EN

Case No COMP/M.5533 - BERTELSMANN/ KKR/ JV

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 08/09/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

Dear Sir/Madam,

Subject: Case No COMP/M.5533 - Bertelsmann/ KKR/ JV
Notification of 4 August 2009 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 4 August 2009, the Commission received a notification of a proposed concentration within the meaning of Article 3(4) of Council Regulation No 139/2004 on the control of concentrations between undertakings ("the Merger Regulation") by which Bertelsmann AG ("Bertelsmann", Germany) and Kohlberg Kravis Roberts & Co L.P. ("KKR", United States of America) will establish a jointly controlled music publishing and rights management undertaking (the "JV"), to which Bertelsmann's current music publishing and recording activities will be contributed. The JV will also act as a vehicle for the acquisition of certain music publishing assets from Crosstown Songs America, LLC ("Crosstown", USA).

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. Bertelsmann is an international media company active in TV and radio (through the RTL group ("RTL")), book publishing, magazine publishing, media services, and book and media clubs. Following the disposal of its main music publishing interests to Universal (see Case M.4404 – *Universal Music Corp/BMG Music Publishing*) and the

[1] OJ L 24, 29.1.2004, p. 1.

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disposal of its 50% interest in the former Sony BMG joint venture to Sony (see Case M.5272 – *Sony/Sony BMG*), Bertelsmann has established a small music publishing and rights management business (the "BMG Rights Management")[2] which had revenues of […] in the last quarter of 2008.

4. KKR is a private equity investment firm whose affiliated funds have investments in a range of different businesses, including TV and radio (through its joint control of ProSiebenSat.1 ("P7S1"), a German broadcaster, with Permira, another private equity firm).

5. Crosstown is active in music publishing.

II. THE OPERATION

6. Under the terms of the proposed transaction, Bertelsmann will contribute the BMG Rights Management business to a new joint venture with KKR. KKR will contribute to the JV the consideration payable for the acquisition of certain music assets from Crosstown ("Crosstown Assets").[3] Following this capital contribution by KKR, KKR will hold 51% of the share capital of the JV, with Bertelsmann holding the remaining 49%.

<u>Related Transactions</u>

7. The notifying parties submit that the proposed concentration consists of two related transactions, namely; (i) the creation of the JV ("BMG Rights Management Transaction"); and (ii) the acquisition by the JV of the Crosstown Assets ("Crosstown Transaction").

8. The notifying parties submit that the BMG Rights Management Transaction is *de facto* conditional on the Crosstown Transaction, whilst the Crosstown Transaction is *de jure* conditional on the BMG Rights Management Transaction.

9. Bertelsmann will contribute the BMG Rights Management business to the JV whilst KKR will contribute funds to the JV, including the consideration payable in relation to the acquisition of the Crosstown Assets. Once both transactions are completed, KKR will hold 51% of the share capital of the JV, with Bertelsmann holding the remaining 49%.

10. In terms of the Subscription Agreement between Bertelsmann and KKR dated 8 July 2009 ("Subscription Agreement"), KKR's capital commitment is stated to be […]

11. If the add-on transaction is not unconditional at the date of closing of the BMG Management Transaction,[4] the BMG Rights Management Transaction will be closed. However, pending closing of the add-on transaction, it will be Bertelsmann who will

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2 BMG Right Management was established in October 2008.

3 Crosstown Assets comprise a catalogue of 8,000 songs spanning multiple music genres, decades and geographic origins across the Anglo-American repertoire.

4 The BMG Management Transaction is due to close on the later of […] or the date of receipt of regulatory clearances.

hold […]% of the shares in the JV, whilst KKR will hold the remaining […]%[5] as it is only upon payment of the consideration for the add-on transaction that KKR will come to hold […]% of the shares in the JV.[6]

12. Furthermore, in terms of the Subscription Agreement, […] The notifying parties entered into definitive documentation in relation to the Crosstown Transaction on 22 July 2009.

13. The obligation of BMG Rights Management to effect closing of the Crosstown Transaction is, in terms of the Asset Purchase Agreement between BMG Rights Management and Crosstown dated 22 July 2009 ("Asset Purchase Agreement"), subject to the condition that the KKR funding pursuant to the Subscription Agreement will have been completed.[7]

14. Whilst it is true that the BMG Transaction may be closed if the Crosstown Transaction is not unconditional until the date of closing of the BMG Management Transaction, Bertelsmann will remain in sole control of the JV until the acquisition of the Crosstown Assets becomes unconditional.

15. The BMG Rights Management Transaction is not *de jure* conditional upon the Crosstown Transaction, as the Asset Purchase Agreement was entered into at a later date than the Subscription Agreement. However, the Subscription Agreement foresees an add-on acquisition by the JV and makes KKR's contribution obligation (and therefore acquisition of joint control of the JV by the notifying parties) conditional upon closing of the add-on acquisition.

16. The closing of the Crosstown Transaction is the triggering factor for KKR to come to hold 51% of the shares (and the resulting joint control of the JV). This fact shows that the BMG Transaction cannot be fully completed without closing of the Crosstown Transaction. The option provided for in the Subscription Agreement whereby […], further evidences the economic aims of the notifying parties in this regard. Therefore, the BMG Rights Management Transaction is *de facto* conditional upon the Crosstown Transaction.[8]

17. Given that in terms of the Asset Purchase Agreement, the completion of the Crosstown Transaction is conditional upon completion of the KKR funding under the Subscription Agreement, the Crosstown Transaction is clearly conditional upon the BMG Rights Management Transaction.

18. In terms of the Jurisdictional Notice, even if several transactions are linked by condition upon one another, they can only be treated as a single concentration if control is acquired ultimately by the same undertakings. A single concentration may exist if the

5 In terms of Article 2.02(a) of the Subscription Agreement, at closing of the BMG Transaction, KKR will subscribe to […]% of the shares of the JV.

6 […].

7 […].

8 See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings ("Jurisdictional Notice"), paragraph 43.

same purchasers acquire control of a single business, that is, a single economic entity, via several transactions if those are inter-conditional.[9]

19. Control of the BMG Business and the Crosstown Assets will ultimately be acquired by the same undertakings, namely Bertelsmann and KKR.[10] Therefore, in light of all the above it can be concluded that the BMG Transaction and the Crosstown Transaction are unitary in nature and constitute a single concentration for the purposes of Article 3 of the Merger Regulation.

Joint control of the JV

20. Following the capital contribution for the Crosstown Transaction by KKR, KKR will hold 51% of the share capital of the JV, with Bertelsmann holding the remaining 49%. The JV's board of directors will initially be composed of 5 directors. As majority shareholder, KKR would be entitled to designate a majority of the JV's directors. However, as the industrial partner in the JV, Bertelsmann will enjoy a number of veto rights (as long as it holds at least […] of the shares of the JV), including veto rights over:

(i) the right to approve (which approval shall not be unreasonably withheld or delayed) the adoption or amendment to the business plan[11] or annual budget, which results in (a) a decrease in earnings before interest, tax, depreciation and amortization (EBITDA) for the relevant fiscal year by […]% or more; or (b) the planned aggregate cash equity investment by KKR and Bertelsmann exceeding […]for the relevant fiscal year, in all cases tested against the last business plan or annual budget;

(ii) the dismissal of the chief executive officer ("CEO"), chief financial officer ("CFO") or chief investment officer ("CIO")[12] for where EBITDA has not been […]% or more below planned EBITDA on a cumulative basis in any twelve month period; and

(iii) the conclusion, modification or termination of agreements with a value the greater of EUR […] and […], or if the full economic value is not readily capable of being determined, which are otherwise of strategic value for the business.

21. For the purposes of the present case, the following elements are in themselves likely to be insufficient for establishing Bertelsmann's joint control over the JV:

(i) Bertelsmann's veto right in relation to the conclusion, modification or termination of agreements with a value the greater of EUR […] and […]. From the information submitted by the notifying parties, it seems likely that this threshold will not be

9 Jurisdictional Notice, paragraph 4.

10 See Jurisdictional Notice, paragraphs 41 and 45.

11 The initial five year business plan will be jointly agreed by Bertelsmann and KKR prior to closing. The adoption of subsequent business plans and annual budgets in principle would require Bertelsmann's consent. However, this consent must not be unreasonably "withheld or delayed", a concept which has not been defined in the transaction agreements and which the notifying parties intend to keep open.

12 From the information provided by the notifying parties, it appears that these officials will be the incumbent senior management officers of Bertelsmann's BMG Rights Management Business.

attained. The veto right seems to be designed to protect Bertelsmann's financial interests as an investor.

(ii) Bertelsmann's veto rights in relation to amendments to the business plan or annual budget which results in (a) a decrease in earnings before interest, tax, depreciation and amortization (EBITDA) for the relevant fiscal year by […]% or more; or (b) the planned aggregate cash equity investment by KKR and Bertelsmann exceeding […] for the relevant fiscal year. The business plan presented by the notifying parties does not provide the detailed aims of the JV together with the measures to be taken in order to achieve those aims. In such circumstances, even an unconditional veto right over this type of business plan would not, on its own, be sufficient to confer joint control.[13] As to the annual budget, Bertelsmann's veto right is limited to blocking the adoption/amendment of an annual budget which results in (a) a decrease in earnings before interest, tax, depreciation and amortization (EBITDA) for the relevant fiscal year by […]% or more; or (b) the planned aggregate cash equity investment by KKR and Bertelsmann exceeding […] for the relevant fiscal year. This veto right seems to be merely a means of protecting Bertelsmann's financial interest as an investor rather than allowing it to influence the JV's commercial behaviour.

22. However, in assessing Bertelsmann's veto rights in the proposed JV as a whole and overall context the Commission considers that, in particular in view of the following additional elements, Bertelsmann's proposed influence over the JV will lead to negative joint control of the JV by Bertelsmann and KKR:

(i) Bertelsmann is the industrial shareholder which will contribute its BMG Rights Management Business to the JV. KKR is a mere financial investor, which indicates a degree of dependency of KKR on Bertelsmann's experience in music publishing and rights management business.[14]

(ii) Bertelsmann will determine the first CEO, CFO and CIO and can use its veto right to ensure that this senior staff will remain in office (unless the JV makes significant financial losses).

23. Therefore, since:

(i) in light of the terms of the proposed transaction and in view of the overall context of the planned operation, it would seem that KKR would need to cooperate with Bertelsmann in order to determine the strategic behaviour of the proposed JV; and

(ii) in view of Bertelsmann's role as an industrial shareholder in the JV and given that it would enjoy the right to determine the management personnel of the JV possibly on a long-term basis, Bertelsmann can be reasonably expected to be in a position to block important strategic decisions in the proposed JV which are not in its interest,

13 See Jurisdictional Notice, paragraph 70.

14 According to Jurisdictional Notice, paragraph 78, control may also result from a high degree of dependency of a majority shareholder on a minority shareholder, because the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor.

it can be concluded that the proposed transaction will result in the acquisition of joint control by Bertelsmann and KKR over the JV.

Full functionality

24. The notifying parties submit that the JV will perform on a lasting basis all the functions of an autonomous entity in terms of Article 3(4) of the Merger Regulation.

25. Following the transfer, the JV will have access to sufficient resources to enable it to conduct its business activities on a lasting basis. In this regard, according to the information submitted by the parties, the business which will be transferred to the JV as a result of the BMG Rights Management Transaction already essentially operates as an autonomous entity. The acquisition of the Crosstown Assets will further add to the JV's resources. The current management team of the BMG Rights Management business will transfer to the JV, which will therefore have its own dedicated management. The joint venture will also have its own work force.

26. Bertelsmann will provide transitional and ongoing services to the JV, for which the JV will be charged. The transitional services[15] will have a twelve months' duration. The ongoing services include financial accounting, human resources services[16] and treasury services. The JV will be able to terminate these services by giving a six months' notice at any time after the date which is 18 months after the contribution of the KKR funding. The parties expect that the agreement relating to ongoing services will be terminated after two years.

27. Notwithstanding the notifying parties' presence in the TV and radio markets, [0-5]%[17] of the JV's total revenue stream will result from the licensing of rights to companies controlled by Bertelsmann or KKR (including RTL and P7S1).

28. In light of the above, it can be concluded that the JV will be a full functional joint venture performing on a lasting basis all the functions of an autonomous entity.

IV. COMMUNITY DIMENSION

29. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Bertelsmann: EUR 16 118 million, KKR: EUR […] million and Crosstown EUR […] million) and a Community-wide turnover in excess of EUR 250 million (Bertelsmann: EUR […] million and KKR: EUR […] million). None of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension[18].

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15 These transitional services include tax administration, legal services, purchasing/procurement services and corporate infrastructure services.

16 These services will relate to the JV's own employees.

17 Notifying parties' estimate.

18 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

V. COMPETITIVE ASSESSMENT

A. Relevant Product and Geographic Markets

30. The JV will be active in music publishing and recording. In addition, Bertelsmann (through the RTL group) and KKR (through its joint control of P7S1) are active in TV, radio, TV production and the licensing of broadcasting rights, which are all vertically-related to the music publishing and recording markets.

1. Music publishing

31. The notifying parties, in line with the Commission's decisions in *Universal/BMG Music Publishing*[19] and *Sony/SonyBMG*[20], submit that music publishing constitutes a separate product market from music recording. The activities of a music publisher are two-fold (i) the downstream activity of exploiting the works of authors under contract; and (ii) an upstream activity of signing authors and providing them with financial and marketing support as a counterpart to the transfer of their musical works.

a. Exploitation of music publishing rights

32. The notifying parties rely on Commission precedents which identified five different types of publishing rights: (i) mechanical rights (for reproduction in sound recordings, for example on CDs); (ii) performance rights (for TV, radio, live performance exploitation); (iii) synchronisation rights (for synchronisation of music with visual image); (iv) print rights (for reproduction on music sheets); and (v) online rights (for online exploitation)[21].

33. In previous cases, the Commission considered that the market might be delineated by different genres/categories of music.[22] The notifying parties submit that the market should not be delineated by genres.[23]

34. In *Universal/BMG Music Publishing,* the Commission considered a possible segmentation of the market between national and international repertoires[24] for music publishing. The notifying parties do not consider that a separate market should be identified for international repertoire at this point in time.[25]

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19 Case COMP/M.4404 – *Universal/BMG Music Publishing*, 22 May 2007.

20 Case COMP/M.5272 – *Sony/SonyBMG*, 15 September 2008.

21 Case COMP/M.4404 – *Universal/BMG Music Publishing* and Case COMP/M.5272 – *Sony/SonyBMG.*

22 Case No IV/M.1219 - *Seagram/Polygram,* 21 September 1998 and Case No IV/M.202 - *ThornEMI/Virgin,* 27 April 1992.

23 The notifying parties state that although a number of independent labels specialise in a particular genre, music publishers usually acquire and commercialise rights for several types of music and that users generally licence rights covering a wide variety of genres. This view appears to be in line with the results of the market investigation in *Universal/BMG Music Publishing.* No reference to this possible sub-segmentation of the market was made by the Commission in *Sony/SonyBMG.*

24 The term "national repertoire" relates to musical works that are acquired and commercialised on a national basis. "International repertoire" relates to a large extent to Anglo-American repertoire (English language musical works) that are acquired and exploited on a largely multi-national basis.

25 No reference to this possible sub-segmentation of the market was made by the Commission in Case COMP/M.5272 – *Sony/SonyBMG.*

35. Relying on Commission precedents, the notifying parties submit that the five types of music publishing rights are all national in scope. In previous decisions, the Commission found that the markets for the five types of music publishing rights are national in scope, while there are indications that online rights could potentially develop into a multi-territorial market in the future[26].

36. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

b. Music publishing services to authors

37. The notifying parties submit that the segmentation of music publishing activities between the upstream (author-publisher) and downstream (publisher-user) levels is unlikely to be important in practice, as the Commission has recognised that the same market structure prevails in the upstream market for publishing services as for the overall market for music publishing rights (including the five rights outlined in paragraph 32 above).

38. In *Universal/BMG Music Publishing*, the Commission stated that the market for publishing services provided to authors appears to be national.

39. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

2. Recorded Music

40. Record companies operate downstream from music publishers and are active in the discovery and development of artists and the promotion, marketing and sales of their sound recordings as well as exploitation of rights in the sound recording of an artist's performance.

41. In its second *Sony/BMG* decision[27] and in *Sony/SonyBMG,* the Commission distinguished between the sale of physical recorded music and the sale of recorded music in digital form. In its second *Sony/BMG* decision[28] and in *Sony/SonyBMG,* the Commission found that the markets for the sale of recorded music in physical form and the market for licensing of recorded music in digital format were national in scope.

42. The notifying parties note that the International Federation of the Phonographic Industry ("IFPI") presents market data for recorded music broken down into physical sales, digital sales and revenues arising from the exploitation of performance rights. However, the notifying parties submit that the relevant market the market for all recorded music, which is national in scope.

43. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

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26 , See second Commission decision of 3 October 2007 in Case COMP/M.3333 – *Sony/BMG* and Case COMP/M.4404 – *Universal/BMG Music Publishing*.

27 See second Commission decision of 3 October 2007 in Case COMP/M.3333 – *Sony/BMG*.

28 See second Commission decision of 3 October 2007 in Case COMP/M.3333 – *Sony/BMG*.

3. TV

44. The Commission's practice has been to distinguish between pay-TV and free-to-air TV ("FTA TV") in relation to the provision of TV services to end-users, both markets being national in scope or related to linguistically homogenous areas[29].

45. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

4. Radio

46. The market for free access radio was considered by the Commission in *Bertelsmann/CLT*[30], where it found that the relevant market was that that for radio advertising. The notifying parties submit that the relevant market should include all forms of advertising-financed activities. The notifying parties refer to *Bertelsmann/CLT* in which the Commission found that the market for radio advertising is at least limited to a specific country and left open the possibility that there might be distinct regional markets within a country.

47. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

5. TV production

48. The notifying parties refer to previous Commission decisions which distinguished between TV productions produced by broadcasters for captive use on their own channels and non-captive TV productions. Although it left the product market open, the Commission stated that as only the latter productions are offered on the market, the relevant product market must therefore be limited to TV productions which are not for captive use[31].

49. The Commission has previously stated that TV broadcasting still generally takes place on national markets and that the markets for sale of TV productions may be sometimes broader and comprise a particular language region.[32]

50. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

6. Distribution (i.e. licensing of broadcast rights)

51. The notifying parties made reference to a previous Commission decision[33] which identified separate markets for the licensing of television broadcasting rights to pay-TV and to free-to-air-TV ("FTA"). The Commission has also considered (i) premium football rights (ii) premium films and (iii) other TV contents as separate markets. This Commission

29 See for example Case No COMP/M.5121 - News Corp/Premiere, 25 June 2008 and Case No COMP/M.4547 – KKR/Permira/ProSiebenSat.1, 22 February 2007.

30 Case No COMP M.779 – Bertelsmann/CLT, 7 October 1996.

31 Case No COMP M. 779 – Bertelsmann/CLT, 7 October 1996 and Case No COMP M. 4353 – Permira/All3 Media Group, 22 September 2006.

32 Case No COMP 4353 – Permira/All3 Media Group, 22 September 2006.

33 Case No COMP/M.5121– Newscorp/ Premiere, 25 June 2008.

decision further found that these markets are national in scope or distinguished alongside linguistic borders.

52. For the purposes of the present case, the exact market definition may be left open as it would not alter the competitive assessment.

B. Horizontal assessment

1. Overlaps with Crosstown

53. The proposed concentration will lead to an overlap between BMG Rights Management business and the Crosstown Assets in music publishing and in recorded music. The proposed concentration will however not lead to any affected markets as (a) the JV will have a market share of [0-5]% on each of the narrowly defined sub-markets for music publishing (including hypothetical markets delineated by genre or divided between national and international repertoires) and on a market for music publishing services to authors in each EEA state; and (b) the Crosstown Assets include only three master recordings and BMG Music Management currently holds a market share of [0-5]% on each of the possible recorded music sub-markets in each EEA state.

2. Overlaps with Bertelsmann and KKR

54. Given that RTL and P7S1 have minor activities in music publishing and recorded music, the proposed transaction would lead to overlaps between the JV (including the Crosstown Assets) and RTL and P7S1. The proposed concentration will however not lead to any affected markets as (a)(i) the JV will have a market share of [0-5]% on each of the narrowly defined sub-markets for music publishing (including hypothetical markets delineated by genre or divided between national and international repertoires) and on a market for music publishing services to authors in each EEA state; (ii) the JV will have a market share of [0-5]% in relation to all hypothetical recorded music markets in each EEA state; and (b)(i) RTL and P7S1's respective shares for music publishing would be [0-5]% in each EEA state; and (ii) RTL has a share of [0-5]% on the French market for recorded music (where it is active) and P7S1 has a share of [0-5]% and [0-5]% on the Austrian and German recorded music markets (where it is active) respectively.

C. Vertical assessment

1. Vertical links with Crosstown

55. The proposed concentration will give rise to a vertical link between Crosstown's music publishing activities (upstream) and BMG Business' recorded music activities (downstream). However, given the limited market shares of Crosstown and BMG Music Management, this vertical link would not give rise to an affected market.

2. Vertical links with Bertelsmann and KKR[34]

Music publishing (upstream) and recorded music (downstream)

[34] The market shares indicated in this section were supplied by the notifying parties.

56. The proposed transaction would lead to vertical links between the JV's music publishing activities and the recorded music business of RTL and P7S1, and between RTL and P7S1's music publishing activities and the JV's recorded music business.

57. Since the JV will have a market share of [0-5]% on each of the narrowly defined sub-markets for music publishing in each EEA state (including hypothetical markets delineated by genre or divided between national and international repertoires) and since RTL and P7S1's activities in the music sector are very small (RTL has a share of [0-5]% on the French market for recorded music (where it is active) and P7S1 has a share of [0-5]% and [0-5]% on the Austrian and German recorded music markets (where it is active) respectively) in comparison with the activities of the music majors and independent companies, these potential vertical links would not amount to affected markets.

Music publishing/recorded music (upstream) and TV and radio (downstream)

58. RTL and P7S1 as broadcasters would require a license of the publishing rights in a musical work and the rights in a sound recording controlled by the JV to legally broadcast the work on their TV or radio stations.

59. The proposed concentration will lead to affected markets on the market for FTA TV[35] in Belgium, France, Germany, Hungary and the Netherlands in terms of audience (viewing share) and advertising revenues and in Luxembourg in terms of advertising revenues. As regards the radio sector, the proposed concentration will only lead to affected markets in Luxembourg and Sweden in terms of share of voice and in France, Germany, Luxembourg, Norway, Romania, Sweden and The Netherlands in terms of share of advertising revenues.

60. The proposed concentration will not lead to any competition concerns in terms of input foreclosure. The JV will have a market share of [0-5]% on the sub-markets for the exploitation of music publishing rights (and in particular performance and synchronisation rights) and in relation to recorded music in each EEA state and therefore will lack market power on the relevant upstream market. In any event, as regards performance rights, it should also be noted that as held by the Commission in *Universal/BMG Music Publishing*, licensing of performance rights and rights in sound recordings to TV and radio broadcasters is generally carried out by collecting societies on behalf of publishers and/or authors. Collecting societies generally sign agreements with all publishing and music companies, allowing the collecting society to grant a blanket licence on standard non-discriminatory terms including repertoires from all companies. Therefore, all end users would have a full and non-discriminatory access to musical works.

61. The proposed concentration will not lead to any competition concerns in terms of customer foreclosure. Notwithstanding RTL and P7S1's relatively significant presence on some of the downstream TV and radio markets in certain Member States, upstream rivals will continue to have access to a sufficient customer base post-merger. In most of the countries mentioned below, there are other TV and radio broadcasters and therefore

[35] In the information submitted by the notifying parties it is shown that RTL and P7S1 have only a small presence in pay-TV markets and no vertically affected markets will arise in this regard. Therefore, the vertical links resulting from the proposed transaction due to RTL and P7S1's presence on Pay-TV markets are not discussed further in this decision.

other actual economic alternatives exist in the downstream market for upstream rivals of the JV.

62. In any event, as held by the Commission in *Universal/BMG Music Publishing*, licensing of performance rights and rights in sound recordings to TV and radio broadcasters is generally carried out by collecting societies. Therefore, RTL and P7S1 would obtain a blanket license to all musical works controlled by the relevant collecting society including musical works of the JV's competitors. In addition, there are other alternative means of exploiting music publishing rights other than through licensing to TV and radio broadcasters.

63. An additional reason why the JV will not have an incentive or ability to foreclose competing publishers from access to RTL's or P7S1's TV and radio stations is that RTL and P7S1 would have an incentive to maintain access to a broad range of different musical works as they compete for a share of audience and voice and advertising revenues.[36]

TV and radio (upstream) and recorded music / music publishing (downstream)

64. Sound recordings and musical works controlled by the JV may receive promotional coverage on radio stations and on TV channels controlled by RTL and P7S1 (promotional airplay). Also some album releases may be advertised on RTL and P7S1's TV and radio stations (advertising slots).

– *Promotional airplay*

65. RTL controls a number of popular music-based TV talent finding shows, in particular the Pop Idol format. P7S1 controls the programme Popstars. Winning contestants in these shows are rewarded with recorded music contracts. Therefore preferential treatment of the JV and the possible input foreclosure of rival record companies from access to inputs should be considered.

66. Since the recorded music business which is to be contributed to the JV is currently owned by Bertelsmann, the vertical relationship regarding talent finding shows between RTL and the JV already exists and therefore does not arise from the proposed concentration. As regards Popstars, the notifying parties submit that P7S1 would not have the incentive to foreclose rival record companies. There is a real rivalry between TV production companies and TV channels to produce and broadcast the most successful shows. Furthermore, KKR jointly controls P7S1 with Permira, which has no economic interest or incentive to favour the JV over its recorded music rivals as regards advertising, promotional airplay or access to talent finding programmes.

67. In the information submitted by the notifying parties, it is shown that there exist alternative talent finding programmes and that talent shows constitute just one of a number of ways in which record companies may discover and promote artists Moreover, the notifying parties submit that RTL and P7S1 have a policy of allowing the TV channels and radio stations they control to have complete editorial independence in the

[36] In fact, it appears that the choice of songs broadcast on TV and radio stations is driven by viewer/listener preference.

selection of artists for participation in programmes, which would depend on expected demand and popularity of the artist concerned. It is therefore unlikely that the proposed concentration would lead to any competition concerns in this regard.

68. As regards promotional airplay by rival broadcasters, the JV will have a market share of [0-5]% on each of the narrowly defined sub-markets for music publishing in each EEA state (including hypothetical markets delineated by genre or divided between national and international repertoires) and a market share of [0-5]% in relation to all hypothetical recorded music markets in each EEA state. In view of these limited market shares, the proposed concentration will not lead to any competition concerns in terms of customer foreclosure.

– *Advertising slots*

69. The notifying party submits that the JV is not expected to engage in advertising of its recordings as BMG Rights Management appointed Sony as its distributor for physical and digital sales of recorded music. In any event, the notifying parties submit that there is no risk of input foreclosure since RTL and P7S1's shares of TV and radio markets are not substantial enough for any foreclosure strategy to influence competition. Referring to the Commission's *Sony/BMG* decision[37], the notifying parties submit that, as recognised in that decision, RTL or P7S1 would have no incentive to foreclose access.

70. If RTL and/or P7S1 sought to foreclose access, the JV's rivals would still be able to advertise and promote on other TV and radio stations. Furthermore, the JV will have a market share of [0-5]% in relation to all hypothetical recorded music markets in each EEA state in which it will be active. If RTL or P7S1 were perceived as favouring the JV over rivals, Bertelsmann and KKR would lose revenues as other recorded music companies would take their advertising business to rival TV channels and radio stations. Advertising revenues from RTL and P7S1's TV channels and radio stations will constitute a substantially more significant proportion of Bertelsmann and KKR's total revenues that their respective share of the JV's revenues from recorded music. In any event, TV and radio are not used in promoting the vast majority of new releases. Therefore, any strategy of foreclosure is unlikely to be profitable or successful.

71. At any rate and despite RTL and P7S1's relatively significant presence on some of the upstream markets, the JV's rivals would still be able to advertise and promote on other TV and radio stations in most EEA countries.As regards RTL's position on the FTA TV market in Luxembourg, from the information provided by the parties, it appears that rival recorded music companies could still reach viewers in Luxembourg by advertising on TV channels in France, Belgium and Germany.

72. An input foreclosure strategy would also seem unlikely given that the JV will only have a market share of [0-5]% in relation to all hypothetical recorded music markets in each EEA state (in which there is a vertically affected market). In any event, the JV's recorded music rivals would also have alternative promotional platforms for advertising such as the internet and the press.

73. The notifying parties submit that the proposed concentration will not give rise to risks of customer foreclosure.

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37 See second Commission decision of 3 October 2007 in Case COMP/M.3333 – *Sony/BMG*.

74. Since the JV will have a market share of [0-5]% on each of the narrowly defined downstream sub-markets for music publishing in each EEA state (including hypothetical markets delineated by genre or divided between national and international repertoires) and a market share of [0-5]% in relation to all hypothetical downstream recorded music markets in each EEA state), the proposed concentration will not lead to any competition concerns in terms of customer foreclosure. The proportion of music advertising on TV and radio will be very small, given the JV's share of the recorded music market. Therefore, even if the JV placed no advertising business with RTL and P7S1's rivals, these rivals would still have access to other recorded music companies, including the four music industry majors. Therefore, such a strategy would not have any competitive impact. TV and radio stations will continue to have access to other advertising opportunities for non-music related products.

D. Co-operative effects of the joint venture

1. <u>Music</u>

75. RTL and P7S1 are both present in recorded music, but their activities are limited to musical works used in their programmes. Regardless whether music production is considered as part of or distinct from the recorded music market, RTL and P7S1's activities in this area would be too insignificant[38] to result in material co-ordination of the parents' competitive behaviour. In any event, RTL is only present on the French market (with a market share of [0-5]%) whereas P7S1 is only present on the Austrian and German markets (with market shares of [0-5]% and [0-5]% respectively). Therefore, there is no overlap between the activities of RTL and P7S1 in this regard.

2. <u>TV and radio</u>

76. Both RTL and P7S1 are active in TV, radio advertising, TV production and licensing of TV broadcasting rights.

77. The notifying parties submit that as regards FTA TV, both RTL and P7S1 have incentives to compete via the selection of programmes to broadcast on their TV channels and radio stations in order to maximise their chances of increasing audience share. The notifying parties submit that although the respective audience and advertising share of RTL and P7S1 in the territories in which their activities of overlap are not insignificant, any attempt by them to co-ordinate competitive conduct, for example on advertising revenues, would leave them vulnerable to losing business to other TV companies and other advertising mediums. As regards TV production and licensing of TV broadcasting rights, the notifying parties submit that both RTL and P7S1 have incentives to compete to sell and license their rights to as many broadcasters as possible thereby increasing revenues. Moreover, the notifying parties submit that coordination is unlikely to be successful as customers/licensees of TV content can choose content from large distributors which have attractive content and smaller distributors.

78. Both RTL and P7S1 have TV channels in Belgium, Germany, Hungary and The Netherlands. Notwithstanding the relatively significant presence of RTL and P7S1 on these markets, risks of co-ordination between the parents of the JV may be ruled out in this regard given the very small market share ([0-5]%) of the joint venture on the potential

[38] RTL earned revenues of approximately just EUR […] in 2008 and P7S1 earned EUR […].

downstream music publishing and recorded music markets (and relative turnover expected to be generated[39]) in each of these states in comparison to the turnover of RTL and P7S1 on these potentially upstream markets for FTA TV and radio. Both RTL and P7S1 have a radio channel in Greece. RTL and P7S1's activities in this area would be too insignificant to result in material co-ordination of the parents' competitive behaviour.

79. In light of the above, coordination between the parent companies appears unlikely. Therefore it can be concluded that the JV does not have as its object or effect the coordination of the competitive behaviour of the parent companies.[40] Moreover, it can be concluded from the competitive assessment that the transaction is unlikely to have a negative impact on cultural diversity.

VI. CONCLUSION

80. In light of the above, the Commission concludes that the proposed concentration is unlikely to significantly impede effective competition in the common market or in a substantial part of it.

81. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Neelie KROES
Member of the Commission

39 BMG Rights Management had revenues of […] in the last quarter of 2008.

40 Article 2(4) of the Merger Regulation.