



EUROPEAN COMMISSION
DG Competition

CASE M.6800-PRSfM/ STIM/ GEMA/ JV

(Only the English text is authentic)

MERGER PROCEDURE REGULATION (EC) 139/2004

Article 8(2) Regulation (EC) 139/2004

Date: 16/06/2015

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COMMISSION DECISION

of 16.6.2015

**declaring a concentration to be compatible with the internal market and the EEA
agreement (Case M.6800 - PRSfM / STIM / GEMA / JV)**

(Only the English text is authentic)

TABLE OF CONTENTS

1.	Introduction	1
2.	The Parties.....	2
2.1.	Collective management organisations and the different types of copyright in music .	2
2.2.	PRSfM.....	3
2.3.	STIM	4
2.4.	GEMA	4
2.5.	The JV	5
3.	The transaction	5
3.1.	Background to the transaction: the fragmentation of music repertoire and the CRM Directive.....	5
3.2.	The creation of the JV	9
3.3.	Applicability of the CRM Directive to the JV	12
3.4.	Interrelated transactions	13
3.5.	Joint control.....	13
3.6.	Full functionality	14
3.6.1.	Sufficient resources to operate independently on the market	14
3.6.2.	Activities beyond one specific function for the parents	14
3.6.3.	Sale/purchase relations with the parents	15
3.6.4.	Operation on a lasting basis	16
4.	EU dimension.....	16
5.	Market definition.....	16
5.1.	Market for copyright administration services provided to CMOs and option 3 publishers in relation to transactional multi-territorial licenses	16
5.1.1.	Relevant product market	16
5.1.1.1.	Notifying Parties' view	16
5.1.1.2.	Commission's assessment.....	18
5.1.2.	Relevant geographic market.....	22
5.1.2.1.	Notifying Parties' view	22
5.1.2.2.	Commission's assessment.....	23
5.2.	Online licensing market (the market for the licensing of online rights in musical works).....	24
5.2.1.	Relevant product market	24
5.2.1.1.	Notifying Parties' arguments	24
5.2.1.2.	Commission's assessment.....	25
5.2.2.	Relevant geographic market.....	27
6.	Competitive assessment	28

6.1.	Market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences.....	28
6.1.1.	Affected markets	28
6.1.2.	Notifying Parties' arguments	28
6.1.3.	Commission's assessment	30
6.1.3.1.	Market shares and market structure	31
6.1.3.2.	Assessment of significant existing barriers to entry and expansion and of barriers to entry and expansion resulting from the proposed transaction.....	38
6.1.4.	Conclusion regarding the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences	47
6.2.	Online licensing market (the market for the licensing of online rights in musical works).....	47
6.2.1.	Notifying Parties' arguments	48
6.2.2.	Commission's assessment.....	49
6.2.2.1.	Market shares	49
6.2.2.2.	Assessment of the JV's impact on licensing terms for DSPs.....	55
6.2.2.3.	Possible spill-over effects because of the Notifying Parties' activities in the same market as the JV	63
6.2.3.	Conclusion regarding the EEA-wide online licensing market (the market for the licensing of online rights in musical works)	64
6.3.	Exchange of commercially sensitive information.....	64
6.3.1.	Notifying Parties' arguments	65
6.3.2.	Commission's assessment.....	66
6.3.3.	Conclusion regarding exchange of commercially sensitive information	67
7.	Commitments	67
7.1.	Analytical framework.....	67
7.2.	Procedure.....	68
7.3.	The First Commitments.....	68
7.3.1.	Description of the commitments	68
7.3.1.1.	The first key element of the First Commitments	69
7.3.1.2.	The second key element of the First Commitments.....	69
7.3.1.3.	The third key element of the First Commitments	70
7.3.1.4.	Duration.....	71
7.3.2.	Commission's assessment.....	71
7.3.2.1.	First key element of the First Commitments.....	71
7.3.2.2.	The second key element of the First Commitments.....	73
7.3.2.3.	The third key element of the First Commitments	76
7.3.2.4.	Duration.....	76

7.3.3.	Conclusion on the First Commitments.....	76
7.4.	The Final Commitments.....	77
7.4.1.	Description of the commitments	77
7.4.1.1.	The first element of the Final Commitments	77
7.4.1.2.	The second element of the Final Commitments.....	77
7.4.1.3.	Other elements of the Final Commitments	78
7.4.2.	Commission's assessment.....	78
7.4.2.1.	The first element of the Final Commitments	78
7.4.2.2.	The second key element of the Final Commitments.....	79
7.4.3.	Conclusion on the Final Commitments.....	80
7.5.	Conclusion.....	80
8.	Conditions and obligations.....	80

COMMISSION DECISION

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declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.6800 - PRSfM/ STIM/ GEMA/ JV)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 8(2) thereof,

Having regard to the Commission's decision of 14 January 2015 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations²,

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. INTRODUCTION

- (1) On 28 November 2014, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 by which the undertakings PRS for Music Limited ('PRSfM', United Kingdom), Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. ('STIM', Sweden), and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte ('GEMA', Germany) acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control by way of purchase of shares in a newly created joint venture (the 'JV').⁴
- (2) PRSfM, STIM and GEMA are hereinafter referred to as the 'Notifying Parties'. PRSfM, STIM, GEMA and the JV are collectively referred to as the 'Parties'.
- (3) Based on a market investigation, the Commission found that the notified concentration raised serious doubts as to its compatibility with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ C200. , p....

³ OJ C200. , p....

⁴ Publication in the Official Journal of the European Union No C 438, 6.12.2014, p.29.

Merger Regulation on 14 January 2015. On 28 January 2015, the Notifying Parties submitted their written comments on the Commission's Article 6(1)(c) decision. On 13 March 2015, the Notifying Parties submitted commitments and on the same day the Commission submitted those commitments to a market test. The Notifying Parties submitted revised commitments on 1 April 2015 and final commitments on 10 April 2015.

2. THE PARTIES

2.1. Collective management organisations and the different types of copyright in music

- (4) PRSfM, STIM and GEMA are collective management organisations (CMOs), also known as collecting societies. They manage copyrights in musical works.⁵ The management of copyrights includes the granting of licenses to users.
- (5) Several types of rights are relevant for the licensing of music and CMOs only license some types. A first category of rights are the recording rights, also known as related rights, which protect the recorded rendition of a musical work. These recording rights are owned by the performers (the persons whose voice or instrument has been recorded) and by record companies (the companies that record and sell music). Performers normally transfer their rights to record companies and record companies license these rights, together with their own rights, directly to users. These recording rights are not licensed through CMOs and are not at issue in this decision. A second category of rights are the rights in the musical work itself, that is the rights in the composition and lyrics of the musical work. The rights in musical works are originally owned by the authors of the musical work, that is the persons who composed the music or wrote the lyrics.
- (6) There are several types of rights in musical works⁶ but for this decision, only the online rights are directly relevant. Online rights consist of a combination of two types of rights: mechanical and performing rights for online use. Performing rights (which are owned by authors) are the rights to communicate a musical work to the public, which includes the right to make the musical work available to the public. Mechanical rights (which are owned by authors and, for some musical works, publishers)⁷ are the rights to reproduce a musical work. For instance, when a song is delivered digitally to a customer, this will normally entail the making of a copy of the song and, hence, this activity requires a licence to the mechanical rights.
- (7) CMOs only license rights in musical works, not recording rights. Authors transfer or entrust the management of their performing and mechanical rights to CMOs because it would be impractical for them to licence their copyrights themselves, as each author would have to enter into a contract with each user of his or her songs. CMOs bundle the rights of a large number of authors and then license those rights

⁵ Musical works are a combination of a musical composition (which in turn is a combination of melody, rhythm and harmony) and, in case of songs, lyrics. Many musical works are songs and, in this Decision, the term 'song' is used interchangeably with the term 'musical work'.

⁶ See, for more details, Commission decision of 19 April 2012 in Case COMP/M.6459 – Sony/Mubadala/EMI Music Publishing, recital 22.

⁷ Publishers are companies that assist authors in creating songs and obtaining payment for the use of their songs. They own the mechanical rights in the so-called Anglo-American repertoire. This is explained in recital (26).

collectively. The entire package of rights that a CMO licenses in this way is the repertoire of the CMO. After licensing the rights, CMOs also monitor the use of these rights and collect royalties that are due to the author for the use of his or her song. CMOs transfer the royalties they collect to authors and music publishers (), but deduct a commission for their work.

- (8) Copyrights can be licensed for different uses. Particularly relevant for this decision is the licensing of copyrights for online use, also known as the granting of online licenses. Digital service providers ('DSPs') such as iTunes, Spotify, Deezer, Google Play, YouTube, Amazon, etc. need to acquire these online licenses to offer music to their subscribers. They need a license for both the mechanical right and the performing right. Copyrights can be licensed for a single country or for several countries, resulting in mono-territorial licenses and multi-territorial licences respectively.
- (9) In most EEA-countries, there is only one CMO managing a specific category of rights of authors in copyright-protected works. CMOs therefore typically hold either *de jure* or at least *de facto* a monopoly or a dominant position in their respective home country.

2.2. PRSfM

- (10) PRSfM (formerly: MCPS-PRS Alliance Limited) is a United Kingdom based CMO engaged in collective rights management for musical works.
- (11) PRSfM is a 100% subsidiary and the operating company of the Performing Right Society Limited ('PRS'). PRSfM manages the performing rights owned or controlled by PRS. On the basis of a service level agreement between the Mechanical-Copyright Protection Society Limited ('MCPS') and PRS, PRSfM also manages the mechanical rights controlled by MCPS. MCPS is a CMO controlled by the Music Publishers Association (MPA) and acts as an agent for the licensing and administration of the mechanical rights owned or controlled by MCPS's members. A group of MCPS members consisting of independent publishers offers multi-territorial licences to their combined repertoires in cooperation with PRS through PRSfM under the brand name Independent Music Publishers European Licensing ('IMPEL').⁸ Both PRS and MCPS are not-for-profit associations.
- (12) PRSfM manages about 10 million musical works on behalf of over 100,000 songwriters, composers and publishers who are members of PRS or MCPS or both. Moreover, PRS has been appointed by the Irish CMO IMRO and other (non-EEA) performing rights CMOs to license their repertoire directly on a pan-European level⁹. PRSfM administers these licences as well.
- (13) Apart from managing the rights owned by PRS and the rights administered by MCPS, PRSfM (as the operating company of PRS) is also engaged in managing copyrights of publishers and CMOs that are not members of PRS or MCPS. It does

⁸ MCPS provides the mechanical Anglo-American rights of the respective independent MCPS publishers, PRS contributes the corresponding Anglo-American performing rights, and PRSfM is administering the licences.

⁹ More precisely, PRS is able to license the performing rights of the following non-EEA CMOs on a pan-European basis: ASCAP (USA), BMI (USA), SESAC (USA), SOCAN (Canada), APRA (Australia), SAMRO (South Africa). These mandates are non-exclusive and confined to licences for online use.

so on the basis of contractual arrangements concluded by PRS and MCPS with such publishers¹⁰ and on the basis of representation agreements with other CMOs.

- (14) The representation agreements with other CMOs typically confer a mandate on PRSfM to grant licences not only in the United Kingdom, but also in Ireland, Gibraltar, Malta and Cyprus (where PRSfM essentially acts as the ‘local CMO’) and other (non-EEA) territories.

2.3. STIM

- (15) **STIM** is the Swedish CMO for songwriters, composers and music publishers. STIM is a membership-based not-for-profit-association and manages both the performing and the mechanical rights of its members and associated rightholders.¹¹ STIM has more than 71,000 members.

- (16) Apart from the rights of its members, STIM is also engaged in managing copyrights of publishers on the basis of contractual arrangements¹² and with other CMOs on the basis of representation agreements.. Just like PRS, STIM also holds mandates to license the repertoire of certain other (non-EEA) performing rights CMOs¹³ on a pan-European level.

2.4. GEMA

- (17) **GEMA** is the German CMO for songwriters, composers and music publishers. GEMA is a membership-based not-for-profit-association and *inter alia* represents both the performing and the mechanical rights of its members. GEMA serves more than 68,000 members.

- (18) Apart from the rights of its members, GEMA is also engaged in managing copyrights of publishers on the basis of contractual arrangements¹⁴ and with other CMOs on the basis of representation agreements. Just like PRS and STIM, GEMA also holds mandates to license the repertoire of certain other (non-EEA) performing rights CMOs¹⁵ on a pan-European level.

¹⁰ I.e., the repertoire of Warner Chappell (PEDL) and EMI (through SOLAR, a 100% subsidiary of the CELAS-JV with GEMA (now SOLAR-Music Rights Management GmbH)). [...]*

* 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.

¹¹ In this decision the term members is used hereinafter to denote both members and associated rightholders. The two major types of members of a CMO are authors and publishers (who acquired rights from authors and are therefore sometimes referred to as ‘derivative’ rightholders). To the extent reference to CMO members is made in the present decision, it covers, unless otherwise specified, authors and publishers.

¹² Namely the repertoires of Warner Chappell (PEDL) and Kobalt Music Publishing (the latter through STIM’s 100% subsidiary Kobalt Stim Aggregated Rights AB).

¹³ ASCAP (USA), BMI (USA), SESAC (USA), SOCAN (Canada), APRA (Australia), SAMRO (South Africa). These mandates are non-exclusive and confined to licences for online use.

¹⁴ Namely the repertoires of SonyATV (through its 100%-subsidiary PAECOL); BMG (through its 100%-subsidiary ARESA) and EMI (through SOLAR, a 100% subsidiary of the CELAS-JV with PRSfM (now SOLAR-Music Rights Management GmbH)). [...]*

¹⁵ ASCAP (USA), BMI (USA), SESAC (USA), SOCAN (Canada), APRA (Australia), SAMRO (South Africa). These mandates are non-exclusive and confined to licences for online use.

2.5. The JV

- (19) The JV which the Notifying Parties intend to create will have two main functions. First, a specific legal entity, 'Zeta', will be created as a licensing hub for multi-territorial, multi-repertoire ('MTMR') licences of mechanical and performing rights in musical works for online exploitation, including mobile, to multi-territorial DSPs, that is DSPs offering services in several Member States. The licences granted by Zeta will cover: (i) the Notifying Parties' repertoires, as well as (ii) the repertoires of other CMOs and rightholders which may choose to make use of the JV's services. These repertoires will be offered in one integrated licence (the "Zeta Core Licence"). DSPs that want to obtain the Zeta Core Licence must negotiate with the JV and agree on the price and the geographic coverage for which they obtain the Zeta Core Licence. However, the Zeta Core Licence will always be a multi-territorial licence, not a mono-territorial licence. DSPs purchasing the Zeta Core Licence will automatically have access to the entire repertoire within the Zeta Core Licence and will not be able to licence only parts of the repertoire covered by it.
- (20) Second, the JV will offer copyright administration services to option 3 publishers¹⁶ and to other CMOs. These services will be offered through Zeta and a specific legal entity that will be created for this purpose ('Delta'). Delta will offer back-office services for the administration of licences granted by the JV and for licences granted by the Notifying Parties and other CMOs and option 3 publishers who may wish to become the JV's customers. Delta will in particular provide copyright database services, as well as online processing and invoicing services.

3. THE TRANSACTION

3.1. Background to the transaction: the fragmentation of music repertoire and the CRM Directive¹⁷

- (21) CMOs traditionally licensed both performing and mechanical rights to DSPs for online use. They traditionally did so only for their own country, meaning they granted mono-territorial licences. However, each CMO had agreements with other CMOs, so-called reciprocal representation agreements ('RRAs'), allowing each CMO to licence the repertoire of the other CMOs in its home country.
- (22) Under an RRA, one contracting CMO ("mandating CMO") grants to another CMO ("mandated CMO") the mandate to license the repertoire of the mandating CMO in the territory of the mandated CMO and to collect the royalties owed by users and forward them to the mandating CMO. The mandated CMO includes the repertoire of the mandating CMO in all licensing offers to users on equal terms as the mandated CMO's own repertoire and typically licenses all rights made available to it under RRAs in its own name. As a result, users are able to obtain from a CMO a licence covering the "world repertoire" for use in the territory of the respective CMO. The RRAs between the CMOs created a network of territorial (mostly national) "one-stop shops" for blanket licences covering the world repertoire ("national blanket licence"). This way, each CMO was able to license the world repertoire, but only for its own territory. Online platforms therefore had to obtain a license from all CMOs in the EEA to provide their services across the entire EEA.

¹⁶ For the definition of 'option 3 publishers', please refer to recital (27).

¹⁷ Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72, the 'CRM Directive').

- (23) In the past decade, this traditional scheme has changed in two important ways. First, some CMOs have started granting multi-territorial licences to their repertoire. These CMOs license their repertoire not only for use in their own country but also in other countries in the EEA. One consequence of this development is that these CMOs no longer grant an unrestricted mandate to other CMOs to license their repertoire for online use in countries covered by the multi-territorial licence. Instead, these CMOs reserve the right of first refusal or limit the mandate by other mechanisms.
- (24) According to the Notifying Parties, the Commission's decision in the *CISAC* case¹⁸ has also triggered a renegotiation of RRAs among CMOs in the course of which many CMOs have introduced "carve out"-provisions in relation to the licensing of repertoire for those online services which mandating CMOs have decided to license directly on a multi-territorial basis.¹⁹ Once a CMO has decided to grant a multi-territorial licence to a certain DSP directly, it will give notice to its sister-CMOs in order to avoid that DSP being licensed (and invoiced) a second time by another CMO for the same territory.
- (25) For example, the PRS and MCPS repertoires are no longer available to other CMOs under the system of RRAs to the extent they are licensed directly on a multi-territorial basis by PRSfM for online exploitation. Similarly, STIM has already started granting multi-territorial licences for its own repertoire to online music services. When PRSfM and STIM grant direct multi-territorial licences, they license not only their own repertoire for multiple countries but also the world repertoire which they are allowed to license in their own home country, that is the United Kingdom for PRSfM and Sweden for STIM. This repertoire is made available as part of the licensing agreement concluded with the DSP.²⁰ This means DSPs which obtain a multi-territorial licence from PRSfM and STIM no longer need a separate licence for PRSfM's and STIM's home territories since the relevant rights are already part of their multi-territorial licensing deal with PRSfM and STIM respectively. While GEMA has so far not engaged in multi-territorial direct licensing, [...] it would have started doing so in the absence of the JV.
- (26) Second, some mechanical rights have been removed from CMOs' repertoires. In particular, CMOs have lost the right to grant online licenses to an important part of the mechanical rights in Anglo-American repertoire ('Anglo-American mechanical rights'). The Anglo-American repertoire consists of musical works of authors registered with CMOs in the United Kingdom, Ireland, the US and other English-speaking countries. Authors in these English-speaking countries have traditionally assigned their mechanical rights to music publishers. Because publishers had obtained the mechanical rights through assignment, they were able to license the mechanical rights directly themselves. By contrast, in respect of non-Anglo-American repertoires, authors have not traditionally assigned their mechanical rights

¹⁸ Commission decision of 16 July 2008 in Case COMP/C2/38698 – CISAC Agreement.

¹⁹ The Notifying Parties explain that the "carve outs" essentially mean that the mandating CMO unilaterally limits the scope of the mandate granted to the mandated CMO in order to reserve an "exclusive customer group" to itself for the purpose of directly licensing its repertoire.

²⁰ Since CMOs and publishers are increasingly moving towards direct licensing, the world repertoire which CMOs can license under their national blanket licence is constantly shrinking. This is reflected in the use of the term 'residual world repertoire' to denote the repertoire that is licensed under the national blanket licence.

to publishers. Instead, authors traditionally registered their mechanical right with a CMO.

- (27) The publishers that have withdrawn their online mechanical rights from CMO repertoires are known as option 3 publishers. That term originates from the impact assessment that preceded the Commission's 2005 Recommendation on the cross-border collective management of copyright for online use.²¹ The 2005 Recommendation recommended that holders of online rights should have the right to withdraw their online rights and transfer the multi-territorial management of those rights to a CMO of their choice.²² After the 2005 Recommendation was issued, all major publishers²³ and some smaller publishers withdrew their Anglo-American mechanical rights. As a result, these publishers now grant licences to users themselves. This practice has recently also been extended to American performing rights controlled by the publishers.²⁴
- (28) Option 3 publishers usually license their repertoire on a multi-territorial basis in cooperation with one or more CMOs acting as service providers or agents for the relevant publishers.²⁵ The withdrawal by option 3 publishers only concerns the mechanical rights for online use, not for offline use.
- (29) The two developments described above, that is the withdrawal of Anglo-American mechanical rights by option 3 publishers and the move towards multi-territorial licensing by some but not all CMOs, has made it complicated for online platforms to obtain the necessary licenses. To offer services across the EEA, online platforms not only have to obtain licences from CMOs in all EEA-countries but also a number of additional licences from option 3 publishers. Moreover, licences from some CMOs only cover the relevant CMO's domestic territory while others are for the entire EEA. According to the Notifying Parties, this situation creates significant legal

²¹ Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (the '2005 Recommendation'), [2005] OJ L 276 of 21.10. 2005, p. 54.

²² 2005 Recommendation, 5(c).

²³ Major option 3 publishers include Universal Music Publishing International Limited, Warner Chappell Music Ltd, Sony/ATV Music Publishing (UK) Limited, which recently acquired another option 3 publisher, EMI Music Publishing (Commission decision of 19 April 2012 in Case COMP/M.6459 – Sony/Mubadala/EMI Music Publishing) and BMG Rights Management GmbH.

²⁴ The Notifying Parties explain that, starting in 2012, certain major publishers (namely Sony/ATV, EMI, Warner, BMG and Universal) have sought to withdraw performing rights for online exploitation from the American performing rights CMOs ASCAP and BMI for the purposes of licensing those rights outside the USA (principally within the EU alongside the Anglo-American mechanical rights). The Notifying Parties submit that the aforementioned publishers therefore claim that they control (and are able to license on a pan-EEA-basis) not only the Anglo-American mechanical rights, but also the corresponding American performing rights without the direct involvement of their EEA-based partner-CMOs (which, in the past, 'contributed' the American performing rights on the basis of their representation agreements with the American performing CMOs). [...]*. That said, it is currently unclear whether the partial withdrawal is valid under US-law.

²⁵ Option 3 publishers that have decided to withdraw its Anglo-American mechanical rights from the CMO-network usually licence their works on a multi-territorial basis by mandating an *ad-hoc* entity (usually in the form of a CMO's subsidiary). In such a scenario, the entity appointed by the option 3 publisher will usually request a mandate for the Anglo-American performing rights (from PRS, ASCAP, BMI, APRA, SOCAN etc.) that match the Anglo-American mechanical rights in the option 3 publisher's repertoire, in order for the appointed entity to be able to grant a licence to DSPs for both the performing and mechanical rights in the musical works.

uncertainty and very high transaction costs for users wishing to offer pan-European online services, as it has increased the number of licences required to clear the world repertoire for pan-European licensing.²⁶

- (30) Moreover, according to the Notifying Parties, these developments have created challenges for CMOs' licence administration and processing systems, as the fragmentation of repertoires has made it more difficult to calculate accurately the royalties due. Whereas, under the traditional system of 'blanket licences', each CMO could grant a licence to the world repertoire for its territory and did not have to take into account repertoire carve-outs and withdrawals by publishers from the CMO system, the new system of repertoire-specific 'transactional' licences²⁷ covering several Member States puts a strain on CMOs' data processing systems and requires CMOs to develop and continuously update extensive copyright databases with multi-territorial scope that accurately reflect the 'share picture'²⁸ for a large number of territories. Moreover, the administration of transactional licences requires the processing of very large and ever-increasing amounts of data in the CMO's matching and invoicing systems.²⁹
- (31) This situation has recently triggered regulatory intervention by the EU in the form of the CRM Directive. The CRM Directive was adopted in February 2014 and establishes a framework to promote, subject to compliance with Union and national competition rules, the aggregation of different music repertoires for multi-territorial online licensing by CMOs. The CMOs that engage in multi-territorial licensing must, however, comply with a set of specific requirements laid down in the CRM Directive.
- (32) The CRM Directive imposes strict governance, financial management, transparency and reporting requirements on all CMOs. In addition, specific requirements apply to potential CMOs that will be granting multi-territorial licences for online rights in

²⁶ In addition, the DSP will in the vast majority of cases need further licences to clear the 'related rights' of the performing artists and record producers in order to be able lawfully to include a specific sound recording in its online service offer. These rights are normally held and directly licensed by record companies. Some of the major record companies are part of the same corporate groups as the major publishers.

²⁷ Remuneration of a transactional licence is usage based, that is to say, a DSP only pays for the use of a given right in a song when the song is played. It is for the DSP to report this usage to the CMO granting the licence.

²⁸ The 'share picture' is a dataset showing the share of the 'rights ownership' or the claims to total royalty for a given work which is attributable to different authors/publishers in a given musical work. This 'share picture' may vary from country to country mainly due to (1.) differing arrangements between the local CMO and the publishers (e.g. royalty streams might differ depending on whether all or a part of the royalty income has to be distributed to a local sub-publisher or whether the entire 'publisher share' will have to be directly distributed to the 'main publisher'); (2.) differing 'splits' of royalties revenues between mechanical and performing rights (the performing / mechanical rights split is traditionally determined by each local CMO and published on the CISAC-website; the local CMOs split is typically also applied in case of direct licensing or option 3 arrangements); and (3.) different distribution policies of local CMOs among various rightholders (e.g. local legal provisions establishing a 'minimum writers' share' that cannot be paid out to publishers; different proportions of writers'/publishers' shares or of composers'/text authors' shares in different territories). Moreover, the 'share picture' is not static, but continuously changes over time.

²⁹ For example, between 2009 and 2013 the usages processed by PRSfM alone have increased from 1.17bn in 2009 to 136bn in 2013. For more details on the difficulties arising in this context see Impact Assessment of the CRM Directive, sec. 3.2.1. and Annex I.

musical works (such as sufficient capacity to electronically process data needed for such licenses, transparency of its repertoire information to its rightholders, other CMOs and DSPs, accurate and timely reporting and invoicing, accurate and timely payment to rightholders, etc.). The CRM Directive also encourages the sharing and/or consolidation of back-office capabilities in order to improve management services and rationalize the required investments in data management tools.³⁰

- (33) CMOs that do not license their repertoire on a multi-territorial level themselves are entitled to request a CMO that grants multi-territorial licences for online rights in musical works and that aggregates repertoire, to include their repertoire in any multi-territorial licensing offer to users. Any representation agreement concluded for this purpose shall be non-exclusive.³¹ The latter CMO is obliged to agree to this request and include the first CMO's repertoire in all its licensing offers to users on a non-discriminatory basis³². The CRM Directive therefore promotes the consolidation of the repertoires of different CMOs in 'licensing hubs' for the purposes of multi-territorial licensing of online services in order to reduce the transaction costs for users, but also to foster access of the repertoires of individual CMOs to the market for multi-territorial licences for online use.

3.2. The creation of the JV

- (34) The Notifying Parties submit that the JV is a direct response to the CRM Directive and fully in line with its objective of promoting the aggregation of different music repertoires for pan-European or multi-territorial online licensing. The JV will allow multi-territorial DSPs to obtain multi-territorial licences covering the Notifying Parties' entire combined repertoire – and potentially also the repertoire of the option 3 publishers that are currently cooperating with the Notifying Parties – from one single point of contact. The JV will further act as a licensing hub for other CMOs wishing to have their repertoire included in the JV's licensing offer. The JV will also develop a middle- and back-office for the administration of multi-territorial licences, including a copyright database with at least EEA-wide coverage. The development of the back-office will also allow the JV to offer 'middle- and/or back-office only'-services to other CMOs and option 3 publishers, which do not wish to make use of the JV's services in the front-office (and which may then start engaging in multi-territorial licensing themselves).³³
- (35) In more detail, according to the agreement entered into between the Notifying Parties on 10 June 2014 (the 'JV Agreement'), the JV will consist of two interdependent legal entities – Delta and Zeta.
- (36) Zeta will be created by activating a "shelf company", which has been set up and is currently wholly owned by PRSfM. At completion, Zeta will issue one new share to each of GEMA and STIM, so that each of the Notifying Parties will hold one share.
- (37) Delta will build on the existing PRSfM – STIM joint venture International Copyright Enterprise AB ("ICE"). The IT-assets of ICE will be upgraded and GEMA will join

³⁰ Recital 43 CRM Directive.

³¹ Recital 44 and Article 29(1) of the CRM Directive.

³² Article 30(3) and (4) of the CRM Directive.

³³ These back- and middle-office services are explained in recitals (40) to (43).

ICE as a shareholder. GEMA will acquire 1/3 of the shares and voting rights of ICE and contribute its back-office systems LION and MAX to ICE.³⁴

- (38) At the end of the transaction, each of the Notifying Parties will own (directly or indirectly) a third of the shares in each of Delta and Zeta.
- (39) The JV will be active in the provision of copyright administration services to rightholders and CMOs, as well as in the multi-territorial licensing of rights in musical works for online use.
- (40) As regards the provision of copyright administration services to rightholders and CMOs, the JV will provide third party CMOs and publishers with back-office, middle-office and front-office services. The JV will also provide the Notifying Parties with certain back-office and middle office services in relation to the mono-territorial online licences they will continue to grant – see also recital (45)).
- (41) The JV's back-office will in particular develop and administer a database of copyright-protected musical works. At a later stage, it may also create a database of musical works featured in audio visual works.³⁵ In addition, the back-office will also provide processing services³⁶ for online licenses granted by the JV, the Notifying Parties and third-party customers of the JV (namely CMOs and option 3 publishers). The back-office services will be provided by Delta.
- (42) For the purposes of providing copyright database services, the JV will integrate ICE, the existing joint venture of PRSfM and STIM, into Delta. Currently, ICE is a copyright database that offers a clear view of the rights-ownership in the musical works in the repertoire of PRSfM, STIM and customers of ICE. It also contains publishing agreement information registered by creators and publishers affiliated with the Parties and other relevant information. After becoming the third shareholder of ICE, GEMA will contribute its licence processing tools LION³⁷ and MAX³⁸ (together with other relevant data management systems) to ICE. These systems are complementary to each other and to ICE as MAX is a matching tool, and LION is the system that applies tariffs to the matched usages. Thus after the transaction ICE will develop from a copyright database provider into an integrated back-office provider with its own processing engine to process online usage reports for online licenses granted by the JV.
- (43) The JV will also provide so-called middle-office services to the Notifying Parties and third party customers (as well as to itself). According to the Notifying Parties' definition, middle office services comprise (i) the issuing of invoices, collection of monies and distribution of monies; (ii) licensee monitoring and enforcement activities; (iii) the management and resolution of invoice claim disputes; (iv) the

³⁴ LION, MAX and ICE are explained in recital (42).

³⁵ It will develop and administer comprehensive databases of copyright-protected musical works and audiovisual works and the 'share picture' in such works in all relevant territories, i.e. the share of various rightholders in such works in all relevant territories.

³⁶ Processing services comprise services such as the analysis of usage reports submitted by DSPs and matching of those reports against a copyright database with a view to invoicing a DSP for the usage of the rights included in a given licence.

³⁷ LION is a licensing and distribution system for online usage (share based and pan-European licensing), invoice preparation and preparation of distribution for online usage.

³⁸ MAX is a system for the auto-matching and manual matching of usage information to works, for all usage categories.

negotiation and management of sub-agent agreements with local collecting societies as regards exploitation of the rights required by local online and mobile operators; and (v) the provision of market analysis, business intelligence, legal services and other value-added services to support the aforementioned activities.³⁹ The middle-office services will be provided by Zeta.

- (44) The JV will further provide so-called front office services to third parties (third party CMOs and option 3 publishers), consisting of the provision of licensing-related-services. These services include: (i) the negotiation and conclusion of licensing deals with DSPs on behalf of the third party, if the third party agrees to its repertoire being licensed by the JV as part of the Zeta Core Licence; (ii) the provision of assistance and support in the negotiation of a licensing deal with DSPs, if the third party intends to license its repertoire separately from the Zeta Core Licence, but still relies on the JV for the negotiations with the DSP; (iii) customer account and relationship management; (iv) monitoring of authorized online usage, detection of unauthorized usage and judicial enforcement of the copyrights owned or controlled by the licensor. The front-office services will be provided by Zeta.
- (45) As a result of the creation of the JV, the Notifying Parties will stop providing copyright administration services to rightholders (including option 3 publishers) and CMOs⁴⁰ in relation to multi-territorial licences for online use. The Notifying Parties will also rely on the ICE copyright database for their offline business. The Notifying Parties will however retain separate processing solutions for mono-territorial online licenses and for all offline licences.
- (46) As regards the online licensing activities of the JV which will be provided through Zeta, post transaction, the JV will offer a MTMR licence that will comprise the Notifying Parties' combined repertoires, the so-called Zeta Core Licence. The Notifying Parties expect that this licence in the future will also include the repertoires of at least some option 3 publishers and the repertoire of other CMOs, which will grant the JV the mandate to license their repertoire together with the repertoire of the Notifying Parties. However, at this stage it is not yet known if and in what timeframe option 3 publishers or other CMOs would join the Zeta Core Licence. The Zeta Core Licence is designed for DSPs that provide EEA-wide or multi-territorial online music services. After the transaction, DSPs operating in more than one country will no longer be able to obtain separate mono- or multi-territorial licences from each of the Notifying Parties for their respective repertoire (and the additional repertoire that each of them is currently able to license in the framework of the RRAs concluded with other CMOs). The only way for a DSP operating in more than one country to obtain a licence for the repertoire previously licensed separately by each of the Notifying Parties would be to seek a Zeta Core Licence from the JV.
- (47) By contrast, mono-territorial DSPs, that is to say DSPs which are active in only one Member State, will continue to be able to obtain a national blanket licence, typically covering the world repertoire, from each of the Notifying Parties, for exclusive use in the single territory where that DSP operates.

³⁹ A number of respondents to the market investigation submitted that they only distinguish between front- and back-office services and consider that the different so-called middle-office services are either front-office or back-office services.

⁴⁰ PRSfM is currently administering the repertoire of the Irish CMO IMRO on a multi-territorial basis (see recitals (12) and (101)).

3.3. Applicability of the CRM Directive to the JV

- (48) In light of the Notifying Parties' explanations on the functioning of the JV, the Commission considers that the provisions of the CRM Directive regulating CMOs would be applicable to the JV. Article 2(3) of the CRM Directive provides:

'The relevant provisions of this Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation, provided that such entities carry out an activity which, if carried out by the collective management organisation, would be subject to the provisions of this Directive'.

- (49) The JV will be controlled by three CMOs. It will manage copyrights and related rights, which is an activity that, if it were carried out by a CMO, would be subject to the provisions of the CRM Directive. The relevant provisions of the CRM Directive will therefore apply to the JV. The Notifying Parties are also of the view that the JV would be subject to the CRM Directive.⁴¹
- (50) The Notifying Parties note that CMOs typically enjoy considerable market power at least in their home territory, and are potentially subject to Article 102 TFEU and similar provisions of national competition laws. In addition, in most Member States, they are also subject to specific national legislation providing *inter alia* for judicial price controls, duties to grant licences on fair and non-discriminatory terms to users, and specific dispute-resolution mechanisms for disputes between CMOs and licensees concerning the adequacy of licensing terms.⁴² In the course of the implementation of the CRM Directive, specific provisions of national law as regards CMOs including on licensing terms and dispute resolution mechanisms will have to be adopted in the Member States, and effective enforcement of these new provisions will have to be ensured.⁴³
- (51) With specific respect to the JV's activities, the Notifying Parties submit that, while there has in the past been some controversy as to the currently applicable regulatory regime for a CMO's licensing activities outside its home territories (country of origin, country of destination or both), as the JV will be based in London and Berlin, it will at least be subject to existing United Kingdom and German regulation. The German Patent and Trademark Office (including the Schiedsstelle, i.e. its dispute resolution body) has jurisdiction to exercise price control over collective licensing bodies which grant licences relating to exploitations in Germany. The UK Copyright Tribunal exercises similar powers with regard to the territory of the United Kingdom.
- (52) The Notifying Parties also submit that the Parties will be subject to the relevant legislation implementing the CRM Directive. The JV will therefore *inter alia* be (1) supervised by the national regulatory authorities in the United Kingdom and

⁴¹ Reply to RFI No. 7, dated 12 February 2015, question 57.

⁴² The Notifying Parties note that, for example, German CMOs are subject to specific regulation under the German Copyright Management Act (Urheberrechtswahrnehmungsgesetz). They are supervised and regulated by the German Patent- and Trademark-Office (DPMA). In particular, DPMA serves as a dispute resolution body in case of disputes regarding the licensing tariffs and terms applied by the CMO. In the United Kingdom, the CMOs' activities including the licensing rates are subject to supervision by the UK Copyright Tribunal. In other countries (e.g. in Sweden), CMOs are only subject to antitrust laws and are closely supervised by the national competition authorities.

⁴³ See Article 16, Article 34 *et seq.* of the CRM Directive. Pursuant to Article 43 (1) of the CRM Directive, the deadline for Member States to implement the CRM Directive is 10 April 2016.

Germany; (2) obliged to base licensing terms in licences to users on objective and non-discriminatory criteria;⁴⁴ (3) obliged to represent the repertoire of other CMOs (not engaging in MTMR licensing) and include those third-party repertoires in its MTMR-licensing offers on a non-discriminatory basis;⁴⁵ and (4) subject to mandatory dispute resolution mechanisms (relating inter alia to the appropriateness of royalties and commission rates charged by CMOs to users and rightholders respectively). In relation to commission rates for services provided to rightholders and other CMOs, the CRM Directive stipulates that ‘management fees’ (i.e. commission rates) shall not exceed the justified and documented costs incurred by a CMO in managing copyright and related rights.⁴⁶ The CRM Directive further prohibits any discrimination of other CMOs or their members in case a CMO manages their rights under a representation agreement.⁴⁷

3.4. Interrelated transactions

- (53) The acquisition of joint control over each of Delta and Zeta by PRSfM, STIM and GEMA has to be considered as two interrelated transactions pursuant to paragraphs 38 and 43 of the Commission's Consolidated Jurisdictional Notice (the ‘Jurisdictional Notice’).⁴⁸ The two transactions are interdependent, in that: (1) both JV companies will be linked by a joint steering group which will be established by the Boards of Directors of the JV companies; (2) the activities of Zeta and Delta are linked in economic terms as the MTMR licensing services offered by Zeta will rely on the copyright and processing services offered by Delta, and Zeta will exclusively use Delta as its provider of such services for all licences granted by Zeta; (3) the two transactions are carried out by the same agreement, namely the JV Agreement, and (4) in light of the structure and economic rationale of the JV, the Notifying Parties consider that they would not implement one JV company without the other.

3.5. Joint control

- (54) The proposed transaction involves the acquisition of joint control over the JV by PRSfM, STIM and GEMA.
- (55) As a result of the transaction, each of the Notifying Parties will hold a third of the shares in both Zeta and Delta. Each of the Notifying Parties will have the right to appoint an equal number of directors to the JV companies’ Boards of Directors⁴⁹ and the Notifying Parties will jointly appoint the Managing Director of both Delta and Zeta.⁵⁰ The JV will also have a Licensing Committee, which will approve general guidelines and key strategic decisions concerning the JV’s licensing policy. [...]*. Moreover, the Notifying Parties will exercise negative joint control over the JV because each Notifying Party will have veto rights over certain strategic decisions of

⁴⁴ Article 16(2) of the CRM Directive.

⁴⁵ Articles 29 and 30 of the CRM Directive.

⁴⁶ Article 12 (3) CRM Directive and - specifically for management fees charged to other CMOs in case of multi-territorial licensing of online rights - Article 30(5) of the CRM Directive.

⁴⁷ See Article 14 of the CRM Directive (no discrimination between own members and members of third-party CMOs in relation to tariffs/management fees/conditions for collection and distribution).

⁴⁸ Commission Consolidated Jurisdictional Notice under Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008 p.1).

⁴⁹ JV Agreement dated 10 June 2014, clause 12.

⁵⁰ JV Agreement dated 10 June 2014, clause 11 and Schedule 1, point 10.

the JV's shareholder meetings.⁵¹ Strategic decisions include the adoption and amendment of the JV's business plan and the altering of the JV's articles of association.⁵²

- (56) Therefore, the proposed transaction involves the acquisition of joint control over the JV by PRSfM, STIM and GEMA.

3.6. Full functionality

- (57) According to Article 3(4) of the Merger Regulation '*[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)*'.

- (58) In light of the elements described in recitals (59) to (63), the Commission considers that the JV constitutes a joint venture performing on a lasting basis all the functions of an autonomous economic entity, as provided for in the Jurisdictional Notice.

3.6.1. Sufficient resources to operate independently on the market

- (59) According to paragraph 94 of the Jurisdictional Notice, in order for it to be considered full-function, a joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible). As regards the management of the JV, each of Delta and Zeta will have a Managing Director, appointed with the unanimous consent of the Notifying Parties, who will deal with the day-to-day operation of each of the JV companies. Other managing bodies will be the Board of Directors and the Licensing Committee.⁵³ As regards the financial resources, Zeta's equity capital will amount to EUR [...]*, Delta's equity capital amounts to EUR [...]*. In addition to equity, the Notifying Parties will provide further financial resources to the JV in the form of substantial shareholder loans amounting to EUR [...]* and a further estimated EUR [...]* until the end of 2016 for Delta and EUR [...]* for Zeta.⁵⁴ As regards the staffing of Delta and Zeta, the JV will have its own staff, including their own customer service, operations, human resources, finance, legal and IT teams/departments. Finally, as regards assets, the Notifying Parties will provide Delta with their existing back-office structure and all assets and intellectual property rights currently held by them, such as the intellectual property rights relating to the copyright database of ICE and the licence processing tools LION and MAX. The Notifying Parties will also provide Zeta with the mandate to grant MTMR licences to the Notifying Parties' repertoire, which will allow Zeta to grant these licences to DSPs. The JV will have its own business premises and office equipment.

3.6.2. Activities beyond one specific function for the parents

- (60) Pursuant to paragraphs 95 and 96 of the Jurisdictional Notice, a joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. Delta and

⁵¹ [...]*.

⁵² [...]*.

⁵³ The Licensing Committee will be responsible for the key strategic decisions concerning the licensing policy of Zeta. In line with general industry practice, CMOs typically establish committees with member representation as a means to assure that the member rights are being licensed and managed effectively. The Licensing Committee will consist of the Managing Director of Zeta and of one senior representative nominated by each Notifying Party.

⁵⁴ [...]*.

Zeta are a "full-service" operation for negotiating, granting, processing (through its Delta back-office), administering and enforcing MTMR licences for online, including mobile, exploitation, as well as monitoring licensees and the market development in general (middle-office). The JV will also offer to the market a new product that each of the Notifying Parties today are unable to offer, namely the Zeta Core Licence, which is an MTMR licence that includes the three repertoires controlled by each of the Notifying Parties and possibly other repertoires.

- (61) The JV will also enjoy a sufficient degree of pricing autonomy from the Notifying Parties. As regards middle- and back-office services, the JV's management will have full pricing autonomy. As regards the front-office/licensing activities, the JV's management will be free to negotiate and grant licences as long as the negotiated deals stay within the ranges contained in a Standard Rate Card⁵⁵ pre-approved by the Licensing Committee (where representatives of the Notifying Parties will be present). Any licensing deal falling outside of the terms provided for in the Standard Rate Card will need to be specifically approved by the Licensing Committee. In this regard, the Commission notes that it is common practice within CMOs in the EEA that committees in which CMO members are represented are set up within each and every CMO. This practice ensures the participation of the members of CMOs in all key decisions concerning the "price" of licences granted by the CMO. As a result, the presence of a Licensing Committee within the JV composed of representatives of the Notifying Parties does not deprive the JV of its full-functional character, but rather represents a common practice which could be found within every CMOs operating on the same market. Therefore, despite the influence that the Notifying Parties will continue to exercise on the commercial terms of the licensing activity of the JV through their presence in the Licensing Committee, the Commission considers that the present JV should be regarded as full-function, in so much as *'the joint venture [...] perform[s] the functions normally carried out by undertakings operating on the same market'*.⁵⁶

3.6.3. Sale/purchase relations with the parents

- (62) Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, for it to be considered full function, a joint venture must play an active role on the market and must be considered economically autonomous from an operational viewpoint. Given the novelty of the services that will be provided by the JV, the Notifying Parties expect that there will be an immediate high demand for Zeta's services and that the commission/service fees charged will be sufficient to cover the JV's operating costs as from the end of the first full year of its licensing activity. More precisely, according to the JV's business plan, [more than 50]*% of Zeta's royalty collections and commission income will be attributable to third-parties as from its first year of activity,⁵⁷ whereas Delta's revenues generated by providing services to customers other than the Notifying Parties will amount to approximately

⁵⁵ The Standard Rate Card, approved by the Licensing Committee, will contain a core standard set of terms and conditions and a "flexible set" of terms and conditions that set the framework for Zeta's negotiations with potential customers. In the event that third-party CMOs or option 3 publishers decide to join the Zeta Core Licence, their repertoire will be licensed by the JV together with the JV Parents' repertoires, without the possibility for a user to selectively choose one or more repertoires over the others.

⁵⁶ Jurisdictional Notice, points 93 to 94.

⁵⁷ Business Plan, page 25.

[more than 20]*% in the first year of operations.⁵⁸ Overall, according to the business plan⁵⁹, revenues from third-parties will represent [more than 20]*% of the total external revenues⁶⁰ of the JV in the first year of operations, [more than 20]*% in the second year, [more than 20]*% in the third year, [more than 20]*% in the fourth year and [more than 50]*% in the fifth year.

3.6.4. *Operation on a lasting basis*

- (63) Paragraphs 103 to 105 of the Jurisdictional Notice provide that a full-function joint venture must be intended to operate on a lasting basis. The Notifying Parties did not provide any legal duration for the JV companies. Moreover, the JV Agreement will be subject to a lock-in period of at least five years.
- (64) In light of the above, the Commission considers that the JV fulfils the relevant criteria to be considered full-function. Therefore, the proposed transaction constitutes a concentration within the meaning of Article 3(4) of the Merger Regulation.

4. **EU DIMENSION**

- (65) The proposed transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation. The combined aggregate worldwide turnover of the Parties does not exceed EUR 2 500 million.
- (66) However, on 19 September 2014, the Notifying Parties requested a referral of the case to the European Commission pursuant Article 4(5) of the Merger Regulation, given that the proposed transaction would have been capable of being reviewed under the national competition laws of at least three Member States (notably Germany, Poland and the United Kingdom).
- (67) On 10 October 2014, given that no Member State competent to examine the concentration under its national competition law expressed its disagreement on the referral request, the proposed transaction was deemed to have a Union dimension and was notified to the Commission on 28 November 2014.

5. **MARKET DEFINITION**

- (68) The Notifying Parties propose to define the relevant markets as follows:
- the market for copyright administration services provided to rightholders and CMOs; and
 - the market for online licensing of copyrights in musical works.

5.1. **Market for copyright administration services provided to CMOs and option 3 publishers in relation to transactional multi-territorial licenses**

5.1.1. *Relevant product market*

5.1.1.1. Notifying Parties' view

- (69) The Notifying Parties consider that there is a relevant market for copyright administration services provided to rightholders and CMOs. Although

⁵⁸ Business Plan, page 29.

⁵⁹ Notifying Parties' submission of 6 August 2013.

⁶⁰ The sum of Zeta and Delta's total commission revenues minus intra-JV sales.

acknowledging that the market for copyright administration services could potentially be subdivided into a market for copyright administration services provided to rightholders and a market for copyright administration services provided to other CMOs (a so-called 'inter-CMO services' market), the Notifying Parties consider that such further segmentation of the market would neither be appropriate nor necessary. Also, according to the Notifying Parties, the services provided to publishers, in their capacity as CMO members and in their capacity as option 3 publishers, do not differ from those provided to other rightholders and to CMOs and thus, the market should not be segmented according to these different groups of customers.

- (70) In their reply to the Article 6(1)(c) decision, the Notifying Parties furthermore submit that there is no separate market for copyright administration services provided to option 3 publishers as the services required by option 3 publishers and other CMOs are the same.⁶¹ In addition, the Notifying Parties consider that from a supply-side perspective, the services provided are the same not only for option 3 publishers and CMOs but also for CMO members.⁶²
- (71) Moreover, in the Notifying Parties' view, a segmentation of the market for copyright administration services according to the category of rights administered (for instance mechanical or performing rights) or according to type of exploitation (e.g. administration of rights relating to offline and online use) is not appropriate. In particular, although some CMOs, including PRSfM, only administer performing rights of their members, the services provided by those CMOs are the same as those provided by CMOs administering both performing and mechanical rights and all CMOs are theoretically able to administer both sets of rights.
- (72) The Notifying Parties consider, however, that it may be possible to segment the market further according to the geographic scope of the copyright administration services provided, i.e. services provided for the administration of mono-territorial licences on the one hand and multi-territorial licences on the other. In the Notifying Parties' view, providing services for the administration of licences on a multi-territorial basis is complex at least as far as online (mechanical and performing) rights are concerned and not every CMO may be able to provide those services. The Notifying Parties also submit that this difference may become more pronounced in the future as the regulatory framework applicable to copyright administration services will differ depending on whether they are provided on a mono-territorial or on a multi-territorial basis.⁶³ In particular in relation to copyright administration services provided in relation to multi-territorial licences the actual or potential players active would not only be CMOs but also larger publishers (notably option 3 publishers) themselves and providers of IT services. The Notifying Parties consider that the question of further segmentation according to the geographic scope of the copyright administration services provided can be left open as, in the Notifying Parties' view, the proposed transaction does not give rise to any competition concerns

⁶¹ Notifying Parties' reply to the Article 6(1)(c) decision, paragraph 11.

⁶² Notifying Parties' reply to the Article 6(1)(c) decision, paragraph 12.

⁶³ While the requirements contained in Title I and II of the CRM Directive apply to all CMOs, only CMOs engaging in multi-territorial licensing of authors' rights for online uses will also have to comply with the more demanding provisions of Title III of the CRM Directive (in particular, Articles 24 - 28 of the CRM Directive).

irrespective of whether the market is further segmented into copyright administration services for multi-territorial licenses and mono-territorial licenses.

5.1.1.2. Commission's assessment

- (73) The Commission has not previously assessed a concentration involving copyright administration services. However, in its decision in the *CISAC* case,⁶⁴ the Commission considered that in addition to operating on a licensing market, CMOs operate on a rights management market and an inter-CMO services market. The distinction of these levels of services provided by CMOs is also reflected in the Impact Assessment accompanying the CRM Directive.⁶⁵
- (74) As set out in recitals (39) to (45), the JV will provide services for the administration of multi-territorial licences for online use. The Notifying Parties will continue to provide copyright administration services in relation to mono-territorial licences for online use and in relation to all licences for offline use outside of the JV. In addition, the JV will not provide copyright administration services to rightholders in their capacity as CMO members directly but only to the CMOs to which they are affiliated.

The view taken in the Article 6(1)(c) decision

- (75) In the Article 6(1)(c) decision the Commission found indications that copyright administration services provided to rightholders, that is, to CMO members and to option 3 publishers on the one hand, and to CMOs, on the other hand, could be part of the same product market. Indeed, the majority of CMOs responding to the market investigation considered that copyright administration services related to licences for online use do not differ depending on whether they are provided to rightholders (CMO members and option 3 publishers) or to CMOs.⁶⁶ The replies of publishers and DSPs were more mixed although a majority of them submitted that they lack sufficient knowledge of the commercial arrangements among CMOs to be able to provide a meaningful explanation for their view.⁶⁷
- (76) However, in its Article 6(1)(c) decision the Commission, based on the responses received during the market investigation in Phase I, identified a possible separate market for copyright administration services provided to option 3 publishers because, due to the large size of their repertoires, the copyright administration services required by option 3 publishers differ from those required by other rightholders (that is to say CMO members) who hold a smaller amount of rights. The majority of publishers and DSPs considered that the copyright administration services provided to larger publishers (notably option 3 publishers) differ from those provided to smaller publishers, as larger publishers obtain tailor-made services that other rightholders do not require or obtain.⁶⁸ Responses from CMOs did not support either conclusion as most CMOs did not differentiate between copyright administration services provided to their members and copyright administration services provided to option 3 publishers. The majority of CMOs limited themselves to considering that

⁶⁴ Commission decision of 16 July 2008 in Case COMP/C2/38.698 – *CISAC Agreement*, recital 49.

⁶⁵ See Impact Assessment, section 3.1.3. (p. 20).

⁶⁶ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 11.

⁶⁷ Replies to Commission questionnaire Q 1 – to customers (to DSPs) of 1 December 2014, question 12.

⁶⁸ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, questions 8, 9, 12.

the services provided to larger publishers (in their capacity as CMO members) do not differ significantly from those provided to their other members. CMOs mainly referred to non-discrimination obligations to justify their answers.⁶⁹

Distinction according to the complexity of the copyright administration services required for blanket and transactional licences and for mono-territorial and multi-territorial licences

- (77) In its in-depth investigation the Commission further investigated the exact delineation of the relevant product market. In particular, in light of the comments submitted by the Notifying Parties in reply to the Article 6(1)(c) decision, the Commission investigated whether the copyright administration services provided to option 3 publishers differ from services provided to CMOs and other rightholders to an extent that would justify the finding of separate markets. The Commission also further investigated the differences in copyright administration services depending on whether they are provided in relation to mono-territorial licences or in relation to multi-territorial licences.
- (78) First, the in-depth investigation indicated that the basic copyright administration services provided to option 3 publishers, CMO members and CMOs are by and large identical.
- (79) Based on the market investigation and further information provided by the Notifying Parties regarding the copyright administration services currently provided by them, the Commission considers, however, that at least some of these services, in particular copyright database management and licence processing services that are typically required by option 3 publishers and (for the time being to a lesser extent) by CMOs,⁷⁰ can differ significantly in terms of complexity. Complexity increases depending on at least two variables: (i) whether the licence is blanket or transactional in nature; (ii) the geographic scope of the licence to be administered. The size of the repertoire to be administered may add further complexity to the services required.
- (80) As set out in recitals (22) and (30), CMOs' blanket licences cover the world-repertoire in the territory of a given CMO, generally one country. Under blanket licences the royalties are in most cases charged as a lump sum calculated on the actual or potential audience reached by a certain service and the DSP typically pays for the possibility to use the entire repertoire. Thus, for blanket licences, usage reports are generally not relevant for the purposes of invoicing to the DSP. They are only relevant for the distribution of the collected royalties to members and rightholders.⁷¹

⁶⁹ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 5.

⁷⁰ There is currently only one EEA-based CMO, IMRO, that is sourcing copyright administration services in relation to transactional multi-territorial licences.

⁷¹ While blanket licences can be lump sum deals, it is not always the case for larger services. In addition, there are also transactional blanket licences, i.e. licences that are charged on the basis of the actual usage of certain works. However, these licences do not need to be invoiced on the basis of repertoire shares in works. Rather, the CMO would typically collect the overall royalties due for the use of musical works within the service. Depending on the royalty mechanic for the blanket licence, this may operate at a aggregated level and may not require any detailed processing of the file. However, if the royalty mechanic includes any kind of greater of calculation which includes a percentage of revenue and a per use minimum then processing on a line-by-line basis may still be required to ascertain the accurate royalty. However, the shares of individual rightholders in those songs would be irrelevant for invoicing purposes, and would only play a role at the distribution stage.

- (81) As set out in recital (30), transactional licences are usage-based licences, typically granted on a multi-territorial basis, under which royalties are calculated at work-share level based on reported music usage data, that is to say, according to the actual usage of copyright-protected works (based on the actual number of downloads or streams of individual works). Under transactional licences, the usage report provided by a DSP is the basis for the calculation of the royalties owed by the DSP (and thus the invoicing to the DSP).
- (82) In light of those differences, the Commission considers that the administration of transactional, usually multi-territorial, licences is more complex as it requires the processing of very large amounts of data in a given CMO's copyright database and licence processing systems. Therefore, blanket licences and transactional licences are not part of the same product market.
- (83) As regards the geographic scope of the licence to be administered – mono-territorial licences on the one hand and multi-territorial licences on the other – replies to the in-depth market investigation show significant material differences as regards the functioning of CMOs' copyright databases and licence processing tools. CMOs, and especially those who currently license their repertoire on a multi-territorial basis submit that the complexity as regards back-office services rises dramatically when administering repertoires on a multi-territorial basis. Those CMOs submit, in particular, that the quantity of data requiring processing increases and, as a consequence, so do the potential conflicts in need of being resolved as regards the 'share picture' of the musical works concerned.⁷² Indeed, as set out in footnote 28, the share picture in one and the same song often varies across different countries. CMOs administering multi-territorial licences need to have the necessary IT infrastructure and know-how available to be able to administer those complex structures.
- (84) Another factor adding to the complexity of the administration of online rights is the size of the repertoire administered. For the administration of large repertoires, CMOs need to have robust IT systems, powerful servers capable of processing large quantities of data, and qualified staff in order to provide services to customers that own large repertoires – to date usually option 3 publishers and to a lesser extent also CMOs.⁷³ This is in particular true as regards the administration of large repertoires under transactional licences given the reporting requirements set out in recital (81).
- (85) Current market reality corroborates this finding. The majority of DSPs and publishers responding to the market investigation in Phase I pointed to the fact that there might not be full supply-side substitutability as not all CMOs are able to administer multi-territorial licences due to a lack of necessary infrastructure and resources.⁷⁴ The Commission notes that currently only a limited number of large and medium-sized CMOs provide multi-territorial copyright administration services to option 3 publishers (and even fewer provide those services to other CMOs).
- (86) Obstacles to be overcome by CMOs (see section 6.1.3) in order to start providing copyright administration services in relation to multi-territorial licences also show that the complexity of the services to be provided goes beyond what those CMOs,

⁷² Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 8.1.1.

⁷³ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 3.4.

⁷⁴ Replies to Commission questionnaire Q 1 - to DSPs of 1 December 2014, question 13.

who are already operating on the market, provide in terms of copyright administration services today. First, the market investigation indicates that CMOs would have to invest time and money to develop their IT infrastructure and know-how further.⁷⁵ Second, access to a comprehensive copyright administration database in order to be able to offer copyright administration services in relation to multi-territorial licences was identified by market participants as an important criterion for potential competitors to be able to offer services that are comparable to those provided by existing players.

- (87) Finally, the Commission notes that the CRM Directive enables a CMO to request that another CMO accept a mandate to represent its repertoire on a multi-territorial basis where it cannot or does not wish to do so itself. The CRM Directive even imposes an obligation on the requested CMO to accept such a mandate if it already aggregates repertoires from other CMOs and offers or grants multi-territorial licences.⁷⁶ Thus, even the CRM Directive takes into account the complexity of copyright administration services provided in relation to multi-territorial licences and that not all CMOs will have the ability or incentive to start providing such services by themselves to their own members, let alone to third parties.
- (88) Therefore, services in relation to mono-territorial and services in relation to multi-territorial licences are not part of the same product market.

Possible segmentation by type of customer to be serviced

- (89) Despite the views expressed during the market investigation, and in particular by CMOs, that copyright administration services do not differ whether provided to CMOs on the one hand and rightholders on the other (see recital (75)) and that those services do not differ depending on the size of the customer (see recital (76)), the Commission considers that copyright administration services provided to rightholders in their capacity as CMO members are not part of the relevant product market.
- (90) First, regarding the distinction between copyright administration services provided to rightholders as CMO members on the one hand and CMOs on the other hand, the Commission notes that the vast majority of CMOs provide copyright administration services to other CMOs in the framework of the traditional RRA-network, which, in effect, amounts to representing the members of a sister-CMO. One CMO explained the situation as follows. ‘*As regards songwriters composers and music publishers, [that CMO] represent[s] their own members and, via their reciprocal agreements, those of other CMO’s in [its home] territory [...]*’. On this basis, inter-CMO services are indistinguishable from services provided to individual CMO members and do not differ substantially compared to the services that CMOs provide to their own members. The copyright administration services provided to CMOs with which the present case is concerned are, however, not those covered by the traditional RRA-network. Regarding the distinction between copyright administration services provided to CMO members on the one hand and option 3 publishers on the other hand the Commission notes that the view expressed by the vast majority of CMOs, that copyright administration services provided do not differ according to the size of the respective customer, is based on an assessment only in relation to the CMOs’

⁷⁵ See recital (200).

⁷⁶ Recital 40 and Article 30 of the CRM Directive.

members as the vast majority of respondents do not provide services to option 3 publishers.

- (91) The vast majority of responding CMOs therefore do not address possible differences in copyright administration services provided to CMO members on the one hand and other CMOs outside of the RRAs and option 3 publishers on the other hand.
- (92) Second, for the reasons set out below, the Commission considers that the services provided to CMO members also differ from a supply-side perspective from those provided to CMOs and option 3 publishers.
- (93) The copyright administration services provided to CMO members, including publishers, which decided to rely on CMOs for the administration of their rights are different from the services provided by CMOs to option 3 publishers, which decided to withdraw their Anglo-American mechanical rights from the CMO system and to license them directly, albeit with the support of the CMOs. CMO members essentially rely on the CMOs for the licensing of their copyright (as part of the CMO's repertoire) and receive from the CMOs reports on the licensing of their works and the corresponding royalties. Option 3 publishers, however, source a much more complex set of services from CMOs, which include back-, middle- and front office services as further described in section 3.2.
- (94) In addition, the copyright administration services provided to CMO members, including publishers, which decided to rely on CMOs for the administration of their copyright are also different from the services provided by CMOs to other CMOs (that is to say, services such as those envisaged by the JV and not inter-CMO services provided in the framework of the traditional RRA-network), which essentially decide to 'outsource' some of their activities. This reflects the fact that the services that CMOs may decide to source from other CMOs, for instance, back-office copyright database and licence processing services are very different from the services that CMO members typically source from CMOs in the context of the traditional RRA-network. As set out in recital (93), the services rendered by CMOs to their members predominantly consist in reporting on the licensing of their works and passing on of the corresponding royalties.
- (95) Therefore, in light of its findings in recitals (90) to (94) the Commission considers that copyright administration services provided to CMO members are not part of the relevant product market.
- (96) The two categories of customers present on the relevant market, therefore, are CMOs and option 3 publishers. The Commission considers that the question whether the market should be further segmented according to those types of customers, that is to say option 3 publishers on the one hand and CMOs on the other can be left open as the proposed transaction raises competition concerns in relation to both types of customers.

Conclusion

- (97) In the light of its findings in recitals (73) to (93), the Commission concludes that, for the purposes of the present decision, there is a relevant product market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licenses.

5.1.2. Relevant geographic market

5.1.2.1. Notifying Parties' view

- (98) The Notifying Parties consider that the market for copyright administration services provided to rightholders has become broader than national and is at least EEA-wide

in scope. CMOs accept rightholders from across the EEA as their members and actively compete for members based in countries other than the CMOs' home countries. Likewise, CMOs compete to provide copyright administration services to option 3 publishers who are located outside of the CMOs' home countries. The Notifying Parties submit that this competition may even extend beyond the EEA.

- (99) As regards copyright administration services provided to CMOs the Notifying Parties submit that CMOs, with a few exceptions, generally still rely on the RRAs to mandate their sister CMOs for the administration of their repertoire in relation to national blanket licences in the sister CMOs' respective home territories. Thus, the market is still considered to be predominantly national in scope. However, also in relation to inter-CMO services the market is showing a tendency towards extending its scope beyond national boundaries. In particular, the promotion of pan-European licensing and the must-carry obligations contained in Articles 29-31 of the CRM Directive⁷⁷ will lead to the emergence of a pan-European inter-CMO services market.

5.1.2.2. Commission's assessment

- (100) In the *CISAC* decision the Commission took the view that the geographic scope of copyright administration services provided to CMO members was national. However, the Commission stated that '*in the absence of membership restrictions, the geographic market could potentially be broader, since authors could switch between collecting societies and transfer their rights to those collecting societies which would provide the best service to them*'.⁷⁸ Similarly, the Commission considered in relation to the geographic scope of inter-CMO services that '[t]he geographic scope of the market for the provision of copyright administration services to other public performance rights collecting societies has both a national aspect and wider cross-border elements',⁷⁹ explaining that in the absence of the restrictions contained in the RRAs CMOs would be able to grant multi-territorial licences.⁸⁰ Hence, the geographic scope of the copyright administration services provided to other CMOs in relation to such licences would be broader.
- (101) In this respect, the Commission notes that the restrictions contained in the RRAs were removed as a result of the Commission's *CISAC* decision and some CMOs, including PRSfM and STIM, have started to provide multi-territorial licences. In addition, the Irish CMO IMRO has entrusted PRSfM and SACEM with granting licences to IMRO's repertoire not only in the latter CMOs' home countries but across the EEA on a multi-territorial basis. Moreover, when considering from which CMO to source copyright administration services outside of their respective home countries, CMOs list criteria other than local market and/or language knowledge such as cost, reporting quality and timely distribution of royalties.⁸¹

⁷⁷ Licensing hubs will be obliged to license the repertoire of CMOs on a multi-territorial basis upon request.

⁷⁸ Commission decision of 16 July 2008, Case COMP/C2/38698 – *CISAC* Agreement, recital 59.

⁷⁹ Commission decision of 16 July 2008, Case COMP/C2/38698 – *CISAC* Agreement, recital 60.

⁸⁰ Commission decision of 16 July 2008, Case COMP/C2/38698 – *CISAC* Agreement, recital 62.

⁸¹ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 26.

- (102) Furthermore, the market investigation shows that, if CMOs compete to provide copyright administration services to option 3 publishers, they do so irrespective of where the CMO providing the services and its potential customers are based.
- (103) As regards the question whether competition at least in relation to copyright administration services in relation to multi-territorial licences provided to option 3 publishers extends beyond the EEA, the Commission notes that the Commission's 2005 Recommendation (see recital (27)) that aimed at strengthening the EEA-wide licensing of online rights, as well as the CRM Directive that sets out the regulatory framework for multi-territorial licensing of rights in musical works in the EEA and is applicable to all CMOs active in this sector in the EEA had and will have an impact on multi-territorial licensing within the EEA but not beyond the territory of the EEA. Those two regulatory instruments therefore create conditions of competition within the EEA which are sufficiently homogeneous and which can be distinguished from the conditions of competition elsewhere due to different applicable regulatory frameworks.
- (104) In the light of the considerations set out in recitals (100) to (103), the Commission considers that, for the purposes of the present case, the market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licenses is EEA-wide in scope.

5.2. Online licensing market (the market for the licensing of online rights in musical works)

5.2.1. Relevant product market

5.2.1.1. Notifying Parties' arguments

- (105) The Notifying Parties submit that the market definition adopted in *Sony/Mubadala/EMI Music Publishing* and *Universal/BMG Music Publishing*, and in particular the distinction between online rights in musical works on the one hand and the other categories of rights in musical works referred to in recital (109) on the other hand can also be applied in the present case which only concerns the licensing of online rights.
- (106) As regards the repertoires covered by online licences, the Notifying Parties submit that the online licensing markets should not be subdivided further into separate markets for mono- and multi-repertoire licences, that is to say, licences granted by a given CMO covering only its own repertoire and licences granted by a given CMO covering the repertoires of multiple CMOs⁸² as there is typically no separate demand for mono-repertoire licences from users.
- (107) As regards the territorial coverage of online licences, that is the territories for which the online rights are granted, the Notifying Parties submit that it may be possible to distinguish between separate markets for mono-territorial licences on the one hand and multi-territorial licences on the other hand. For most users, these forms of licences are not substitutable. A purely national DSP will not be interested in a multi-territorial licence since it can obtain a national licence covering the same or a larger repertoire. Conversely, a multi-territorial DSP cannot substitute a multi-territorial

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As set out above in recital (21), under the RRAs, one contracting CMO ("mandating CMO") grants to another CMO ("mandated CMO") the mandate to license the repertoire of the mandating CMO in a certain territory (either in its own name or as an "agent" for the mandating CMO) and to collect the royalties owed by users and forward them to the mandating CMO.

licence with a bundle of national licences, because some repertoires are licensed on a multi-territorial basis and are no longer part of the national blanket licence. The Notifying Parties submit that the distinction between two separate markets for these kinds of licences will become more pronounced in the future as more and more DSPs will expand their activities to other Member States and more and more publishers and CMOs will start engaging in multi-territorial licensing of online rights either directly for one repertoire or as part of a licence covering several repertoires.

- (108) The Notifying Parties furthermore submit that there is only one market for online licences comprising both publisher- and CMO repertoires. The Notifying Parties submit that DSPs always need licences covering both CMO-repertoires and publisher-repertoires, and moreover, DSPs need a multi-territorial licence for both a publisher's mechanical Anglo-American rights and the corresponding Anglo-American performing rights which have traditionally been made available by CMOs.

5.2.1.2. Commission's assessment

- (109) The Commission has assessed concentrations in the music publishing sector in the past, most recently in *Sony/Mubadala/EMI Music Publishing*,⁸³ where the Commission defined separate product markets for the exploitation of different categories of rights in musical works (referred to as music publishing rights in that decision): (i) mechanical rights: the right to reproduce a work in a sound recording (e.g. CDs); (ii) performing rights: the right for commercial users such as broadcasters (TV or radio stations), concert halls, theatres, night clubs, restaurants to divulge a work to the public; (iii) synchronisation rights: the right for commercial users such as advertising agencies or film companies to synchronise music with a visual image; (iv) print rights: the right to reproduce a work in sheet music; and (v) online rights: a combination of mechanical and performing rights for online applications, such as music downloading and streaming services.
- (110) The proposed transaction exclusively concerns the exploitation of one specific category of rights in musical works, namely online rights, since the JV will only be active in the licensing of this type of rights.
- (111) In *Sony/Mubadala/EMI Music Publishing*,⁸⁴ which concerned the merger of two music publishers that only held Anglo-American mechanical rights, the Commission took into account the parties' position in relation to these rights in the competitive assessment of the overall online rights market. However, the Commission assessed the effect of that concentration on the overall market for online rights.
- (112) Within the market for licensing of online rights, the Commission has also examined in the present case whether it is appropriate to distinguish separate markets according to:
- The retail model (e.g. download, streaming or other types of retail model) for which the licence is sought;
 - Whether the license is granted by CMOs or by option 3 publishers; and
 - The geographic scope of the license.

⁸³ Commission decision of 19 April 2012 in Case COMP/M.6459 – Sony/Mubadala/EMI Music Publishing, recitals 21-26.

⁸⁴ Commission decision of 19 April 2012 (Case COMP/M.6459 – Sony/Mubadala/EMI Music Publishing).

- (113) The majority of respondents to the market investigation did not consider that the online music licensing market should be segmented further depending on the retail model.⁸⁵ Based on the results from the market investigation, the Commission does not consider that a distinction should be made in this case between online licensing to streaming services and online licensing to downloading services.
- (114) Regarding the differences between licenses granted by CMOs and licenses granted by option 3 publishers, it appears that, since a number of CMOs started to license their repertoires to DSPs on a multi-territorial basis, at least some CMOs may compete with and operate in the same market as option 3 publishers. However, the market investigation was inconclusive as to the question whether the online licensing market should be limited to licences granted by CMOs or whether also licences granted by option 3 publishers form part of this market. The majority of DSPs explained that CMOs' and option 3 publishers' licensing activities are the same irrespective of (i) any applicable regulation to CMOs; (ii) possible differences in scope, diversity and stability in the repertoires of CMOs and option 3 publishers; and (iii) possible differences in the commercial incentives of CMOs and option 3 publishers in licensing of their repertoire.⁸⁶ However, CMOs and publishers explained that there are differences between the activities of CMOs and option 3 publishers because (i) CMOs administer repertoire on a collective basis whereas publishers discover and develop talents; (ii) option 3 publishers control only mechanical rights of usually more attractive works; (iii) CMOs and option 3 publishers have different (commercial) interests; and (iv) CMOs are subject to regulation.⁸⁷
- (115) The market investigation was equally inconclusive as regards the possible segmentation of the online licensing market according to the geographic scope of the licences granted (mono-territorial or multi-territorial). From the demand-side perspective, DSPs active in only one country typically need only one blanket mono-territorial (multi-repertoire) licence from the CMO of that country. Conversely, DSPs that operate in more than one country, typically require multi-territorial licences but also mono-territorial licences, since not all repertoires are available on a multi-territorial basis.
- (116) DSPs therefore consider that separate markets for multi- and mono-territorial licensing exist as the combination of mono-territorial licences cannot replace the multi-territorial licence because of various carve-outs by CMOs and the withdrawal

⁸⁵ Downloading involves the purchase and storage of a digital copy of a musical work on one or more computers or electronic devices. Typical examples of download platforms are Apple's iTunes service and Amazon's MP3 service. With a streaming service, the user does not download music files and no permanent copy is stored on the user's computer or electronic device. Instead, the audio file is delivered in small data packets over the Internet and playback commences as soon as the Internet streaming is initiated. Streaming services can comprise a basic, ad-sponsored service that is available free of charge and a premium, paid-for service. Premium services are typically ad-free, offer additional functionality (for instance unlimited plays of songs, a larger music library or support of mobile devices) and may grant users the possibility to download and store tracks in order to listen to them offline during the period of the subscription (so-called 'tethered downloads'). Important examples of streaming services available in the EEA include Spotify, Deezer, Google Play, Rdio, etc.

⁸⁶ Replies to Commission questionnaire Q 4 – to DSPs of 4 February 2015, questions 6.1, 6.2, 6.3 and 6.4.

⁸⁷ Replies to Commission questionnaire Q 6 – to publishers of 4 February 2015, question 6; Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 11.

of option 3 publishers from the CMO system.⁸⁸ The majority of publishers take the same view. Most CMOs, however, take the view that markets should not be segmented further into markets for mono- and multi-territorial licences. In addition, some CMOs argue that the segmentation is not justified because most new business models are launched in one country and services are rolled out thereafter in other countries.⁸⁹

- (117) The Commission also notes, however, that the JV will only be active in the provision of multi-territorial licences to multi-territorial DSPs, while the Notifying Parties will retain the online licensing activities in relation to mono-territorial DSPs. It follows that in order to assess the JV's position in the market where it will operate, it may be appropriate to define a relevant product market comprising the multi-territorial licensing activities of option 3 publishers and CMOs (or of CMOs only) or, in short, a multi-territorial online licensing market.
- (118) In the light of the considerations set out in recitals (109) to (117), the Commission considers that the broadest possible relevant product market is the overall market for the licensing of online rights in musical works. The Commission does not need to decide whether this market should be further subdivided according to whether the licence is granted by a CMO or by an option 3 publisher, and according to the geographic scope of the license (mono-territorial or multi-territorial) because, regardless of how the market is defined, the transaction does not raise competition concerns in respect of the market for the licensing of online rights in musical works.

5.2.2. *Relevant geographic market*

- (119) The Notifying Parties submit that from a geographic perspective the online licensing markets are national in scope with a tendency of moving towards an EEA-wide scope.
- (120) In its previous decisions regarding mergers in the music publishing sector the Commission has left open the geographic market definition for the exploitation of rights in musical works.⁹⁰ The Commission has also left open the geographic market definition for the narrower product market consisting of the exploitation of online rights in musical works. However, with respect to these online rights, the Commission has found that the market was moving towards an EEA-wide market.⁹¹
- (121) In the *CISAC* decision, the Commission has analysed the market for the licensing of public performance rights for satellite, cable and internet broadcasting to commercial users and has taken the view that in view of the organisation of collecting societies and their licensing practices, the relevant geographic market can be defined as being national in scope. However, the Commission has acknowledged that in the online environment remote monitoring of usage is possible and therefore the potential market is much broader – it is potentially worldwide or at least regional in scope.⁹²

⁸⁸ Reply to Commission questionnaire Q 1 - to DSPs of 1 December 2014, questions 17 and 19.

⁸⁹ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 18.

⁹⁰ Commission decision of 22 May 2007 in Case No COMP/M.4404, Universal/BMG Music Publishing and Case COMP/M.6459, Sony/Mubadala/EMI Music Publishing, recital 61.

⁹¹ Case COMP/M.6459, Sony/Mubadala/EMI Music Publishing, recital 59.

⁹² Commission decision of 16 July 2008, Case COMP/C2/38698 – CISAC Agreement, recitals 63-64.

- (122) The Commission notes that, from the supply side, a number of big option 3 publishers and CMOs are engaged in direct licensing of their repertoire across the EEA. These licensors are able and do grant licences to DSPs, which cover the whole of the EEA or any subset of countries where the DSP intends to operate. There are, however, still a number of (smaller) CMOs, which do not engage in licensing on a multi-territorial basis. These CMOs license their repertoire either through national blanket licences or rely on a third party (larger) CMO to license their repertoire on a multi-territorial basis on their behalf (for example, IMRO, the Irish CMO, currently relies on PRSfM for the pan-European multi-territorial licensing of its repertoire).
- (123) From the demand side, the majority of respondents to the market investigation consider that the geographic scope of the licences granted to DSPs depends on the business model of the given DSP (whether it is a national or multi-territory or EEA-wide service) and that the DSPs that are active in multiple territories need to obtain a variety of licences that vary in geographic scope. The scope of many of these licences extends beyond national boundaries (for example, those granted by option 3 publishers and those granted by the CMOs that are licensing to DSPs active in more than one country), while others (the residual blanket licences from CMOs) are national in scope.
- (124) In this respect, the Commission also notes that most of the largest DSPs active in the EEA operate in a significant number of countries, and some are active in the whole of the EEA. The largest DSPs aim at obtaining licences that cover the broadest assortment of musical content possible in order to serve a broad range of end users in as many countries as possible. On the other hand, there are DSPs that are active in only one country, and which need a national blanket license for the respective country.
- (125) In light of the supply-side and demand-side considerations set out in recitals (122) to (124), as well as of the fact that the JV will operate EEA-wide in the granting of multi-territorial multi-repertoire licences, the Commission considers that the relevant geographic market is EEA-wide. The JV's position will therefore be assessed on the EEA-wide overall market for the licensing of online rights in musical works.

6. COMPETITIVE ASSESSMENT

6.1. Market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences

6.1.1. Affected markets

- (126) The proposed transaction gives rise to horizontal overlaps between the activities of the Notifying Parties to be contributed to the JV on the market for the provision of copyright administration services in relation to transactional multi-territorial licences provided to CMOs and option 3 publishers.
- (127) As the JV will not offer copyright administration services in relation to blanket licences, no further affected markets arise.

6.1.2. Notifying Parties' arguments

- (128) The Notifying Parties submit that the proposed transaction will not raise any competition concerns in relation to the provision of copyright administration services to rightholders and to CMOs.
- (129) In relation to services provided to CMOs, the Notifying Parties submit, first, that they will maintain all representation agreements amongst them and with other CMOs and the Notifying Parties or the JV will continue to provide inter-CMO services to

other CMOs. As the Notifying Parties and other CMOs will continue to rely on their sister-CMOs for copyright administration services provided in relation to rights for offline exploitation, they will not have any incentives to harm those CMOs.

- (130) Second, the JV will be competing for CMOs to join their back-office. It will have an interest in obtaining new customers as the integration of new repertoires will improve the quality of its copyright database.
- (131) Third, the Notifying Parties consider that the inter-CMO services to be offered by the JV will be a new product that will not affect the current offer of inter-CMO services at national level. Although the Notifying Parties may discontinue their participation in other back-office initiatives this will not give rise to concerns as the JV will be open for third parties. Moreover, other CMOs or rightholders could develop their own back-office or processing systems.
- (132) Fourth, the Notifying Parties submit that the JV, in line with the aims pursued by the CRM Directive, will significantly improve the quality of copyright administration services which will lead to more efficient and more accurate licensing, processing and invoicing to the benefit of rightholders, CMOs and DSPs. Indeed, the Notifying Parties submit that the JV Agreement contains a clear commitment of the Notifying Parties to improve service levels and reduce commission rates post transaction to JV customers.
- (133) In relation to copyright administration services provided to rightholders (the product market definition as initially proposed by the Notifying Parties – see section 5.1.1.2), the Notifying Parties submit that the pre-merger situation will remain in principle unchanged with the exception of the Notifying Parties' ceasing to compete for the administration of the pan-European licensing of the Anglo-American repertoire of option 3 publishers. In the Notifying Parties' view, this change will not give rise to competition concerns for four reasons.
 - (134) First, the ability and incentives of rightholders who are members or otherwise affiliated to one of the Notifying Parties to switch to another CMO will remain largely unchanged.
 - (135) Second, the JV will not benefit from an increase in market power vis-à-vis option 3 publishers.
 - (136) Those option 3 publishers are at the same time members of the Notifying Parties and, due to their size and the option to withdraw their mechanical rights also from the national blanket licences, have a considerable influence within the Notifying Parties' decision making bodies.
 - (137) In addition, the Notifying Parties submit that the duration of option 3 mandates is short and if one of the three publishers that currently work with the Notifying Parties were to decide to start working with another CMO or IT services provider, the Notifying Parties' combined market share would significantly shrink. The Notifying Parties consider that switching to other suppliers is possible on short notice and at negligible costs for publishers.
 - (138) Moreover, according to the Notifying Parties, the results of the market investigation in Phase I show that publishers consider the Notifying Parties' combined back-office services to be beneficial for them, and a majority of CMOs would consider sourcing back-office services from the JV. The concern that the reduction in the number of CMOs able to provide the full set of copyright administration services to option 3 publishers would be harmful is only supported by a small minority of respondents.

- (139) Also, the Notifying Parties reiterate that the JV Agreement contains a clear commitment of the Notifying Parties to improve service levels and reduce commission rates post transaction to JV customers.
- (140) Third, option 3 publishers would continue to have alternative service providers from whom they could source their copyright administration services. The Notifying Parties submit that other CMOs and notably those participating in other cooperation initiatives such as Armonia, a non-full function online music licensing platform between currently six collecting societies, SACEM, SIAE, SGAE, Artisjus, SABAM and SUISA, or the Amsterdam Initiative, a common licensing and administrative vehicle for the online and mobile market in Europe currently being contemplated, could offer copyright administration services to publishers for pan-European licensing. Also IT services providers such as Accenture, MRI and SYNCH TANK and technology companies such as Google, You Tube, Apple or BMAT could offer those services. The Notifying Parties also submit that barriers to entry on this market are low. In particular, the Notifying Parties submit that the JV's back office will be able to administer multi-territorial licences, something that not all smaller CMOs are currently able to do as they lack the necessary expertise and IT infrastructure. If they were to source the JV's back office services, which, according to the Notifying Parties, provide such expertise and IT infrastructure, smaller CMOs would be able to provide option 3 publishers with essentially the same copyright administration services as the JV intends to offer.
- (141) Fourth, option 3 publishers could set up their own licensing and copyright administration infrastructure. They could do so themselves or in cooperation with an IT services provider such as Accenture, Arvato, Cap Gemini, Deloitte or BMAT without relying on CMOs. According to the Notifying Parties, the large independent publishers would be able to set up their own licensing and copyright administration within one to two years. The Notifying Parties estimate that the cost of setting up this infrastructure would amount to EUR 1-3 million depending on the publisher. As the CRM Directive will enable all rightholders to withdraw their rights from CMOs, publishers would also have an incentive for setting up their own licensing and copyright administration vehicle.
- (142) In their reply to the Article 6(1)(c) decision the Notifying Parties moreover submit that regulatory changes resulting from the implementation of the CRM Directive will also directly affect certain aspects of the Commission's competitive concerns. The Notifying Parties in particular note that the national regulators will determine the requirements for CMOs to license on fair, reasonable and non-discriminatory terms, establish the review of the licensing terms and rates of multi-territorial licences, and the provision of dispute resolution procedures. In addition, the Notifying Parties consider that these changes will also affect the business strategies of CMOs and other market participants, such as publishers and successful writers, which will put competitive pressure on rightholders and CMOs, as well as licensing hubs, such as the JV.

6.1.3. *Commission's assessment*

- (143) The proposed transaction raises concerns on the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licenses as it raises certain specific barriers to market entry. Those concerns will be assessed in the present section. Since the existing and merger-specific entry barriers differ slightly for option 3 publishers and CMOs – the two principal two categories of customers serviced on this market (see recital(93)) – these two categories of customers are discussed separately.

6.1.3.1. Market shares and market structure

- (144) According to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Horizontal Merger Guidelines'),⁹³ market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.⁹⁴

Overall market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences

- (145) Given the different stages of development of the market segments for copyright administration services in relation to multi-territorial licences as set out in further detail in recitals (149) to (182), the Commission does not consider that market share data based on revenues obtained by the Notifying Parties through the provision of copyright administration services to CMOs and option 3 publishers would provide any meaningful indication of the Notifying Parties' position on this market.
- (146) Each of the Notifying Parties is currently active in the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers. However, only PRSfM also provides such services to another CMO, IMRO (see recital (101)).
- (147) The number of competitors active on the market is limited. The most meaningful competitor providing copyright administration services in relation to transactional multi-territorial licences is the French CMO SACEM, which provides such services to one option 3 publisher, Universal, and to one CMO, IMRO (see recital (101)). Other competitors are a few medium-sized CMOs, including the Spanish CMO SGAE, which provides copyright administration services to Sony ATV, the Italian CMO SIAE, the Belgian CMO SABAM and the Hungarian CMO Artisjus. Given the different stages of development of the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences the Commission considers it more meaningful to assess the market shares and market structure on each of the market segments separately.
- (148) The proposed transaction will lead to a number of structural changes on the two market segments for copyright administration services in relation to transactional multi-territorial licences provided to option 3 publishers on the one hand and to CMOs on the other hand. Those changes will be discussed in detail in the following sections.

Copyright administration services in relation to transactional multi-territorial licences provided to option 3 publishers

- (149) Table 1 below sets out the Notifying Parties' market shares by revenues on the EEA-wide market segment for the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers.

⁹³ OJ C 31, 5.2.2004, p. 5.

⁹⁴ Horizontal Merger Guidelines, paragraph 14.

Table 1: EEA copyright administration services market for option 3 publishers (revenues)

PRSFM	STIM	GEMA	JV
[40-50]%	[5-10]%	[20-30]%	[70-80]%

Source: Notifying Parties' estimates

- (150) As set out in this table, the JV's market share would be very high, amounting to [70-80]%. The number of competitors currently providing copyright administration services in relation to transactional multi-territorial licences to option 3 publishers apart from the Notifying Parties, which, post transaction, will cease competing for those services, is limited. At present, the French CMO SACEM, which administers the licences for Universal's Anglo-American mechanical rights and holds a market share of [20-30]%. The remaining [0-5]% of the market is held by a few medium-sized CMOs, including the Spanish CMO SGAE ([0-5]%), which administers the Latin-American mechanical rights of Sony ATV, the Italian CMO SIAE, the Belgian CMO SABAM and the Hungarian CMO Artisjus.
- (151) Internal documents show that the Notifying Parties expect to gain more market power post transaction if and when the JV would compete for option 3 mandates rather than each of the Notifying Parties separately. [...]*.⁹⁵[...]*.⁹⁶[...]*.
- (152) In addition, the Notifying Parties' internal documents show that, apart from the cooperation of PRSFM and GEMA in relation to the joint administration of the Anglo-American mechanical rights of EMI (and, once fully set up also in relation to Anglo-American mechanical rights of SonyATV),⁹⁷ in relation to which PRSFM and GEMA do not compete against each other, today, PRSFM, GEMA and STIM are competing for option 3 mandates.⁹⁸
- (153) The Commission notes that the vast majority of respondents to the market investigation consider that, in principle, the back-office envisaged by the JV, and in particular the consolidated copyright database will offer enhanced copyright administration services not yet available on the market to the benefit of rightholders, including option 3 publishers, and CMOs, many of whom, on top of that, seem to be showing interest to rely on those services in the future.⁹⁹
- (154) Concerns were, however, voiced in relation to the reduction of options for option 3 publishers in terms of CMOs able to provide the full set of copyright administration services in relation to transactional multi-territorial (pan-EEA) licences for their repertoire.
- (155) On the one hand, option 3 publishers consider that the aggregation of back office services could be beneficial for them and would consider joining the JV's back

⁹⁵ Annex 5.4.c.3 to the Form CO, 'Projekt DELTA (ICE) & Projekt ZETA (Front Office-Kooperation mit PRS/STIM, 7/8 March 2012, p. 7.

⁹⁶ Doc ID 1452-1458, slide 16.

⁹⁷ See also recitals (157) to (159).

⁹⁸ See, for instance, Annex 5.4.c.22 to the Form CO and Doc ID 1481-733, an internal document of STIM which states that STIM is in competition for option 3 mandates with PRSFM.

⁹⁹ Replies to questionnaire Q 5 to CMOs, questions 32 and 47, replies to questionnaire Q 6 to publishers, questions 29 and 39.

office.¹⁰⁰ One publisher commented that: *‘We anticipate that the aggregation of administration services in particular will lead to a greater standardisation of process and therefore a reduction in transaction costs in the market which will benefit DSPs, rightsholders and CMOs.’*¹⁰¹ The joint copyright database is named as a positive aspect of the JV's back office. Likewise, the majority of CMOs would consider sourcing their back office services from the JV.¹⁰²

- (156) On the other hand, a number of option 3 publishers expressed concerns that, as a result of the proposed transaction, the number of CMOs competing for option 3 mandates that are also able to provide pan-European copyright administration services would be reduced.¹⁰³ Those respondents consider PRSfM, STIM and GEMA to be the most important players on that market who have the capability to administer licences of option 3 players. SACEM is mentioned as a fourth player with such capabilities. However, a number of market participants do not perceive SACEM as equally strong and active on this market as PRS or GEMA or possibly other CMOs.
- (157) The Commission, however, notes that the actual market share increment, as a proxy of the reduction of competition, resulting from the proposed transaction is likely to be much smaller than that which would appear from the mere sum of the Notifying Parties' market shares. The only relevant and very limited market share increment would be brought about by STIM. This reflects the fact that PRSfM and GEMA already pre-transaction cooperate as regards the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers and do therefore not compete separately to provide copyright administration services to certain option 3 publishers.
- (158) Indeed, PRSfM and GEMA offer their services to a very large option 3 publisher jointly: GEMA and PRSfM are providing copyright administration services to EMI in the framework of a joint venture called Centralized European Licensing and administrative Services GmbH (‘CELAS’).¹⁰⁴ Moreover, GEMA is currently providing copyright administration services to Sony/ATV through a 100% owned subsidiary called Pan-European Central Online Licensing GmbH (‘PAECOL’). In light of the SonyATV/EMI-merger,¹⁰⁵ PRSfM and GEMA decided to create a subsidiary of CELAS (100% owned by CELAS), Solar Music Rights Management Limited (‘SOLAR’), which is scheduled to start providing copyright administration services to SonyATV/EMI in the future. [...]*
- (159) This cooperation between PRSfM and GEMA regarding EMI and Sony ATV thus relativises the concentrative effect of the proposed transaction on the market for the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers. Absent the transaction, it is likely that this cooperation would have remained in place. Indeed, the extension of the joint administration of option 3 repertoire by PRSfM and GEMA to SonyATV was agreed

¹⁰⁰ Replies to questionnaire Q 3 to publishers, question 66.

¹⁰¹ Reply to questionnaire Q 3 to publishers, question 60.

¹⁰² Replies to questionnaire Q 2 to CMOs, question 64.

¹⁰³ Replies to Commission questionnaire Q 3 - to suppliers of 1 December 2014, question 65.

¹⁰⁴ The Notifying Parties submit that for the purposes of calculating the market shares [...]*

¹⁰⁵ Commission decision of 19 April 2012 in Case COMP/M.6459, Sony/Mubadala/EMI Music Publishing.

upon and publicly announced prior to the notification of the proposed transaction, on 25 September 2014.¹⁰⁶ Moreover, it cannot be excluded that at least PRSfM and GEMA would have found it profitable to compete jointly also in relation to the administration of other mandates from option 3 publishers.

- (160) As regards the market share increment brought about by STIM, the Commission notes that, as further explained in recitals (186) and (202), the mandate granted by Kobalt Music Publishing Limited ('Kobalt') to STIM for the provision of copyright administration services has been terminated as Kobalt has decided to partner with the small US CMO American Mechanical Rights Association ('AMRA') for the provision of copyright administration services it requires.¹⁰⁷ This termination will become effective [...]*. STIM is thus very likely to lose market share in the near future which even relativises the market share increment brought about by STIM.
- (161) The Commission also notes that, as set out in recital (150), there are a number of medium-sized CMOs which currently compete for mandates from option 3 publishers and will continue doing so post transaction.

Copyright administration services in relation to transactional multi-territorial licences provided to CMOs

Situation at present

- (162) Currently, CMOs already provide copyright administration services to each other. However, those services provided under the existing network of RRAs relate to a large extent to the non-complex administration of national blanket licences (see recitals (21) to (22)) and are not part of the relevant product market as defined in section 5.1.1.2, i.e. the market for the copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licenses. To the extent that the copyright administration services provided to another CMO relate to the administration of transactional mono-territorial licences, the services provided to the mandating CMO are, likewise, less complex than those that the JV intends to provide as they only concern one country (and therefore are also not part of the relevant product market as defined in section 5.1.1.2).
- (163) Given that the copyright administration services referred to in recital (162) are not part of the relevant product market assessed in this section, the market shares that the Notifying Parties hold on this inter-CMO services market segment are not taken into account for the purposes of assessing the JV's position on the market segment for the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs post transaction.
- (164) On the market segment on which the JV will be active, the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs, currently only PRSfM and SACEM appear to be active to a very limited extent. Indeed, there is currently only one small CMO (IMRO, Ireland) that has mandated PRSfM and SACEM to grant online licences to IMRO's repertoire across the EEA on a multi-territorial basis. Currently, therefore, PRSfM and SACEM together account for 100% in terms of revenues of this market.

¹⁰⁶ See <http://www.prsformusic.com/aboutus/press/latestpressreleases/pages/sony-atv-prs-for-music-gema-launch-joint-venture.aspx>

¹⁰⁷ Kobalt is an option 3 publisher as well. However, in terms of the copyright administration services sourced it is smaller than the major option 3 publishers listed in footnote 14.

- (165) However, the Commission does not consider that those current market share figures for the copyright administration services provided by PRSfM and SACEM to IMRO for the administration of IMRO's repertoire on a multi-territorial basis provide any meaningful indication in relation to the competitive impact of the proposed transaction on the market. The market is a nascent market and copyright administration services provided to CMOs in relation to transactional multi-territorial licences are a new product. The JV is likely to be the first provider of such services on a larger scale and will change the market landscape significantly.
- (166) Today, there are several cooperation initiatives between CMOs which are aimed at the provision of multi-territory copyright administration services to other CMOs. These initiatives take various forms and concern one or more of the back-, front- or middle office copyright administration services layers. The cooperation initiatives in the EEA that the Commission is aware of are Armonia, the NCB, Network of Music Partners (NMP), Polaris Nordic, and the Amsterdam Initiative.
- (167) The non-full function online music licensing platform Armonia between the six collecting societies SACEM, SIAE, SGAE, Artisjus, SABAM and SUISA is essentially a joint negotiating platform and thus a cooperation limited to front-office services.
- (168) NCB is a copyright collecting society owned by several Nordic CMOs: the Danish CMO KODA, the Icelandic CMO STEF, STIM, the Finnish CMO TEOSTO, and the Norwegian CMO TONO. STIM owns [20-30]% of the NCB. The NCB has cooperation agreements with the Baltic CMOs EAÜ (Estonia), AKKA/LAA (Latvia) and LATGA-A (Lithuania) through which it administers the rights also of those CMOs. [...] The NCB itself does not offer back- and middle-office services, those are offered by NMP, a joint venture owned by PRSfM and the NCB which is active in the management, administration, operation and processing of recorded media data.
- (169) The NCB members TONO, TEOSTO and KODA cooperate in the Polaris Nordic back-office cooperation that will rely upon ICE (the JV's back-office provider that will also operate the JV's copyright database). Polaris Nordic is an alliance formed by KODA, TONO, and TEOSTO for back- and middle-office cooperation (front-office services are provided to these CMOs by the NCB). Polaris Nordic will source its back- and middle-office services from ICE as ICE will manage all of Polaris Nordic's copyright documentation for both domestic and international repertoire.
- (170) NMP, which is owned by PRSfM and the NCB, each of which hold 50% of the shares, is providing recorded media back-office services to PRSfM and NCB and handles the back-office activities of its parents in relation to offline licensing in the United Kingdom and the Nordic and Baltic region. To a limited extent, NMP currently also provides online processing services to the NCB's members in relation to their [...] online licences. [...] NMP will also [cooperate with] ICE for the purpose of providing online-processing services to BUMA/STEMRA.
- (171) ICE has concluded contracts with Polaris Nordic, SABAM and BUMA/STEMRA for the provision of copyright services and - in the case of BUMA/STEMRA - online processing services. As set out in recital (170) NMP currently [cooperates with] ICE to provide online processing services to BUMA/STEMRA.
- (172) Finally, the planned common licensing and administrative vehicle, the Amsterdam Initiative would be set up on a non-exclusive basis, that is to say, its members could also decide to join another licensing and/or copyright administration hub. This initiative was led by KODA and BUMA/STEMRA.

- (173) The Commission notes that, compared to the other cooperation initiatives listed, NMP appears to be a less important initiative for the provision of multi-territory copyright administration services to other CMO as its business model is somewhat different, focussing on offline and recorded media back-office services. In addition, its contract with BUMA/STEMRA for the provision of online processing services [...]*. Nevertheless, and despite the absence of a meaningful provider of copyright administration services to CMOs, there are a number of cooperation initiatives on-going or being contemplated that could start to compete in this nascent market absent the proposed transaction.

Structural change introduced by the proposed transaction to the market

- (174) At present, and with the exception of the inter-CMO services referred to in recital (162) (which are not part of the relevant product market as defined in section 5.1.1.2), the vast majority of CMOs do not rely on third parties for the administration of their multi-territorial licences (with the exception of IMRO described in recital (164)).¹⁰⁸ Moreover, as set out in recitals (166) to (173), there are currently a number of cooperation initiatives on-going or being contemplated on the market, that offer different types of licensing and copyright administration services. However, in the absence of a provider of such services, CMOs are currently not able to source a complete set of copyright administration services from one and the same entity.¹⁰⁹
- (175) The proposed transaction would create an entity which intends to offer a full range of copyright administration services to other CMOs. The JV would be in a position to attract new customers for two reasons. First, ICE, together with GEMA's Lion/MAX processing tools would form the core of the JV's copyright administration services offering and will enable the JV to offer a full range of services required by CMOs. Second, as set out in section 6.2.2, the JV would become a powerful licensing hub with an important repertoire of a considerable size. CMOs might find it attractive to include their repertoire in the Zeta Core Licence and may, as a result, decide to also source copyright administration services from the JV. In addition, it is not unlikely that in particular the CMOs that currently cooperate with NMP/ICE for back- and middle-office services might also source front-office services from the JV.
- (176) For the reasons set out in recital (175), the Commission is concerned that, as a result of the proposed transaction, the other cooperation initiatives, such as the NCB, the Polaris Nordic cooperation and the Amsterdam Initiative would not be able to develop into players that are able to offer a full range of copyright administration services or will not be able to succeed at all in the post-transaction environment. Thus, there is a risk that ultimately, there will only be a very limited number of providers of copyright administration services. As also further set out in recitals (177) to (181), it would appear that next to the JV only the Armonia hub, of which SACEM, one of the largest EEA CMOs with the ability to provide multi-territorial copyright administration services already today, is a founding member, could have a

¹⁰⁸ The Commission notes, however, that a number of CMOs, including BUMA/STEMRA and the members of the Polaris Nordic initiative (TONO, TEOSTO and KODA) are currently transferring their copyright databases to ICE with a view to sourcing at least services related to access to and the maintenance of the copyright database from ICE in the near future.

¹⁰⁹ This is, however, possible for option 3 publishers. Option 3 publishers usually source back-, middle- and front-office services from CMOs. The only part of the package that option 3 publishers handle entirely themselves concerns the actual negotiations of the terms of the licences with DSPs, and thus part of the front-office services.

chance to succeed. The members of the other initiatives, in turn, might have the incentive to start sourcing copyright administration services from either the JV or Armonia. However, as explained in recital (167), even Armonia is, at present, only a licensing hub. Its members currently mainly provide their middle- and back-office copyright administration services in-house (or plan to rely, such as in the case of SABAM, on ICE for part of those services). Whether or not the Armonia members will decide to develop and establish also a joint middle- and back-office is unclear at present.

- (177) The internal documents submitted by the Notifying Parties show that the Notifying Parties themselves envisage that ultimately there will only be at most two hubs providing copyright administration services, the JV and Armonia, to which all other CMOs, including those that are currently part of competing initiatives, will gravitate.
- (178) [...]*.¹¹⁰
- (179) [...]*.¹¹¹ The following figure, also contained in this document, shows that PRSfM expects that were the Amsterdam Initiative to materialise (as opposed to its member societies joining the JV or Armonia), its members would at least source copyright database services from ICE while it is less clear from where such members would source their processing services. In any event, PRSfM expects the Amsterdam Initiative to only be a licensing cooperation.¹¹²
- [...]*
- (180) [...]*.¹¹³ [...]*.¹¹⁴
- [...]*
- (181) An e-mail exchange between PRSfM and MCPS of 4 July 2013 sheds further light on the expectations of PRSfM in relation to the future developments of hubs. It appears from that e-mail exchange that PRSfM intends to attract other CMOs [...]* over time so as to prevent the emergence of [...]* hub: [...]*.¹¹⁵
- (182) In light of the on-going co-operation initiatives, the Commission considers that absent the proposed transaction there would have been room for multiple hubs, including hubs that could potentially be able to offer some or even a full range of copyright administration services in relation to transactional multi-territorial licences, to emerge. It is by no means certain that absent the proposed transaction PRSfM, STIM and GEMA would have been part of one and the same initiative. On the contrary, a number of internal documents suggest that [STIM and GEMA also considered other hubs]*^{116 117 118}.

¹¹⁰ Doc ID 1450-694, 'ICE Board Meeting' dated 27 May 2013, p. 1.

¹¹¹ Doc ID 1450-7136, pp. 2, 4.

¹¹² Doc ID 1450-7136, p. 4.

¹¹³ Doc ID 1450-6594, Document dated 28 August 2013, p. 15.

¹¹⁴ Doc ID 1450-6594, Document dated 28 August 2013, pp. 8-10.

¹¹⁵ Doc ID 1453-128.

¹¹⁶ Doc ID 1450-10923 [...]*.

¹¹⁷ Doc ID 1481-556 [...]*.

¹¹⁸ [...]*.

6.1.3.2. Assessment of significant existing barriers to entry and expansion and of barriers to entry and expansion resulting from the proposed transaction

Copyright administration services in relation to transactional multi-territorial licences provided to option 3 publishers

Existing barriers to entry and expansion

- (183) In light of the results of the market investigation and the content of some of the Notifying Parties' internal documents, the Commission also analysed whether the possible anti-competitive effects arising from the proposed transaction could be offset by the expansion of existing competitors or the entry of new players.
- (184) The Notifying Parties submit that barriers to entry on the market for the provision of copyright administration services in relation to transactional multi-territorial licences, provided in particular to option 3 publishers, are low. IT services providers and data companies such as Google could start providing copyright administration services within a short time frame and at limited cost. The Notifying Parties also submit that option 3 publishers would be able to set up their own copyright administration infrastructure within a short time frame and at limited cost.
- (185) More particularly, the Notifying Parties claim, first, that any CMO engaged in multi-territorial licensing¹¹⁹ would be able to provide copyright administration services to option 3 publishers without incurring any major additional investments. If those CMOs engage in multi-territorial licensing they have to be able to correctly identify their repertoire across multiple territories and to be able to process usage reports of DSPs for a large number of countries with different share pictures on a line-by-line basis. If the CMOs concerned have the systems required to do so, they can easily take on the repertoire of an option 3 publisher without any significant additional cost.
- (186) Moreover, the Notifying Parties submit that Kobalt recently acquired AMRA and that, according to the Notifying Parties' knowledge, AMRA is intended to service Kobalt's option 3 business after the expiry of Kobalt's contract with STIM [...]*.
- (187) The Notifying Parties also submit that providers of IT services, including BMAT Licensing, S.L. ('BMAT'), Audiam Inc. ('Audiam'), Deloitte, Music Reports, Inc. ('MRI') and MondiaMedia (formerly Arvato, part of the Bertelsmann group) already support option 3 publishers, who decided to self-supply their copyright administration services, with different types of services such as usage report processing, invoicing services and copyright database management.
- (188) Third, the Notifying Parties consider that the attractiveness of non-CMO copyright administration services providers will increase once the CRM Directive is transposed by Member States and CMOs and their subsidiaries will have to comply with the obligations set out therein whereas non-CMOs will not be bound by those obligations.¹²⁰
- (189) Fourth, the Notifying Parties submit that post transaction even more CMOs will be able to compete for mandates from option 3 publishers as they will have access to the

¹¹⁹ The Notifying Parties list the following CMOs: SACEM, SGAE, SIAE, SUISA, OSA, SABAM, BUMA/STEMRA, Artisjus, ZAIKS, AEPI and the NCB.

¹²⁰ In that context, the Notifying Parties refer to transparency obligations, mandatory dispute resolution provisions and an obligation to license on the basis of objective and non-discriminatory criteria and at reasonable rates.

JV's back-office on a non-discriminatory basis. This applies in particular to those CMOs who do not have the ability or incentive to develop a back-office infrastructure that can handle the administration of multi-territorial licences themselves. Those CMOs will thus be able to build competitive service offerings for option 3 publishers by relying on the JV's back-office.

- (190) According to the Horizontal Merger Guidelines, *'[w]hen entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. Therefore, entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger'*.¹²¹
- (191) In its Article 6(1)(c) decision, the Commission found that the majority of respondents to the market investigation consider that copyright administration services for option 3 publishers could theoretically be provided by entities other than CMOs, such as for instance Google, Audiam and Global Music Rights.¹²² However, market participants considered actual entry on the market to be only a theoretical possibility due to the fact that, at present, no company has indicated an intention to begin providing copyright administration services to option 3 publishers. Therefore, the Commission voiced doubts as to whether market entry would be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the proposed transaction.
- (192) During its in-depth investigation, the Commission reached out to a significant number of companies, including CMOs based outside of the EEA, that were identified by the Notifying Parties as potential entrants on the market for the provision of copyright administration services in relation to transactional multi-territorial licences.
- (193) In relation to the question of whether option 3 publishers would have the ability and incentive to enter the relevant market for copyright administration services, smaller publishers consider the investment cost associated with setting up the relevant infrastructure to be too high.¹²³ Larger publishers submit that they are dependent on CMOs for matching performing rights and that CMOs have access to more comprehensive databases, including those of CISAC,¹²⁴ which allow them to provide more accurate matching services and facilitate the resolving of disputes and double claims. For those reasons, option 3 publishers do not have any incentives in setting up their own copyright administration infrastructure.¹²⁵ Although such publishers may not have the incentives to do so, the market investigation suggested that they do, to some extent, have the ability to self-supply, that is, to carry out some of their own copyright administration services.¹²⁶

¹²¹ Horizontal Merger Guidelines, paragraph 68.

¹²² Replies to Commission questionnaire Q 1 - to DSPs of 1 December 2014, question 55; Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 61; Commission questionnaire Q 3 - to publishers of 1 December 2014, question 64.

¹²³ Replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, questions 14, 15.

¹²⁴ CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs) is a non-governmental, non-profit making organisation that represents 230 CMOs in 120 countries. It provides its members with access to a network of databases.

¹²⁵ Replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, questions 14, 15.

¹²⁶ Replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, question 22.

- (194) Results are more mixed as regards the responses of CMOs. While the majority of CMOs indeed think that option 3 publishers would have the ability and incentives to self-supply copyright administration services, a number of those respondents submit that this would only apply to large option 3 publishers. In addition, one CMO considers that option 3 publishers would not have the ability or incentive to self-supply copyright administration services because, following the 2005 Recommendation¹²⁷ they made the conscious choice to withdraw their Anglo-American mechanical rights, but to nevertheless source copyright administration services from CMOs due to the CMOs' expertise and the tools available to them, in particular as regards copyright databases.¹²⁸ Another CMO submits that *'it is a logical choice of the option 3 publishers to look for partners that already have experience and an IT system in place and that have access to a comprehensive copyright database (with sub publishing data), which are the large CMOs'*.¹²⁹
- (195) The Commission therefore considers that option 3 publishers are unlikely to enter the market segment for the provision of copyright administration services to option 3 publishers in relation to transactional multi-territorial licences. However, they would have the ability to partly self-supply copyright administration services.
- (196) Likewise, the market investigation indicated that providers of IT services are also unlikely to enter the market. None of the IT services providers suggested by the Notifying Parties as actual or potential competitors on the market confirmed that they were active on the market or contemplating market entry.¹³⁰ In addition, the majority of respondents to the market investigation do not consider that providers of IT services could provide copyright administration services to option 3 publishers even if, to the extent available, they were granted access to an option 3 publisher's copyright database.¹³¹
- (197) However, for the reasons set out in recitals (198) to (203), the majority of respondents to the market investigation consider that CMOs, including small and medium-sized ones, could realistically enter the market and start providing copyright administration services to option 3 publishers.
- (198) CMOs have on-going relationships with publishers because, irrespective of whether a publisher has decided to withdraw its mechanical rights from the CMO system in order to become an option 3 publisher, that publisher remains a member of the CMO for the purposes of licensing its online rights at national level and for the administration of its offline rights.
- (199) CMOs also have on-going relationships in the form of the RRAs as described in recitals (21) and (22) with other CMOs for the purposes of the administration of the world repertoire of online rights in the CMOs' respective home territories and for the administration of offline rights. In that framework, CMOs have access to copyright

¹²⁷ See recital 0.

¹²⁸ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015 question 17.

¹²⁹ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015 question 19.

¹³⁰ Replies to the Commission questionnaire Q 7 – to service providers of 5 February 2015, questions 10-11.

¹³¹ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 10; replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, question 5.4; Replies to the Commission questionnaire Q 7 – to service providers of 5 February 2015, question 8.4.

databases, including to those maintained by CISAC. The vast majority of respondents consider that such access, which is usually limited to CMOs, is crucial for the provision of copyright administration services.¹³²

- (200) In addition, the financial investments and time required for small and medium-sized CMOs to upgrade their infrastructure so as to be able to administer an option 3 publisher's repertoire on a multi-territorial basis would appear to be moderate. Indeed, CMOs consider that in order to be able to offer copyright administration services in relation to transactional multi-territorial licences they would be required to invest in further developing existing IT tools and/or developing new IT tools. In addition, more staff would be required and existing staff would have to be trained.¹³³ One CMO submits that the time required for those developments would range between 1 and 3 years. That CMO does not indicate a cost estimate, but it submits that the investment in staff would be more significant than that required to upgrade its IT infrastructure.¹³⁴
- (201) The market investigation revealed that there are, indeed, at least two CMOs, SUIISA and BUMA/STEMRA that are contemplating to actively start competing for mandates from option 3 publishers. One of those CMOs submits that it intends to do so following an upgrade of its IT infrastructure at the end of 2015.¹³⁵ The other one confirmed that it is currently enhancing its IT infrastructure with a view to attracting small and medium-sized option 3 publishers.¹³⁶
- (202) The Commission notes that, as indicated by the Notifying Parties, another potential entrant on the market is AMRA. AMRA was acquired by Kobalt on 11 July 2014. According to the information available to the Commission AMRA plans to start directly licensing its rights outside of the USA, including in the EEA as of April 2015.¹³⁷ The Commission notes that AMRA intends to start offering copyright administration services in relation to transactional multi-territorial licences to option 3 publishers and to CMOs in the EEA, based on Kobalt's copyright software. Processing services will be based on an IT-solution developed in-house by AMRA.¹³⁸ One of AMRA's option 3 customers will be Kobalt, which is currently still serviced by STIM.
- (203) The example of Kobalt sponsoring entry of AMRA on the EEA copyright administration services market and the fact that, as pointed out by respondents to the market investigation, option 3 publishers have a preference to have their repertoire administered by CMOs, suggests that other option 3 publishers could decide to partner with a CMO to create a competing service provider on the market.¹³⁹

¹³² Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 22; replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, question 19.

¹³³ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 14.

¹³⁴ Minutes of a call on 26 February 2015, Doc ID 1888, p. 2.

¹³⁵ Minutes of a call on 30 January 2015, Doc ID 2094, p. 1.

¹³⁶ Minutes of a call on 26 February 2015, Doc ID 1888, p. 2.

¹³⁷ Minutes of a call on 26 February 2015, Doc ID 2012, p. 2.

¹³⁸ Minutes of a call with AMRA on 26 February 2015, Doc ID 2012, p. 1.

¹³⁹ For the sake of completeness the Commission notes that it is unclear, at this stage, whether AMRA will be considered as CMO within the meaning of Article 3(a) of the CRM Directive. According to this provision, a CMO is, among others, owned by its members and or operates on a non-for-profit basis.

- (204) In light of its findings set out in recitals (197) to (203), the Commission considers that, absent the proposed transaction, CMOs do not face significant barriers that would prevent them from entering or expanding their activities on the market (or a possible segment thereof) for the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers. That is in particular true if option 3 publishers were to decide to support a CMO in entering or expanding.
- (205) Consequently, the Commission considers that, against the background of the current market structure, the market structure post transaction and the fact that CMOs do not face significant entry barriers, the combination of the Notifying Parties' activities in relation to the services provided to option 3 publishers does not in itself raise competition concerns. Rather, the transaction raises competition concerns because, as set out in the following section, the proposed transaction is likely to give rise to certain additional barriers to entry and expansion, which would make it more difficult for new players to enter or expand their activities in this market segment.

Barriers to entry and expansion resulting from the proposed transaction

- (206) During its in-depth investigation the Commission found that additional barriers to entry and expansion are likely to arise as a result of the proposed transaction.
- (207) The first transaction specific barrier relates to behaviour PRSfM could engage in due to the fact that it holds the performing rights that match the Anglo mechanical rights which option 3 publishers' have withdrawn from CMOs ('PRSfM matching performing rights'). As explained in recitals (26) to (27), option 3 publishers have withdrawn the mechanical rights in Anglo-American repertoire from CMOs. However, the performing rights have not been withdrawn and are still licensed by CMOs. In the case of Anglo repertoire, PRSfM is the CMO that controls the performing rights. DSPs need both the mechanical and the performing rights to a given song to be able to include that song in their services and the control of these rights in relation to the Anglo repertoire are split between the option 3 publishers (which control the mechanical rights) and PRSfM (which controls the performing rights). From a commercial perspective, notably as regards the reduction of transaction costs and the avoidance of hold-ups in making certain songs available to consumers, DSPs have an interest in obtaining both types of rights as part of the same licence. The Commission is concerned that PRSfM could use its control over the PRSfM matching performing rights to frustrate or delay entry or expansion of actual or potential competitors.¹⁴⁰
- (208) The Notifying Parties explain that at present, when a DSP negotiates a licence for an option 3 publisher's repertoire, the option 3 publisher (or its licensing vehicle) negotiates the terms not only for the Anglo-American mechanical rights held by the option 3 publisher but also for the matching performing rights held by a CMO such as, for instance PRSfM. Indeed, PRSfM's general policy at present is to grant mandates to CMOs who service option 3 publishers to proceed with negotiating the terms also for PRSfM matching performing rights. Once the terms are agreed, the option 3 publisher (or its licensing vehicle) approaches PRSfM requesting approval to include those rights in the licence with the DSP under the terms negotiated.

¹⁴⁰ The Commission's concerns only relate to the performing rights of PRSfM, not those of STIM and GEMA, since mechanical rights have only been withdrawn from Anglo American repertoire, not continental European repertoire such as that of STIM and GEMA.

PRSfM submits that, to date, it never refused its agreement to include the PRSfM matching performing rights in the licences concerned. However, if PRSfM were to refuse such inclusion, it would license the PRSfM matching performing rights as part of the pan-EEA licence to its repertoire rather than granting a separate additional licence only covering the PRSfM matching performing rights.

- (209) The Commission considers that it is likely that the PRSfM matching performing rights will continue to be licensed outside the JV in the foreseeable future, that is, the coming two to three years. DSPs need both mechanical and performing rights and, as set out in recital (207), prefer to clear both types of rights through one single negotiation and in one licensing agreement. Option 3 publishers do not plan to join the Zeta Core Licence in the foreseeable future.¹⁴¹ Hence, to ensure that mechanical and performing rights can ‘flow’ together through one single negotiation and in one licensing agreement, it is likely that the PRSfM matching performing rights will continue to be licensed outside the JV via mandates granted by PRSfM to CMOs that provide services to option 3 publishers. In this respect, the Commission notes that the JV Agreement contains a clause specifically allowing PRSfM to provide its rights to other entities to license those rights outside of the Zeta Core Licence.¹⁴²
- (210) That being said, and even if PRSfM will continue to let its rights ‘flow’ outside of the Zeta Core Licence, it could nonetheless engage in conduct which could significantly impede effective competition.
- (211) The Commission notes that already today PRSfM has the ability and potentially also the incentives to leverage the fact that it holds the PRSfM matching performing rights in order to attract option 3 publishers to source copyright administration services from PRSfM rather than from a competing CMO. Indeed, the internal documents of PRSfM [...] suggest that PRSfM has tried to use this threat in the past, notably as regards [...].¹⁴³ Nevertheless, as set out in recitals (208) to (210), to date PRSfM has so far never refused to include the PRSfM matching performing rights in the licences negotiated by an option 3 publisher (or its licensing vehicle) nor has it actually been successful in attracting option 3 publishers to source copyright administration services from PRSfM rather than from a competing CMO.
- (212) However, based on the market investigation and following a review of the Notifying Parties' internal documents the Commission considers that, post-merger, PRSfM would likely have an increased incentive to leverage the fact that it holds PRSfM matching performing rights. The JV would have an increased presence on the market for the provision of copyright administration services in relation to transactional multi-territorial licences that goes beyond the position currently held by PRSfM on this market. PRSfM could use its leverage to tie option 3 publishers to the JV by making the licensing of the PRSfM matching performing rights dependent on such publisher sourcing copyright administration services from the JV.¹⁴⁴ In doing so, the

¹⁴¹ Replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, question 39.

¹⁴² JV Agreement dated 10 June 2014, clause 32.4.4. See also clause 2.6.4, which provides that the aggregation of the JV Parents’ repertoire is non-exclusive, among others because of the possibility that [...].

¹⁴³ See for example Doc ID 1481-653.

¹⁴⁴ As set out in recital (209), the Commission considers that option 3 publishers will not join the Zeta Core Licence in the foreseeable future. However, PRSfM could use its leverage to force option 3 publishers to source other front-, middle- and back-office services from the JV.

JV could, on the one hand secure and strengthen its market power and extract more onerous terms from the option 3 publishers concerned. On the other hand, it could eliminate actual competition regarding the provision of copyright administration services in relation to transactional multi-territorial licences or prevent the emergence of new providers of such services.

- (213) The majority of option 3 publishers responding to the market investigation are concerned that post transaction, PRSfM (given its control of the PRSfM matching performing rights) could engage in delaying tactics to force option 3 publishers to source their copyright administration services from the JV rather than from its competitors.¹⁴⁵ Those respondents submit that, post transaction, PRSfM could threaten to delay or deny the licensing to the DSPs of the PRSfM matching performing rights that it controls. This would essentially prevent a DSP from operating and deprive the licensing deal concluded by the option 3 publisher in relation to the matching mechanical rights of any value. PRSfM would have the ability and the incentive to engage in this conduct in order to persuade option 3 publishers to source copyright administration services from the JV and not from its competitors. The majority of CMOs consider that option 3 publishers would source copyright administration services from the JV in case of a hold-up in the licensing of PRSfM matching performing rights by PRSfM.¹⁴⁶
- (214) The Notifying Parties' internal documents also show that, post transaction, PRSfM would have increased incentives to leverage the fact that it holds the PRSfM matching performing rights vis-à-vis option 3 publishers who decided not to source copyright administration services from the JV. For example, [...]*.¹⁴⁷
- (215) The second transaction specific barrier concerns the sole or exclusive nature of the mandates by CMOs and option 3 publishers granted to the JV for the administration of their licences. According to the Form CO, a CMO or option 3 publisher who grants a mandate to the JV would be allowed to also offer its repertoire by itself, but it would not be allowed to grant a mandate to another hub (including to potential entrants). Sole or exclusive mandates could eliminate actual competition in relation to the provision of copyright administration services in relation to transactional multi-territorial licences and/or prevent the emergence of new providers of such services.
- (216) The Commission concludes that the transaction specific barriers to entry and expansion identified in recitals (207) to (215) would make successful market entry or expansion difficult. Therefore, in the Commission's view, the proposed transaction has a negative impact on the market segment for the provision of copyright administration services in relation to transactional multi-territorial licences to option 3 publishers.

Copyright administration services in relation to transactional multi-territorial licences provided to CMOs

Existing barriers to entry and expansion

- (217) As in its findings in recitals (183) to (204), the Commission considers that there are no significant existing barriers to entry and expansion for CMOs contemplating to

¹⁴⁵ Replies to Commission questionnaire Q 3 - to suppliers of 1 December 2014, question 54.

¹⁴⁶ Replies to Commission questionnaire Q 2 - to CMOs of 1 December 2014, question 51.

¹⁴⁷ Doc ID 1785-2997, presentation 'DELTA/ZETA realignment', slide 22.

provide copyright administration services in relation to transactional multi-territorial licences to CMOs.

- (218) As set out in recitals (162) to (173), the competitive landscape as regards the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs is quite fragmented and still developing. CMOs, irrespective of whether they are part of ongoing or currently contemplated initiatives or not, have access to the relevant copyright databases, including to those maintained by CISAC (see recital (199)) and have the ability to set up or upgrade their technical infrastructure. Thus, competing hubs for the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs could develop.

Conclusion

- (219) In light of its considerations set out in recitals (162) to (173) and (217) to (218), the Commission considers that, against the background of the current market structure and the market structure expected post transaction, the combination of the Notifying Parties' activities in relation to the services provided to CMOs does not, in itself raise competition concerns. Rather, as further set out in the following section, the proposed transaction will create a number of specific barriers to entry that go beyond the obstacles actual and potential competitors on that market face today and would continue to face absent the proposed transaction.

Barriers to entry and expansion resulting from the proposed transaction

- (220) During its in-depth investigation, the Commission also found that additional entry barriers are likely to arise as a result of the proposed transaction as regards the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs.
- (221) The first transaction specific barrier relates to the JV's copyright database and licence processing tools. The majority of respondents to the market investigation are concerned about the set-up of the envisaged copyright administration services offering of the JV which will consist of the combination of ICE and LION/MAX.¹⁴⁸ A number of those respondents see a risk that the JV would force its customers to source the entire range of copyright administration services as a bundle rather than offering each of back-, middle- and front-office services separately.¹⁴⁹ Another one of those respondents raises concerns as regards the interoperability of the ICE database with third party processing tools and submits that '*if accessing ICE is possible only by using LION/MAX tools, the impact would definitely be negative*'.¹⁵⁰
- (222) When asked to comment on the incentives of the owner of a copyright database to make this database available to third parties, there appears to be consensus that, in principle any such incentives would be economic in nature.¹⁵¹ However, a number of

¹⁴⁸ Replies to questionnaire Q 5 to CMOs, question 32 ; replies to questionnaire Q 6 to publishers, question 29.

¹⁴⁹ Replies to questionnaire Q 6 to publishers, question 29.

¹⁵⁰ Reply of TEOSTO to questionnaire Q 5 to CMOs, question 32.

¹⁵¹ Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, question 37; replies to questionnaire Q 6 to publishers, question 34.

respondents voiced concerns that there would be no incentives at all to grant access to a copyright database to third parties and that access would be limited to CMOs.¹⁵²

- (223) In relation to the ICE copyright database, the Commission acknowledges that it might be beneficial for the market if other CMOs contribute their data to this database. However, respondents to the market investigation, as well as the Notifying Parties submit that once a CMO migrated its data into a new copyright database, there is no need to continue maintaining the old database. In other words, once migration is completed, the CMOs concerned would be dependent on the functioning of this new third party copyright database to which they migrated their data. As set out in recitals (131) and (165), the copyright administration services offered by the JV, including its copyright database, are essentially a new product and the JV is likely to be one of very few players operating such a copyright database in the near future. Its market power might provide the JV with the ability and incentive to lock its customers into the copyright database even if there are or were to be alternative providers of copyright databases. As a result, CMOs would be tied to the JV and would not have the ability or incentive to have their rights administered outside of the JV, including by a potential new market entrant. This could, again, eliminate actual competition in relation to the provision of copyright administration services in relation to transactional multi-territorial licences or prevent the emergence of new providers of such services.
- (224) Finally, the Commission notes that GEMA itself, in an internal document, considers that one of the purposes of the JV is to [...] * ([...] *) [...] * ([...] *).¹⁵³
- (225) The second transaction specific entry barrier is common to services provided to CMOs and services provided to option 3 publishers and concerns the sole or exclusive nature of the mandates granted to the JV. As set out in recital (215), in the Form CO the Notifying Parties submit that mandates granted by CMOs and option 3 publishers to the JV for the administration of their licences should be sole mandates. In other words, a CMO or option 3 publisher who grants a mandate to the JV would be allowed to also offer its repertoire by itself, but it would not be allowed to grant a mandate to another hub (including to potential entrants). Sole or exclusive mandates could eliminate actual competition in relation to the provision of copyright administration services in relation to transactional multi-territorial licences or prevent the emergence of new providers of such services.
- (226) The Commission concludes that the transaction specific barriers to entry and expansion identified in recitals (220) to (225) would make successful market entry and expansion difficult. Therefore, in the Commission's view, the proposed transaction also has a negative impact on the market segment for the provision of copyright administration services in relation to transactional multi-territorial licences to CMOs.

¹⁵² Replies to questionnaire Q 5 to CMOs, question 37 ; replies to questionnaire Q 6 to publishers, question 34.

¹⁵³ Doc ID 1452-158, slide 16.

6.1.4. *Conclusion regarding the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences*

(227) In light of its considerations set out in section 6.1.3, the Commission concludes that the proposed transaction would lead to non-coordinated anti-competitive effects in the market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences, and, therefore, significantly impede effective competition in the internal market or a substantial part of it.

6.2. Online licensing market (the market for the licensing of online rights in musical works)

(228) In section 5.2, the Commission concluded that the broadest possible relevant product market is the overall market for the licensing of online rights in musical works. It left open whether this market should be further subdivided according to whether the licence is granted by a CMO or by an option 3 publisher, and according to the geographic scope of the license (mono-territorial or multi-territorial).

(229) In this section, the Commission assesses the competitive impact of the JV on the overall market for the licensing of online rights in musical works and the possible narrower markets within that the overall market on which the JV will be active. In the section in which the JV's market share is analysed (section 6.2.2.1), the JV's position is therefore assessed on the basis of different possible market definitions. The assessment of the JV's impact on licensing terms for DSPs (section 6.2.2.2) applies regardless of the exact market definition.

(230) All three Notifying Parties are currently active on the total EEA-wide online licensing market, which includes the online licensing activities of both CMOs and option 3 publishers.¹⁵⁴ All three Notifying Parties are also active on the narrower EEA-wide online licensing market that includes only the activities of CMOs. The proposed transaction will combine some of the activities of each of the Notifying Parties in the EEA-wide online licensing market and in the narrower EEA-wide online licensing market including only the activities of CMOs. In these markets, the Notifying Parties would confer on the JV their existing activities in the granting of multi-territorial online licences to DSPs, and would refrain from competing with the JV in the granting of these licences. At the same time, the Notifying Parties would continue to be active in these markets through their retained activities in the granting of mono-territorial online licences to DSPs (except for multi-territorial DSPs, which would have to obtain a multi-territorial licence from the JV). Moreover, as explained in recital (209), PRSfM will continue to be active in these markets through the multi-territorial licensing of the PRSfM matching performing rights.

(231) Two of the Notifying Parties (PRSfM and STIM) are currently active on the EEA-wide market for multi-territorial online licensing, which includes the online licensing activities of both CMOs and option 3 publishers. The third Notifying Party (GEMA) would have entered this market in the near future absent the transaction. Two of the Notifying Parties (PRSfM and STIM) are also active on the narrower EEA-wide market for multi-territorial online licensing which includes only the activities of CMOs. The proposed transaction will combine the activities of the Notifying Parties into the JV in these markets. Nevertheless, PRSfM would continue to be active in

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The distinction between licensing by CMOs and option 3 publishers was discussed in recital (114).

these markets through the multi-territorial licensing of the PRSfM matching performing rights. Apart from that activity by PRSfM, the Notifying Parties will not be active on these markets as they will refrain from granting multi-territorial licences to DSPs in competition with the JV.

6.2.1. *Notifying Parties' arguments*

- (232) The Notifying Parties submit that the proposed transaction would not give rise to competition concerns on the online licensing market.
- (233) The Notifying Parties submit that their product offerings on the licensing market are complementary. Since DSPs need all CMOs repertoires, each CMO repertoire is unique and not in competition with the repertoire of other CMOs. Post transaction, DSPs will merely obtain one combined larger repertoire from one single point which in itself is not sufficient to increase the negotiating power of the JV.
- (234) The Notifying Parties submit that the current practice is for DSPs to first secure licensing terms from record companies for the recording rights (see recital (5)), then from option 3 publishers and lastly from CMOs which license on a pan-European basis, and from other CMOs. As PRSfM already issues multi-territorial licences, its position will not change post transaction. The Notifying Parties submit that the addition of the STIM and GEMA repertoire will not improve PRSfM's position. In any event, record labels and option 3 publishers will remain of greater value to DSPs. In addition, DSPs frequently refer to their existing or pending publisher-deals in order to put pressure on the CMOs to accept lower licensing rates. The Notifying Parties are therefore not only exposed to the bargaining power of DSPs, but also to pressure from "their" option 3 publishers to come to a quick agreement with DSPs and avoid any hold up or undue delay in the launch of new services of DSPs.
- (235) The Notifying Parties submit that CMOs are different from option 3 publishers whose mergers were analysed by the Commission in *Universal/BMG Music Publishing*¹⁵⁵ and in *Sony/Mubadala/EMI Music Publishing*¹⁵⁶ for the following reasons: (i) CMOs administer and license much wider and culturally diverse repertoires than option 3 publishers who focus on exploiting only the most popular works; (ii) option 3 publishers negotiate and license their popular Anglo-American repertoire to multi-territorial DSPs directly and the terms of the license for the CMOs performing rights simply "follow" the terms of the licence for the option 3 publishers' mechanical rights; (iii) most option 3 publishers have recorded music interests whereas CMOs do not have recorded music interests; (iv) unlike the repertoires of option 3 publishers which predominantly consist of the rights of creators who have signed exclusive long-term contracts with an option 3 publisher, CMOs' repertoires are constantly changing and under constant threat of rights withdrawal which weakens the bargaining position of CMOs vis-à-vis DSPs; (v) the objectives pursued by option 3 publishers are mainly profit maximisation, whereas CMOs act as "trustees" for their members and therefore have a duty to bring their entire repertoire to the market in order to secure sufficient remuneration for all of their members. Consequently, CMOs are less able to engage in profit maximization than publishers who can treat more successful and less successful authors differently. In addition, the Notifying Parties submit that authors, in particular less successful authors, are

¹⁵⁵ Commission decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*.

¹⁵⁶ Commission decision of 19 April 2012 in Case COMP/M.6459, *Sony/Mubadala/EMI Music Publishing*.

dependent on receiving a constant revenue stream from CMOs. They expect CMOs to license as many DSPs as possible in order to increase the royalty streams derived from the use of their rights in the marketplace. CMOs are therefore under constant pressure to conclude deals with DSPs as quickly as possible, subject to applicable regulatory constraints.

- (236) The Notifying Parties submit that since the revenues of their members ultimately depend on the DSPs' success in the downstream market and the end-users readiness to pay for music content, the Notifying Parties have an interest in ensuring that as many DSPs as possible offer their repertoire to end-users at prices which are sufficiently low to incentivise the use of legally offered music as opposed to the use of illegal music content.
- (237) The Notifying Parties submit that because CMOs are subject to strict regulation the proposed transaction will not result in any anti-competitive effects. The Notifying Parties submit that CMOs are subject to strict regulatory pricing constraints and duties to license on fair and non-discriminatory terms. Licensing tariffs are either set by law, subject to approval by a public authority, or subject to control by an independent court or a dispute resolution body. According to the Notifying Parties since the JV will be based in London and Berlin, at least the UK Copyright Tribunal and the German Patent and Trademark Office will exercise price control over the JV. Also, as a result of the implementation of the CRM Directive, the JV, supervised by the national regulatory authorities at least in the United Kingdom and Germany, will be obliged to base licensing terms on objective and non-discriminatory criteria, subject to mandatory dispute resolution mechanisms. The Notifying Parties also submit that a finding of "unreasonable" rates in court or arbitration procedures would constrain CMOs' negotiation behaviour vis-à-vis DSPs because the rates considered reasonable by a court or by an arbitration body would have to be applied retroactively to all similar DSPs. The Notifying Parties submit that additional regulatory constraints for the conduct of CMOs would follow from competition law, namely from Article 102 TFEU and corresponding provisions of national competition law.
- (238) The Notifying Parties submit that the hypothetical ability of the JV to extract better licensing terms from DSPs would in any event not lead to higher prices for consumers. Such a development would only slightly increase the share of DSPs' licensing budget payable to the JV and its CMO-partners rather than to record labels and option 3 publishers.
- (239) The Notifying Parties submit that the JV will create a new product that will generate substantial efficiencies. The Notifying Parties submit that DSPs will receive from the JV improved copyright administration and documentation processing and the Zeta Core Licence will facilitate the licensing process, enhance cultural diversity, facilitate development of new online services and reduce transaction costs.

6.2.2. *Commission's assessment*

6.2.2.1. Market shares

- (240) The structural effect of the proposed transaction is the aggregation of three repertoires into a single repertoire and the joint licensing of this repertoire by the JV through a single licence. The merger control analysis of the proposed transaction therefore focuses on the assessment of such structural effect. In addition, the repertoire that will be licensed by the JV includes not only the repertoire that is directly controlled by each of the Notifying Parties and that will be licensed exclusively by the JV on a multi-territorial basis, but also any additional third party

repertoire, which, based on the information available to the Commission, will likely be included in the Zeta Core Licence as a result of the proposed transaction. The JV's future market share is therefore not just the sum of the market shares of the repertoire that is directly controlled by each of the Notifying Parties and that will be licensed exclusively by the JV but also includes the third party repertoire that the JV will likely license.

- (241) The repertoire directly controlled by the Notifying Parties that will be included in the Zeta Core Licence includes the rights in musical works of their members.
- (242) Regarding the PRSfM matching performing rights, PRSfM's general policy at present is to grant mandates to CMOs that provide services to option 3 publishers, allowing them to also negotiate the terms for the PRSfM matching performing rights. After the creation of the JV, PRSfM matching performing rights are likely to continue to be licensed by PRSfM, outside of the Zeta Core Licence, to enable a joint 'flow' of performing rights and mechanical rights through one single entity in cases in which publishers do not make their rights available through the JV.¹⁵⁷ However, since it is not excluded that PRSfM will include some or all of its matching performing rights into the JV's Zeta Core Licence, for the sake of completeness, the Commission also assessed the JV's market position on the hypothesis that the PRSfM matching performing rights were attributed to the JV.
- (243) The third party repertoire that, based on currently available information, will likely be included in the Zeta Core Licence as a result of the proposed transaction includes (1) the MCPS repertoire that the JV will likely be able to license on an EEA-wide basis; (2) the IMRO repertoire that the JV will also likely be able to license on a EEA-wide basis; and (3) the third party CMO repertoire that each of the Notifying Parties currently licenses under blanket agreements in their respective home territories based on RRAs with these CMOs and that will also likely be part of the Zeta Core Licence.¹⁵⁸
- (244) As regards the MCPS repertoire, the Commission finds that the mechanical rights controlled by MCPS, that PRSfM alone is contractually entitled to license since 1997, will likely be included in the Zeta Core Licence.¹⁵⁹ The Notifying Parties submit that the agreement on the basis of which MCPS rights are licensed by PRSfM is to be re-negotiated in [...] and it is unclear at this stage whether the agreement will be renewed as MCPS may decide to use other entities for the administration and licensing of its rights. However, the Commission finds that it is most likely that the MCPS repertoire will continue to be administered and licensed through PRSfM, or the JV post transaction, regarding multi-territorial licences. First, the contractual

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¹⁵⁸ For completeness, it is noted that each of the Notifying Parties will continue to grant such national blanket licenses separately for their respective territories to DSPs that are only offering services in one Member States, that is mono-territorial DSPs, since these DSPs would not be eligible for the Zeta Core Licence.

¹⁵⁹ PRS and MCPS formed an operational alliance in 1997 ('MCPS-PRS Alliance Limited') and from that date the operating company has provided all services to support the grant of licences by MCPS and PRS. In April 2013, MCPS agreed to sell its shares in the MCPS-PRS Alliance (now PRS for Music Limited) to PRS such that the operating company is now wholly owned by PRS. At the same time, PRS entered into an agreement with MCPS to provide services (inter alia to continue to provide the same services (via the operating company) save where it was agreed to exclude or vary them) with effect from 1 July 2013. The operating company changed its name to PRSfM.

relationship between MCPS and PRSfM has lasted for almost 20 years and there is no evidence that this historical relationship would be terminated in the near future. Second, given the market reality and the change that will likely be brought about by the planned transaction, the Commission considers that the JV is the most likely hub through which the MCPS repertoire will be administered and licensed post transaction. Indeed as explained in recital (176), it would appear that at least in the near future there would be no other hubs other than the JV and Armonia, and it is far more likely that the MCPS repertoire will be licensed and administered through the JV rather than through Armonia. Finally, PRSfM itself presents itself as the representative combining PRS and MCPS rights and memberships.¹⁶⁰ Therefore, it is most likely that the MCPS repertoire will be included in the Zeta Core Licence and thus will be treated as PRSfM-controlled repertoire.

- (245) As regards the IMRO repertoire, PRSfM is mandated to grant licenses to most of IMRO repertoire on a pan-European level.¹⁶¹ It is likely that, after the transaction, the IMRO repertoire will be licensed by the JV and, hence, the IMRO repertoire should be included when calculating the future market share of the JV.
- (246) The Zeta Core Licence will also likely include the residual world repertoire controlled by third party CMOs, which each of the Notifying Parties is entitled to license in its own home territory under RRAs. Each of the Notifying Parties license, with respect to its home territory, the world repertoire under the RRA system, excluding the option 3 withdrawals and CMO carve outs (such as SACEM, SIAE, SGAE, SUISA, SABAM, STIM, PRS, MCPS carve-outs). It is likely that the world repertoire for the Notifying Parties' home territories would be included in the Zeta Core Licence. In addition, the licences of the Notifying Parties include for the Notifying Parties' home territories (the relevant part of) American performing rights of the CMOs ASCAP (USA), BMI (USA), SESAC (all USA), SOCAN (Canada), APRA (Australia) and SAMRO (South Africa), which have granted non-exclusive mandates to each of the Notifying Parties (and other EEA-based CMOs) for the licensing and administration of their repertoire on a pan-European and national basis. American performing rights for which the corresponding mechanical rights have not been withdrawn by the publisher are licensed as part of the residual world repertoire national blanket licenses of each of the Notifying Parties for the Notifying Parties' home territories ("non-matching performing rights"), in which case they would be most likely included in the Zeta Core Licence post transaction, in the same way as the rest of the world repertoire.¹⁶²

¹⁶⁰ See PRS for Music Business Insight Presentation, 18 November 2013, slides 5 -17, document ID 1452-2093; see also <http://www.prsformusic.com/Pages/default.aspx>.

¹⁶¹ IMRO has mandated non-exclusively both PRSfM and SACEM to license IMRO's repertoire on a pan-European basis. Out of the revenues obtained by IMRO from the pan-European licensing of its online rights, those derived from licensing through SACEM account for less than [...]%, whereas those derived from licensing through PRSfM account for more than [...]%.

¹⁶² The JV Parents (and other CMOs) are also providing services to the non-EEA-based American performing CMOs by "adding" those American performing rights to the licensing deals of option 3 publishers in order to match the option 3 publishers' mechanical rights. The pan-European mandates granted by ASCAP and BMI are in practice confined to the performing rights which would match option 3 publisher repertoires. However, the American performing rights that would match the mechanical rights of option 3 publishers would most likely not be part of Zeta Core License since it is unclear whether option 3 publishers' repertoire will be included in the Zeta Core License. In addition, certain major publishers have recently sought to withdraw their performing rights from the American performing rights CMOs.

- (247) Finally, at this stage, the Commission considers that third party repertoire that may in the future be included in the Zeta Core Licence, such as the repertoire of option 3 publishers¹⁶³ and of third party CMOs (other than the proportion relating to the 'residual world repertoire') should not be taken into account for the purposes of assessing the JV's market power. This reflects the fact that it is unclear whether this repertoire will be included in the Zeta Core Licence. According to information from the Notifying Parties, all option 3 publishers currently working with one of the Notifying Parties have clearly indicated to their option-3-partner that they are not interested in joining the Zeta Core Licence in the foreseeable future. Regarding other CMOs, although the Notifying Parties have some indications that certain CMOs may be willing to join the Zeta Core Licence, it is unclear which CMOs will actually join the Zeta Core Licence and within what time frame. In addition, the publishers and CMOs which responded to the in-depth market investigation also confirmed that they currently do not consider joining the Zeta Core Licence or they have not yet taken a decision as to whether or not to join the Zeta Core Licence.
- (248) Any additional aggregation of repertoire into the Zeta Core Licence stemming from future agreements entered into between the JV and third party CMOs or option 3 publishers falls outside the scope of the review of the proposed transaction. The possible impact on competition resulting from any additional significant increase in the repertoire of the JV, in particular the future possible addition of the repertoire of a large CMO or a large option 3 publisher, would need to be reviewed under the applicable competition law rules, including, in particular, Article 101 TFEU and the corresponding provisions at the national level.

Total EEA-wide online licensing market

- (249) The estimate of the market shares of the JV and the Notifying Parties on the total EEA online licensing market is based on the licensing revenues generated by the Notifying Parties with the repertoire directly controlled by the Notifying Parties, as well as the third party repertoire that, based on currently available information, will likely be included in the Zeta Core Licence as explained in recitals (242) to (246) above. The licensing revenues used for the estimate of the market shares on the total EEA online licensing market are licensing revenues obtained both from DSPs active in more than one Member State and DSPs active only in one Member State, i.e. licensing revenues from all DSPs.
- (250) In the table below, the revenues associated with the PRSfM matching performing rights are not attributed to the JV's market share on the total EEA online licensing market.¹⁶⁴ The Notifying Parties submit that in the vast majority of cases those rights flow with the option 3 publishers' mechanical rights, that is to say outside of PRSfM's pan-EEA licence.

¹⁶³ Regarding the rights repertoire of option 3 publishers, this would currently include the mechanical rights of option 3 publishers. However, it cannot be excluded that in the future the rights repertoire of option 3 publishers may include also performing rights, taking into account that certain major publishers have sought to withdraw their performing rights from the American performing rights CMOs.

¹⁶⁴ [...]*

Table 2: Total EEA online licensing market – CMOs and option 3 publishers' repertoire (revenues)

PRE TRANSACTION				POST TRANSACTION	
PRSfM	STIM	GEMA	MCPS	Notifying Parties	JV
[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[20-30]%

Source: Notifying Parties' estimates

Table 3: Total EEA online licensing market – CMOs' repertoire only (revenues)

PRE TRANSACTION				POST TRANSACTION	
PRSfM	STIM	GEMA	MCPS	Notifying Parties	JV
[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[30-40]%

Source: Notifying Parties' estimates

- (251) Tables 2 and 3 provide an overview of the total EEA-wide online licensing market, where, post transaction, both the JV (as regards the granting of multi-territorial online licences) and the Notifying Parties (as regards the granting of mono-territorial online licences and, for PRSfM, also the granting of multi-territorial licenses to the PRSfM matching performing rights to the extent it refrains from including them in the Zeta Core Licence) will be active. It is apparent from those tables that the JV would hold a market share of [20-30]% when both CMOs' and option 3 publishers' repertoire are included in the market, and a market share of [30-40]% when only CMOs' repertoire is included in the market.¹⁶⁵
- (252) The combined position of the JV and the Notifying Parties on the total EEA-wide online licensing market would be [20-30]% when both CMOs' and option 3 publishers' repertoire are included in the market, and [40-50]% when only CMOs' repertoire is included in the market.

EEA-wide market for multi-territorial online licensing

- (253) The estimate of the market shares on the EEA-wide market for multi-territorial online licensing has been performed on the same basis as for the total EEA online licensing markets (as explained in recitals (249) and (250) above). The sole exception is that licensing revenue obtained by the Notifying Parties from DSPs active only in one country has been excluded. Therefore, in estimating the position of the Notifying Parties and the JV on the EEA-wide market for multi-territorial online licensing, only the licensing revenue from DSPs active in more than one country has been used. The Commission used revenue from online licences granted to DSPs active in more than one country as a proxy for revenue from multi-territorial online licences in order to take into account GEMA's contribution to the JV's future market share. At present, GEMA does not grant any multi-territorial licenses. It does, however, grant mono-territorial licences to DSPs active in several countries. Once the JV is created, these DSPs active in several countries will obtain multi-territorial

¹⁶⁵

Source: Notifying Parties estimates.

licences from the JV. Hence, the revenue that GEMA currently generates from mono-territorial licences to DSPs active in several countries will likely be converted into revenue from multi-territorial licences granted by the JV. To calculate the JV's future market share in the market for multi-territorial online licensing, the revenue that is currently generated from DSPs active in more than one country is therefore used as a basis.

- (254) Post transaction, PRSfM will also be active in the EEA-wide market for multi-territorial online licensing, as it will grant multi-territorial online licences to the PRSfM matching performing rights, as explained in recital (209).

Table 4: EEA multi-territorial online licensing market – CMOs' and option 3 publishers' repertoire (revenues)

PRE TRANSACTION				POST TRANSACTION	
PRSfM	STIM	GEMA	MCPS	PRSfM	JV
[10-20]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[20-30]%

Source: Notifying Parties' estimates

Table 5: EEA multi-territorial online licensing market – CMOs only repertoire (revenues)

PRE TRANSACTION				POST TRANSACTION	
PRSfM	STIM	GEMA	MCPS	PRSfM	JV
[10-20]%	[10-20]%	[10-20]%	[5-10]%	[5-10]%	[30-40]%

Source: Notifying Parties' estimates

- (255) On the EEA-wide market for multi-territorial online licensing the JV would hold a market share of [20-30]% when both CMOs' and option 3 publishers' repertoire are included in the market, and a market share of [30-40]% when only CMOs' repertoire is included in the market.
- (256) The combined position of the JV and PRSfM on the EEA-wide market for multi-territorial online licensing would be [30-40]% when both CMOs' and option 3 publishers' repertoire are included in the market, and [40-50]% when only CMOs repertoire is included in the market.
- (257) As it appears from the market share data, the JV would hold a market share in excess of [30-40]% on the total EEA online licensing market that includes CMOs' repertoire only and on the EEA online licensing market for multi-territorial licensing that includes CMOs' repertoire only, where it would hold a share of [30-40]% and [30-40]% respectively. In addition, if the PRSfM performing rights, as well as the JV Parents' retained activities as regards the granting of mono-territorial online licences to DSPs active in only one territory were to be taken into account, the combined position of the JV and the JV Parents would be higher on all alternative relevant markets identified above.

- (258) The Commission considers that market shares are a starting point for the assessment of the JV's market position vis-à-vis DSPs. However, given the specificities of the market for the licensing of online rights in musical works, the Commission also attaches considerable importance to other elements. The specificities of this market include the fact that CMOs have a monopoly on the licensing of their national repertoire and the fact that there is a certain degree of complementarity between the different repertoires offered by different CMOs. This is evidenced by the fact that DSPs do not license only one repertoire but several repertoires. Hence, the effect of combining several repertoires cannot be assessed on the basis of market shares alone. As explained in recitals (259) to (266), the Commission has therefore also conducted an empirical analysis on how the size of a repertoire affects a CMO's bargaining position and, ultimately, the licensing terms for DSPs.

6.2.2.2. Assessment of the JV's impact on licensing terms for DSPs

The Commission's analytical framework

- (259) The Commission recently reviewed two concentrations in the music sector: *Sony/Mubadala/EMI Music Publishing*¹⁶⁶ (a phase I decision with remedies) and *Universal Music Group/EMI Music*¹⁶⁷ (a phase II decision with remedies). In these two decisions, the Commission concluded that the combining of the repertoires of the merging parties into a single larger repertoire would allow the merged entity to obtain better commercial terms from DSPs. This conclusion was based on a finding that larger repertoires allow record companies and music publishers to obtain better terms.
- (260) Applying this 'size effect' logic to the online licensing by CMOs in the present case would imply that CMOs with larger repertoires are able to charge higher royalty rates than CMOs with smaller repertoires. In turn, this would mean that the JV, which will have a larger repertoire than the Notifying Parties separately, would be able to extract higher royalty rates from DSPs. From a theoretical perspective, such an effect could be the outcome of negotiations between CMOs and DSPs if the increase in the DSPs' profits relative to the size of their repertoire becomes progressively smaller as the size of their repertoire increases ('decreasing returns' or 'sub-additivity'). If this were the case, a DSP that loses access to a larger repertoire would lose disproportionately more than if it lost access to a smaller repertoire, which means the CMO with the larger repertoire could extract higher royalty rates.
- (261) According to the Notifying Parties, the transaction would not lead to higher royalty rates but, if anything, to lower royalty rates because CMO repertoires are complementary. The aggregation of complementary repertoires in the JV would lead to lower royalty rates because the JV would find it profitable to charge lower royalty rates in order to generate higher demand (lower royalty rates would lead to lower prices charged by DSPs and, hence, to higher demand for their services). Therefore the transaction would result in a negative 'size effect'.
- (262) The Commission considers, however, that economic theory is not, in itself, conclusive as to whether a larger repertoire implies more or less bargaining power in a setting where CMOs and DSPs bargain for licensing terms. For example, if the

¹⁶⁶ Commission decision of 19 April 2012 in Case COMP/M.6459, *Sony/Mubadala/EMI Music Publishing*.

¹⁶⁷ Commission decision of 21 September 2012 in Case COMP/M.6458, *Universal Music Group/EMI Music*, recital 540

profits of a DSP from an additional repertoire increased with the total size of the repertoire that the DSP contracted for ('increasing returns' or 'super additivity') then even a CMO with a small repertoire could have a large average impact on the DSP's profits. Assuming the DSP already has some repertoire, the loss of a small repertoire would cause a loss of revenue that is proportionally (that is in comparison to the size of the repertoire) higher than the loss of a larger repertoire. Therefore, with progressively increasing profits for DSPs, the CMOs' bargaining power relative to the size of their repertoire would decrease with repertoire size. Such a setting could lead to CMOs with a larger repertoire charging lower prices.

- (263) Since economic theory is inconclusive about whether a larger repertoire would lead to higher or lower royalty rates, the Commission considers it appropriate to carry out an empirical analysis to determine whether a larger repertoire implies that CMOs can obtain higher royalty rates. A similar approach was adopted in *Universal Music Group/EMI Music*¹⁶⁸, which concerned the combination of the repertoires of two record companies, where the Commission ascertained whether larger repertoires allow record companies to impose more onerous terms by assessing whether, before the merger, Universal (which was larger than EMI) obtained more favourable conditions from DSPs than EMI. The Commission based its assessment on the following: an analysis of the commercial agreements of Universal and EMI with DSPs, a quantitative analysis of the royalties paid by DSPs to record companies, evidence from the market investigation, and the parties' internal analyses and assessments of the transaction.¹⁶⁹
- (264) In *Sony/Mubadala/EMI Music Publishing*¹⁷⁰ the Commission used a similar approach, although no quantitative analysis was undertaken in that case. The concerns in that case related to the licensing terms for rights in musical works licensed by publishers. The Commission found that the royalty rates of the larger publisher (EMI) were higher than those of the smaller publisher (Sony). This finding, together with the results of the market investigation, led the Commission to conclude that the merger would lead to more onerous terms for DSPs, because the merged entity would have a larger repertoire than the parties before the merger.
- (265) Consistent with the Commission's approach in *Sony/Mubadala/EMI Music Publishing* and *Universal Music Group/EMI Music*, in the present case, the Commission (1) assessed the evidence from the market investigation, (2) reviewed the Notifying Parties' internal analyses and assessments, (3) reviewed the commercial agreements between several CMOs and DSPs and (4) conducted a quantitative analysis of royalty payments made by DSPs to CMOs.
- (266) Although the Commission's empirical approach in the proposed transaction is similar to that undertaken in *Sony/Mubadala/EMI Music Publishing*,¹⁷¹ the Commission also notes that there are differences between CMOs and option 3 publishers.

¹⁶⁸ Commission decision of 21 September 2012 in Case COMP/M.6458, *Universal Music Group/EMI Music*.

¹⁶⁹ Commission decision of 21 September 2012 in Case COMP/M.6458, *Universal Music Group/EMI Music*, recital 448.

¹⁷⁰ Commission decision of 19 April 2012 in Case COMP/M.6459, *Sony/Mubadala/EMI Music Publishing*.

¹⁷¹ Commission decision of 19 April 2012 in Case COMP/M.6459, *Sony/Mubadala/EMI Music Publishing*.

- (267) First, regulatory rules constrain CMOs in their licensing negotiations with DSPs, whereas no such rules apply to option 3 publishers. CMOs are subject to regulatory pricing obligations and duties to license. In most countries, licensing tariffs are either set by law, subject to approval by a public authority, or subject to control by independent courts or dispute resolution bodies. Also, the JV will be subject to the CRM Directive and the relevant implementing legislation. The JV will therefore be (i) supervised by the national regulatory authorities in the United Kingdom and Germany; (ii) obliged to grant licences to users on the basis of objective and non-discriminatory criteria; (iii) conduct negotiations for the licensing of rights in good faith; (iv) obliged to represent the repertoire of certain other CMOs and include those third-party repertoires in its licensing offers on a non-discriminatory basis, and (v) subject to independent and impartial dispute resolution mechanism (concerning among others licensing conditions).
- (268) CMOs are bound by non-discrimination obligations and are required to set generally applicable tariffs for certain forms of copyright exploitations. Therefore, CMOs have to apply the same conditions to comparable services and are therefore less flexible in negotiations as compared to publishers and record labels. The non-discrimination principle entails that CMOs determine rates primarily by comparing a DSP to other licensees.
- (269) CMOs, unlike option 3 publishers, are not-for-profit entities which have to act as "trustees" in the interest of all their members, including smaller and less successful authors, whereas publishers can treat more successful and less successful authors differently. CMOs are obliged not to discriminate between their members and seek licensing terms which would not leave behind smaller and less successful authors. The corporate organizations of CMOs ensure that authors are involved in the decision-making process of CMOs. The heterogeneous composition of a CMO membership, consisting of successful and less successful artists, and decision-making bodies, combined with the fact that CMOs are bound by the principle of equal treatment of each of their members, results in CMOs having less ability to engage in profit maximization than publishers.
- (270) Second, the repertoires of CMOs are not of the same type as the repertoires of option 3 publishers. The repertoires of the latter consist of mechanical rights in Anglo-American music focusing on the most successful works. CMOs' repertoires on the other hand are of much wider and diverse range, covering different linguistic and cultural areas, niche repertoires, and promoting not only the most successful authors but also less successful authors. The JV will thus aggregate quite different repertoires, across cultural and linguistic differences.
- (271) Also, unlike major publishers, CMOs traditionally license all repertoires of all CMOs at least in their home territories on the basis of RRAs (subject to the carve-outs by some CMOs of multi-territorial online rights which they license themselves). The CMOs' licences therefore contain shares to almost every musical work registered in a CMO home territory. In addition, CMOs have repertoires that are continuously changing as compared to the option 3 publishers repertoires that usually have long-term exclusive contracts with the authors. Thus, DSPs would not normally know the split of rights between the different CMOs and would normally need to have a licence from all CMOs when DSPs want to offer as much repertoire as possible on a multi-country basis.
- (272) The Commission considers that the regulatory obligations on CMOs and their special characteristics may exert some constraints on the licensing terms that CMOs can seek from DSPs. However, these constraints do not appear, in themselves, to be

sufficient to counteract a possible ‘size effect’, meaning the possibility that the JV will be able to charge higher royalty rates to DSPs because of its larger repertoire. Hence, in the following recitals (recitals ((273) to (296), the Commission assesses whether a ‘size effect’ exists in this case by examining the available evidence from the market investigation, the Parties’ own analyses and a quantitative analysis.

Results from the market investigation

- (273) DSPs were virtually unanimous in stressing that they currently have little or no bargaining power vis-à-vis CMOs.¹⁷² Several DSPs described CMOs as having a ‘de facto monopoly’ or being ‘near monopolists’. In the view of a small DSP, CMOs set the rate and DSPs have to accept that rate.
- (274) At the same time, most DSPs also acknowledged that CMOs are constrained by law as regards the tariffs for online licensing.¹⁷³ Thus, some DSPs pointed out that they have the possibility to initiate proceedings in case the CMOs seek excessive royalty rates.¹⁷⁴ Although this legal constraint on CMOs was viewed positively by DSPs, other legal constraints were viewed less favourably. Some DSPs pointed out that the equal treatment obligations applicable to some CMOs prevent these CMOs from granting better rates to starting DSPs which do not yet have an established business and therefore have difficulties paying the standard CMO rates.¹⁷⁵
- (275) Several DSPs pointed out that withdrawing the repertoire of a particular CMO from their services is extremely difficult or impossible, since DSPs do not know exactly which musical works belong to a specific CMO’s repertoire.¹⁷⁶ This weakens the bargaining position of DSPs, since they have no choice other than to secure a licence from each CMO.
- (276) A majority of DSPs considered that the size or attractiveness of a CMO’s repertoire plays a role in the negotiations of licenses.¹⁷⁷ One DSP, for instance, explained that CMOs with sizeable repertoire were more aggressive and unreasonable in negotiations than less influential CMOs. On the other hand, several DSPs pointed out that each CMO has a monopoly on its repertoire and since DSPs have to clear repertoires of all CMOs to offer a multi-territorial service, CMOs with relatively small market shares have similar bargaining power to large CMOs. One DSP, for instance, stated that ‘the size of a CMO’s repertoire has little bearing on the negotiating power balance, because a licensee such as [...]’ has no choice but to obtain a licence from every publishing licensor (or risk inadvertent infringement of copyright) so, therefore, every licensor (regardless of how large or small) holds a ‘monopoly’ in respect of the artists represented and would be able to impose any tariff it chooses if no regulation were applicable’.¹⁷⁸

¹⁷² Replies to Commission questionnaire Q 1 - to customers (to DSPs) of 1 December 2014, question 29.1.

¹⁷³ Replies to Commission questionnaire Q 4 - to DSPs of 4 February 2015, question 24.

¹⁷⁴ Replies to Commission questionnaire Q 1 - to customers (to DSPs) of 1 December 2014, question 29.1.

¹⁷⁵ Replies to Commission questionnaire Q 1 - to customers (to DSPs) of 1 December 2014, question 29.1.

¹⁷⁶ Replies to Commission questionnaire Q 1 - to customers (to DSPs) of 1 December 2014, question 29.1.

¹⁷⁷ Replies to Commission questionnaire Q 4 - to DSPs of 4 February 2015, question 3-4.

¹⁷⁸ Replies to Commission questionnaire Q 4 - to DSPs of 4 February 2015, question 3.1, Doc ID 1527.

- (277) Approximately half of the DSPs expected that the aggregation of repertoires in the JV would have a negative impact on their licensing negotiations.¹⁷⁹ They stated that the larger size of the JV's repertoire would prompt the JV to seek higher tariffs. Another DSP was concerned that the JV would align its licensing approach to that of GEMA, which was perceived as very intransigent.
- (278) The other half of the DSPs anticipate that the JV would have a positive or neutral impact on their licensing negotiations. Among the positive effects mentioned by DSPs were the fact that a single contract for three repertoires would make licensing easier, and the expectation that the pooling of resources in the JV would lead to a more accurate database and more accurate usage reporting.
- (279) Many CMOs stated that they did not have knowledge of the licensing rates that other CMOs obtain from DSPs and, hence, were not in a position to assess whether larger repertoires obtained better licensing terms.¹⁸⁰ The CMOs that did express an opinion on this point were divided. A CMO that believed that larger or more attractive repertoires obtain better licensing terms suggested that these repertoires give the CMO more leverage and that DSPs would secure licenses with the major repertoires first. A CMO that believed larger repertoires do not obtain better terms gave the example of some smaller CMOs obtaining better terms than larger CMOs such as PRS, SACEM and GEMA. Another CMO stated that the size or attractiveness of the repertoire did not play a significant role in determining the licensing tariffs, but that it results in higher advance payments because these advance payments are based on an estimate of the share of the CMO's repertoire in the total of songs played on the DSP's platform. Since more popular repertoires are expected to be played more frequently, the advance payment is proportionally higher. The Commission notes that this does not suggest that larger repertoires obtain better licensing terms, since it appears logical that a repertoire that is played more frequently obtains a larger share of the payments made by DSPs. The CMO in question also considered that DSPs may seek to clear the rights for large repertoires first, before moving to smaller repertoires.
- (280) CMOs also expressed diverging views on whether they expected the JV's rates to be higher than the current rates of GEMA, PRSfM and STIM.¹⁸¹ A majority of the CMOs who expressed an opinion on this point believed the JV would not increase rates. Several CMOs anticipate that the JV would lead to cost savings for DSPs, in the form of lower processing or transaction costs. One CMO stated that these cost savings could justify the JV demanding higher rates.
- (281) Most publishers stated they did not know whether CMOs with larger repertoires secure better terms than CMOs with smaller repertoires.¹⁸² Of the publishers that did express a view on this point, some assumed that, based on business logic, a CMO with a larger basket of rights would have a stronger negotiating position. Others, however, had the impression that larger repertoires do not secure better terms or that DSPs prefer to deal with CMOs with large repertoires because this cuts the cost of licensing. However, a large majority of all publishers that expressed a view on this point did not expect the JV to charge higher licensing rates than the Notifying

¹⁷⁹ Replies to Commission questionnaire Q 4 - to DSPs of 4 February 2015, question 16.

¹⁸⁰ Replies to Commission questionnaire Q 2 – to CMOs of 1 December 2014, question 39.

¹⁸¹ Replies to Commission questionnaire Q 2 – to CMOs of 1 December 2014, questions 40 and 47.

¹⁸² Replies to Commission questionnaire Q 3 – to suppliers of 1 December 2014, question 40.

Parties.¹⁸³ On the contrary, some publishers expected the JV to charge lower royalty rates to DSPs.¹⁸⁴

- (282) Some publishers believed rate increases would be unlikely since the JV would benefit from economies of scale. Most publishers also considered that the JV would reduce DSP's transaction costs.¹⁸⁵ Other publishers, however, cautioned that, although the JV would not raise the royalty rates, it would seek higher advance payments from DSPs.
- (283) On balance, the Commission considers that the results of the market investigation were mixed. A majority of DSPs considered that the size of the repertoire has an impact on the licensing negotiations. At the same time, a substantial number of DSPs pointed out that repertoire size was not really linked to better licensing terms because even relatively small CMOs have a de facto monopoly and DSPs need to clear the rights with all CMOs in the EEA to legally offer multi-territorial services. Moreover, the DSPs who considered that larger repertoires obtain higher rates could only provide limited examples to support that view. Opinions between CMOs and publishers diverged as to whether larger repertoires lead to higher rates, but tended to believe the JV would not lead to an increase in rates. Overall, the Commission considers that the results of the market investigation do not allow the Commission to conclude that the JV would have significantly increased bargaining power and lead to higher prices for DSPs.

Parties' internal analyses and assessments

- (284) The Parties' internal analyses and assessments of the effects of the transaction did not provide consistent evidence that the JV would have greater bargaining power or that the JV would use this power to obtain more favourable licensing terms.
- (285) [...]*.¹⁸⁶ [...]*.¹⁸⁷ [...]*.
(286) [...]*.¹⁸⁸ [...]*.
(287) [...]*.¹⁸⁹ [...]*.¹⁹⁰ [...]*.

Analysis of commercial agreements between CMOs and DSPs

- (288) The Commission also analysed the multi-territorial licensing agreements between CMOs of various sizes and DSPs that offer downloading or streaming services. A comparison of the licensing terms in these commercial agreements did not reveal that

¹⁸³ Replies to Commission questionnaire Q 3 – to suppliers of 1 December 2014, questions 41 and 49.

¹⁸⁴ Replies to Commission questionnaire Q 3 – to suppliers of 1 December 2014, question 41.1.

¹⁸⁵ Replies to Commission questionnaire Q 3 – to suppliers of 1 December 2014, questions 51.

¹⁸⁶ Notifying Parties' submission of 6 August 2013, Annex 3 ('Project DELTA/ZETA Business Plan'), p. 24, p.27 (table listing expected evolution of digital music sales and royalties of Zeta), Doc ID 74-11.

¹⁸⁷ Annex 5.4.a63 to the Form CO 'PRS for Music, GEMA and STIM Hubs Strategy: March 2014'.

¹⁸⁸ PRS for Music, GEMA and STIM Hubs Strategy: March 2014 (Document prepared by PRSfM's [senior executive]*), Doc Id 1883.

¹⁸⁹ E-mail from [PRSfM employee]* to [STIM employee]* of 1 October 2014 (subject: 'RE: blueprint£'), Doc ID 1449-902 (e-mail at the bottom of the e-mail chain).

¹⁹⁰ E-mail from [PRSfM employee]* to [STIM employee]* of 1 October 2014 (subject: 'RE: blueprint£'), Doc ID 1449-902 (e-mail at the bottom of the e-mail chain).

CMOs with large repertoires obtain more favourable licensing terms than CMOs with small repertoires. The royalty rates (a percentage of retail revenue paid by the DSP to the CMO) charged by different CMOs were often similar, as were minimum amounts per track and minimum amounts per subscriber. While there were exceptions to this rule they were country- or CMO-specific and unrelated to the size of the repertoire held by the CMOs. Other variables, such as advance payments and promotional support, showed variation but there was no consistent indication that CMOs with larger repertoires obtained better terms than the CMOs with smaller repertoires.

- (289) The fact that the Commission did not find that CMOs with large repertoires obtain more favourable licensing terms may be due to the specificities of the current state of the online licensing market. First, the market for online multi-territorial licensing by CMOs is a nascent market and, hence, the sample of agreements that could be compared was limited. Whereas PRSfM has concluded several multi-territorial licensing agreements, STIM has concluded only a few and GEMA has concluded none. Other CMOs have concluded multi-territorial licensing agreements, but the number of these agreements was also limited. Hence, the Commission was only able to compare a limited number of agreements. Second, the CMOs whose agreements the Commission compared hold repertoires of varying sizes, but the differences are not very marked and the repertoire sizes are relatively small compared to the entire market. With an [5-10]% market share, STIM's repertoire is smaller than that of PRSfM, which has a [10-20]% market share (see table 4 above), but neither repertoire is very large. In *Universal Music Group/EMI Music* and *Sony/Mubadala/EMI Music Publishing*, two cases in which the Commission did find that larger repertoires obtained more favourable terms, the repertoires concerned were significantly larger than in this case.
- (290) Another specific factor that made the analysis of the commercial agreements difficult is the fact that the licensing terms for DSPs have been subject to rapid changes in the past few years. This made it difficult to compare the terms of the agreements. As the market develops and more multi-territorial licensing agreements are concluded by CMOs, a more meaningful analysis may be possible in the future. At present, however, the analysis of the multi-territorial music licensing agreements of CMOs did not allow the Commission to draw any firm conclusions regarding a relationship between repertoire size and more favourable licensing terms.

Quantitative analysis of royalty payments from DSPs to CMOs

- (291) The Commission collected data from DSPs to test whether CMOs with larger repertoires obtain higher royalty payments. If this were the case, it would be consistent with a theory of harm that repertoire size affects the bargaining power of CMOs and, hence, royalty payments. This would in turn be an indication that the creation of the JV would likely lead to higher royalty payments, since the JV will have a larger repertoire than the Notifying Parties separately.
- (292) Data was collected about the revenues DSPs earn by selling music from each CMOs' repertoire and the corresponding royalties DSPs pay to the CMOs in return. This revenue and royalty data was collected separately for download services, subscription based streaming services and ad-funded streaming services for 2012 and 2013 in relation to each Member State and it included also option 3 publishers' data.
- (293) The key variables for the empirical analysis, that is the repertoire size and ability of the CMO to extract better terms, were calculated following the empirical approach in *Universal Music Group / EMI Music*. Repertoire size was captured by the relative size of a CMO / option 3 publisher compared to the DSP's revenue. The CMO's

ability to extract better terms was captured by the average effective royalty rate it paid. For a repertoire 'size effect' to exist, the correlation of these two variables should be positive. Unfortunately, the quality of the collected data varied across DSPs. Therefore, the results of the quantitative analysis have to be interpreted cautiously and in conjunction with the other evidence used by the Commission to assess whether a 'size effect' exists.

- (294) The Commission found that the results of the quantitative analysis indicate no systematic positive relationship between repertoire size and better licensing terms. Therefore, on the basis of the data collected, there does not appear to be any systematic relationship between size (measured by the revenue share of a CMO in the total retail revenue of a DSP in a country) and bargaining outcomes (measured by royalties from a CMO's repertoire as a fraction of the revenue earned on the same repertoire). Occasional positive relationships are weak and driven by outliers. Therefore, the evidence from the quantitative analysis of royalty and revenue data does not support a theory of harm that control over a larger repertoire would allow the JV to extract better licensing terms from DSPs in the present case.

Impact on DSPs that do not launch in the entire EEA

- (295) The Commission analysed the effect of the proposed transaction taking into account different possible business approaches by DSPs. For instance, a DSP could launch services in just a small number of countries initially, before moving on to other countries in the EEA. In that case, the DSP would need to obtain a licence from the JV for a number of Member States only and not for the whole of the EEA. The Commission considers that the effect of the proposed transaction would be the same irrespective of the DSP's business strategy. A DSP launching in any configuration of countries would probably need the PRSfM repertoire, given the importance of the Anglo repertoire across the EEA. Therefore, the fact that the DSP would, as a consequence of the JV, also obtain a licence to the repertoire of STIM and GEMA would not have a detrimental effect on the DSP. DSPs are charged for the songs which are actually used on their service and although the DSP would have the option of offering these repertoires to its users, it would not have the obligation to do so. On the contrary, transaction costs for a DSP would probably be reduced because the DSP would only need to obtain one licence instead of three.
- (296) Although the Commission does not consider it likely that the JV will lead to an increase in royalty rates, the Commission also notes that royalty payments made by DSPs to CMOs for rights in musical works constitute only a small fraction of the royalty payments made by DSPs. A much larger fraction is spent on recording rights, which are owned by record companies and performers. This is also reflected in the low share of DSPs' revenue that flows to CMOs and option 3 publishers. Around 12% of DSPs' revenue flows to CMOs and option 3 publishers, while around 60% flows to record companies.¹⁹¹ Even if all CMOs and publishers were to increase royalty rates by 5-10%, this would result in a very small increase in the total licensing costs borne by DSPs.

¹⁹¹ Submission by the Notifying Parties of 27 February 2015 ('Assessment of the theory of harm being considered by the Commission in regard to licensing terms'), page 26, footnote 60. This information was also confirmed by the market investigation. See Replies to Commission questionnaire Q 4 - to DSPs of 4 February 2015, question 12.3-12.4.

6.2.2.3. Possible spill-over effects because of the Notifying Parties' activities in the same market as the JV

- (297) When the creation of a JV that constitutes a concentration has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, the Commission must assess such coordination in accordance with the criteria of Article 101(1) and (3) TFEU.¹⁹² In making this assessment, the Commission must take into account, in particular, whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market that is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.¹⁹³ In addition, the Commission has to take into account whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.¹⁹⁴ A restriction of competition under Article 101(1) TFEU is established when the coordination of the parent companies' competitive behaviour is likely and appreciable and results from the creation of the joint venture.¹⁹⁵
- (298) In this case, the JV will grant multi-territorial licenses to the repertoire included in the Zeta Core License to DSPs operating in several countries, while PRSfM, STIM and GEMA will continue to grant national licenses to the world repertoire to DSPs operating in a single country. In section 5.2, the Commission left open whether the overall market for the licensing of online rights in musical works should be divided into a market for the multi-territorial licensing of online rights in musical works and a market for the mono-territorial licensing of online rights in musical works. If such a distinction were made, the JV and the Notifying Parties would not be present on the same market since the JV will be active on the multi-territorial licensing market and the Notifying Parties will be active on the mono-territorial licensing market. However, if one adopts the broader product market definition (the market for the licensing of online rights in musical works), PRSfM, STIM and GEMA would retain activities in the same market as the JV. Moreover, PRSfM will probably continue to grant multi-territorial licences to the PRS matching performing rights.
- (299) Although PRSfM, STIM and GEMA will retain activities that are, under the broadest possible market definition, in the same market as those of the JV, the Commission does not consider it likely that the JV will increase the risk of coordination between the Notifying Parties. The licenses that PRSfM, STIM and GEMA will grant are mono-territorial licences, for exclusive use in a single territory, and they will cover the world repertoire. By contrast, the JV will grant multi-territorial licences to the repertoires of PRSfM, STIM and GEMA and any other repertoire that is part of the Zeta Core Licence. The customers of PRSfM, STIM and GEMA will be DSPs operating in a single territory, whereas the customers of the JV will be DSPs operating in several territories. Given the differences in customers, the difference in the geographical scope of the licence and the difference in the repertoire covered, the Commission considers it unlikely that the JV would facilitate coordination. Even if

¹⁹² Article 2(4) of the Merger Regulation.

¹⁹³ Article 2(5) of the Merger Regulation.

¹⁹⁴ Article 2(5) of the Merger Regulation.

¹⁹⁵ Commission decision of 20 July 2004 in Case M.3333, Sony/BMG, recital 176.

mono-territorial licensing and multi-territorial licensing are considered part of the same market, differences exist between these types of licences and these differences make it unlikely that the JV, which is exclusively engaged in multi-territorial licensing, would become a channel through which the Notifying Parties would coordinate their mono-territorial licensing activities.¹⁹⁶

- (300) Furthermore, in light of the safeguards that the Notifying Parties have put in place (see section 6.3 below), the Commission does not consider it likely that PRSfM, STIM and GEMA would be in a position to share information concerning the terms of their mono-territorial licenses with the JV, which will engage exclusively in multi-territorial licensing.
- (301) The Notifying Parties will negotiate their licenses individually and independently from the JV. The JV's managing directors, the members of the Licensing Committee and of the Board of Directors will not be involved in the handling, management or supervision of licensing matters and, hence, cannot become a channel through which information relating to licensing terms could flow. In addition, the Parties have agreed to establish firewalls and business separation mechanisms to ensure that confidential information on licences will not be disclosed from the JV to the Notifying Parties or *vice versa*. This limits the possibility that the Notifying Parties receive commercially sensitive information about competitors and limits the information received by the Notifying Parties only to the minimum required for the Notifying Parties to operate the JV as the JV's shareholders.

6.2.3. *Conclusion regarding the EEA-wide online licensing market (the market for the licensing of online rights in musical works)*

- (302) In light of all the above elements, the Commission concludes that the proposed transaction is unlikely to lead to increased bargaining power and more onerous licensing terms for DSPs. The Commission therefore concludes that the creation of the JV would not significantly impede effective competition in the EEA-wide market for the licensing of online rights in musical works or any of the possible, narrower markets within that market, and therefore in the internal market or a substantial part of it. The creation of the JV is also unlikely to lead to coordination between the Notifying Parties in violation of Article 101(1) of the TFEU.
- (303) However, any additional aggregation of repertoire into the Zeta Core Licence stemming from future agreements entered into between the JV and third party CMOs and/or option 3 publishers falls outside the scope of this review of the proposed transaction. The possible impact on competition of any such additional aggregation of repertoire would need to be reviewed under the applicable competition law rules, including, in particular, Article 101 TFEU and the corresponding provisions at the national level.

6.3. **Exchange of commercially sensitive information**

- (304) Post transaction, the JV, via the back-, middle- and front-office services that it will provide to option 3 publishers and third party CMOs will have access to commercially sensitive information of third parties. This information includes, in particular, information about rates and other commercial terms of the licensing deals

¹⁹⁶ PRSfM will probably also grant multi-territorial licences but STIM and GEMA will not. Hence, coordination between PRSfM's multi-territorial licensing activities on the one hand and the mono-territorial licensing activities of STIM and GEMA on the other is also unlikely because of the differences in customers, geographical scope and repertoire covered.

entered into by CMOs and option 3 publishers, which will rely on the JV's copyright administration services but which will not be joining the Zeta Core Licence.

6.3.1. Notifying Parties' arguments

- (305) The Notifying Parties submit that there is no realistic prospect that the flow of commercially sensitive information or the transparency of the market will be increased as a result of the proposed transaction.
- (306) In their submission dated 11 December 2014, the Notifying Parties submit that the JV will implement a set of business separation measures in order to prevent a possible exchange of commercially sensitive information.
- (307) As regards the JV front-office activities, the Notifying Parties submit that members of the licensing teams responsible for the negotiations of the Zeta Core Licence and members of the licensing teams responsible for other types of licences administered by the JV (for example, option 3 mandates) will be physically separated and have separate team leaders. The licensing team members will be prohibited from discussing any issues related to a licensing matter with any non-team members other than the relevant customer and from disclosing any such commercially sensitive information to non-team members. The members of the different licensing teams will have separate and restricted IT-systems or access to hardcopy documents. They will be provided with scan based printing technology facilities and they will receive specific competition compliance training prior to any new role commencing. A strict 'clean desk' policy will be adhered to, calendar invitations and details of appointments will not reference any commercially sensitive information, meetings with customers will be held in secure meeting rooms that will be cleared after the meetings. All JV personnel will be informed about the business separation policy and the need to comply with it at all times.
- (308) As regards the JV back-office activities, the Notifying Parties submit that the business separation measures will apply to personnel in the back office involved in the online processing of licensing deals ('processing personnel'), who, as a necessary function of their role, will come into contact with commercially sensitive information generated by the licensing teams.' The processing personnel will be subject to the same business separation measures as those that will be applicable to the front-office personnel. In addition, the processing personnel will discuss commercial terms only with the respective licensing team that has provided the terms to the back office personnel, to the extent this is necessary in order to ensure that processing is undertaken properly. Under no circumstances will a member of the processing personnel discuss commercial terms received from one licensing team with another licensing team.
- (309) As regards the JV's middle-office activities, the Notifying Parties submit that the business separation measures will apply to those personnel who will be in contact with commercially sensitive information coming from the licensing teams or the back-office ('invoicing personnel'). The invoicing personnel will be subject to the same business separation measures as those that will be applicable to the front-office and back-office personnel. In addition, the invoicing personnel will discuss commercial terms only with the respective licensing team and/or processing personnel to the extent this is necessary in order to ensure the invoicing is undertaken properly. Under no circumstances will a member of the invoicing personnel discuss commercial terms received from one team with another team.
- (310) Furthermore, the middle-office activities of the JV will also comprise a business intelligence function, which will analyse market data received by the JV – from the

public domain, purchased by the JV or data received by the JV's customers in accordance with the permission given by the JV's customers. Such business intelligence team will not have access to commercially sensitive data achieved by the licensing teams of the JV but rather to usage data and copyright data of the back-office. In any case, such data will be disclosed only to the respective JV licensing team in accordance with competition law.

- (311) Last but not least, the JV's managing directors, the members of the JV Licensing Committee and the Board of Directors of the JV will not be entrusted with, or be involved in, the handling, management or supervision of licensing matters within the corporate groups of the Notifying Parties and/or of JV customers or their competitors, for the term of their appointment and after that, until the last licensing contract concluded during the time of their committee/board membership has expired. Board and committee members will not disclose any commercially sensitive information relating to licensing matters of the JV or the JV's customers to anyone other than the relevant JV-licensing team/back-office team dealing with this matter. This will include the prohibition of disclosure of commercially sensitive information to the Board and Licensing Teams/Committees of the Notifying Parties and/or other JV-customers. Management reports to shareholders and customers will only include commercially sensitive information relating to licenses covering the relevant repertoire. Apart from that, any report will only contain aggregated data which will not allow conclusions to be drawn as to the terms and conditions of licensing deals not including the relevant shareholder's/customer's repertoire.

6.3.2. *Commission's assessment*

- (312) During the market investigation respondents and in particular DSPs raised the concern that there could be a risk of an undue exchange of commercially sensitive information as a result of the creation of the JV.¹⁹⁷
- (313) DSPs explained that exchanges of commercially sensitive information within the JV could lead to a significant increase in the rates that the JV, and potentially other players, could apply to DSPs. As regards the type of information that could be exchanged, DSPs generally explained that this can be any licensing term, such as rates, advances, minimum guarantees and specific conditions on promotional offers. The majority of the DSPs also explained that firewalls may not be sufficient to dispel the risk of information exchange, although the specific measures that the Notifying Parties propose to put in place were not tested as part of the market investigation.
- (314) However, the majority of publishers and CMOs that responded to the market investigation did not share the concerns of the DSPs, namely that the creation of the JV may lead to the exchange of commercially sensitive information.¹⁹⁸
- (315) The Commission notes that the creation of hubs offering multi-territorial copyright administration services of musical works to third parties, such as the type of hubs promoted by the CRM Directive, entails the aggregation, within that hub, of commercially sensitive information of those third parties that have decided to rely on the hub's copyright administration services. The question that needs to be answered

¹⁹⁷ Replies to Commission questionnaire Q 1 - to customers (to DSPs) of 1 December 2014, question 52

¹⁹⁸ Replies to Commission questionnaire Q 2 – to CMOs of 1 December 2014, question 58.1; Replies to Commission questionnaire Q 3 – to suppliers of 1 December 2014, question 61.1.

therefore is whether the aggregation of certain commercially sensitive information within this particular JV is likely to give rise to competition concerns.

- (316) The Commission considers that the business separation measures described in recitals (306) to (311) that will be applicable to the JV and the Notifying Parties for the entire term of the JV, and that are aimed at effectively preventing the undue exchange of commercially sensitive information, constitute an effective safeguard that the proposed transaction will not lead to exchange of commercially sensitive information.
- (317) In addition, the proposed transaction will not significantly change the current situation, in particular as regards the aggregation of commercially sensitive information of option 3 publishers licensing deals in the hands of the Notifying Parties who, already today, provide independently and/or in cooperation with each other copyright administration services to option 3 publishers.

6.3.3. *Conclusion regarding exchange of commercially sensitive information*

- (318) In light of all the above elements, the Commission concludes that the creation of the JV would not significantly impede effective competition in the internal market or a substantial part of it as a result of the possible exchange of commercially sensitive information.

7. COMMITMENTS

7.1. Analytical framework

- (319) When a concentration raises competition concerns because it would significantly impede effective competition, the parties may seek to modify the concentration in order to resolve those competition concerns and thereby obtain clearance of the transaction.
- (320) The commitments must eliminate the competition concerns entirely and must be comprehensive and effective in all respects.¹⁹⁹ The commitments should also be proportionate to the competition concerns identified.²⁰⁰ Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.²⁰¹
- (321) Under the Merger Regulation, the Commission must show that a concentration would significantly impede effective competition in the internal market or in a substantial part of it. By contrast, it is for the parties to the concentration to propose appropriate commitments. The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent a significant impediment to effective competition in all relevant markets in which competition concerns were identified.

¹⁹⁹ Recital 30 of the Merger Regulation. See also paragraph 9 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation No 802/2004 (OJ C 267, 22.10.2008, p.1) (the 'Remedies Notice').

²⁰⁰ Recital 30 of the Merger Regulation.

²⁰¹ Remedies Notice, paragraph 9.

- (322) Pursuant to Article 10(2) of the Merger Regulation, the Commission has to take a clearance decision as soon as the serious doubts referred to in the decision initiating proceedings are removed as a result of the commitments submitted by the parties. This rule applies to commitments proposed in second phase proceedings before the Commission has issued a statement of objections.²⁰²

7.2. Procedure

- (323) In order to address the competition concerns identified by the Commission, the Notifying Parties submitted a first set of commitments (the ‘First Commitments’) on 13 March 2015. The Commission initiated a market test of the First Commitments on the same day, seeking responses from CMOs, publishers, IT services providers and DSPs.
- (324) The Commission communicated the results of the market test and the Commission’s assessment of the First Commitments of 13 March 2015 to the Notifying Parties on 25 March 2015.
- (325) In light of those comments, the Notifying Parties submitted a revised set of commitments (the ‘Second Commitments’) on 1 April 2015.
- (326) Following additional comments by the Commission regarding the independence of the monitoring trustee to be appointed to monitor the implementation of the commitments, the Notifying Parties submitted a third set of commitments (the ‘Third Commitments’) on 10 April 2015. Given that the Second Commitments and the Third Commitments do not differ in relation to the substance of the commitments made by the Notifying Parties, they will be described and assessed together in section 7.4 and referred to collectively as the ‘Final Commitments’.

7.3. The First Commitments

- (327) As outlined in section 6.1.3 of this Decision, the Commission is concerned that the proposed transaction raises barriers to entry and expansion on the market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences which would make successful market entry and expansion difficult. Those barriers relate, first, to the ability and incentives of PRSfM to leverage its control over the PRSfM matching performing rights to tie option 3 publishers to the JV by making the licensing of the PRSfM matching performing rights dependent on the publisher sourcing copyright administration services from the JV. Second, the JV could have the ability and incentives to provide access to its database under onerous terms and conditions. In particular, the JV could decide to bundle the whole range of copyright administration services it provides rather than allowing customers to choose the services they require. The JV could also make access to and exit from its copyright database difficult. Third, the JV would only accept sole or exclusive mandates from its customers.

7.3.1. Description of the commitments

- (328) According to the Notifying Parties, the overall aim of the First Commitments was to keep the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences contestable and to maintain conditions of competition that allow current and future

²⁰² Remedies Notice, paragraph 18.

providers of copyright administration services to compete with the JV. To that effect, the First Commitments contained three key elements.

7.3.1.1. The first key element of the First Commitments

- (329) The first key element of the First Commitments relates to the concern that PRSfM could leverage its control over the PRSfM matching performing rights to tie option 3 publishers to the JV by making the licensing of the PRSfM matching performing rights dependent on such publisher sourcing copyright administration services from the JV.²⁰³ PRSfM essentially committed not to use the granting of a mandate for the inclusion of the PRSfM matching performing rights in a licence concluded by a CMO servicing an option 3 publisher with a DSP to force that option 3 publisher or the CMO to source copyright administration services from the JV. To that effect, the First Commitments provided that “[t]he PRS board shall retain the absolute discretion to determine PRS’ general policy concerning PRS rights”. In light of this, PRSfM committed not to make the grant of a mandate to license the PRSfM matching performing rights to a CMO or subsidiary thereof that has been mandated by an option 3 publisher to provide copyright administration services in relation to that option 3 publisher’s Anglo-American mechanical rights conditional upon the CMO, its subsidiary or the option 3 publisher joining the JV’s licensing hub or using any other services of the JV. This commitment was applicable *‘insofar as [PRS’ general policy] provides for the grant of PRS rights to licensing entities’*. If PRS’ general policy were not to grant PRS rights to licensing entities, there would be no opportunity for PRS to make its mandates conditional, since it would not grant mandates to begin with.
- (330) The beneficiaries of the commitment relating to the PRSfM matching performing rights were CMOs or entities controlled by a CMO and mandated by an option-3 publisher to provide copyright administration services for the multi-territorial exploitation of online rights within the EEA.

7.3.1.2. The second key element of the First Commitments

- (331) The second key element of the First Commitments related to the provision of copyright administration services to CMOs other than the Notifying Parties and the JV itself. The aim of this part of the commitments is to address the Commission's concern that the JV could have the ability and incentives to bundle the whole range of copyright administration services it provides rather than allowing customers to choose the services they require or to make access to and exit from its copyright database difficult by ensuring that CMOs relying on the JV for copyright administration services would be able to obtain a mix of services from the JV and other providers of copyright administration services. To this end, the Notifying Parties gave a commitment that the JV would provide CMOs with a choice between so-called ‘Copyright Services’ (i.e. all services related to the JV’s copyright database) as a stand-alone service offer and an integrated set of so-called ‘Back-Office Services’ (i.e. Copyright Services and licence processing services). The Notifying Parties also gave a commitment that the JV will not bundle Copyright Services or Back-Office Services with other services (licence processing, front- or middle-office) from the JV.
- (332) The Notifying Parties also gave a commitment that the JV would provide Copyright Services and Back-Office services on terms that are fair, reasonable and non-

²⁰³ See recital (207). Defined in all three sets of Commitments as ‘PRS Rights’.

discriminatory as compared to the terms offered to the JV's licensing arm and the Notifying Parties. This general obligation was then followed by several specific commitments.

- (333) CMOs that rely on the JV for Back-Office Services will need to contribute ('onboard') their data to the JV's copyright database. Until the data relating to the CMOs repertoire is part of the JV's copyright database, the JV cannot provide Back-Office Services to the CMO. The Notifying Parties gave a commitment that the JV will onboard data from CMOs as soon as reasonably practicable based on objective criteria. Moreover, the JV will use a standard customer contract and a standard 'price book' which will set out objective criteria for the pricing of the various services offered by the JV. The customer contract and the price book will be presented to the monitoring trustee for review. If the Notifying Parties or the JV's licensing arm obtain Back-Office Services on more favourable terms than other CMOs, those differences must be based on objective reasons which must be documented and are subject to review by the monitoring trustee. In addition, the Notifying Parties gave a commitment that the JV would provide a monitoring trustee with an annual analysis of all terms offered to CMOs. To ensure that the monitoring trustee can conduct a meaningful review, the Notifying Parties committed that the JV would provide the monitoring trustee with a detailed statement of the JV's costs. If a CMO is of the view that the JV is not complying with the First Commitments in that regard, it can report its concerns to the monitoring trustee or initiate fast-track arbitration under a procedure laid down in the commitments.
- (334) Moreover, in order to ensure interoperability of its copyright database with third party processing solutions, the Notifying Parties gave a commitment that the JV will accept and support industry established standard identifiers and data formats, and that it will use standard application program interfaces ('API') to allow access to its copyright database. Upon reasonable request and following conclusion of a customer contract this interoperability information will be made available to the CMO concerned. The Notifying Parties also gave a commitment that the JV will not degrade the interoperability with and/or the performance of third party processing solutions.
- (335) The First Commitments also included a commitment aimed at allowing CMOs (but not option 3 publishers and other third parties) that rely on the JV's copyright database to exit the database and switch to another service provider. Specifically, the Notifying Parties gave a commitment that the JV will allow CMOs to terminate their customer agreement with the JV at any point in time, subject to a nine-month notice period. On termination, the CMOs concerned will be provided, upon request and on payment of a fee covering the associated costs, with an extract of the data pertaining to the works administered by those CMOs in a standardised format allowing for the integration in another database solution.

7.3.1.3. The third key element of the First Commitments

- (336) The third key element of the First Commitments was a commitment by the Notifying Parties that the JV will not enter into exclusive or sole mandates with any customer of the JV's front-office. A sole mandate is a mandate that requires the customer of the JV to rely solely on the JV for multi-territorial online licensing, and not on any third party, but which still allows the customer to license its repertoire directly itself. An exclusive mandate is a mandate that not only prevents the customer from relying on a third party but which also prevents the customer from licensing its repertoire directly itself.

7.3.1.4. Duration

(337) The duration of the First Commitments was ten years.

7.3.2. Commission's assessment

(338) The Commission initiated a market test of the First Commitments and received responses from publishers, CMOs, DSPs and IT services providers.²⁰⁴

(339) The response from the market test on the overall effect of the commitments in relation to the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences was mixed.

7.3.2.1. First key element of the First Commitments

(340) As explained in further detail in recitals (341) and (342), most CMOs viewed the commitment relating to the PRSfM matching performing rights as adequate. DSPs considered this element of the commitments as inadequate. Responses from publishers were mixed. Several publishers, but also a number of CMOs, indicated that the formulation of the commitment should be improved in order to make it fully effective.²⁰⁵

(341) Several of those CMOs and publishers that expressed concerns commented that the reference to the PRS board's '*absolute discretion to determine PRS' general policy concerning PRS rights*' would allow PRSfM to circumvent the commitment. One publisher submitted that '*PRS's exclusive control over Anglo performance rights*' should be addressed '*by ensuring that the licensing of the PRS performing rights automatically follows the licensing of the matching mechanicals rights into the licensing arrangement selected by option 3 publishers without requiring PRS's prior approval*'.²⁰⁶

(342) In addition, most publishers and DSPs regarded the fact that the commitment relating to the PRSfM matching performing rights would only benefit CMOs and their subsidiaries, to be a shortcoming.²⁰⁷ For instance, although the negotiations about performing rights currently take place between CMOs and their subsidiaries, option-3 publishers may in the future be interested in engaging in direct negotiations with CMOs.²⁰⁸

(343) The Commission notes, at the outset, that its concerns in relation to the PRSfM matching performing rights, set out in recitals (207) to (214), do not warrant a commitment by PRSfM always to grant a mandate to option 3 publishers or their licensing vehicles to negotiate the terms of a licence with DSPs and a commitment always to approve these terms once they have been negotiated. This would amount to a licensing obligation at terms on which PRSfM would not have any influence, since PRSfM would be under a duty to approve whatever terms the option 3 publisher or

²⁰⁴ Only two IT services providers responded to the market test, and on most issues they did not provide an opinion. Replies to Commission questionnaire Q 11 - to service providers of 13 March 2015.

²⁰⁵ Replies to Commission questionnaire Q 9 - to CMOs of 13 March 2015, question 1; Replies to Commission questionnaire Q 10 - to publishers of 13 March 2015, question 1.

²⁰⁶ Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 1.

²⁰⁷ Replies to Commission questionnaire Q 10 - to publishers of 13 March 2015, question 3; Replies to Commission questionnaire Q 8 - to DSPs of 13 March 2015, question 3.

²⁰⁸ Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 3.

its licensing vehicle had negotiated. Such a licensing obligation would go beyond what is necessary to address the concern relating to the PRSfM matching performing rights arising out of the proposed transaction. In the Commission's view, the PRSfM matching performing rights are likely to continue to 'flow' outside of the Zeta Core Licence (see recital (209)). As a result, the commitments offered by the Notifying Parties only need to adequately address a concern relating to potentially anti-competitive behaviour by PRSfM or the JV in a scenario where the PRSfM matching performing rights are not included in the Zeta Core Licence.

- (344) The first key element of the First Commitments provides that, to the extent PRSfM's general policy allows for the grant of PRSfM matching performing rights to CMOs or their subsidiaries for inclusion in a licence agreement with a DSP covering option 3 publishers' mechanical rights, PRSfM will not make the grant of a mandate to a CMO or subsidiary thereof contingent upon that CMO or subsidiary joining the JV. The Commission considers that such a commitment is conceptually capable of addressing the competition concern identified. However, the Commission notes that the first key element of the First Commitments does not address those concerns entirely as it suffers a number of shortcomings.
- (345) Firstly, PRSfM only committed not to make the grant of a mandate contingent upon a CMO, its subsidiary or an option 3 publisher joining the JV's licensing hub or using any other services of the JV. However, as explained in recital (208), PRSfM not only grants a mandate to negotiate the terms for the PRSfM matching performing rights but, once the terms have been negotiated, also requires the CMO or its subsidiary to obtain PRSfM's approval to the specific licensing terms that were negotiated with a given DSP. In other words, PRSfM could use its control over its performing rights as leverage at two different stages: when PRSfM grants a mandate to CMOs or their subsidiaries to negotiate and when PRSfM approves the terms of a specific licensing deal. The First Commitments remove the Commission's concerns relating to the first stage (the granting of mandates) but not relating to the second stage (the approval of specific licensing deals).
- (346) Secondly, the first key element of the First Commitments did not foresee that PRSfM would be obliged to state the reasons of a possible refusal to grant a mandate to CMOs or their subsidiaries to negotiate the terms of the PRSfM matching performing rights. In the Commission's view, without reporting obligations, the monitoring trustee would not be in a position to assess whether this aspect of the first element of the commitments has been complied with.
- (347) Thirdly, the commitment not to make the grant of a mandate contingent upon the CMO, its subsidiary or the option 3 publisher joining the JV's licensing hub or using any other services of the JV only applied in relation to mandates granted to CMOs or their subsidiaries. In other words, when a CMO negotiates with the JV on behalf of an option 3 publisher to obtain a mandate to license the PRSfM matching performing rights, the commitment would prevent PRSfM from making the mandate conditional upon the CMO or the option 3 publisher joining the JV. However, when an option 3 publisher seeks to obtain a mandate directly itself (not via a CMO) and negotiates directly with PRSfM, PRSfM would not be prevented from making a mandate conditional upon the option 3 publisher joining the JV. As set out in recital (341), respondents to the market test considered that this element of the First Commitments should also apply in relation to non-CMOs, including option 3 publishers. The Commission considers that the commitments should indeed ensure that option 3 publishers remain contestable customers (to allow for competition and market entry to take place) or have the possibility to operate independently on the market. The first element of the First Commitments does not effectively address that point.

(348) Therefore, the Commission considers that the first key element of the First Commitments is not adequate to address the competition concerns identified.

7.3.2.2. The second key element of the First Commitments

(349) Most CMOs and publishers believed the commitment aimed at allowing CMOs to obtain a mix of services from the JV and other service providers was adequate.²⁰⁹

(350) As regards the terms at which those services are offered to CMOs, the majority of CMOs and publishers considered that the First Commitments were, in principle, adequate to ensure that CMOs would be able to obtain services on terms that are fair, reasonable and non-discriminatory as compared to the terms offered to the JV's licensing arm and to the Notifying Parties.²¹⁰

(351) However, some respondents to the market investigation expressed concerns as regards the time frame within which the JV commits to onboard the respective CMOs' data, that is 'as soon as reasonably practicable based on objective criteria'.²¹¹ Respondents expressed doubts as to whether it can be ensured on the basis of the First Commitments that 'reasonably practicable' onboarding times are kept within reasonable parameters. Moreover, respondents raised the concern that the First Commitments do not include an obligation on the JV to grant access to the standard customer contract and the pricing terms to potential customers.²¹²

(352) In relation to the time required for onboarding the CMOs' data, the Commission considers that the formulation of the First Commitments is rather ambiguous and does not provide sufficient clarity as regards the interpretation of the term 'as soon as reasonably practicable'. As regards the access for potential customers to the standard customer contract and the pricing terms, the Commission considers that, if no such access is granted to potential customers, they are not in a position to assess whether the terms of access are indeed fair, reasonable and non-discriminatory in comparison to the terms offered to the JV's licensing arm and to the Notifying Parties.

(353) The majority of publishers and CMOs considered that the commitment to ensure interoperability between the JV's Copyright Services and third party processing solutions was adequate to ensure that no interoperability issues would arise and stressed the importance of being aware of the standards that the JV intends to rely upon.²¹³ However, access to information about the JV's APIs and communication protocols will only be made available to customers following conclusion of a contract.

(354) The Commission considers that this information is a decisive element for any potential customer and constitutes a basis for the decision on whether or not to enter into a contractual relationship with the JV. It would thus be important for the JV's

²⁰⁹ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 4; Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 4.

²¹⁰ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 5; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 5.

²¹¹ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, questions 5, 6; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, questions 5, 6.

²¹² Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, questions 5, 6; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, questions 5, 6.

²¹³ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 7; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 7.

customers to have this information readily available prior to the conclusion of a contract.

- (355) Most CMOs considered the provisions allowing CMOs to exit the JV's copyright database as adequate to ensure that CMOs would be able to terminate their service agreement flexibly.²¹⁴ Most CMOs also considered the nine month notice period as reasonable, referring, in particular, to the time period required to prepare a change of service provider.²¹⁵ By contrast, most publishers considered the nine month notice period to be too long and suggested that a six month notice period would be more reasonable.²¹⁶ Moreover, one respondent submitted that customers exiting the JV's database would require certain information allowing them to test interoperability of the data with which it would ultimately be provided upon termination of its agreement with the JV and to prepare transition towards another provider of copyright administration services.²¹⁷
- (356) The Commission is of the view that seamless switching of service providers requires at least the possibility to switch within a timeframe of no more than six months. The Commission takes the view that a notice period exceeding six months would make it excessively difficult for CMOs to switch service providers and considers this as a shortcoming of the commitments. This does not mean, however, that a CMO requiring more time to prepare the transfer of its data to another copyright database is prevented from taking this time. Moreover, a seamless transition to another service provider appears to be difficult if a customer were indeed provided with its data only upon termination of its contract with the JV and without prior possibility to prepare the transition towards another provider of copyright administration services. Such an obstacle could prevent CMOs from terminating their relationship with the JV in the first place.
- (357) In relation to the data that the Notifying Parties committed would be made available by the JV upon termination of a contract between a CMO and the JV, the majority of publishers and CMOs considered that such a commitment was adequate to ensure that CMOs who exit from the JV would be able to operate after termination.²¹⁸ However, a number of respondents submitted that, in addition to the data pertaining to the works administered by the customer concerned, other customer-specific data, such as for instance usage data or management reporting information should also be made available to the exiting customer. The Commission considers that customers exiting from the JV should be provided with all data required for them to be able to move to another provider of copyright administration services (or to start providing copyright administration services themselves). If that were not ensured, the First Commitments would not effectively ensure the creation of conditions of competition that would allow competing providers of copyright administration services to successfully establish themselves in the market.

²¹⁴ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 11.

²¹⁵ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 12.

²¹⁶ Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 12.

²¹⁷ Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 13.

²¹⁸ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 13; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 13.

- (358) Most publishers considered that the second key element of the First Commitments should also apply to services provided to publishers.²¹⁹ Most CMOs did not consider this necessary.²²⁰ The Commission acknowledges that, as at today, the only potential customers for copyright administration services provided by a hub such as the JV are CMOs. Option 3 publishers rely on CMOs or their subsidiaries for the administration of their licences. However, this situation might change and option 3 publishers might contemplate providing copyright administration services in-house or mandate a non-CMO with the provision of such services. Also, non-CMOs may consider entering the market for copyright administration services provided to CMOs. Such non-CMOs could potentially offer services similar to those of the JV. Option 3 publishers and other non-CMOs might, for those purposes, have to rely on the JV's back-office in the same way as the JV's future CMO customers would.
- (359) The Notifying Parties submitted that option 3 publishers would not need a level of access to a copyright database that extends beyond the access granted when an option 3 publisher mandates the JV for the administration of its repertoire. The administration of an option 3 publisher's repertoire differs from the administration of a CMO's repertoire. An option 3 publisher is aware of the scope of its repertoire and can identify it based on usage reports received from DSPs. CMOs, on the other hand, are not aware of the exact scope of their repertoires for a given licensing agreement with a DSP²²¹ and, in addition, the share picture of the rights in a given song vary from country to country. This requires CMOs to match their claims against a copyright database. Option 3 publishers are not required to take this step. This finding is supported by the majority of respondents to the market investigation.²²²
- (360) As regards other non-CMOs, the Commission notes that such players would provide copyright administration services either to CMOs or to option 3 publishers or to both. If a non-CMO copyright administration services provider was to service option 3 publishers, its customers would be able to provide it with the data required to administer their multi-territorial licences. No access to a copyright database would be required. Likewise, a non-CMO copyright administration services provider would not need direct access to a third party copyright database if it were to service CMOs. CMOs would either have their own authoritative copyright database to which they could grant their service provider access or, if a CMO decides to migrate their data into the JV's copyright database, the non-CMO service provider could rely on its CMO customer's access to that database as provided by the First Commitments. As the CMO also has the right to extract its data from the database, the commercial arrangement between that CMO and its non-CMO service provider could also foresee that the CMO's data is migrated to the non-CMO service provider.
- (361) In light of its findings in recitals (359) and (360) and based on the explanations provided by the Notifying Parties, the Commission considers that option 3 publishers do not need access to a copyright database. However, the second key element of the First Commitments is inadequate in that it does not provide option 3 publishers with

²¹⁹ Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 9.

²²⁰ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 9.

²²¹ The scope of the repertoire depends, among others, on the withdrawals by other CMOs from the system of RRAs, which may vary from license agreement to license agreement.

²²² Replies to Commission questionnaire Q 5 – to CMOs of 4 February 2015, questions 17, 20-22; Replies to the Commission questionnaire Q 6 – to publishers of 4 February 2015, question 17-18, 27.

the right to extract their data from the JV's copyright database. Contrary to the views expressed by respondents to the market investigation, the Commission does not consider it necessary to extend the scope of the second element of the First Commitments to non-CMO providers of copyright administration services and to a right to unbundled access to the JV's copyright database.

7.3.2.3. The third key element of the First Commitments

- (362) Most CMOs and publishers considered that the third key element of the First Commitments, which prohibits the JV from entering into sole or exclusive mandates, would make it easier for CMOs and option 3 publishers to switch to other providers of copyright administration services.²²³ The Commission considers that the ability of CMOs and option 3 publishers to switch providers of copyright administration services makes them contestable customers, that is to say customers other providers of copyright administration services can compete for, and will therefore create conditions of competition allowing third parties to enter this market and to develop solutions to attract those CMOs and option 3 publishers. This, in turn, will constrain the JV, notably as regards the terms and conditions at which it offers its copyright administration services. The Commission considers that the third element of the First Commitments removes the Commission's concerns stemming from the fact that the JV may enter into sole or exclusive mandates with CMOs and option 3 publishers.

7.3.2.4. Duration

- (363) The majority of respondents to the market test considered the ten-year duration of the First Commitments to be adequate.²²⁴
- (364) The Commission takes the view that, indeed, a term of ten years for the First Commitments is adequate. With the ongoing implementation of the CRM Directive copyright administration in the online licensing sphere in the EEA is currently undergoing significant changes. Moreover, as set out in section 6.1.3, the market entry of the JV will further contribute to considerably changing the competitive landscape on the market. In order to allow for competition to develop and remain viable in this nascent market and to ensure that potential market entrants can sustainably establish themselves in order to inject competition into the market, the commitments need to remain in force for a sufficiently long period of time.

7.3.3. Conclusion on the First Commitments

- (365) Although the First Commitments removed some of the Commission's competition concerns relating to the EEA-wide market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences, they had several shortcomings as set out in sections 7.3.2.1 and 7.3.2.2 above. Because of these shortcomings, the First Commitments did not entirely remove the competition concerns identified by the Commission.

²²³ Replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 16; Replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 16.

²²⁴ Replies to Commission questionnaire Q 8 – to DSPs of 13 March 2015, question 17; replies to Commission questionnaire Q 9 – to CMOs of 13 March 2015, question 17; replies to Commission questionnaire Q 10 – to publishers of 13 March 2015, question 17.

7.4. The Final Commitments

7.4.1. Description of the commitments

(366) In light of the comments provided by the Commission, the Notifying Parties revised the first and second key elements of the First Commitments while leaving the remainder of the text unchanged, and submitted the Second Commitments on 1 April 2015. On 10 April 2015, the Notifying Parties submitted revised Commitments – the Third Commitments – which were identical to the Second Commitments apart from one element relating to the independence of the monitoring trustee. This section of the Decision evaluates the Second and the Third Commitments together and refers to them as the Final Commitments.

7.4.1.1. The first element of the Final Commitments

(367) As mentioned in recital (329), the First Commitments only contained an obligation for PRSfM not to make the grant of a mandate to negotiate the terms for the PRSfM matching performing rights when negotiating a licence for an option 3 publisher's mechanical rights contingent upon the CMO, its subsidiary or the option 3 publisher joining the JV's licensing hub or using any other services of the JV. The Final Commitments broadened this scope of the commitment by extending the obligation to the grant of consent to include the PRSfM matching performing rights in a licence agreement. This means that PRSfM is prevented from using its control over the PRSfM matching performing rights not only in the first stage (the granting of a mandate to negotiate) but also in the second stage (approval of the specific terms of a licensing deal) of the process in which PRSfM allows the PRSfM matching performing rights to flow with option 3 publishers' mechanical rights. Moreover, in the event that PRSfM refuses either grant of a mandate or the grant of consent, it commits to document the reasons for the refusal and provide this documentation to the monitoring trustee for review.

(368) PRSfM also commits that, insofar as it extends its general policy to grant mandates for the negotiation of terms for the PRSfM matching performing rights also to option 3 publishers or other third parties, the commitment described in recital (367) shall equally apply. This means that, if PRSfM were to start granting mandates to option 3 publishers directly (as opposed to the current practice of granting mandates to CMOs acting on behalf of option 3 publishers), it would not be allowed to make the granting of a mandate or the approval (consent) to a specific licensing agreement contingent on the option 3 publisher joining the JV or using other services of the JV.

(369) Finally, while the First Commitments merely stated that PRSfM retains discretion to determine its policy in relation to the PRSfM matching performing rights, PRSfM in the Final Commitments commits to adhere to this policy as defined from time to time.

7.4.1.2. The second element of the Final Commitments

(370) The Notifying Parties revised the commitment relating to the provision of copyright administration services to CMOs other than the Notifying Parties and the JV itself in a number of respects.

(371) Firstly, in relation to the onboarding of the data of other third party CMOs the Notifying Parties clarify the criteria that are relevant to determine a reasonable timeframe for the onboarding. The Notifying Parties give a commitment that the JV will agree a detailed and reasonable timeline for the onboarding with each third party CMO.

- (372) Secondly, the Notifying Parties give a commitment that the JV will make its standard customer contract and a non-confidential version of the price book available to potential customers upon signing of a standard non-disclosure agreement.
- (373) Thirdly, the Notifying Parties submit that the JV will make information regarding APIs and communications protocols available to third party CMOs both following conclusion of a customer contract and also at the negotiating stage upon signing of a standard non-disclosure agreement.
- (374) Fourthly, the Notifying Parties shortened the notice period for termination of the contracts concluded between the JV and third party CMOs for the provision of copyright administration services from nine months to six months. Following receipt of the termination notice, the JV will provide third party CMOs with all information reasonably required in order to allow that customer to test interoperability with the destination copyright database and to prepare the transition to another provider of copyright administration services.
- (375) Fifthly, the Notifying Parties committed that the JV would not only provide the third party CMO, upon request and on payment of a fee to cover the associated costs, with an extract of the data pertaining to the works administered by it but also with any other customer specific data reasonably required by that CMO in order to conduct its business.
- (376) Sixthly, if an option 3 publisher terminates a mandate granted to a CMO that is at the same time also a customer of the JV, that CMO may request the JV to provide, on payment of a fee to cover the objectively justified costs, an extract of the data of that option 3 publisher to the CMO or to the option 3 publisher directly.
- (377) Finally, the Notifying Parties include a commitment similar to this second element for the benefit of option 3 publishers. The JV will make available to option 3 publishers a fully integrated set of front-, middle- and Back-Office Services and a stand-alone package of middle- and back-office services which will not be bundled with front-office services. If an option 3 publisher decides to withdraw its mandate from the JV or if a publisher decides to become an option 3 publisher by withdrawing its rights from the CMO system, the JV will provide that option 3 publisher with an extract of his data and with any other customer specific data reasonably required by that option 3 publisher in order to conduct its business.

7.4.1.3. Other elements of the Final Commitments

- (378) As set out in recital (366), given that the Commission considered the third element and the duration of the First Commitments to be adequate, the Notifying Parties did not propose any changes to those sections.
- (379) It should, however, be noted, that, in order to remove doubts as regards the independence of the monitoring trustee, the Notifying Parties committed to extending the period during which the monitoring trustee does not and will not have any direct or indirect employment, consultancy or other relationship with the Notifying Parties to the two years preceding the appointment and the three years following the completion of its mandate.

7.4.2. *Commission's assessment*

7.4.2.1. The first element of the Final Commitments

- (380) The first element of the Final Commitments applies not only when PRSfM grants mandates to CMOs and option 3 publishers to negotiate about the PRSfM performing rights but also when it approves the licensing terms that result from these negotiations. The Commission considers that this sufficiently removes PRSfM's

ability to leverage its control over the PRSfM performing rights throughout the process of negotiations of a licence for the repertoire of an option 3 publisher who has not decided to source copyright administration services from the JV. In addition, the commitment to report the reasons for any refusal to grant a mandate or to approve a specific licensing deal allows the trustee to assess whether the refusal was in line with PRSfM's general policy to grant mandates and to confirm that PRSfM did not attempt to force a CMO, its subsidiary or the option 3 publisher concerned to join the JV.

- (381) The first element of the Final Commitments will also apply when PRSfM negotiates mandates with option 3 publishers and other third parties, but only if it is PRSfM's general policy to grant mandates for the negotiation of terms for the PRSfM matching performing rights also to option 3 publishers or other third parties. The competition concerns identified, as explained in recital (343), do not warrant an extension of PRSfM's general policy in relation to the licensing of PRSfM matching performing rights to option 3 publishers and CMOs. If, however, PRSfM were to have a general policy to allow the PRSfM matching performing rights to flow with an option 3 publisher's mechanical rights under the same licence agreement negotiated outside of the JV, then it cannot make the grant of individual mandates and the consent to include those rights under the terms negotiated in a given licence contingent upon the option 3 publisher or third party joining the JV. The first element of the Final Commitments is thus adequate to address the competition concerns resulting from the merger.
- (382) In any event, the possible impact on competition of PRSfM's behaviour in relation to the PRSfM matching performing rights, given its arguably strong position on the market in relation to those rights and the importance of these rights as an input to compete, including with the JV, for mandates from option 3 publishers, is at all times, subject to assessment under the applicable competition law rules, including, in particular, Article 102 TFEU and the corresponding provisions at the national level. In more detail, if PRSfM's refusal to license the PRSfM matching performing rights, whether to a CMO or to a non-CMO, were to be aimed at, or have as its likely effect, the exclusion of this third party from the market or, in any event, to negatively impact competition therein, this conduct would need to be closely scrutinised under Article 102 TFEU and/or the corresponding national rules.
- (383) The Commission concludes, therefore, that the first element of the Final Commitments, together with the other elements of the Final Commitments, ensures that option 3 publishers remain contestable customers, thereby providing sufficient competitive constraints on the JV in relation to the copyright administration services provided to option 3 publishers.

7.4.2.2. The second key element of the Final Commitments

- (384) The Final Commitments address the competition concerns that remained because of the shortcomings in the second key element of the First Commitments, and which were set out in section 7.3.2.2.
- (385) The Commission therefore considers that the second key element of the Final Commitments allow CMOs to source copyright administration services at fair, reasonable and non-discriminatory terms from the JV. The unbundled access, as well as the possibility to seamlessly switch to another provider of copyright administration services, keeps CMOs contestable customers for other copyright administration services hubs. This, in turn, provides sufficient competitive constraints for the JV in the way it behaves on that market. Moreover, the possibility for option 3 publishers to source a mix of copyright administration services from

different providers and the possibility to extract their data from the JV's copyright database also facilitates the switching of providers for option 3 publishers as well as becoming a contestable customer on the market in the first place.

7.4.3. Conclusion on the Final Commitments

- (386) The Commission considers that the Final Commitments ensure that conditions of competition post transaction are such that other players can enter the market and start supplying copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences. The Final Commitments ensure, on the one hand, that option 3 publishers remain contestable customers for the full range of back-, middle-, and front-office services for which competitors of the JV can compete. On the other hand, the Final Commitments maintain the possibility for copyright administration services hubs that have the possibility to effectively compete against the JV to develop in the EEA within the framework foreseen by the CRM Directive.

7.5. Conclusion

- (387) In light of its assessment in sections 7.3 and 7.4 the Commission takes the view that the Final Commitments remove the competition concerns identified on the market for the provision of copyright administration services to CMOs and option 3 publishers in relation to transactional multi-territorial licences.

8. CONDITIONS AND OBLIGATIONS

- (388) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (389) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (390) In accordance with the basic distinction described in Recital (389) as regards conditions and obligations, the commitments submitted by the Notifying Parties on 10 April 2015 should be considered as obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as Annex 1 to this Decision and forms an integral part thereof,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby PRS for Music Limited, Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) u.p.a. and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte acquire joint control of a newly created joint venture within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

Article 2

Article 1 is subject to compliance by PRS for Music Limited, Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) u.p.a. and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte with the obligations set out in Annex 1.

Article 3

This Decision is addressed to:

PRS for Music Limited
2 Pancras Square
London
N1C 4AG
United Kingdom

Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) u.p.a.
Hornsgatan 103
P.O. Box 17092
10462 Stockholm
Sweden

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
(GEMA)
Bayreuther Straße 37
10787 Berlin
Germany
Done at Brussels, 16.6.2015

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

Brussels, 10 April 2015

Annex I

M.6800 – PRSfM / GEMA / STIM – JV COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), PRS for Music Limited (hereinafter referred to as “**PRSfM**”), Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) u.p.a. (hereinafter referred to as “**STIM**”), and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (hereinafter referred to as “**GEMA**”) (the “**Notifying Parties**”) hereby enter into the following Commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering the creation of the full-function joint venture between PRSfM, STIM and GEMA (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Active Works means works due to be distributed or licensed.

Activity Triggers means the customer’s way of notifying ICE when works data is due to be used in distributions and/or for licensing/invoicing purposes.

Affiliated Undertakings means undertakings controlled by the Notifying Parties and/or by the ultimate parents of the Notifying Parties, including the DELTA Company and the ZETA Company, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the “**Consolidated Jurisdictional Notice**”).

API means Application Program Interface.

API Calls means the supply of copyright data to and from a customer via a set of APIs.

Appointment means the appointment of a Third Party Customer or any of the Notifying Parties by an Option-3-Publisher for the purpose of granting licences of the latter's rights for multi-territorial online/mobile exploitation in the EEA.

Back-Office Services means an integrated service solution consisting of Copyright Services and Processing Services provided by DELTA Company, either directly or through a subsidiary.

CIS Imports and Extracts means functions to support CMOs in complying with international standards and binding resolutions by, on a regular basis, exchanging data with the international CIS data tools.

CMO means a Collective Management Organisation as defined in Art. 3 lit. a) of the CRM Directive.

CRM Directive means the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ([2014] OJ L 84, pp. 72 et seq.).

Confidential Information means any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest means any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

Copyright Services means the provision of IT software solutions for the purpose of identification, documentation and maintenance of ownership of musical works solely to support copyright licensing by the customer, IT services (centralised and local managed IT platforms, the creation of additional test environments and the management of change requests) and copyright management services (managing publishing agreements (local and pan-European), work notifications, Active Works (local and pan-European), Work Updates, ICE Online Access, Activity Triggers, API Calls, CIS and Customised Imports and Extracts, and producing reports on demand).

Customised Imports and Extracts means customised services related to exchange of copyright data.

Data Protection Rules means the UK Data Protection Act 1998, **the Swedish Personal Data Act (1998:204)**, **the German Data Protection Act**, the Data Protection Directive (95/46/EC), the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI 2000/2699), the Electronic Communications Data Protection Directive (2002/58/EC), the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) and all other applicable laws and regulations relating to the processing of personal data and privacy, including where

applicable the guidance and codes of practice issued by any competent supervisory authority, and the equivalent of any of the foregoing in any relevant jurisdiction.

DELTA Company means ICE or any other company which will provide Back-Office Services and/or Copyright Services within the JV and will be owned and jointly controlled by the Notifying Parties or their Affiliated Undertakings.

DELTA Company Copyright Database means the database containing data relating to specific musical works, - including data provided to ICE/DELTA Company from time to time by its customers - as may be run from time to time on ICE/DELTA Company's information technology software and system(s), to which a Third Party Customer is granted access to benefit from the Copyright Services or Back Office Services of the JV.

Effective Date means the date of adoption of the Decision.

Exclusive Mandate means a Mandate which contractually obliges the Option 3 Publisher or CMO granting the Mandate to refrain from (i) granting mandates to other entities for the purpose of the multi-territorial licensing of the relevant Option 3 Publisher's/CMO's copyrights for online/mobile exploitation, and (ii) directly licensing the copyrights controlled by the relevant Option 3 Publisher/CMO for online/mobile exploitation on a multi-territory basis.

Front Office Services means (i) conducting and/or supporting licensing negotiations on behalf of ZETA-Customers for the purposes of licensing copyrights in musical works for online and mobile exploitation either individually on behalf of each ZETA-Customer or as part of the ZETA Core Licence; (ii) customer account and relationship management concerning licensees of the JV, ZETA-Customers and the Notifying Parties; (iii) monitoring of authorized online usage, detection of unauthorized usage and judicial enforcement of the copyrights owned or controlled by the Notifying Parties and ZETA-Customers.

ICE means International Copyright Enterprise Services AB, including its subsidiaries and its legal successor(s).

ICE Online Access means an online read-only access to the ICE copyright application for customer users.

JV means the notified full-function joint venture consisting of a joint licensing hub and a shared back-office, i.e. (i) the newly established ZETA Company (and/or its legal successors or any other company jointly owned or controlled by the Notifying Parties which in full or in part replaces the ZETA Company) and (ii) DELTA Company (and/or its legal successors or any other company jointly owned or controlled by the Parties which in full or in part replaces the DELTA Company).

Licensing Entity means a CMO or an entity directly or indirectly controlled by a CMO, which has been mandated by an Option-3-Publisher to provide licensing related services for online/mobile exploitation.

Mandate means the appointment of the JV by an Option-3-Publisher or a CMO for the purpose of granting licences of their rights for multi-territorial online/mobile exploitation within the EEA.

Middle Office Services means the invoicing of licensees, dispute analysis and resolution, collection of royalties on behalf of, and/or the preparation of business intelligence reports and market data analyses at the request of, the ZETA Company, the Notifying Parties and/or ZETA-Customers.

Monitoring Trustee means one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Parties, and who has/have the duty to monitor the Notifying Parties and the JV's compliance with the conditions and obligations attached to the Decision.

Option-3-Publisher means a publisher of musical works which, at the Effective Date, has withdrawn or otherwise reorganised, or, following the Effective Date decides to withdraw or otherwise reorganize, its Anglo-American mechanical rights in the EEA for the purposes of licensing online/mobile exploitation on a multi-territorial basis.

Parties means the Notifying Parties and ICE.

PRS means Performing Right Society Limited including its subsidiaries and its legal successor(s).

PRS Mandate means the mandate granted by PRS to a Licensing Entity which sets out the basis for allowing the Licensing Entity to license PRS Rights.

PRS Policy means PRS's general policy concerning the PRS Rights including the grant of PRS Mandates and the inclusion of the PRS Rights in licence agreements.

PRS Rights means, for the purposes of licensing online/mobile exploitation on a multi-territory basis in the EEA, the communication to the public right, including the making available right, in the works, or shares of works, written and composed by members of PRS which are published by an Option-3-Publisher.

Processing Services means the management of online usage processing (collection and processing of usage reports from online licensees to produce output files to enable invoicing), online licensee portfolios (processes to assist the management of a customer's repertoire and licences portfolio), and new and existing licensee accounts/licences in DELTA Company systems (e.g. testing of initial usage reporting).

Sole Mandate means a Mandate which contractually obliges the Option 3 Publisher or CMO granting a Mandate to the JV to refrain from (i) granting mandates to other entities for the purpose of the multi-territorial licensing of the relevant Option 3 Publisher's/CMO's copyrights for online/mobile exploitation, without excluding the right of the relevant Option 3

Publisher/CMO to directly license the copyrights controlled by this Option 3 Publisher/CMO for online/mobile exploitation on a multi-territory basis.

Third Party Customer means any CMO other than the Notifying Parties, and/or any entity directly or indirectly controlled by a CMO (including any Licensing Entity) other than the newly established ZETA Company (or its legal successors), which is, or intends to become, a direct customer of DELTA company.

Work Updates means ICE/DELTA Company's process for handling member and customer work query or update.

ZETA Company means a newly established company currently owned by PRSfM which will be activated upon closing of the Transaction and will form the future Front- and Middle Office of the JV.

ZETA Core Licence means the standard multi-repertoire, multi-territory licence for online exploitation negotiated and granted by ZETA Company which will comprise at least the repertoires of STIM, GEMA and PRS (the latter only to the extent PRS Rights are not licensed elsewhere in line with the PRS Policy and the Commitment in Section B. below).

ZETA-Customer means CMOs, Option-3-Publishers, Licensing Entities other than the Notifying Parties and any other entity which is, or intends to become during the period for which the Commitments are applicable, a direct customer of ZETA Company.

Section B. Commitments related to PRS-Rights

1. While the PRS board shall retain the absolute discretion to determine the PRS Policy from time to time, PRS commits
 - a) to adhere to the PRS Policy in relation to the granting of PRS Mandates and the inclusion of the PRS Rights in a licence agreement;
 - b) not to make the grant of a PRS Mandate contingent upon any or all of (i) the Licensing Entity (ii) the CMOs that directly or indirectly control the Licensing Entity and/or (iii) the Option 3 Publisher:
 - joining the ZETA Core Licence and/or
 - using any other services of the JV.

In the event PRS refuses the grant of a PRS Mandate, PRS shall clearly document the reasons for such refusal and shall provide the relevant documentation to the Monitoring Trustee for review so as to allow the Monitoring Trustee to assess whether the refusal is consistent with the PRS Policy and that commitment B.1.a) and b) is complied with.

- c) where a PRS Mandate has been granted, not to make the grant of consent to include the relevant PRS Rights in a licence agreement contingent upon any or all of (i) the Licensing Entity (ii) the CMOs that directly or indirectly control the Licensing Entity and/or (iii) the Option 3 Publisher:

- joining the ZETA Core Licence and/or
- using any other services of the JV.

In the event PRS refuses the consent to include the relevant PRS Rights in a licence agreement, PRS shall clearly document the reasons for such refusal and shall provide the relevant documentation to the Monitoring Trustee for review so as to allow the Monitoring Trustee to assess whether the refusal is consistent with the PRS Policy and that commitment B.1.a) and c) is complied with.

2. In the event and to the extent the PRS Policy provides for the grant of PRS Mandates to Option 3 Publishers or to entities other than Licensing Entities, the commitments above shall apply *mutatis mutandis*.

Section C. Commitments related to the provision of services to other CMOs

1. The Parties commit that DELTA Company will provide Copyright Services and/or Back-Office Services to Third Party Customers on terms which are fair, reasonable and non-discriminatory in comparison to the terms offered to ZETA Company and the Notifying Parties in line with the following provisions. For the avoidance of doubt these commitments are without prejudice to existing agreements between DELTA Company and its existing Third Party Customers.

Provision of Copyright Services and Back-Office Services to Third Party Customers

2. The Parties commit that DELTA Company will provide Third Party Customers with a choice between Copyright Services as a standalone service offer and an integrated set of Back-Office Services.
3. The Parties commit not to require Third Party Customers requesting standalone Copyright Services to use Processing Services and/or to source Front- and/or Middle-Office Services from the JV. The Parties further commit not to require Third Party Customers requesting a full set of Back-Office Services to source Front- and/or Middle-Office Services from the JV.
4. The time required for onboarding Third Party Customer data will vary depending on the particular services requested, available DELTA Company-capacity and the volume and quality of the customer data to be onboarded. The Parties commit that DELTA Company will onboard additional Third Party Customer data as soon as reasonably practicable based on objective criteria, including the timing of the request, the complexity of the onboarding process and regardless of whether the Third Party Customer also sources other services from the JV.

DELTA Company will agree with each Third Party Customer a detailed and reasonable timeline for the onboarding of its customer data setting out the actions required by DELTA Company and the Third Party Customer for this purpose.

5. All services will be offered on the basis of a standard customer contract and a standard “price book” which will set out objective criteria (including, but not limited to, cost orientation, different service levels, data and business volumes) for the pricing of the various services and service levels offered by DELTA Company (as amended from time to time). The standard customer contract and the price book, as well as any amendments thereto, will be presented to the Monitoring Trustee for review. The standard customer contract and the non-confidential version of the price book will be made available to potential Third Party Customers at the negotiation stage, provided that the customer agrees to comply with a standard non-disclosure agreement.
6. Differences in the conditions, including pricing and terms, upon which Copyright Services or Back-Office Services are made available to the Notifying Parties and/or ZETA Company on the one hand and to Third Party Customers on the other hand shall be based upon objective reasons which shall be clearly documented and subject to review by the Monitoring Trustee.
7. The Parties commit to provide the Monitoring Trustee with all agreements concluded with Third Party Customers and an annual analysis of all terms offered to such Third Party Customers, together with an appropriate comparison of those terms with the terms of the agreements applicable to the Notifying Parties and ZETA Company, detailing the relevant factors to be taken into account in considering the comparison in each case.
8. If the Monitoring Trustee considers that any difference in conditions, upon which Copyright Services or Back-Office Services are made available to the Notifying Parties and/or ZETA Company on the one hand, and to Third Party Customers on the other hand, is not objectively justified, it shall promptly inform the Parties and the relevant Third Party Customer.
9. DELTA Company will include the Dispute Resolution/Arbitration Clause as contained in Schedule 1 to these Commitments in each of its contracts with Third Party Customers.

Costs and Accounting

10. The Parties commit that DELTA Company will record its relevant costs in respect of providing Copyright Services and, where relevant, Processing Services for each customer (i.e. the Notifying Parties, ZETA Company and Third Party Customers), including both direct costs of providing these services to each customer and the allocation of any general overheads to these costs, together with the methodology used for such allocation of general overhead costs.
11. The Parties commit to provide the Monitoring Trustee, after the end of each financial year of DELTA Company, with a detailed statement of DELTA Company’s recorded costs per

customer, the service levels agreed with these customers, as well as the resulting pricing, based on recovery of costs and a fair return on investment.

Interoperability of Copyright Database with third-party processing solutions

12. The Parties commit that DELTA Company will continue to accept and support industry-established standard identifiers and data formats such as, at the time of these Commitments, CWR-files, DDEX-reports, CCID-reports, etc. DELTA Company further commits to continue to use standard APIs allowing Third Party Customers access to the DELTA Company Copyright Database. Upon reasonable request and following the conclusion of a customer contract, provided the customer is not in default of such contract, all information related to DELTA Company APIs and communications protocols will be made available to Third Party Customers. This information will also be made available upon reasonable request to a potential Third Party Customer at the negotiation stage after the signing of a standard non-disclosure agreement.
13. The Parties commit that DELTA Company will not take any measures for the deliberate purpose of degrading the performance of processing systems of Third Party Customers (or any other entity to which a Third Party Customers has outsourced its processing system) and/or the interoperability of such processing systems with the DELTA Company Copyright Database.

Exit

14. The Parties commit that DELTA Company will allow Third Party Customers to terminate their DELTA Company-customer service contracts for convenience at any point in time, subject to a 6-months' notice period. Following the receipt of a valid termination notice, DELTA Company will provide the relevant Third Party Customer with all information reasonably requested and reasonably required for the purpose of allowing the customer to test interoperability with, and prepare the transition towards another provider of Copyright or Back Office Services.
15. Following the completion of the onboarding of the relevant Third Party Customer's copyright data onto the DELTA Company Copyright Database and upon valid termination of said agreements by the Third Party Customer, the Parties also commit that DELTA Company will provide any Third Party Customer upon request on the effective date of termination (provided that such request has been notified to DELTA Company no later than 3 months before the effective date of termination), with
 - a) an extract of the data on the DELTA Company Copyright Database pertaining to the works administered by the relevant Third Party Customer at the time of the termination of the DELTA Company customer contract that has been made available to, and is used and required by, this Third Party Customer to conduct its business (the extract constituting at least a copy of the updated version of the data that was onboarded by the Third Party Customer or its members on the Third Party Customer's instruction throughout the term

of the customer agreement) in a standardized format which allows the integration of these data in other database solutions, and

- b) any other customer-specific data stored in the DELTA Company systems which is reasonably requested and reasonably required by the Third Party Customer in order to conduct its business.
16. To the extent that the data extract contains (i) data that have originally been onboarded throughout the term of the customer agreement by a Third Party Customer or its members on the Third Party Customer's instruction (and/or updates of these data by DELTA Company during the term of the customer contract) and/or (ii) any other customer-specific data referred to in paragraph C.15 lit. b) above, nothing shall restrict that customer from using such data at its free discretion, including using it to set up new databases, integrating it into other databases or passing it on to other service operators. Any other data that may be requested and provided as part of the extract according to the principles in paragraph C.15 lit. a) above will be made available by DELTA Company on fair, reasonable and non-discriminatory conditions.
 17. The exiting Third Party Customer shall compensate DELTA Company for the documented and objectively justified costs of extracting the relevant data from the DELTA Company Copyright Database and any other customer-specific costs incurred by DELTA Company until termination which could not be recouped as a result of the termination of the contracts (such costs in all cases to be reviewed and validated by the Monitoring Trustee).
 18. Nothing in the foregoing paragraphs shall preclude DELTA Company from including adequate provisions in the standard customer agreement which ensure compliance of DELTA Company and the exiting customer with the applicable Data Protection Rules and any other statutory or contractual confidentiality obligations applicable to DELTA Company and/or the exiting Third Party Customer in relation to any data provided.
 19. During the term of its customer contract, a Third Party Customer that has received a termination notice of an Appointment and/or, subject to the relevant Third Party Customer's consent, the Option-3-Publisher who has terminated the Appointment of this customer may request DELTA Company to provide the Third Party Customer or the Option-3-Publisher with an extract of data solely relating to that Appointment (such data constituting and limited to the updated version of the Option-3-Publisher data that have been onboarded throughout the term of the customer agreement by the Third Party Customer or the Option-3-Publisher for the purposes of that Appointment). In this case, paragraph C.18 shall apply *mutatis mutandis*. The requesting Third Party Customer or Option-3-Publisher shall compensate DELTA Company for the documented and objectively justified costs of extracting the relevant data from the DELTA Company Copyright Database.

Section D. Commitments related to the provision of services to Option-3-Publishers

1. The Parties commit that the JV will make available to Option 3 Publishers (i) a fully integrated set of Front-, Middle- and Back-Office Services and (ii) a standalone service package of Middle- and Back-Office Services. For the avoidance of doubt, publishers who elect the Middle- and Back-Office Service package will not be required to source Front-Office Services from the JV.
2. Upon effective termination of a customer contract between the JV and an Option-3-Publisher, and/or in case any of the Notifying Parties receives termination notice of an existing Appointment, the Notifying Parties commit that the JV will provide the relevant Option-3-Publisher with (i) a data extract as described in paragraph C.19 above, and/or (ii) any other customer-specific data stored in the JV systems which is reasonably requested and reasonably required by the Option-3-Publisher in order to conduct its business. Paragraphs C.17 and C.18 shall apply *mutatis mutandis*.
3. In the event an Option-3-Publisher elects to withdraw all or part of the rights owned by it from any of the Notifying Parties for the purposes of licensing online/mobile exploitation for certain territories, the relevant Notifying Party commits to provide the relevant publisher upon request with an extract of the updated version of the data that have been onboarded throughout the term of the membership agreement by the Option-3-Publisher and relate to the withdrawn rights and the territories covered by the withdrawal. Paragraphs C.17 and C.18 shall apply *mutatis mutandis*.

Section E. Commitment related to CMO/publisher-Mandates

1. Without prejudice to the lawfulness of such appointments and on a strictly non-precedential basis vis-à-vis the Notifying Parties' business, the Notifying Parties commit that the JV will not enter into Exclusive or Sole Mandates with ZETA Customers.
2. For the avoidance of doubt, the JV shall not be precluded from being the only entity administering mandates for ZETA Customers, provided such appointments comply with applicable laws and regulations.

Section F. Monitoring Trustee

Appointment procedure

1. The Notifying Parties shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Parties commit not to close the Concentration before the appointment of a Monitoring Trustee.
2. The Monitoring Trustee shall:
 - (i) at the time of appointment, be independent of the Notifying Parties and their Affiliated Undertakings;
 - (ii) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as a consultant or auditor;
 - (iii) neither have nor become exposed to a Conflict of Interest; and
 - (iv) have had no direct or indirect employment, consultancy or other relationship with the Parties during the past two years and shall have no such relationship with the Parties or the JV for the three years following the completion of its mandate.
3. The Monitoring Trustee shall be remunerated by the Notifying Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Notifying Parties

4. No later than two weeks after the Effective Date, the Notifying Parties shall submit the name or names of one or more natural or legal persons whom the Notifying Parties propose to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph F.2 and shall include:
 - (b) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments;
 - (c) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

Approval or rejection by the Commission

5. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, the Notifying Parties shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is

approved, the Notifying Parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Notifying Parties

6. If all the proposed Monitoring Trustees are rejected, the Notifying Parties shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 1 and 5 of this section of the Commitments.

Monitoring Trustee nominated by the Commission

7. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom the Notifying Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

Functions of the Monitoring Trustee

8. The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or the Notifying Parties, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

9. The Monitoring Trustee shall:
 - (i) propose to the Commission within one month after the Monitoring Trustee's appointment, a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
 - (ii) monitor compliance with the Commitments set out in Section B to E;
 - (iii) propose to the Notifying Parties and/or the JV such measures as the Monitoring Trustee considers necessary to ensure the Notifying Parties' and/or the JV's compliance with the conditions and obligations attached to the Decision;
 - (iv) act as a contact point for any requests by third parties, in particular Third Party Customers, in relation to the Commitments and broker a resolution of any dispute that would arise between a third party and the JV and/or the Notifying Parties regarding compliance with the Commitments;
 - (v) provide to the Commission, sending the Notifying Parties a non-confidential copy at the same time, a written report regarding the compliance by the Parties with the Commitments. The Monitoring Trustee shall submit these reports (a) during the first two

years following the Effective Date: within 15 days after the end of every six months; (b) thereafter: within 15 days after the end of every full calendar year;

- (vi) promptly report in writing to the Commission, sending the Notifying Parties and the JV a non-confidential copy at the same time, if it concludes on reasonable grounds that the Notifying Parties and/or the JV are failing to comply with the Commitments; and
- (vii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

Duties and obligations of the Parties

10. The Notifying Parties and the JV shall provide and shall cause their advisors to provide the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of the JV's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the JV shall provide the Monitoring Trustee upon request with copies of any document. The JV shall make available to the Monitoring Trustee one or more offices on its premises and the Notifying Parties and the JV shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.
11. The Notifying Parties shall indemnify the Monitoring Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agree that an Indemnified Party shall have no liability to the Notifying Parties and/or the JV for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
12. At the expense of the Notifying Parties, the Monitoring Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Notifying Parties' prior approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should the Notifying Parties refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard the Notifying Parties. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Paragraph 11 of this section of the Commitments shall apply *mutatis mutandis*.
13. The Notifying Parties agree that the Commission may share Confidential Information proprietary to the Notifying Parties and/or the JV with the Monitoring Trustee. The Monitoring

Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.

14. The Notifying Parties agree that the contact details of the Monitoring Trustee are published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties, in particular any potential Third Party Customers, of the identity and the tasks of the Monitoring Trustee.
15. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

Replacement, discharge and reappointment of the Monitoring Trustee

16. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
 - b) the Commission may, after hearing the Monitoring Trustee and the Notifying Parties, require the Notifying Parties to replace the Monitoring Trustee; or
 - c) the Notifying Parties may, with the prior approval of the Commission, replace the Monitoring Trustee.
17. If the Monitoring Trustee is removed according to paragraph 16 of this section of the Commitments, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 1-7 of this section of the Commitments.
18. Unless removed according to paragraph 16 of this section of the Commitments, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented or expired. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section G. Fast Track Dispute Resolution

1. If a Third Party Customer claims that DELTA Company is failing to comply with the commitments described above in Section C. (the “**Section C Commitments**”) vis-à-vis this Third Party Customer, the fast track dispute resolution procedure as described below shall apply. To the extent that the dispute covers matters regulated under the DELTA Company customer contract other than the Section C Commitments, these matters shall be dealt with exclusively under the dispute resolution mechanism contained in the contract as set out above in paragraph C.9 and in Schedule 1 to these Commitments, unless DELTA Company agrees that the Fast Track Dispute Resolution Procedure in this Section G. may also apply to these matters.
2. Any Third Party Customer who wishes to avail itself of the fast track dispute resolution procedure (a “**Requesting Party**”) shall send a written request to DELTA Company (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that the JV is failing to comply with the requirements of the Section C Commitments. The Requesting Party and DELTA Company will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding 15 Working Days after receipt of the Request.

The Monitoring Trustee shall be entitled to reject any request of a Requesting Party if the Requesting Party’s claim that DELTA Company is failing to comply with the Section C Commitments is vexatious or manifestly unfounded (e.g. because the dispute does not concern matters within the scope of the Section C Commitments). In all other cases, the Monitoring Trustee shall present its own proposal (the “**Trustee Proposal**”) for resolving the dispute within 8 Working Days, specifying in writing the action, if any, to be taken by DELTA Company in order to ensure compliance with the Section C Commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.

3. Should the Requesting Party and DELTA Company (together the “**Parties to the Arbitration**”) fail to resolve their differences of opinion in the consultation phase as described in paragraph G.2. above, and unless the request has been rejected by the Monitoring Trustee as vexatious or manifestly unfounded, the Requesting Party may serve a notice (the “**Notice**”), in the sense of a request for arbitration, to the International Chamber of Commerce (hereinafter the “**Arbitral Institution**”), with a copy of such Notice and request for arbitration to DELTA Company and the Monitoring Trustee.

The Notice shall set out in detail the dispute, difference or claim (the “**Dispute**”) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by DELTA Company (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

4. DELTA Company shall, within 10 Working Days from receipt of the Notice, submit its answer (the “**Answer**”), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g., documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action, which DELTA Company proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

5. The Arbitral Tribunal shall consist of three persons having experience in copyright matters. The Requesting Party shall nominate its arbitrator in the Notice; DELTA Company shall nominate its arbitrator in the Answer. The arbitrators nominated by the Requesting Party and by DELTA Company shall, within five Working Days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution, which shall forthwith confirm the appointment of all three arbitrators.

Should any of the Parties to the Arbitration fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, the default appointment(s) shall be made by the Arbitral Institution.

The three-person arbitral tribunal is herein referred to as the “**Arbitral Tribunal**”.

Arbitration Procedure

6. The Dispute shall be finally resolved by arbitration under the rules of the Arbitral Institution with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). The arbitration shall be conducted in Berlin, Germany in the English language.
7. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organizational meeting or immediately thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.

8. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them

at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.

9. The Arbitral Tribunal shall not disclose confidential information and shall apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.
10. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, subject to paragraph G.12. below, the Arbitral Tribunal must find in favour of the Requesting Party unless DELTA Company can produce evidence to the contrary.

Involvement of the Commission

11. The Commission shall be allowed and enabled to participate in all stages of the procedure by
 - Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
 - Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
 - Giving the Commission the opportunity to file amicus curiae briefs; and
 - Being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.

The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Section C Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Section C Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

12. The Arbitral Tribunal shall decide the dispute on the basis of Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and the general principles of law

common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.

13. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
14. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by DELTA Company in order to comply with the Section C Commitments vis-à-vis the Requesting Party (e.g., specify a contract including all relevant terms and conditions). The award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
15. The final award shall, as a rule, be rendered within six months after the adoption of the Terms of Reference; provided, however that if both Parties to the Arbitration agree, the award may be rendered not more than three months thereafter. The time-frame shall, in any case, be extended by the time required for the Commission to submit an interpretation of the Section C Commitments if so requested by the Arbitral Tribunal.

The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.

16. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Section C Commitments in accordance with its powers under the Merger Regulation.

Section H. General Provisions

1. These Commitments shall be effective within the EEA and shall remain in effect for 10 years from the Effective Date.
2. If the JV is abandoned, wound up or otherwise terminated, these Commitments shall automatically cease to apply.
3. If only ZETA Company is abandoned, wound up or otherwise terminated, only the Commitments in Section B., D.1 and E. shall cease to apply. The Commitments contained in Section C. and D.2 and 3 shall continue to apply in this case for the rest of the duration indicated in paragraph H.1 above. Conversely, if only DELTA Company is abandoned, wound up or otherwise terminated, only the Commitments in Sections B. and E. shall continue to apply for the rest of the duration indicated in paragraph H.1 above.
4. Any Notifying Party exiting the JV or ceasing to be a controlling shareholder of both JV-companies shall no longer be bound by the Commitments.
5. In exceptional circumstances, such as in particular
 - a significant change of market circumstances in the markets for copyright administration services and/or the licensing of online rights,
 - the JV and/or the Parties being or becoming subject to regulatory requirements or legislative changes that are potentially inconsistent with the Commitments or achieve the same result as the Commitments,

the Commission may, in response to a reasoned request from the Notifying Parties (or of PRS in the case of the commitment in section B.) showing good cause waive, modify or substitute, one or more of the undertakings in these Commitments. Any such request shall be accompanied by a report from the Monitoring Trustee, who shall at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

Section I. Entry into force

1. The Commitments shall take effect upon the date of adoption of the Decision.

Brussels, 10 April 2015

duly authorised for and on behalf of

PRS for Music Limited

Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) u.p.a.

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte

International Copyright Enterprise Services AB

SCHEDULE 1 - DELTA Company customer contract dispute resolution clause

- 1.1.1. Any dispute, controversy or claim arising out of or in connection with this Agreement, shall first be referred to the escalation procedure described in this Clause 1.1.1.
- a) A Party who wishes to raise a dispute, controversy or claim shall notify the other Party thereof by sending the Service Delivery Manager or Service Demand Manager, as appropriate, a written notice clearly marked as "Escalation" and containing a description of the matter that requires escalation ("**Escalation Notice**").
 - b) Upon receipt of an Escalation Notice, the Service Delivery Manager and the Service Demand Manager shall seek to resolve the escalated matter within five (5) working days from receipt of the Escalation Notice.
 - c) If the Service Delivery Manager and Service Demand Manager fail to resolve or provide a solution for the escalated matter within the period set forth in Clause b), the escalated matter shall be referred to the executive management of the Parties. The executive management teams shall seek to resolve the escalated matter within ten (10) working days from the expiry of the period set forth in Clause b).
- 1.1.2. Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, which has not been resolved in accordance with the Escalation Procedure, shall be finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of the arbitration shall be [Paris, France]. The language of the arbitration procedure shall be English.
- 1.1.3. All opinions, documents and negotiations shared and expressed by Parties during these arbitral proceedings as well as the arbitral award itself shall remain confidential, provided however that a Party may make any disclosure necessary to protect or enforce its rights under such award.
- 1.1.4. The foregoing shall not prevent a Party from instigating proceedings before any court(s) of competent jurisdiction at any time during the term of this Agreement in order to obtain a preliminary injunction or other adequate immediate relief where the dispute resolution procedure above cannot reasonably be expected to provide a sufficient and timely solution or relief, including where the Customer fails to pay any amounts due without a legitimate bona fide ground for withholding such payment.