

EUROPEAN COURT ANNULS SONY/BMG MERGER INDEPENDENTS WIN LANDMARK JUDGEMENT

In a landmark ruling which will set important legal and political precedents, the European Union's Court of First Instance has overturned the European Commission's 2004 authorisation of the Sony/BMG music merger.

The Luxembourg Court pointed out that the Commission's analysis of the Sony BMG case was left wanting in various fundamental respects. It contained a series of legal and economic errors which renders the decision null and void.

The Commission waved the merger through unconditionally in 2004, creating the world's second largest music company and putting 80% of the worldwide music market into the hands of four media conglomerates. This was despite widespread industry objection and previous market assessments that further concentration could not be tolerated. The independents highlighted a catalogue of fundamental mistakes which left the Court in no doubt that it had to overturn the Commission's approval. The Court also ordered the Commission to pay three quarters of IMPALA's costs.

This is a victory for music and cultural diversity. It is the start of market recovery. The independents take the view that the judgement underlines the need for any assessment of mergers in creative sectors to take into account the economic, social and cultural specificities of markets. IMPALA also emphasises that a review of the merger process in terms of the rights of third party market operators is required. IMPALA had made the case to the Court that the merger clearance process is biased towards large corporations and lacks transparency. Third parties who oppose a merger have few rights compared to the notifying parties. They also have extremely limited access to the Commission's file. This makes proper decision making is very difficult.

The parties will now have to consider their options. An appeal to the EU's highest court, also in Luxembourg, would be difficult as it can only be made on grounds of law. The merger will go back to the Commission but the independents believe that the problems highlighted by the Court right across the music market are too fundamental to be repaired. Without competition clearance Sony/BMG would have to dismantle.

The Court's ruling will also thwart any other attempts to merge such as between EMI and Warner. It now looks extremely unlikely that they would obtain the competition clearances necessary. IMPALA will continue to oppose any further concentration.

Patrick Zelnik (Impala President and President of Naïve): *This is a watershed in European affairs. A landmark judgement for music. There is no doubt that it will block any further mergers and will transform how music and other creative sectors are treated. We have proved that, by acting collectively, we can challenge the unchallengeable. We will make the terms of the UNESCO convention on cultural diversity a reality in the market place. The EC will now promote cultural diversity under Article 151 (4) of the EC treaty and carry out a proper cultural diversity impact assessment across its decision making.*

Martin Mills (Impala Chairman and Chairman of Beggars Group): *We are delighted with the judgement. There was an objective need in the general interest to ensure effective judicial review of a decision comforting anti-competitive structures. This is an incredible result, especially considering the inequality of arms between IMPALA and the Commission and Sony Corporation and Bertelsmann Group. We are comforted that we found an ally in the European Court which challenged the European Commission and found it wanting. The fight for market access and diversity will go on. And politics and theories apart, this is a great result for music.*

Michel Lambot (former Impala President and Co-Chairman of PIAS Group/Vital): *This judgement is a turning point for the EC. The Court has recognised that the rights of Europe's creators to create should not be thwarted by unchecked concentration. We see it as a call for the EC to turn its rhetoric on the Europe's creative sectors into action. IMPALA is proud of its action – the first of its kind in any sector. When we took the decision to appeal, we proved that collectively the independents can challenge large commercial interests and the European Commission. We see this as a victory for European artists, entrepreneurs and European citizens.*

Hein van der Ree (Impala Vice-President and Managing Director of Epitaph Europe): *I have always had the confidence that we were fighting for a just cause. The EC had the courage to scrutinize and correct its mistakes. Although it took some effort to get there, they are to be lauded for doing so. This locks the door for an EMI/Warner merger, thankfully, and keeps the doors of market access open for the little guy.*

More on the judgement

The European judges found that the Commission had ignored overwhelming evidence that competition would be severely damaged by SonyBMG and had made an unexplained u-turn when it walked away from the serious objections that it had previously highlighted. The court found that the recorded music market suffers from collective dominance and co-ordination, characterised by:

- alignment of prices, both gross and net,
- transparency of discounts and other terms, including campaign
- stable and relatively high level of pricing, considering significant fall in demand
- links between majors companies (eg jvs for compilations, distribution and licensing, industry association membership, joint copyright negotiations, merry-go-round of senior executives, vertical links)
- relative stability of market shares (ie if they were really competing we would expect to see real variations)
- homogeneity of product (even though content is heterogenous)
- existence of deterrents

The court also identified 8 points on price that make music very transparent and easy to co-ordinate prices and other competitive behaviour.

1. Public nature of PPDs

2. limited no of reference prices
3. limited no of albums that need to be monitored
4. publication of weekly charts
5. long-term stable relationships between retailers and majors
6. limited no of players on market
7. monitoring of the retail market
8. regular and permanent contact between majors' sales forces and retailers and distributors

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