the Netherlands. [...]*

1304. [...]*In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [90-100]*%.

1305. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...]* PPD, while the three remaining majors respectively used 2, 3, and 5 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs ranging from [8-15]*, while the range between the highest and lowest of the main PPDs for the 3 other majors was respectively EUR 12.70-13.25, EUR 11.30-13.50 and EUR 9.75-16.5, giving a maximum range of main PPDs of EUR [8-16.50]*, a variation of [40-50]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1306. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behavior could be compatible with collusion between the majors.

1307. The notifying parties submit that in the Netherlands, Sony BMG has [...]* sales representatives, who are responsible for [...]* customer accounts, representing some [...]* stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1308. In the Netherlands, record companies, including the four majors, transmit information relative to their albums to Phononet³⁵³. The notifying parties submit that the Benelux version of the “Phononet” online database includes the names of all releases, the artist, the composer, the release date and list prices. Access to the database is password restricted and retailers will generally obtain a password to the database. According to the notifying parties, only one individual within Sony BMG (active in logistics and responsible for managing the software interface with Phononet) has a password, but in practice, Sony BMG does not use the password to monitor list prices. Phononet also stated that since the beginning of 2007, the possible access of majors to the PPDs of their competitors has been technically completely removed. In addition, list prices of individual albums are occasionally published in trade magazines, although this is not systematic and not monitored by Sony BMG.

1309. During the market investigation, 71% of Dutch customers have submitted that they believe that record companies generally know about PPDs of their competitors³⁵⁴. This belief seems partly based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies³⁵⁵. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

1310. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in the Netherlands, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

³⁵³ www.phononet.nl

³⁵⁴ Question n°31 – Questionnaire to customers 12 February 2007 – 5 out of 7 (71%) of Dutch customers submit that record companies know the PPDs of their competitors, 1 out of 7 (14%) thinks they do not, and 1 out of 7 customers (14%) has no opinion.

³⁵⁵ Question n°30 – Questionnaire to customers 12 February 2007 – 3 out of 7 (43%) of Dutch customers submit that they use information on other majors' prices when negotiating with one record company; another 3 out of 7 (43%) submit that they do not, and 1 out of 7 (14%) has no opinion.

1311. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varied from [20-30]*% to [20-30]*%. In the Netherlands, file discounts account for approximately [20-30%]* of total discounts and campaign discounts for [50-60%]* for Sony BMG. The company however grants different level of discounts to its different customers, and one of its [...]*customers notable received [a file discount which varied by 10-20% from the average discount]*.
1312. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in the Netherlands from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). Different majors however provide different levels of file discounts to a same customer. For instance, in 2005, Sony BMG granted [0-10]*% file discounts to one of the top five customer (for [80-100]*% of its chart sales to that customer), whereas another major granted file discounts of 8%, 11% and 14% (for 59% of the other major's chart sales to that customer). This also applies to several other main customers among the top five customers in the Netherlands.
1313. Conversely, campaign discounts are somewhat more fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer received [two different discounts ranging from 0-25]*% campaign discounts from Sony BMG (for [20-40]*% of its chart sales to that customer), whereas the same customer received 2%, 3%, and 5% campaign discounts from another major (for 39% of the other major's chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.
1314. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³⁵⁷. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in the Netherlands apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

³⁵⁶ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

³⁵⁷ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

1315. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. 86% of customers believe that major record companies do not know the discounts applied by their competitors³⁵⁸. As for PPDs, some retailers state that they use information on majors' prices when negotiating with other record companies. With regard to discounts it can however be assumed that retailers would have a strong incentive in exaggerating conditions granted by competitors, therefore only providing partial and unreliable information.

1316. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in the Netherlands, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1317. A majority (57%) of Dutch customers submit that record companies do monitor retail prices³⁵⁹, while 29% of them report that record companies do not do so.

1318. Like in other affected markets, Dutch retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, – four out of seven (57%) customers believe that it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices³⁶⁰.

1319. The information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In the Netherlands, three customers provided retail and net wholesale prices for their new releases. Although one retailer applied more stable mark-ups than the two others, these three customers generally applied irregular mark-ups to their new releases³⁶¹.

³⁵⁸ Question n°31 – Questionnaire to customers 12 February 2007 – 6 out of 7 (86%) of Dutch customers submit that record companies do not know the discounts of their competitors, and 1 out of 7 (14%) has no opinion.

³⁵⁹ Question n°32 – Questionnaire to customers 12 February 2007 – 3 out of 7 (43%) of Dutch customers report that record companies do monitor retail prices, 2 out of 7 (29%) submit that record companies do not do so, and 2 out of 7 (29%) have no opinion.

³⁶⁰ Question n°33 – Questionnaire to customers 12 February 2007 – 4 out of 7 (57%) of Dutch customers submit that record companies can reverse-engineer retail prices to deduct net wholesale prices, 2 out of 7 (29%) think they cannot, and 1 out of 7 (14%) has no opinion.

³⁶¹ Based on 5 last new releases of all majors, the three retailers applied a mark-up which deviated from the average mark-up by 4, 7 and 11% on average. Maximum deviation however reached respectively 19%, 32%, and 14%.

1320. In conclusion, , the investigation indicates that in the Netherlands the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in the Netherlands to sustain tacit coordination between major record companies.

1321. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in the Netherlands, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in the Netherlands. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1322. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1323. In the Netherlands, Sony BMG revenues stemming from compilation albums accounted in 2006 for [10-20]*% of total revenue, above the average proportion observed at the level of all affected markets ([10-20]*%). It could therefore be argued that in the Netherlands, a retaliation mechanism excluding a deviating company from compilation deals would be particularly credible. It should nevertheless also be noted that the importance of compilation revenue is under threat because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

1324. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1325. In conclusion, the Commission did not identify any action in the Netherlands that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1326. In the Netherlands, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.
1327. Customers are very concentrated with the top five customers accounting for [50-60]*% of Sony BMG sales. Contrary to other Contracting Parties to the EEA Agreement, however, these customers still realize a high proportion of their turnover with music albums, which weakens their buyer power.
1328. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
1329. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Dutch customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1330. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.
1331. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Dutch market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.
1332. It can therefore be concluded that on the Dutch market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

I) Norway

(1) Characteristics of the market

(a) Market players

Competitors

1333. Universal remained the number one record company in Norway in 2006, with a market share of 25% (24% in 2002), before Sony BMG which gained a 21% market share that year (20% combined market share in 2002). EMI saw its share of the market decrease from 18% in 2002 to 15% in 2006, while Warner kept its 2002 market share of 10% in 2006. Independents also kept their combined market rather stable (28% in 2002 – 29% in 2006). The main independent record companies in Norway are Bonnier Amigo Music Norway, Playground Music, Tuba records, Tylden and Voices Music & Entertainment.

TABLE 107 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Norway	90	21	25	10	15	29
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1334. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1335. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. This was indeed to some extent the case in Norway, where Sony BMG decreased the number of artists on its roster from [...] in 2002 to [...] in 2006.

1336. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Norway, representing some [20-30]% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [20-30]% of its total number of artists signed on the previous year.

1337. The market investigation highlighted that Norwegian customers view the competition among major recording companies taking place on the discovery and signing artists, as well as on price³⁶².

³⁶² Question n°17a – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Norwegian customers interviewed submit that major recording companies compete on artists offering and on price, the other replied besides the question.

Customers

1338. The Norwegian sales of Sony BMG are in totality performed through two types of retailers only, specialised music chains ([60-70]*% in 2006) and wholesalers ([30-40]*%).

TABLE 108 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Norway	[30-40]*%	[0-10]*%	[60-70]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1339. The notifying parties submit that they do not have bilateral distribution arrangements with other majors in Norway, but that in Norway 100% of Sony BMG physical record sales are conducted through ENS -Entertainment Network Scandinavia- Boras Sweden, a (pure distribution) joint venture with EMI, Universal and one independent, Playground. They also submit that Sony BMG Norway does not receive any information about its joint venture partners' pricing. The joint-venture agreement imposes strict confidentiality obligations regarding the pricing information of each of the joint venture partners.

(b) Characteristics of demand for physical albums

Evolution of demand

1340. Norway has witnessed a decrease which is in line with the general downward trend identified at the EEA level, with a 29% decrease in total market value between 2001 and 2006.

TABLE 109 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Norway	128	140	119	116	107	91	-29 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1341. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 110 below shows, online and mobile music sales in Norway, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 110 - Sony BMG sales (MEUR)						
Norway	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [30-40]* %

Source: Notifying parties; Commission analysis

1342. The market survey reveals that 1 out of 2 (50%) Norwegian customers interviewed believe that the introduction of on-line download did trigger similar reactions from the different majors, but the other (50%) believed that it did not³⁶³.

Concentration of sales

1343. The notifying parties have submitted that in Norway, domestic artists accounted for [40-50]*% of sales in 2006, versus [50-60]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Norway is the [...]* highest in the EEA.

1344. A significant proportion of total sales of CDs are concentrated among a few retailers. In Norway, [90-100]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top five customers accounted for [70-80]*% of Sony BMG sales, which is a higher proportion of sales than the average sales concentration observed in all affected markets.

TABLE 111 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Norway	[90-100]*%	[70-80]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1345. In 2006, Norway was the market for Sony BMG with the [...]* lowest number of new releases [...]*.

Charts

1346. Chart albums³⁶⁴ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Norway, the proportion of Sony BMG sales accounted for by chart albums is indeed increasing ([30-40]*% in 2002 – [60-70]*% in 2005). Norway still has the [...]* lowest percentage of Sony BMG sales realised through chart albums in the whole EEA ([60-70]*% in 2005).

³⁶³ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Norwegian customers interviewed believe that legal on-line download is not a competitive pressure to majors; the two (100%) customers had however no views on whether illegal download and piracy are a competitive pressure to majors or not; 1 out of 2 (50%) customers believes that on-line download did not create a different reaction from the different majors, the other one (50%) believes it did create different reactions.

³⁶⁴ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

TABLE 112 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Norway	[30-40]*%	[50-60]*%	[60-70]*%	[60-70]*%	[20-30]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1347. The chart compiler in Norway is VS Newspaper/IFPI Norway³⁶⁵. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Norway. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1348. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Norway, only CDs albums with a minimum list price of 70 NOK will be allowed to enter and be rated in the full-price charts³⁶⁶. However, the minimum price level to enter Norwegian charts is fixed at a low level if compared with retail price generally used for price albums having the potential to realize high sales [100-120]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1349. As shown in table 113 below, the value of sales of compilations is estimated to have been EUR 91 M in 2006 in Norway, representing 10% of the total market value for recorded music. For Sony BMG, compilations represent a slightly higher share of total revenue ([10-20]*%).

TABLE 113 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Norway	91	9	10 %	[...]*	[...]*	[10-20]*%
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]* % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1350. The notifying parties submit that the market for compilation is declining much faster than the overall record market in the EEA. This is also the case in Norway, where the sales of compilation CDs have decreased since 2003 ([10-20]*% of total Norwegian sales in 2003, versus [10-20]*% in 2006). Sales of compilation albums in proportion to Sony BMG sales was higher in 2006 than in 2002, but a lot lower than in 2004, as table 114 below shows.

³⁶⁵ www.ifpi.no

³⁶⁶ 5 CD albums with a list price lower than 70 NOK will be eligible to enter the low-price album chart only.

TABLE 114 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Norway(MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Norway (% total sales)	[0-10]* %	[20-30]* %	[20-30]* %	[20-30]* %	[10-20]*%
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1351. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1352. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Norway. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Norway.

1353. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Norway, making collusion at the level of release prices unlikely.

1354. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³⁶⁷. Even though the number of these main PPDs may seem very concentrated in Norway (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. It is to be noted that the range between the highest and the smallest main PPD used by the different majors is much smaller in Norway than in other Contracting Parties to the EEA Agreement [10-15]*NOK Two majors use the PPD of 110 NOK as their only PPD and a third one uses this PPD in its range. It is still however unclear, if coordination was taking place, why Sony BMG does not use that main PPD of 110 NOK and has a lower range of main PPDs ([90-120]* NOK) than the other majors [...]*.

1355. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and not been challenged by any market participant. For example in Norway around [50-60]*%

³⁶⁷ In 2006, Sony BMG used [...]* PPDs, another major 3 PPDs and the two remaining majors 1 PPD for the majority of their sales in the first 20 weeks after release.

of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the two other majors respectively re-priced 25% and 10% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1356. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Norway, [70-80]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures was [20-30]*% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1357. In addition, the Commission has also analysed the Airtours criteria³⁶⁸ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1358. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

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1359. In 2006, Sony BMG used [50-100]* PPDs in Norway. [...]*

1360. [...] In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [80-90]*%, [90-100]*% and [90-100]*%.

1361. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006,

³⁶⁸ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

Sony BMG used [...] PPDs, another major 3 PPDs and the two remaining majors 1 PPD for more than 10% of their sales. It should however be noted that the two majors using 1 PPD used the same level of PPD of 110 NOK.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors, although this is less striking than in all other Contracting Parties to the EEA Agreement. Sony BMG used PPDs ranging from [90-110]* NOK, while another major PPDs ranged between 110-113.5 NOK, and the two remaining majors used the PPD of 110 NOK, giving a maximum range of main PPDs of 99-113.5 NOK, a variation of [10-20]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1362. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. Although the differences mentioned in the above paragraph are less striking than for the other Contracting Parties to the EEA Agreement analysed, it still seems that the different majors are in a position to allocate a PPD to new releases with some range of discretion, which raises questions as to how this behaviour could be compatible with collusion between the majors.

1363. The notifying parties submit that in Norway, Sony BMG has [...] sales representatives, who are responsible for some [...] stores in the Contracting Party to the EEA Agreement, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1364. During the market investigation, one Norwegian customer interviewed submitted that record companies generally know about PPDs of their competitors³⁶⁹. Unlike in other Contracting Parties to the EEA Agreement, this belief may not be based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as two out of two (100%) Norwegian customers interviewed submitted that they were not engaged in such practices³⁷⁰. Unless knowledge of competitors' prices was obtained through a cartel-type of agreement, which the Commission investigation found no indication of, the two above statements of this paragraph seem somewhat contradictory. Given the relatively small size of the sample of customers interviewed, the Commission will consider the above findings as inconclusive. However, for the sake of caution, the Commission will assume, as it happens in other Contracting Parties to the EEA Agreement, that there is a possibility that sales representatives of Sony BMG and

³⁶⁹ Question n°31 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Norwegian customers interviewed submit that record companies know the PPDs of their competitors.

³⁷⁰ Question n°30 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Norwegian customers interviewed submit that they do not use information on other majors' prices when negotiating with one record company.

other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis.

1365. However, contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is in any case merely a starting point for negotiations. Sony BMG and the other majors also claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Norway, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*³⁷¹

1366. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to the other, majors grant different campaign discounts to a same customer); and (iv) other discounts.

1367. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varies from [20-30]*%. In Norway, file discounts account for approximately [50-60%]* to [70-80%]* of total discounts and campaign discounts for approximately [20-30%]* for Sony BMG [...]*.

1368. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Norway from year to year (meaning that the most commonly used

³⁷¹ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

file discount rates do not vary very significantly in proportion from year to year). [...]*

1369. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). [...]*.

1370. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³⁷². This analysis has highlighted that campaign discounts reduce the predictability of price levels also in the early life of many albums. Indeed, different majors in Norway apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1371. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. Norwegian customers interviewed believed that major record companies do not know the discounts applied by their competitors³⁷³. As for PPDs, one retailer state that it does not use information on majors' prices when negotiating with other record companies, and one submitted it does so.

1372. It is assumed that Sony BMG and other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Norway, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1373. Like in other affected markets, Norwegian retailers apply a mark-up on the net wholesale price of albums to fix retail prices. The market investigations highlights a mixed view from Norwegian customers interviewed on whether it is feasible for the majors to deduce or not the net wholesale prices of their competitors through the knowledge of retail prices³⁷⁴ and 50% (1 out of 2) of Norwegian customers submit that record companies do monitor retail prices³⁷⁵.

³⁷² The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

³⁷³ Question n°31 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Norwegian customers interviewed submit that record companies do not know the discounts of their competitors.

³⁷⁴ Question n°33 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Norwegian customers submits that record companies can estimate the net wholesale price of their competitors from their end-

1374. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Norway, one customer provided retail and net wholesale prices of its new releases. This customer applied a rather regular mark-up to new releases³⁷⁶.

1375. It should however be noted that this retailer is a wholesaler, which generally tend to apply more-regular mark-ups than other types of retailers and that this result may not be representative of the mark-up strategy applied by all retailers in Norway. With 38% of sales conducted through wholesalers in Norway, the Commission will assume that at least for that proportion of the market, there is stability in the way retailers apply their mark-ups to new releases. Nevertheless, this still leaves 62 % of sales which will be assumed -as it is the case in other Contracting Parties to the EEA Agreement- to be made through retailers which may apply irregular mark-ups. In addition, wholesaler mark-up stability does not necessarily make it easier to reverse-engineer net wholesale price of CDs from their retail price, since wholesalers will sell to subsequent retailers (which will then sell to end-customers), and their mark-ups may be very irregular, rendering reverse-engineering more difficult. Finally, the information available to the Commission also indicates that the possibility to reverse-engineer prices is limited to the very early life of an album (around its date of release) and reduces as the album matures. The fact that one retailer applies more regular mark-ups than can be observed in other Contracting Parties to the EEA Agreement, is not necessarily conclusive that all retailers in Norway apply regular mark-ups, rendering price reverse-engineering possible across that market.

1376. In conclusion, the investigation indicates that in Norway the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Norway to sustain tacit coordination between major record companies.

1377. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Norway, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Norway. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

customer prices with 95% accuracy, while the other (50%) submits that such estimation would be very difficult.

³⁷⁵ Question n°32 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Norwegian customers reports that record companies do monitor retail prices on a regular basis, the other submits that record companies are not engaged in such practice.

³⁷⁶ Based on 5 last new releases of all majors, the retailer applied a mark-up which deviates from the average mark-up by 1% on average. Maximum deviation however reaches 5%, with 3 albums out of 20 being priced with a mark-up deviating from the average by 2%.

(b) Retaliation

1378. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1379. In Norway, Sony BMG revenues stemming from compilation albums accounted in 2006 for [10-20]*% of total country revenue, a similar proportion as to what is observed at the level of all affected markets ([10-20]*%).

1380. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1381. In conclusion, the Commission did not identify any action in Norway that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1382. In Norway, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1383. Customers are rather more concentrated in Norway than in other Contracting Parties to the EEA Agreement with the top 5 Sony BMG customers accounting for [70-80]*% of its sales in 2006. Contrary to other Contracting Parties to the EEA Agreement, however, these customers still realize a significant proportion of their turnover with music albums, which weakens their buyer power. On the other hand, it can be considered that piracy through illegal CD burning or illegal downloading exerts a significant pricing constraint on record companies and provides additional arguments to retailers to drive music prices down.

1384. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Norwegian customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1385. The Commission found that coordination on the market for recorded music is unsustainable.. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1386. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Norwegian market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1387. It can therefore be concluded that on the Norwegian market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

m) Portugal

(1) Characteristics of the market

(a) Market players

Competitors

1388. Universal retained its number one position in Portugal in 2006, while EMI was 2nd, Sony BMG third and Warner fourth. Apart for Warner who kept its market share stable (7% in 2002 – 7% in 2006), all three other majors lost market share from 2002 to 2006 (Universal: 21% in 2002 – 18% in 2006; EMI: 19% in 2002 – 17% in 2006; Sony BMG: 20% in 2002 – 16% 2006). Independents have seen their combined market increase further from 34% in 2002 to 42% in 2006. Two independents, Farol and Som Livre, have a market share close to 10%, higher than the one of Warner.

TABLE 115 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Portugal	59	16	18	7	17	42
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1389. Sony BMG is not the market leader, and it can be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1390. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Portugal, the company reduced drastically its roster, going from 14 artists in 2002 to 3 artists in 2006.

1391. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Portugal, representing some [60-70]*% of its total number of artists signed on the previous year, while [...] artists left Sony BMG that year.

1392. The market investigation highlighted that in Portugal, for the retail side of the market, the competition among major recording companies is taking place on the offer of artists, and on price³⁷⁷.

Customers

1393. The Portuguese sales of Sony BMG are on majority performed through two types of retailers: supermarkets ([50-60]*% of 2006 sales) and Specialised Music Chains ([20-30]*% of 2006 sales).

TABLE 116 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Portugal	[0-10]*%	[50-60]*%	[40-50]*%	[0-10]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1394. The notifying parties submit that there are no distribution joint-ventures between majors for the distribution of music in Portugal, and that no major record company has a distribution centre in the country. Sony BMG has no distribution deals in Portugal to distribute any other labels, from other majors or independents. Independents have several distribution options. Some have their own sales and distribution facilities, while others are distributed by specialised distribution services companies.

³⁷⁷ Question n°17a – Questionnaire to customers 12 February 2007 – One Portuguese customer submits that major recording companies compete on artists offering and on price. The Commission received only one contribution from Portuguese customers. The responses of this customer will be quoted in the following for the sake of completeness, however this customer may not be representative of Portuguese customers overall.

(b) Characteristics of demand for physical albums

Evolution of demand

1395. Portugal has witnessed a much higher decrease than the general downward trend identified at the EEA level, with a 48% decrease in total market value between 2001 and 2006.

TABLE 117 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Portugal	109	115	96	71	65	56	-48 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1396. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 118 below shows, online and mobile music sales in Portugal, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 118 - Sony BMG sales (MEUR)						
Portugal	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	N/A	N/A	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	+ [20-30]* %

Source: Notifying parties; Commission analysis

1397. The market survey reveals that in Portugal, from the retail-side viewpoint, the introduction of on-line download did trigger different reactions from the different majors³⁷⁸.

Concentration of sales

1398. The notifying parties have submitted that in Portugal, domestic artists accounted for [30-40]*% of sales in 2006, versus [60-70]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Portugal is the [...] lowest in the EEA.

1399. A significant proportion of total sales of CDs are concentrated among a few retailers. In Portugal, [90-100]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top five customers accounted for [80-90]*% of Sony

³⁷⁸ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – One Portuguese customer believes that legal on-line download is not a competitive pressure to majors; conversely, it believes that illegal on-line download and piracy are a competitive pressure to majors, and that on-line download did create a different reaction from the different majors.

BMG sales, which is much higher than the average sales concentration observed in all affected markets.

TABLE 119 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Portugal	[90-100]*%	[80-90]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1400. In 2006, Portugal was the market for Sony BMG with the [...] lowest number of new releases [...].*

Charts

1401. Chart albums³⁷⁹ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Portugal, the proportion of Sony BMG sales accounted for by chart albums is slightly decreasing, and Portugal [...] Sony BMG sales realised through chart albums ([50-60]*% in 2005) in the whole EEA.

TABLE 120 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Portugal	[50-60]*%	[40-50]*%	[40-50]*%	[50-60]*%	- [0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1402. The chart compiler in Portugal is AC Nielsen. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Portugal. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1403. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Portugal, only single pocket CDs albums with a PPD higher than EUR 4 will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Portuguese charts is fixed at a very low level if compared with retail price generally used for price albums having the potential to realize high sales [11-17]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1404. As shown in table 121 below, the value of sales of compilations is estimated to have been EUR 11 M in 2006 in Portugal, representing [10-20]*% of the total market value for recorded music. For Sony BMG however, compilations represented only [0-

³⁷⁹ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

10]*% of total revenues in 2005, a much smaller share than what can be observed in other affected markets.

TABLE 121 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (2005 - MEUR)	SONY BMG compilations revenues (2005 - MEUR)	SONY BMG Compilations / total revenues (2005 - %)
Portugal	59	11	18 %	[...]*	[...]*	[0-10]* %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]* % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Portugal

1405. The notifying parties submit that the market for compilation is declining much faster than the overall record market. This is also the case in Portugal, where the sales of compilation CDs moved from representing 22% of the total market value for recorded music in 2002 to 18% in 2006. [...]*

TABLE 122 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Portugal (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Portugal (% total sales)	[0-10]* %	[0-10]* %	[0-10]* %	[0-10]* %	[0-10]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1406. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1407. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Portugal. It analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Portugal.

1408. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Portugal, making collusion at the level of release prices unlikely.

1409. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³⁸⁰. Even though the number of these main PPDs may seem very

³⁸⁰ In 2006, Sony BMG used [...]* PPDs, another major 6 PPDs and the two remaining majors 2 PPDs for the majority of their sales in the first 20 weeks after release.

concentrated in Portugal (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than EUR [5-10]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1410. Secondly, the period after release during which an album PPD is stable varies from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. [...] [0-10]*% of Sony BMG albums are re-priced before the end of this period. The other majors generally re-price 10 % of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1411. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Portugal, [20-30]*% of Sony BMG albums and for example 13% of another major's albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures were respectively [0-10]* and 0% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1412. In addition, the Commission has also analysed the Airtours criteria³⁸¹ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1413. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

³⁸¹ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

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1414. In 2006, Sony BMG used [40-50]* PPDs in Portugal. [...]*
1415. [...]*In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [80-90]*%.
1416. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.
- (i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...]* PPD, another major 6 PPDs and the two remaining majors 2 PPDs for more than 10% of their sales.
- (ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used PPDs ranging between [12-14]* EUR, and the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 13.5-17.3, EUR 10.25-13.47 and EUR 12.8-13.5, giving a maximum range of main PPDs of EUR 10.25-17.30, a variation of [40-50]*%.
- (iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.
1417. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises questions as to how this behaviour could be compatible with collusion between the majors.
1418. The notifying parties submit that in Portugal, Sony BMG has [...]* sales representatives, who are responsible for some [...]* stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.
1419. During the market investigation, one Portuguese retailer submitted that record companies generally know about PPDs of their competitors³⁸². This belief may partly be based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as the market survey highlighted

³⁸² Question n°31 – Questionnaire to customers 12 February 2007 – One Portuguese customers submits that record companies know the PPDs of their competitors.

that Portuguese retailers are sometimes engaged in such practices³⁸³. It therefore appears that the sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis. Contrary to the situation regarding retailer feedback on discounts, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations.

1420. Sony BMG and the other majors however claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Portugal, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

*Discounts*³⁸⁴

1421. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varies from [10-20]*% to [30-40]*%. In Portugal, file discounts account for approximately [20-30%]* to [50-60%]* of total discounts and campaign discounts for approximately [20-30%]* for Sony BMG [...]*.

1422. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Portugal from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). In addition, different majors provide more similar file discount levels (although they are still different) to a same customer. For instance, in 2005, Sony BMG granted [0-10]*% discounts to one of the top 5 customer (for [80-100]*% of its chart sales to that customer), whereas another major granted file discounts of [0-10]* (for 100% of the

³⁸³ Question n°30 – Questionnaire to customers 12 February 2007 – 1 Portuguese customer submits that retailers use information on other majors' prices when negotiating with one record company.

³⁸⁴ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

other major's chart sales to that customer). This also applies to several other main customers among the top five customers in the Portugal.

1423. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). Different majors also provide different levels of campaign discounts to a same customer. For instance, in 2006, one important customer received [two different discounts ranging from 10-20%]*% campaign discounts from Sony BMG (for [20-40]*% of its chart sales to that customer), whereas the same customer received 4%, 10%, and 13% campaign discount from another major (for 54% of that other major's chart sales to that customer). This also applies to several other main customers. This level of change over time and variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

1424. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³⁸⁵. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Portugal apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1425. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. One Portuguese retailer nevertheless believes that major record companies know the discounts applied by their competitors³⁸⁶. As for PPDs, retailers sometimes use information on majors' prices when negotiating with other record companies.

1426. It thus appears that Sony BMG and the other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Portugal, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

³⁸⁵ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

³⁸⁶ Question n°31 – Questionnaire to customers 12 February 2007 – 1 Portuguese customer submits that record companies know the discounts of their competitors.

Retail prices

1427. Like in other affected markets, Portuguese retailers apply a mark-up on the net wholesale price of albums to fix retail prices. One Portuguese customer interviewed believes that it is feasible for the majors to deduce very closely the net wholesale prices of their competitors through the knowledge of retail prices³⁸⁷.

1428. As already described, the Commission focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Portugal, the same customer provided retail and net wholesale prices of its new releases. This customer indeed applied (hence his answer mentioned in the previous paragraph) a rather regular mark-up to new releases³⁸⁸.

1429. It should however be noted that this retailer is a supermarket, which generally tend to apply more-regular mark-ups than other types of retailers and that this may not be representative of the mark-up strategy applied by all retailers. With 55% of sales conducted through supermarkets in Portugal, the Commission will assume that at least for that proportion of the market, there is stability in the way retailers apply their mark-ups to new releases (even though data from other markets show that supermarkets sometimes apply very irregular mark-ups). Nevertheless, this still leaves 45 % of sales which will be assumed -as it is the case in other Contracting Parties to the EEA Agreement- to be made through retailers which may apply irregular mark-ups. In addition, the information available to the Commission also indicates that the possibility to reverse-engineer prices is limited to the very early life of an album (around its date of release) and reduces as the album matures. In conclusion, the fact that one retailer applies more regular mark-ups than can be observed in other Contracting Parties to the EEA Agreement, is not necessarily conclusive that all retailers in Portugal apply regular mark-ups, rendering price reverse-engineering possible across that market.

1430. In conclusion, the investigation indicates that in Portugal, the level of transparency that characterises PPDs (low), discounts (low) and mark-ups (possibly higher than in other Contracting Parties to the EEA Agreement) applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums. There is therefore insufficient transparency with regard to prices (PPDs, discounts, and possibly mark-ups) in Portugal to sustain tacit coordination between major record companies.

1431. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Portugal, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective

³⁸⁷ Question n°33 – Questionnaire to customers 12 February 2007 – 1 Portuguese customer submits that record companies can know very closely the conditions of their competitors.

³⁸⁸ Based on 5 last new releases of all majors, the retailer applies a mark-up which deviates from the average mark-up by 2% on average. Maximum deviation however reaches 4%, with 5 albums out of 20 being priced with a mark-up deviating from the average by 4%.

dominance by the major recording companies in Portugal. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1432. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1433. In Portugal, Sony BMG revenues stemming from compilation albums accounted in 2006 for [0-10]*% of total revenue, a significantly lower proportion than what is observed at the level of all affected markets ([10-20]*%).

1434. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1435. In conclusion, the Commission did not identify any action in Portugal that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(c) Reaction of competitors and customers

1436. In Portugal, some (but by far not all) independent competitors may appear to be in a position to jeopardize any potential tacit collusion between majors. Indeed, two independents have a market share which is currently higher than the one of Warner in Portugal. Independent competitors are however generally too small and cannot propose enough hit albums to retailers or other customers.

1437. Customers are very concentrated in Portugal, with for example the top 5 Sony BMG customers accounting for [80-90]*% of its sales in 2006, [...]*. In 2006, [50-60]*% of these customers were supermarkets, which do not realize the majority of their sales through music, a fact which may strengthen their bargaining power versus music record companies. However, a combined [40-50]*% of the 2006 sales were also made through specialized music chains, which still realize a significant proportion of their turnover with music albums, a fact which may weaken their buyer power.

1438. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. The fact that the general price trend for CD prices

indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1439. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Portuguese customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1440. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1441. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Portuguese market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1442. It can therefore be concluded that on the Portuguese market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

n) Finland

(1) Characteristics of the market

(a) Market players

Competitors

1443. Sony BMG retained in 2006, with a market share of 23%, its place as the largest record company in Finland, which it gained after the merger. Since 2002, Warner continued to increase its market share (14% in 2002- 18% in 2006), while Universal kept its market share between 2002 and 2006 at 19% and EMI lost market share from 21% in 2002 to 19% in 2006. Independents lost ground from their 24% combined market share in 2002 to their 22% market share in 2006. The main independent record companies in Finland are Bonnier Amigo Finland, Edel Records

Finland, Johanna Kustannus, Ondine, FG-Naxos, HMC, Playground/Edel and Levy-yhtiö.

TABLE 123 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Finland	59	23	19	18	19	22
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1444. Although Sony BMG is the market leader, its market share is less than 5% higher than the one of its three main competitors, and smaller than 30%. It can therefore be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1445. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Finland, Sony BMG decreased the number of artists on its roster, from [...] in 2002 to [...] in 2006.

1446. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Finland, representing some [30-40]% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [20-30]% of its total number of artists signed on the previous year.

1447. The market investigation highlighted that Finnish customers view the competition among major recording companies as taking place on the discovery and signing of new artists³⁸⁹.

Customers

1448. The Finnish sales of Sony BMG are mainly concentrated around two types of retailers. [30-40]% of their sales are performed through Department Stores, while another even higher proportion ([40-50]%) is performed through wholesalers.

³⁸⁹ Question n°17a – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) of Finnish customers submit that major recording companies compete on artists offering, 1 out of 2 (50%) submits that they compete on marketing.

TABLE 124 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Finland	[40-50]*%	[0-10]*%	[0-10]*%	[30-40]*%	[0-10]*%	[0-10]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1449. The notifying parties submit that they do not have bilateral distribution arrangements with other majors in Finland, but that 100% of Sony BMG physical record sales are conducted through a (pure distribution) joint venture with EMI and Universal. They also submit that Sony BMG Finland does not receive any information about its joint venture partners' pricing and that the staff working in the Finnish distribution joint-venture are subject to strict confidentiality guidelines regarding the sharing of information, and in particular, the passing of pricing or other product information to other joint-venture companies.

(b) Characteristics of demand for physical albums

Evolution of demand

1450. Finland has witnessed a slightly lower decrease than the general downward trend identified at the EEA level, with a 27% decrease in total market value between 2001 and 2006.

TABLE 125 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Finland	81	76	78	67	66	59	-27 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1451. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 126 below shows, online and mobile music sales in Finland, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 126 - Sony BMG sales (MEUR)						
Finland	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [20-30]* %

Source: Notifying parties; Commission analysis

1452. One out of the two customers interviewed consider that the introduction of on-line download triggered different reactions from the different majors, while the other though that major record companies reacted similarly to this new phenomenon³⁹⁰.

Concentration of sales

1453. The notifying parties have submitted that in Finland, domestic artists accounted for [50-60]*% of sales in 2006, versus [40-50]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Finland is the [...] highest in the EEA.

1454. A significant proportion of total sales of CDs are concentrated among a few retailers. In Finland, [80-90]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top five customers accounted for [80-90]*% of Sony BMG sales, [...]*

TABLE 127 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Finland	[80-90]*%	[80-90]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: *Notifying parties; Commission analysis*

1455. In 2006, Finland was the market for Sony BMG with the [...] lowest number of new releases [...]*

Charts

1456. Chart albums³⁹¹ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. [...]*

TABLE 128 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Finland	[60-70]*%	[60-70]*%	[60-70]*%	[60-70]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: *Notifying parties; Commission analysis*

1457. The chart compiler in Finland is the Finnish National Broadcasting Company. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Finland. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

³⁹⁰ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Finnish customers believe that legal on-line download is a competitive pressure to majors; 2 out of 2 (100%) customers also believe that illegal on-line download and piracy are a competitive pressure to majors; 1 out of 2 (50%) customers believes that on-line download created a different reaction from the different majors, versus 1 out of 2 (50%) who thought not.

³⁹¹ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

1458. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Finland, only CDs albums with list prices higher than EUR 8,45 will be allowed to enter and be rated in the albums charts, whereas albums with lower prices will enter the mid-price albums charts. The minimum price level to enter Finnish charts is however fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [12-15]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1459. As shown in table 129 below, the value of sales of compilations is estimated to have been EUR 59 M in 2006 in Finland, representing 15% of the total market value for recorded music. Compilations represent a slightly smaller share of Sony BMG revenue, with [10-20]*% of its total revenues in the same year.

TABLE 129 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Finland	59	9	15 %	[...]*	[...]*	[10-20]* %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]* % ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1460. The notifying parties submit that the market for compilation is declining much faster than the overall record market in the EEA. This is not the case in Finland, where the sales of compilation CDs have remained stable since 2002. [...]*

TABLE 130 – Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Finland (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Finland (% total sales)	[10-20]* %	[0-10]* %	[10-20]* %	[10-20]* %	[10-20]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1461. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1462. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Finland. It then analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Finland.

1463. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Finland, making collusion at the level of release prices unlikely.

1464. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors³⁹². Even though the number of these main PPDs may seem very concentrated in Finland (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, although the range is smaller in Finland than all other Contracting Parties to the EEA Agreement except Norway, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of EUR [0-5]*, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1465. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. [...] only [10-20]*% of Sony BMG albums being re-priced before the end of this period. One other major follows a similar policy whereas the two other majors only re-priced 5% of their albums within the first 20 weeks after release. Again, it is not clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1466. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Finland, [20-30]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figures was [10-20]*% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1467. In addition, the Commission has also analysed the Airtours criteria³⁹³ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be

³⁹² In 2006, Sony BMG used [...] PPD, and the three other majors 3, 2, and 4 PPDs for the majority of their sales in the first 20 weeks after release.

³⁹³ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1468. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1469. In 2005, Sony BMG used [50-100]* PPDs in Finland. [...] despite an important number of gross prices, the 5 most used PPDs account for [70-80]*% of Sony BMG's sales in the second half of 2005 (charts and back catalogue). [...]*

1470. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [90-100]*%.

1471. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006, Sony BMG used [...] PPD, and the three other majors respectively 3, 2, and 4 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG used the PPD of EUR [12-14]*, but the range between the highest and lowest of these main PPDs for the 3 other majors was respectively EUR 12.8-13.4, EUR 13.45-13.75 and EUR 12.75-15.5, giving a maximum range of main PPDs of EUR 12.75-15.50, a variation of [10-20]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1472. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. Although these differences are less striking than in most EEA Contracting Parties analysed, it still therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises questions as to how this behaviour could be compatible with collusion between the majors.

1473. The notifying parties submit that in Finland, Sony BMG has [...] sales representatives, who are responsible for [...] customer accounts, representing some [...] stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1474. During the market investigation, one Finnish customer submitted that they believe that record companies generally know about PPDs levels of their competitors³⁹⁴. Unlike in other Contracting Parties to the EEA Agreement, it appears that this belief is not based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as two Finnish customers submit that they are not engaged in such practices³⁹⁵. Unless knowledge of competitors' prices was obtained through a cartel-type of agreement, which the Commission investigation found no indication of, the two above statements of this paragraph seem somewhat contradictory. Given the relatively small size of the sample of customers interviewed, the Commission will consider the above findings as inconclusive. However, for the sake of caution, the Commission will assume that as other Contracting Parties to the EEA Agreement, there is a possibility that sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis.

1475. Contrary to the situation regarding retailer feedback on discounts, however, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations. Sony BMG and the other majors also claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Finland, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

³⁹⁴ Question n°31 – Questionnaire to customers 12 February 2007 – 1 out of 2 (50%) Finnish customers submits that record companies know the PPDs level of their competitors, the other had no opinion.

³⁹⁵ Question n°30 – Questionnaire to customers 12 February 2007 – 2 out of 2 (100%) Finnish customers submit that they do not use information on other majors' prices when negotiating with one record company.

1476. The Commission has demonstrated the lack of transparency of discounts by illustrating that discounts are not aligned between majors, and by underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to the other, majors grant different campaign discounts to a same customer); and (iv) other discounts.

1477. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average total discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varies from [10-20]*% to [20-30]*%. In Finland, file discounts account for approximately [70-80]* of total discounts and campaign discounts for approximately [20-30]* for Sony BMG. The company however grants different level of discounts to its different customers.

1478. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Finland from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). [...]*

1479. With regard to campaign discounts, the Commission analysis has been limited to the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts³⁹⁷. This analysis has highlighted that campaign discounts also reduce the predictability of price levels in the early life of many albums. Indeed, different majors in Finland apply significant campaign discounts (representing more than 5 or 10% of the PPD) to a significant proportion of their albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

1480. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. A majority (2 out of 2) of customers believe that major record companies do not know the discounts

³⁹⁶ Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

³⁹⁷ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

applied by their competitors³⁹⁸. As for PPDs, some retailers state that they do not use information on majors' prices when negotiating with other record companies.

1481. It is however assumed that Sony BMG and the other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Finland, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1482. Like in other affected markets, Finnish retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, 2 out of 2 customers interviewed believe that it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices³⁹⁹, and a majority (2 out of 2) of Finnish customers also submit that record companies do monitor retail prices⁴⁰⁰.

1483. The information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Finland, these two customers provided the retail and net wholesale prices for their new releases. One customer applied rather regular mark-ups to new releases, while the other one applied irregular mark-ups⁴⁰¹. Although the analysis has been conducted on two retailers only, the Commission did not find any evidence that mark-ups applied by other retailers should be regular and predictable.

1484. In conclusion, the investigation indicates that in Finland the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave so much room for competition that it would not be possible to verify that

³⁹⁸ Question n°31 – Questionnaire to customers 12 February2007 – 1 out of 2 (50%) Finnish customers submits that record companies do not know the discounts of their competitors, and 1 out of 2 (50%) submits that they know the level of co-op payments as they are the same for all majors.

³⁹⁹ Question n°33 – Questionnaire to customers 12 February2007 – 2 out of 2 (100%) Finnish customers submit that record companies can reverse-engineer retail prices (up to a certain level) to deduct net wholesale prices.

⁴⁰⁰ Question n°32 – Questionnaire to customers 12 February2007 – 2 out of 2 (100%) of Finnish customers report that record companies do monitor retail prices.

⁴⁰¹ Based on 5 last new releases of all majors, the retailer applies a mark-up which deviates from the average mark-up by 6% on average. Maximum deviation however reaches 22% and 4 albums out of 20 are priced with a mark-up deviating from the average by more than 10%.

the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Finland to sustain tacit coordination between major record companies.

1485. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Finland, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Finland. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1486. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1487. In Finland, Sony BMG revenues stemming from compilation albums accounted in 2006 for [10-20]*% of total revenue, in line with the average proportion observed at the level of all affected markets ([10-20]*%). The importance of compilation revenue for Sony BMG Finland has slightly increased, [...]*.

1488. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1489. In conclusion, the Commission did not identify any action in Finland that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation. .

(c) Reaction of competitors and customers

1490. In Finland, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.

1491. Customers are less concentrated than the EEA average with the top five customers accounting for [50-60]*% of Sony BMG sales. Contrary to other Contracting Parties to the EEA Agreement, however, a majority of these customers

[...]* still realize a high proportion of their turnover with music albums, which weakens their buyer power.

1492. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.

1493. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Finnish customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1494. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.

1495. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Finnish market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1496. It can therefore be concluded that on the Finnish market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

o) Sweden

(1) Characteristics of the market

(a) Market players

Competitors

1497. Sony BMG, with a market share of 24%, retained its place as the largest record company in Sweden in 2006. EMI was the second record company in Sweden until 2005, when Universal over-took it. EMI market share has declined since 2002, when it was at 23% (versus 19% in 2006). Since 2002, Warner has continued to increase its market share (12% in 2002- 15% in 2006). Independents have kept their combined market stable (23% in 2002 – 22% in 2006). There are two main independent record companies in Sweden, Bonnier Amigo and Playground. Other independent record companies are much smaller and include for example Mariann.

TABLE 131 - Market shares per country (2006) - recorded music (including digital sales)						
Territory	Total Market Value (MEUR)	SONY BMG (%)	UMG (%)	WMG (%)	EMI (%)	Independents (%)
Sweden	112	24	20	15	19	22
Sum of all affected EEA markets	4 949	22	29	12	17	20

Source: Notifying parties; Commission analysis

1498. Although Sony BMG is the market leader, its market share is only 4% higher than the one of its closest competitor Universal, and smaller than 30%. It can therefore be concluded that the merged entity is not in a situation where it enjoys a single dominant position.

Artists

1499. The notifying parties submit that all majors have decreased their number of artists, as a rationalisation exercise, following the decline in demand for recorded music in recent years. In Sweden, Sony BMG only slightly decreased the number of artists on its roster, from [...] in 2003 to [...] in 2006.

1500. Information submitted by the notifying parties show that artists signed with independents move to majors and vice-versa, and also rotate among majors. In 2006, Sony BMG signed [...] new artists in Sweden, representing some [10-20]% of its total number of artists signed on the previous year. In the same year, [...] artists left Sony BMG, representing [30-40]% of its total number of artists signed on the previous year.

1501. The market investigation highlighted that Swedish customers view the competition among major recording companies as taking place on the discovery and signing of artists⁴⁰².

Customers

1502. The Swedish sales of Sony BMG are mainly performed through wholesalers ([40-50]%). The remaining sales are concentrated around three types of retailers

⁴⁰² Question n°17a – Questionnaire to customers 12 February 2007 – 3 out of 4 (75%) of Swedish customers submit that major recording companies compete on artists offering, 1 out of 4 (25%) does not take a position.

with, unlike some other Contracting Parties to the EEA Agreement, [20-30]*% of their sales performed through Internet / mail delivery, [10-20]*% done through Department Stores and [10-20]*% through Independent music stores.

TABLE 132 - Proportion of Sony BMG sales to different customers categories (top 10) – 2006							
Territory	Wholesaler/ Rackjobber	Supermarket	Specialized Music Chain	Department Store	Independent music store	Mail/ Internet	Others
Sweden	[40-50]*%	[0-10]*%	[0-10]*%	[10-20]*%	[10-20]*%	[20-30]*%	[0-10]*%
Sum of all affected EEA markets	[30-40]*%	[10-20]*%	[20-30]*%	[10-20]*%	[0-10]*%	[0-10]*%	[0-10]*%

Source: Notifying parties; Commission analysis

Record companies distribution and licensing deals.

1503. The notifying parties submit that they do not have bilateral distribution arrangements with other majors in Sweden, but that in Sweden, 100% of Sony BMG physical record sales are conducted through ENS -Entertainment Network Scandinavia- a (pure distribution) joint venture with EMI and Universal. They also submit that Sony BMG Sweden confirmed that it does not receive any information about its joint venture partners' pricing. The order system operated by ENS gives no information to any other party than the business owner and ENS itself. The joint venture is regulated by the joint venture agreement and conforms to the 27 May 1999 clearance of the Swedish Competition Authority. All ENS employees have signed confidentiality agreements and employees with access to pricing and other sensitive information have received specific training regarding this.

(b) Characteristics of demand for physical albums

Evolution of demand

1504. Sweden has witnessed a greater decrease than the general downward trend identified at the EEA level, with a 43% decrease in total market value between 2001 and 2006.

TABLE 133 - Market size - Trade value (MEUR)							
Territory	2001	2002	2003	2004	2005	2006	% change 2001-2006
Sweden	198	188	161	133	119	112	-43 %
Sum of all affected EEA markets	7 164	6 886	6 077	5 726	5 550	5 002	-30 %

Source: Notifying parties; Commission analysis

1505. The record industry is facing significant challenges with the decline in CD sales and the development of digital music. As table 134 below shows, online and mobile music sales in Sweden, as in the rest of the EEA, have only recently increased, however not to an extent where the significant decrease in physical sales is -or can be forecast to be- compensated by online and mobile music sales.

TABLE 134 - Sony BMG sales (MEUR)						
Sweden	2002	2003	2004	2005	2006	% changes 2002-2006
Total digital (Online+Mobile+others)	[...]*	[...]*	[...]*	[...]*	[...]*	-
Total Physical (CD albums+others)	[...]*	[...]*	[...]*	[...]*	[...]*	- [50-60]* %

Source: Notifying parties; Commission analysis

1506. The market survey reveals that 3 out of 4 (75%) customers interviewed consider that the introduction of on-line download did not trigger different reactions from the different majors⁴⁰³.

Concentration of sales

1507. The notifying parties have submitted that in Sweden, domestic artists accounted for [30-40]*% of sales in 2006, versus [60-70]*% for international pop rock albums and [0-10]*% for classical music. The share of domestic artists in Sweden is the [...]* lowest in the EEA.

1508. A significant proportion of total sales of CDs are concentrated among a few retailers. In Sweden, [70-80]*% of the 2006 sales of Sony BMG were made through their top 10 customers, and the top five customers accounted for [50-60]*% of Sony BMG sales, which is on slightly lower than the average sales concentration observed in all affected markets.

TABLE 135 - Concentration of Sony BMG sales on top customers – 2006		
Country	top 10	Top 5
Sweden	[70-80]*%	[50-60]*%
Sum of all affected EEA markets	[80-90]*%	[70-80]*%

Source: Notifying parties; Commission analysis

1509. In 2006, Sweden was the market for Sony BMG with the [...]* highest number of new releases [...]*

Charts

1510. Chart albums⁴⁰⁴ generally account for slightly more than half of total sales of record companies. According to submissions from the notifying parties, the proportion of Sony BMG sales accounted for by chart albums is increasing in the EEA. In Sweden, the proportion of Sony BMG sales accounted for by chart albums is indeed increasing, [...]*percentage of Sony BMG sales realised through chart albums ([70-80]*% in 2005) in the whole EEA.

⁴⁰³ Question n°45-46-47 – Questionnaire to customers 12 February 2007 – 2 out of 4 (50%) Swedish customers believe that legal on-line download is not a competitive pressure to majors, while 1 out of 4 (25%) believes it is; conversely, 3 out of 4 (75%) customers believe that illegal on-line download and piracy are a competitive pressure to majors; 3 out of 4 (75%) customers believe that on-line download did not create a different reaction from the different majors.

⁴⁰⁴ Chart albums meaning albums which have been in the national charts at any point of their lifetime.

TABLE 136 - Share of Sony BMG gross sales from chart albums (%)					
Territory	2002	2003	2004	2005	Variation in points 2002-2005
Sweden	[60-70]*%	[50-60]*%	[60-70]*%	[70-80]*%	[0-10]*
Sum of all affected EEA markets	[50-60]*%	[50-60]*%	[50-60]*%	[60-70]*%	[10-20]*

Source: Notifying parties; Commission analysis

1511. The chart compiler in Sweden is GLS/IFPI Sweden⁴⁰⁵. The chart committee is the executive body of the company responsible for collecting the necessary data and providing information for the publishing the official weekly music charts in Sweden. This committee sets the rules according to which for example chart positions are calculated and albums can enter the charts.

1512. The Commission has received information from competitors that chart rules can potentially increase transparency and alignment in prices in some Contracting Parties to the EEA Agreement, as for example in Sweden, only CDs albums with a price higher than 75 SEK (EUR 8 at 2006 exchange rate) will be allowed to enter and be rated in the albums charts. However, the minimum price level to enter Finnish charts is fixed at a low level if compared with PPDs generally used for price albums having the potential to realize high sales [10-15]*. This minimum price as such is therefore unlikely to act as a threshold for price settings by majors.

Compilations

1513. As shown in table 137 below, the value of sales of compilations is estimated to have been EUR 112 M in 2006 in Sweden, representing 12% of the total market value for recorded music. Compilations represent a slightly higher share of Sony BMG revenue, with [10-20]*% of its total revenues in the same year.

TABLE 137 - Compilation market 2006						
Territory	Total Market Value (MEUR)	Market Value Compilations (MEUR)	% compilations/ total market value	SONY BMG Total revenues (MEUR)	SONY BMG compilations revenues (MEUR)	SONY BMG Compilations / total revenues
Sweden	112	14	12 %	[...]*	[...]*	[10-20]* %
Sum of all affected EEA markets	4 949	771 ⁽¹⁾	16 % ⁽¹⁾	[...]*	[...]* ⁽¹⁾	[10-20]*% ⁽¹⁾

Source: Notifying Parties; Commission analysis - ⁽¹⁾ Computation excluding Greece

1514. The notifying parties submit that the market for compilations is declining much faster than the overall record market in the EEA. This is also the case in Sweden, where the sales of compilation CDs have decreased since 2002 (18% of total Swedish sales in 2002, versus 12% in 2006). Sales of compilation albums in proportion to Sony BMG sales have also decreased, as outlined in table 138 below.

⁴⁰⁵ www.hitlistan.se

TABLE 138 - Sony BMG revenue from compilations					
Territory	2002	2003	2004	2005	2006
Sweden (MEUR)	[...]*	[...]*	[...]*	[...]*	[...]*
Sweden (% total sales)	[20-30]* %	[20-30]* %	[10-20]*%	[10-20]* %	[10-20]* %
Sum of all affected EEA markets	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%

Source: Notifying Parties; Commission analysis

(2) Theories of harm – Airtours criteria

1515. The theories that coordination would take place at the level of budgets, at the level of each title pricing, at the level of pricing policy and at the level of non-pricing related policy, have all been analysed and have all been rejected at the general level (including all affected markets). Only the elements relative to the theory of coordination at the level of release price are therefore developed at the national level.

1516. In order to demonstrate whether the theory of coordination at the level of release prices is sustainable, the Commission first analysed whether the results of the analysis of the theory conducted at a general level were also consistent in Sweden. It analysed the three Airtours criteria which characterize collective dominance, with respect to the market in Sweden.

1517. The analysis first conducted at the general level, including all affected markets, has pointed to a number of weaknesses of this theory which would be hardly compatible with collusion. These drawbacks are also observed in Sweden, making collusion at the level of release prices unlikely.

1518. Firstly, the number of main PPDs used by the different majors for the majority of their chart releases, as well as the level of these main PPDs differs between the different majors⁴⁰⁶. Even though the number of these main PPDs may seem very concentrated in Sweden (if compared with the total number of PPDs used by all the majors in this Contracting Party to the EEA Agreement) and could in theory constitute a focal point for tacit coordination on PPDs, it remains unclear how, in the absence of any apparent rule, the liberty for each major to allocate a different PPD to each new chart release could be consistent with tacit collusion. In addition, it is unclear, if coordination was taking place, why the different majors would still use different main PPDs within a range of more than [50-60]*SEK, meaning that some majors with lower main PPDs simply make a loss for a significant portion of their sales when compared to the others.

1519. Secondly, the period after release during which an album PPD is stable varies significantly from album to album. During the first 20 weeks after release, some albums have a unique PPD whereas other albums suffer from a PPD drop after only one or two weeks. This variety has been illustrated by the notifying parties and has not been challenged by any market participant. For example in Sweden more than [50-60]*% of Sony BMG albums are re-priced before the end of this period. One other major follows a similar policy whereas the other two majors respectively re-priced 25% and 10% of their albums within the first 20 weeks after release. Again, it is not

⁴⁰⁶ In 2006, Sony BMG used [...] PPDs, another major 3 PPDs and the two remaining majors 4 PPDs for the majority of their sales in the first 20 weeks after release.

clear whether, in the absence of any apparent rule, the liberty for a major to decrease the PPD of an album "freely" could be compatible with tacit collusion.

1520. Thirdly, the investigation shows that campaign discounts are applied during the early post-release phase of albums to a significant proportion of albums, and that they have a significant impact on the net wholesale price of these albums. In 2005 in Sweden, [40-50]*% of Sony BMG albums received campaign discounts that represented more than 5% of PPD during the first 20 weeks after release (the figure was [30-40]*% for campaign discounts representing more than 10% of PPD). The investigation did not find any simple and recurrent patterns behind the application of these campaign discounts in the early life of albums. The absence of such patterns is hardly consistent with a hypothesis that coordination among the majors has taken place.

1521. In addition, the Commission has also analysed the Airtours criteria⁴⁰⁷ to characterize a collective dominance. According to the Airtours judgment, to characterize a collective dominance on the market for recorded music, there must be sufficient market transparency, a means for oligopoly members to retaliate and no possibility for competitors or customers to jeopardize the coordination.

(a) Transparency

1522. The Commission has evaluated the level of transparency of PPDs, discounts and mark-ups applied by retailers to net wholesale prices, as well as their main characteristics.

Published Prices to Dealers

1523. In 2006, Sony BMG used [100-150]* PPDs in Sweden. [...] Nevertheless, despite an important number of gross prices, the 5 most used PPDs account for [70-80]*% of Sony BMG's sales in 2006 (charts and back catalogue). [...]*

1524. When concentrating on chart releases only, however, this proportion increases significantly. In 2006, the 5 most used PPDs of Sony BMG represented [90-100]*% of sales for the first 20 weeks after the date of release. For the three other majors, figures were respectively [90-100]*%, [90-100]*% and [90-100]*%.

1525. It should nevertheless be noted that differences, not revealed by aggregated figures, exist between majors, which are unlikely to be consistent with coordination. The following paragraphs focus on the period covering the first 20 weeks after release, as this period covers a significant share of sales. However the Commission also examined other potential periods for coordination, ranging from one week to one year, and found the same conclusions.

(i) During the first 20 weeks after chart release, the number of PPD categories accounting for more than 10% of sales differs between the different majors. In 2006,

⁴⁰⁷ See "Airtours vs Commission – Judgment of the Court of First Instance in case T-342/99"; See "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings (2004/C 31/03).

Sony BMG used [...] PPDs, another major 3 PPDs and the two remaining majors 4 PPDs for more than 10% of their sales.

(ii) The range between the highest and lowest of these main PPDs also differs between the different majors. Sony BMG PPDs ranged between [80-120]*SEK, while the range between the highest and lowest of the main PPDs for the 3 other majors was respectively 114-119 SEK, 95-116 SEK and 110-144 SEK, giving a maximum range of main PPDs of [80-144]* SEK, a variation of [30-40]*%.

(iii) Finally, the number and level of main PPDs used by the different majors varies over time, as the main PPDs used by the majors are different at the date of release, 20 weeks after the date of release and one year after the date of release.

1526. The notifying parties submit that the use of such a range of PPDs for Sony BMG, together with the unstable proportion of sales represented by each of the most used PPDs, could not reflect the result of a coordinated approach of the market. The Commission findings confirm the analysis of the notifying parties, also for other majors. It therefore seems that the different majors are in a position to allocate a PPD to new releases with enough range of discretion that it raises serious questions as to how this behaviour could be compatible with collusion between the majors.

1527. The notifying parties submit that in Sweden, Sony BMG has [...] sales representatives, who are responsible for [...] customer accounts, representing more than [...] stores, and that this low number of sales representatives makes it difficult to collect a comprehensive amount of information and data on their competitors' commercial conditions and activities.

1528. In Sweden, record companies, including the four majors, transmit information relative to their albums to Grammotex⁴⁰⁸. Grammotex is an online database aimed at providing information from recording companies to music retailers. The information provided included the following for each album: its title, the name of the artist, the number of tracks per album, the release date, the genre, the record label, the PPD code and list prices of the album. A part of the information provided is fully public⁴⁰⁹, but that information does not contain price information. Otherwise, access to the database is password restricted and retailers will generally obtain a password to the database. According to Grammotex, record companies will only have access to PPD information on their own catalogue, on request, and will only be able to see PPD code information related to their competitors, but not the PPDs themselves. In addition, list prices of individual albums are occasionally published in trade magazines, although this is not systematic.

1529. The notifying Parties submit that one of their mother companies, Bertelsmann, does not have a relevant Swedish affiliate and to the best of its knowledge, no affiliate has access to Grammotex. To the best of their knowledge, no Sony affiliate has access to Grammotex either.

⁴⁰⁸ www.grammotex.se

⁴⁰⁹ www.hitlistan.se

1530. During the market investigation, 3 out of 4 Swedish customers submitted that they believe that record companies generally know about PPDs of their competitors⁴¹⁰. Unlike in other Contracting Parties to the EEA Agreement, it appears that this belief is not based on the habit among some retailers to use information on competing majors' prices when negotiating with other record companies, as 3 out of 4 Swedish customers submit that they are not engaged in such practices⁴¹¹. Unless knowledge of competitors' prices was obtained through a cartel-type of agreement, which the Commission investigation found no indication of, the two above statements of this paragraph seem somewhat contradictory. Given the relatively small size of the sample of customers interviewed, the Commission will consider the above findings as inconclusive. However, for the sake of caution, the Commission will assume, as it happens in other Contracting Parties to the EEA Agreement, that there is a possibility that sales representatives of Sony BMG and other majors are in a position to gather a certain amount of information about the other majors' PPDs from the retailers that they interact with on a regular basis.

1531. Contrary to the situation regarding retailer feedback on discounts, however, it is less clear that retailers would have any strong incentive to exaggerate or otherwise provide unreliable information about PPDs, as this data is merely a starting point for negotiations. Sony BMG and the other majors also claim that any information gathered in this way would suffer from several weaknesses in that it would be largely incomplete, only partly reliable and would require constant updating to account for new releases and changes in PPDs. Against this background, it is not clear that the majors would have a strong incentive to allocate their resources to building and maintaining a data base with all assumed PPDs or even a significant proportion of them for the competing albums at any point in time. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Sweden, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard. In addition, should majors collect their competitors' PPDs, such collection would be limited to a small number of albums (unless disproportionate resources were allocated to this collection exercise) and would suffer from delay, implying that a major would only know PPDs of its competitors one or two weeks after such PPDs were negotiated.

⁴¹⁰ Question n°31 – Questionnaire to customers 12 February 2007 – 3 out of 4 (75%) Swedish customers submit that record companies know the PPDs of their competitors, the other had no opinion.

⁴¹¹ Question n°30 – Questionnaire to customers 12 February 2007 – 3 out of 4 (75%) Swedish customers submit that they do not use information on other majors' prices when negotiating with one record company.

1532. The Commission has demonstrated the lack of transparency of discounts by firstly illustrating that discounts are not aligned between majors, and by secondly underlying that there is no reliable source of information to collect competitors' discounts. The lack of alignment of discounts between majors will be conducted in the following by illustrating the following aspects: (i) general discounts (differences in average discount granted by Sony BMG to its customers); (ii) file discounts (differences in file discounts granted by Sony BMG and another major to a same customer); (iii) campaign discounts (change of average campaign discounts change from year to year, majors grant different campaign discounts to a same customer); and (iv) other discounts.

1533. Based on sales realized by Sony BMG with its top 3 customers in 2005, the average discount was approximately [20-30]*% of gross price. Among the top three customers, the total discount range varies from [10-20]*% to [20-30]*%. In Sweden, file and campaign discounts each account for approximately [50-60]* of total discounts. The company however grants different level of discounts to its different customers.

1534. Like in most other Contracting Parties to the EEA Agreement, file discounts are rather stable in Sweden from year to year (meaning that the most commonly used file discount rates do not vary significantly in proportion from year to year). [...]*

1535. Conversely, campaign discounts are particularly fluctuant from year to year for some majors (meaning that the most commonly used campaign discount rates vary significantly in proportion from year to year). As other majors did not provide information on campaign discounts, it was not possible to evaluate whether different majors provide different levels of campaign discounts to a same customer in Sweden. It will however be assumed that this is the case, as it happens in other Contracting Parties to the EEA Agreement investigated. This level of change over time and assumed level of variation between customers indicates that one major does not apply a stable easily predictable campaign discount policy per category of album or retailer.

1536. The Commission has also investigated the regularity and predictability of discounts applied to a narrower segment of all albums, namely new releases that made it into the charts⁴¹³. Indeed, Sony BMG in Sweden applies [...] campaign discounts [...] to a significant proportion of its albums. Because one major does not know which albums of its competitors will receive campaign discounts, it seems very unlikely that they can predict the wholesale price of albums from competitors even if they were to know the PPDs of these albums.

⁴¹² Unlike the above analysis of PPDs which was made for the first 20 weeks after chart release of Sony BMG and other major's chart albums, this analysis of discounts has been made on the whole life-cycle of albums for the period 2002-2006. As most of the chart album's sales are however realised within a period of 20 weeks, it is assumed that the results would not change if the discount analysis would have been made for a 20 week period instead.

⁴¹³ The basis for this analysis is transaction level data reported to the Commission by Sony BMG and other majors and covering the period between 2002 and 2006.

1537. This variety of discounts, which do not appear to follow any stable rule of application, contributes to limiting the transparency on the market. 50% of customers believe that major record companies know the discounts applied by their competitors⁴¹⁴. As for PPDs, some retailers state that they do not use information on majors' prices when negotiating with other record companies.

1538. It is however assumed that Sony BMG and other majors may receive some feedback on competitor's discount policy through frequent contacts with multiple retailers. Sony BMG and the other majors however claim that any information gathered in this way would be incomplete and, more importantly, unreliable given the retailer's self interest in exaggerating statements about discounts received from other suppliers. Sony BMG and the other majors have submitted that they do not in any systematic way collect such information in Sweden, whilst acknowledging that sales representatives may occasionally comment on statements made by customers. The investigation has not provided evidence that contradicts the statements made by the majors in this regard.

Retail prices

1539. Like in other affected markets, Swedish retailers apply a mark-up on the net wholesale price of albums to fix retail prices. According to the market investigation, 50% of customers interviewed believe that it is feasible for the majors to deduce net wholesale prices of their competitors through the knowledge of retail prices⁴¹⁵, and 50% (2 out of 4) of Swedish customers submit that record companies do monitor retail prices⁴¹⁶.

1540. However, the information available to the Commission indicates that the possibility to reverse-engineer prices is limited also to the very early life of an album (around its date of release) and reduces as the album matures. As already described, the Commission also focused on the possibility to reverse-engineer retail prices to deduce net wholesale prices at the date of release. In Sweden, one customer provided retail and net wholesale prices of its new releases. This customer applied an irregular mark-up to new releases⁴¹⁷. Although the analysis has been conducted on one retailer only, the Commission did not find any evidence that mark-ups applied by other retailers should be more regular and predictable.

⁴¹⁴ Question n°31 – Questionnaire to customers 12 February2007 – 1 out of 4 (25%) Swedish customers submit that record companies do not know the discounts of their competitors, 2 out of 4 (50%) submit that they know the discounts of their competitors, and 1 out of 4 (25%) does not know.

⁴¹⁵ Question n°33 – Questionnaire to customers 12 February2007 – 2 out of 4 (50%) Swedish customers submit that record companies can reverse-engineer the retail prices of their competitors to deduct pretty closely their net wholesale prices.

⁴¹⁶ Question n°32 – Questionnaire to customers 12 February2007 – 2 out of 4 (50%) of Swedish customers report that record companies do monitor retail prices.

⁴¹⁷ Based on 5 last new releases of all majors, the retailer applies a mark-up which deviates from the average mark-up by 14% on average. Maximum deviation however reaches 38% and 17 albums out of 20 are priced with a mark-up deviating from the average by more than 10%.

1541. In conclusion, the investigation indicates that in Sweden the level of transparency that characterises PPDs, discounts and mark-ups applied to retail prices would leave enough room for competition that it would not be possible to verify that the other majors are respecting any commonly agreed pricing policy for all albums, or even during the period after initial release. There is therefore insufficient transparency with regard to prices (PPDs, discounts, mark-ups) in Sweden to sustain tacit coordination between major record companies.

1542. Given that the three Airtours criteria aimed at testing the existence of collective dominant position among oligopolistic companies are cumulative, the Commission considers that the fact that the first Airtours criteria of transparency is not met in Sweden, even for the most narrowly defined terms of coordination (first 20 weeks of chart releases) is already enough to indicate that there is no collective dominance by the major recording companies in Sweden. The Commission has nevertheless investigated the criteria of retaliation and reaction of competitors and customers as a matter of completeness.

(b) Retaliation

1543. Like in all other affected markets, the two possible forms of retaliation that have been reported to the Commission (no other forms have been reported by market participants) are either the exclusion of the deviating company from compilation joint ventures or joint activities, or the termination of the tacitly coordinated behaviour with respect to prices and releases of albums.

1544. In Sweden, Sony BMG revenues stemming from compilation albums accounted in 2006 for [10-20]*% of total revenue, only marginally higher than the average proportion observed at the level of all affected markets ([10-20]*%). The importance of compilation revenue is however diminishing because of the fall in sales of such albums, which again is linked to the development of online, customer-made, compilations.

1545. The Commission also did not find any indication of retaliation aimed at sanctioning the termination of a tacitly coordinated behaviour with respect to prices and releases of albums.

1546. In conclusion, the Commission did not identify any action in Sweden that could be considered as retaliation via exclusion of compilation deals or as activities that were intended as retaliatory responses to competitive behaviour. Although the threat to apply a credible retaliation mechanism can constitute a sufficient deterrent mechanism, the absence of such evidence in circumstances where there has been no observable alignment consistent with terms of coordination confirms that such mechanism would not, in fact, constitute credible means of retaliation.

(c) Reaction of competitors and customers

1547. In Sweden, independent competitors do not appear in a position to jeopardize any potential tacit collusion between majors. Independent competitors are too small and cannot propose enough hit albums to retailers or other customers.
1548. Customers are less concentrated than the EEA average with the top five customers accounting for [50-60]*% of Sony BMG sales in 2006. Contrary to other Contracting Parties to the EEA Agreement, however, a majority of these customers [...] still realize a significant proportion of their turnover with music albums, which weakens their buyer power.
1549. Nevertheless these retailers also heavily depend on the majors for their offer of music and it is unclear whether they could effectively react to any potential coordination among the majors. On the other hand, the fact that the general price trend for CD prices indicates a regular decline, notably driven by the decrease of prices on back catalogue, could be interpreted as a sign of limited market power for record companies.
1550. In conclusion, there seems to be enough, and increasing, scope for at least a sizeable proportion of Swedish customers to destabilise coordination by majors by reducing purchases and advertising on their products. It is therefore not obvious that coordination (which the Commission found no indication of in the market investigation) could be sustained under such circumstances.

(3) Conclusion: coordination is unlikely on the market for recorded music

1551. The Commission found that coordination on the market for recorded music is unsustainable. That conclusion, which was found for a sub-segment of total record sales (new chart releases), is even more applicable when all sales are considered.
1552. It is not enough that it may be assumed that the level of transparency that characterizes PPDs, discounts and mark-ups applied to retail prices could be sufficient to spot whether a record company is significantly changing its business model (for example drop its prices by 20-30%). The level of transparency is however not sufficient to allow the majors to verify that the other ones respect a commonly agreed pricing policy based on the stability of PPDs and discounts during a determined period after release. The level of transparency on prices is therefore not sufficient for sustainable tacit collusion on the Swedish market for recorded music. In addition, the Commission analysis based on transaction data did not conclude that major prices are aligned notably as each major use a different set of main PPDs for its new chart releases.

1553. It can therefore be concluded that on the Swedish market, the transaction did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

C. OVERALL CONCLUSION

1554. Contrary to the normal situation under the current Merger Regulation, the Commission analysis in this Decision relates to a concentration that has already been implemented. In that context and considering the in-depth analysis detailed in this Decision, it appears that market transparency can neither be presumed, nor established for either the online or offline markets for recorded music. This undermines the conditions for establishing a collective dominant position theory as described in *Airtours v. Commission*. Other alleged indicia or evidences of collective dominance (such as commonalities relating to the budget policy, new release policy, etc.) are also dismissed.

1555. The Commission also found evidence that the online or offline markets are characterized by such levels of price alignment that tacit coordination would not appear the only or most likely explanation. Price alignment is notably not relevant at the level of individual title as each album price is set according to a number of title-specific characteristics, each characteristic being subject to a large margin of appreciation. The investigation has also not produced evidence of particularly high levels of alignment at the level of the general pricing policy. Although the majors largely follow similar business models, a feature which is not unusual for firms which are active in the same industry, the Commission analysis in this Decision has in particular underlined that the majors nonetheless generally use different PPD sets and discount rates in all affected markets.

1556. Specifically with regards to the on-line market, the Commission found evidence to establish that the merger has neither led, nor will lead to the creation or strengthening of a collective dominant position of the four remaining majors in the markets for licences for digital music in any of the Contracting Parties to the EEA Agreement, as a result of which effective competition would be significantly impeded in the common market or in a substantial part it.

1557. For the off-line market, the Commission also did not find confirmation of the various theories of harm, based on price or non-price items, put forward by independent market observers.

1558. Finally, the Commission found evidence that the merger had no effect on the market characteristics or on the competition between actors in the markets of off-line and on-line music.

1559. It can therefore be concluded that the notified operation whereby Sony Corporation of America and Bertelsmann AG acquire joint control of the joint venture Sony BMG should be declared compatible with the common market and the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Sony Corporation of America and Bertelsmann AG acquire joint control, within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89, of the joint venture Sony BMG is hereby declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

Bertelsmann AG
Carl-Bertelsmann-Straße 270
D-33311 Gütersloh
Germany

Sony Corporation of America
550 Madison Avenue
10022 New York, NY
USA

Done at Brussels, 03/X/2007

For the Commission
(signed)
Neelie KROES
Member of the Commission



EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER
IN CASE COMP/M.3333 – Sony / BMG

**(pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC)
of 23 May 2001 on the terms of reference of Hearing Officers
in certain competition proceedings – OJ L162, 19.06.2001, p.21)**

On 9 January 2004 the Commission received a notification of a proposed concentration by which the undertakings Bertelsmann AG and Sony Corporation of America acquired, within the meaning of Article 3(1)(b) of Council Regulation (EC) No 4064/89 (*Merger Regulation*), joint control of the record music joint venture "Sony BMG" by way of purchase of shares in a newly created company.

On 19 July 2004 the Commission declared the concentration compatible with the common market. On 13 July 2004 the Hearing Officer concluded in its final report that the right to be heard of all participants to the proceedings had been respected.⁴¹⁸

Subsequently, on 13 July 2006, further to an application for annulment submitted by Independent Music Publisher and Labels Association (IMPALA) the Court of First Instance of the European Communities annulled the Commission decision.

On 31 January 2007 the Commission received an updated version of the initial notification containing the necessary information and data to enable it to assess the notified transaction in the light of current market conditions. The updated notification comprised the creation of the recorded music joint venture "Sony BMG", which has been completed following the Commission's clearance decision of 19 July 2004.

After examining the updated notification the Commission concluded that the notified transaction fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the functioning with the EEA Agreement. Accordingly, on 1 March 2007, the Commission decided to initiate proceedings in accordance with Article 6.1(c) of the Merger Regulation.

The procedure was suspended in accordance with Article 11(5) of the Merger Regulation from 22 March 2007 until 26 June 2007, as the parties had not fully responded to a request for information.

⁴¹⁸ OJ C 52/5, 2.3.2005.

The Parties were, upon request, granted access on 15 March, 8 May and 3 August 2007 to key documents in the file provided by third parties in accordance with DG Competition's "Best Practices on the conduct of EC merger control proceedings".

In addition, IMPALA, a third party representing independent record companies, received, on request, a non-confidential version of the Article 6.1(c) decision and subsequent comments submitted by the Parties as well as other key documents submitted in this case by the Parties, notably their comments on IMPALA's submissions.

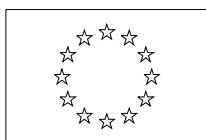
Following an in-depth market investigation carried out by the Commission services it was concluded that the proposed transaction would not significantly impede effective competition in the common market or a substantial part of it and is therefore compatible with the common market and the EEA Agreement. Accordingly, no Statement of Objections was sent to the Parties in this case.

No queries or submission have been made to the Hearing Officer by the Parties or any other third party. The case does not call for any particular comments as regards the right to be heard.

Brussels, 25 September 2007

(signed)

Karen Williams



OPINION

of the ADVISORY COMMITTEE on MERGERS

given at its meeting of 17 September 2007 relating a draft decision relating to

Case COMP M.3333 – SONY/BMG

Rapporteur : DENMARK

1. The members of the Advisory Committee agree with the Commission that the notified operation constitutes a concentration within the meaning of the Merger Regulation (EEC) No 4064/89.
2. The members of the Advisory Committee agree with the Commission that the notified operation has a Community dimension as defined by that Regulation.
3. The majority of the members of the Advisory Committee agrees with the Commission that in the present case the relevant product markets are:
 - a. the market for physical recorded music.
 - b. the market for licensing of recorded music in digital format which might be further subdivided into markets for online and mobile digital music.

A minority of the members of the Advisory Committee disagrees with point 3a.

4. The members of the Advisory Committee agree with the Commission that the market for physical recorded music is national in scope.
5. The members of the Advisory Committee agree with the Commission that the market for recorded music in digital format is national in scope.
6. The members of the Advisory Committee agree with the Commission that the proposed concentration will not lead to the creation of a single dominant position, as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it, in any of the EEA countries in the markets for physical recorded music.
7. The members of the Advisory Committee agree with the Commission that the proposed concentration will not lead to the creation of a single dominant position, as a result of which effective competition would be significantly impeded in the Common

Market or in a substantial part of it, in any of the EEA countries in the markets for recorded music in digital format.

8. The members of the Advisory Committee agree with the Commission that the proposed concentration will not lead to the strengthening nor the creation of a collective dominant position, as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it, in any of the EEA countries in the markets for physical recorded music.
9. The members of the Advisory Committee agree with the Commission that the proposed concentration will not lead to the strengthening nor the creation of a collective dominant position, as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it, in any of the EEA countries in the markets for recorded music in digital format.
10. The members of the Advisory Committee agree with the Commission that the proposed concentration should be declared compatible with the Common Market and with the EEA Agreement.
11. The Advisory Committee is of the opinion that the Commission has taken due account of the findings of the Court of First Instance in the Impala Case.
12. The members of the Advisory Committee recommend the publication of its opinion in the Official Journal of the European Union.

<u>BELGIË/BELGIQUE</u>	<u>BULGARIA</u>	<u>ČESKÁ REPUBLIKA</u>	<u>DANMARK</u>	<u>DEUTSCHLAND</u>
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<u>ITALIA</u>	<u>KYPROS/KIBRIS</u>	<u>LATVIJA</u>	<u>LIETUVA</u>	<u>LUXEMBOURG</u>
M. GANGI				
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		B. BOSCH B.L.K. VROOMEN	B. SCHOIßWOHL	
<u>PORTUGAL</u>	<u>ROMANIA</u>	<u>SLOVENIJA</u>	<u>SLOVENSKO</u>	<u>SUOMI-FINLAND</u>
				H. KAIPONEN
<u>SVERIGE</u>	<u>UNITED KINGDOM</u>			
M. ULFVENSJÖ BALTAZIS	I. NITSCHKE			