



EUROPEAN COMMISSION
DG Competition

***Case M.8018 - SONY CORPORATION OF AMERICA /
SONY-ATV MUSIC PUBLISHING***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 01/08/2016

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EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party

Dear Sir/Madam,

**Subject: Case M.8018 – SONY Corporation of America / SONY/ATV
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

- (1) On 14 June 2016, the European Commission ("Commission") received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Sony Corporation of America ("Sony" or the "Notifying Party") will acquire from the Michael Jackson Estate a 50 percent interest in Sony/ATV Music Publishing LLP ("Sony/ATV") within the meaning of Article 3(1)(b) of the Merger Regulation (the "Transaction"). Sony/ATV is a music publishing joint venture currently owned and controlled by Sony and the Michel Jackson Estate. As a result of the Transaction Sony will acquire sole control of Sony/ATV³.

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 L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

³ Publication in the Official Journal of the European Union No C 242, 02.07.2016, p.49.

1. THE PARTIES

- (2) **Sony** is the U.S. subsidiary of Sony Corporation, headquartered in Tokyo, Japan. Sony Corporation, directly and through its subsidiaries, is active globally in various businesses, including electronics products (for example, audio, video, televisions, digital, cameras, camcorders, smartphones, tablets, semiconductors and components), games (for example game consoles and software), entertainment services (e.g., motion pictures, television programming, and recorded music, music publishing), and financial services (e.g., life insurance and banking). Sony Corporation has listings on the New York and Tokyo stock exchanges, and employs 125,300 people worldwide. Sony currently owns a 50% interest in Sony/ATV, which it has exclusively managed since the company was formed in 1995. Sony Corporation, together with all subsidiaries, affiliates, and companies directly and indirectly controlled by Sony Corporation is referred to as the "Sony Group".
- (3) **The Michael Jackson Estate** manages the assets of the deceased singer/songwriter Michael Jackson. Michael Jackson (and his Estate after his death) has owned a 50% interest in Sony/ATV since the company was formed.
- (4) **Sony/ATV** is a music publishing company that was established in 1995 when Sony Music Publishing was transferred to a 50/50 joint venture jointly owned by Michael Jackson, along with certain catalogues then owned by the singer-songwriter. Michael Jackson had acquired the music publishing business of ATV (American Television) in 1985, which held a catalogue of publishing rights to around 4,000 songs.
- (5) Sony/ATV is governed by a board of representatives on which each of Sony and the Michael Jackson Estate are entitled to equal representation and voting power.⁴ The Board has not delegated authority to any committees. In addition, certain major corporate actions require the Sony/ATV Board's unanimous consent, that is to say, the approval of both Sony and the Michael Jackson Estate. These actions include [corporate actions for which unanimous consent of Sony/ATV's board is required].⁵ Under these arrangements, both Sony and the Michael Jackson Estate have the power to block actions that determine the strategic commercial behaviour of Sony/ATV. As a result, they both exercise decisive influence over the behaviour of Sony/ATV and have to reach a common understanding in determining the commercial policy of Sony/ATV. In other words, Sony/ATV is jointly controlled within the meaning of the Merger Regulation and paragraphs 62 to 82 of the Commission Consolidated Jurisdictional Notice.⁶
- (6) While under joint control, Sony/ATV has been exclusively managed by Sony since its formation.⁷

⁴ Form CO, paragraph 1.5.

⁵ Form CO, paragraph 1.5.

⁶ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95/1, 16.4.2008, p. 17.

⁷ Form CO, Chapter 6, paragraph 7.3.

- (7) Although not a party to the Transaction, it is important context that Sony/ATV, in addition to administrating its own catalogue, is the exclusive administrator of the catalogue of EMI Music Publishing (“EMI MP”), which was acquired in 2012 by DH Publishing. DH Publishing is owned by a consortium of investors comprising Mubadala Development Company PJSC (“Mubadala”), Sony, the Michael Jackson Estate, Jynwel, GSO, and EMI West (the “DH Publishing Consortium”). Sony/ATV administers the EMI MP catalogue under the terms of an Administration Agreement,⁸ which allows it to license the catalogue, collect the money from such licensing activity and identify potential new catalogue acquisitions on behalf of the consortium. Sony/ATV's role as administrator of the EMI MP catalogue is subject to certain veto rights afforded to DH Publishing. The rights of Sony/ATV under the administration agreement, the veto rights of DH Publishing and thus the control over the EMI MP catalogue will be discussed in more detail in section 6.1.2.2 of this decision.

2. THE TRANSACTION

- (8) Pursuant to the Member Interest Purchase Agreement of 15 April 2016,⁹ Sony will acquire the ownership interests of the Michael Jackson Estate in Sony/ATV for a cash consideration of around USD 750 million.
- (9) The Transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (10) The notified operation has an EU dimension under Article 1(3) of the Merger Regulation, given that:
- i.) the undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2500 million¹⁰ (Sony Group: EUR [...], Sony/ATV: EUR [...]);
 - ii.) each of Sony Group and Sony/ATV has an EU-wide turnover in excess of EUR 100 million (Sony Group: EUR [...], Sony/ATV: EUR [...]);
 - iii.) the combined turnover of Sony Group and Sony/ATV in each of at least three Member States exceeded EUR 100 million (Sony Group alone had a turnover of EUR [...] in the United Kingdom, EUR [...] in Germany and EUR [...] in France);
 - iv.) Each of Sony Group's and Sony/ATV's turnover in France, Germany and the United Kingdom exceeded EUR 25 million (Sony Group: see subparagraph iii), Sony/ATV: EUR [...] in France, EUR [...] in Germany; [...] in the United Kingdom); and

⁸ Form CO, Annex G(1).

⁹ Form CO, Annex G(3).

¹⁰ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

- v.) Neither Sony Group nor Sony/ATV achieved two-thirds of their EU wide turnover in any one Member State ([details regarding proportion of turnover achieved in one Member State).

4. CHANGE FROM JOINT TO SOLE CONTROL

- (11) The Transaction involves the acquisition by Sony of sole control of Sony/ATV over which it already has joint control. As such, the concentration qualifies in principle for simplified treatment, in accordance with paragraph 5 (d) of the *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004* (the "Notice on simplified procedure").¹¹
- (12) In considering whether or not to apply the simplified procedure, it is important context that in M.6459 *Sony/Mubadala/EMI Music Publishing*,¹² the Commission approved the acquisition by Sony and Mubadala of joint control over EMI MP subject to conditions and obligations. A key consideration in the clearance decision was that Sony did not have full control neither over Sony/ATV nor over EMI MP due to the joint control situation in both entities.¹³ As the Transaction gives Sony full control over Sony/ATV, having regard to this precedent the Commission considers that the Transaction warrants a closer investigation and a full decision in accordance with paragraph 9 of the Notice on simplified procedure.
- (13) Accordingly, in section 5, the Commission will first review the relevant markets. In section 6 the Commission will carry out the competitive assessment. The commission will first examine the effects of the Transaction on the market for the exploitation of online rights (section 6.1). The Commission will then carry out a competitive assessment with respect to the other markets (section 6.2). In the last section, the Commission will assess the vertical relationships (section 6.3).

5. RELEVANT MARKETS

5.1. Relevant product markets

5.1.1. Commission precedents

- (14) In past decisions, the Commission considered that music publishers are active on two market levels.¹⁴ Upstream, they are active in the supply of publishing services to authors. These services include signing authors and providing them with financial, marketing and career support. As a counterpart to these services, authors transfer the rights in their musical work to the publisher or grant that publisher an economic interest in the musical work by providing the publishers the right to obtain a certain portion of the royalties collected. Downstream, music publishers

¹¹ OJ C 366/5 14.12.2013.

¹² Case M.6459 *Sony/Mubadala/EMI Music Publishing*, Commission decision of 19 April, 2012 ("*Sony/Mubadala/EMI*").

¹³ *Sony/Mubadala/EMI* recital 210.

¹⁴ *Sony/Mubadala/EMI*, recital 19; M.4404 *Universal/BMG Music Publishing*, and M.1219 *Seagram/Polygram*, recitals 11 and 16.

are active in the exploitation of works of authors under contract or for a certain period of time following the expiration of the contract (so-called retention period). On that level, they either directly grant licences for use of the musical works to right users against the payment of royalties, or receive a part of the royalties collected by collecting societies (for licences issued by the societies) for the promotion of the authors' work.¹⁵

- (15) In line with the distinction between the upstream and downstream activities, the Commission defined the upstream market as the market for publishing services to authors.
- (16) At the downstream level, the Commission considered that there was no single product market that would encompass the exploitation of all types of music publishing rights but rather a separate market for the exploitation of each major type of publishing rights. These separate product markets were as follows:¹⁶
- i.) Mechanical rights: the right to reproduce a work in a sound recording (e.g. CDs);
 - ii.) Performance 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.) Synchronization 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 performance rights for online applications, such as music downloading and/or streaming services.
- (17) From a demand-side perspective, separate markets for the exploitation of each type of right exists because there is no substitutability between the different categories of rights. Depending on the intended use of the musical work (broadcast, sheet music, use in a film etc.), the right user requires a license for a specific type of right, which is not substitutable with a license for a different type of right.
- (18) In addition, the Commission found important differences between the different types of rights from a supply-side perspective either, the main difference being related to the role of the collecting societies¹⁷. Namely, the licensing of mechanical and performance rights for offline use is generally carried out by collecting societies on behalf of publishers. By contrast, synchronization and print rights are generally licensed and administered directly by the publishers without the involvement of collecting societies. Online rights are subject to a hybrid solution whereby some repertoire and rights were licensed directly by publishers (or

¹⁵ Collecting societies are bodies created by copyright law or by private agreement that have the authority to license authors' works, negotiate licenses on behalf of the authors as well as to collect royalties.

¹⁶ *Sony/Mubadala/EMI*, recital 19; *M.4404 Universal/BMG Music Publishing*, recitals 18-25.

¹⁷ *Sony/Mubadala/EMI*, recital 25.

collecting societies/rights management entities acting as their agents) and other repertoire and rights were licensed by collecting societies without any influence from the publishers. The different role by the collecting societies resulted in different supply conditions as collecting societies were legally bound to license on fair and non-discriminatory manner, whereas publishers are not subject to the same obligations. Furthermore, pricing and other licensing conditions also differed depending on involvement of collecting societies and thus on the control over these terms.

- (19) In *Sony/Mubadala/EMI*, in 2012, the Commission considered further subdivisions within the market for the exploitation of online rights according to
- i.) Genres (classical, rock, hip-hop etc.);
 - ii.) Access devices (accessing music on tablets, phones, personal computers...etc.);
 - iii.) Retail model (streaming and downloading)
 - iv.) Type of repertoire : Anglo-American versus Continental;
- (20) The Commission concluded that the market for the exploitation of online rights should not be further subdivided according to genres as rights users (online music platforms) generally license rights that cover a variety of genres.¹⁸ From a supply side perspective, music publishers are generally active in all genres, which confirmed the absence of separate markets based on genres.
- (21) The Commission also concluded that separate markets do not exist according to access devices based on the fact that the licensed rights are identical regardless of the type of device the music can be accessed on and that there was a tendency of convergence among access devices.¹⁹
- (22) With respect to the distinction based on retail model, the Commission found that the rights that music platforms license are identical regardless of the fact whether or not the music platform uses a streaming or a downloading model. At the same time, licensing terms and conditions regularly differed depending on whether the music was made available on a downloading or streaming basis. The Commission ultimately left the question open, as the competitive assessment would remain the same irrespective of the conclusion on this point.²⁰
- (23) With respect to the subdivision based on the repertoire (Anglo-American and Continental), the Commission noted that from a demand side perspective the distinction is not appropriate because online customers need full access to musical works, irrespective of whether they belong to Anglo-American and/or Continental European repertoire. At the same time, supply conditions are different as the rights for the Continental European repertoire remain with collecting societies whereas all major publishers withdrew their online mechanical rights from the collecting

¹⁸ *Sony/Mubadala/EMI*, recitals 38-40.

¹⁹ *Sony/Mubadala/EMI*, recitals 41-43.

²⁰ *Sony/Mubadala/EMI*, recitals 35-37.

society system and thus took control over these rights. Given the different legal framework in which collecting societies and publishers operate, this difference meant that licensing conditions are evolving differently for the two types of repertoires. On balance, the Commission took the view that there is no separate markets for the exploitation of online rights based on the type of repertoire, but nonetheless carried out the competitive assessment separately for each segment due to the differences in supply conditions.²¹

- (24) Subsequent to *Sony/Mubadala/EMI*, in 2015, the Commission revisited some of these potential distinctions in *PRSfM / STIM / GEMA / JV*.²²
- (25) Notably, on the basis of its market investigation, the Commission considered that distinguishing separate markets according to retail model was not appropriate.²³
- (26) The Commission also considered whether narrower product markets should be distinguished within the exploitation of online rights according to licensing of the rights held by collective management organisations ("CMO"s, i.e. collecting societies) on the one hand and licensing of the rights held by "Option 3" publishers on the other hand. "Option 3" publishers are publishers that withdrew their mechanical rights from the traditional collecting society system.²⁴ The name "option 3" refers to the fact that withdrawal of such content was one of the options the study considered for dealing with the inefficiencies of the traditional collecting society system, which developed along national lines. All major publishers, including Sony/ATV and EMI MP, implemented the option 3 solutions. These changes concerned the Anglo-American repertoire only as under Continental legal systems changes to the administration and licensing of Continental European repertoire would require the consent of each individual author.²⁵
- (27) It follows that the potential distinction in market definition relating to "Option 3" publishers and CMOs in *PRSfM / STIM / GEMA / JV* coincides in practice with the distinction Anglo-American/Continental European in *Sony/Mubadala/EMI*. In contrast to *Sony/Mubadala/EMI*, the market investigation was inconclusive as to the need to define narrower markets.²⁶ Online platforms considered the distinction inappropriate, as they perceived the activities of CMOs and publishers to be the

²¹ *Sony/Mubadala/EMI*, recitals 28-34.

²² Case M.6800 - *PRSfM / STIM / GEMA / JV* Commission decision of 16.06.2015 ("*PRSfM / STIM / GEMA / JV*").

²³ *PRSfM / STIM / GEMA / JV*, recital 113.

²⁴ The Option 3 gives right-holders the choice to authorise a collective society of their choice to manage their works across the entire EU. See European Commission Study on a Community Initiative on the Cross-Border Collective Management of Copyright, July 2005, p. 34. Following on to this Study, the Commission Recommendation 2005/737/EC of 18 May 2005 on the cross-border collective management of copyright for online users (OJ L 276 of 21.10.2005 p. 54) 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. After the 2005 Recommendation was issued, all major publishers and some smaller publishers withdrew their Anglo-American mechanical rights. As a result, these publishers now grant licences to users themselves. See decision *PRSfM/STIM/GEMA/JV* in case M.6800, recital 27.

²⁵ This was also explained in *Sony/Mubadala/EMI*, recitals 77 and 148.

²⁶ *PRSfM / STIM / GEMA / JV*, recital 114.

same irrespective of regulatory environment, difference in repertoires and differences in commercial incentives. On the other hand CMOs and publishers considered that CMOs are subject to different regulations, they have different commercial interests and a different business model (for instance CMOs administer repertoire on a collective basis, whereas publishers discover and develop talents)²⁷, which ultimately leads to different licensing terms. On this basis, the Commission left the market definition open, as the transaction did not raise competition concerns under any possible market definition.²⁸

- (28) The Commission also considered a further distinction, namely that between the exploitation of online rights on a multi-territorial basis and the exploitation of online rights on a mono-territorial basis. The Commission left this distinction open²⁹ given that the transaction did not raise competition concerns regardless of this distinction (and thus even if this distinction was applied in combination with the possible segmentation between Option 3 publishers and CMOs.
- (29) As a potential subdivision, the Commission considered a potential subdivision of the market for the exploitation of synchronization rights. The Commission checked whether the music to be synchronized is produced specifically for the motion picture, commercial etc. (so-called production music) or exists independently. The Commission ultimately left this question open, as it did not influence the competitive assessment.³⁰
- (30) For the sake of completeness, the Commission notes that in the past it considered that publishing rights need to be distinguished from recording rights as belonging to a separate relevant market.³¹ Publishing rights represent the rights to the notes and lyrics of a song and are transferred to the publishers by the authors. By contrast, recording rights represent the rights to the particular rendition of that song as recorded by a performing artist (who is often different from the author). Since Sony/ATV is not active in the recorded music sector, recording rights will not be discussed in detail in the remainder of this decision other than in the context of the so-called “control share” analysis (see Section 6.1.2 below).

5.1.2. *Notifying Party's view*

- (31) The Notifying Party considers that it is appropriate to distinguish the upstream market of publishing services to authors.³²
- (32) With regard to the subdivision of the downstream market for the exploitation of publishing rights according to different type of rights (mechanical rights, performance rights etc.), the Notifying Party considers that authors contact publishers for the exploitation of all of their rights and publishers are active in the

²⁷ *PRStM / STIM / GEMA / JV*, recital 114.

²⁸ *PRStM / STIM / GEMA / JV*, recital 118.

²⁹ *PRStM / STIM / GEMA / JV*, recital 118.

³⁰ *Sony/Mubadala/EMI*, recitals 44-49.

³¹ Case M.4404, *Universal/BMG Music Publishing*, recitals 16-17.

³² Form CO, chapter 1, paragraph 6.5.

exploitation of all of these rights³³. Nevertheless, the Notifying Party supplied information and assessed the competitive effects on the basis of this distinction.

- (33) The Notifying Party does not consider it appropriate to further sub-divide the market for the exploitation of online rights:³⁴
- i.) Genres. The Notifying Party contends that in most cases, music publishers commercialize rights for a broad range of genres, licences and prices cover all repertoires, and users generally license rights covering a wide variety of genres. There are no indications suggesting that competitive conditions in the publishing industry are materially different depending on the genres involved.
 - ii.) Access devices. The Notifying Party submits that the reasons why the Commission did not define separate markets are still valid and apply even more. Namely, the rate of convergence between different devices has accelerated since 2012 and music content is easily downloaded to and transferred between a variety of different devices.
 - iii.) Retail Model (downloading vs streaming). The Notifying Party considers that from a supply perspective, there is no basis for the distinction as the same type of rights and the same repertoires are involved. From a demand perspective, the various models compete intensely with one another. While individual users may have different preferences and different online music services may expand overall demand for online music, different services offer substitutable forms of consumed music and ultimately compete for the same discretionary consumer spend. Moreover, the differences between download and streaming services have become blurred, with streaming services routinely including so-called “tethered” download options that enable off-line access to tracks during the subscription period. In addition, the rapidly evolving nature of online retail models would render any sub-division artificial and quickly outdated.
 - iv.) Type of repertoire (Anglo-American vs. Continental European). The Notifying Party considers that on the supply side, all large publishers active in the EEA seek to develop a balanced repertoire comprising both Anglo-American and Continental European repertoire. On the demand side, Anglo-American repertoire competes with Continental European repertoire. A song written by ABBA, for example, competes with a song written by Phil Collins. The origin or residence of an author is not determinative for consumer choice.
- (34) The Notifying Party does not discuss whether the market for the exploitation of synchronization rights should be further subdivided according to the type of music that is to be synchronized (production music or other).

³³ Form CO, chapter 2, paragraph 6.2.

³⁴ Form CO, chapter 6, paragraph 6.20.

5.1.3. *Commission's assessment*

- (35) The Commission considers that the market investigation did not reveal any information that would call into question the distinction between publishers' upstream and downstream markets. Indeed these activities are fundamentally different and take place at different levels of the music value chain.
- (36) As regards the downstream activities of music publishers, the market investigation confirmed that it is appropriate to define separate markets according to the different types of rights (mechanical rights, performance rights etc.) that are licensed, due to the same factors the Commission identified in the precedents mentioned in section 5.1.1: these rights are not substitutable from a demand perspective and supply conditions also differ based on the role of the collecting societies. A large majority of respondents agreed with this approach.³⁵ Accordingly, separate markets still exist for the exploitation of mechanical rights, performance rights, synchronization rights, print rights and online rights.
- (37) The majority of respondents confirmed the distinction between exploitation of publishing and recording rights. A minority of respondents considered that such distinction may not be appropriate. These respondents pointed out that online music is increasingly becoming the most important form of music consumption and online music platforms need both recording and publishing rights to operate their service, while the three major publishers all control both publishing and recording rights. Given, therefore, these supply and demand factors, these respondents took the view that recording and publishing rights should be assessed jointly.³⁶
- (38) This view, however, was only expressed by a minority of respondents. Furthermore, within the online world these rights are rather complementary than substitutable, as the fact that online platforms need both sets of rights implies that a licence for recording rights does not replace a licence for publishing rights. These rights do not appear to be substitutable in a more general fashion either. A license for the authors' notes and lyrics (but without a recording) does not substitute for the license of an actual recorded version of that song and vice versa. There are also numerous companies who are involved in licensing of recording rights only or in licensing of publishing rights only. The Commission therefore considers that the distinction between the market for recording and the market for publishing rights is still applicable. The interplay of recording and publishing rights on the online market is analysed below when assessing the market power of major publishers on this market (see Section 6.1 below).
- (39) With regard to the potential subdivisions within the market for the exploitation of online rights, the vast majority of the respondents to the market investigation considered that separate markets should not be distinguished according to access devices.³⁷ This view was based on the same reasons that were already expressed in the previous cases, namely the convergence between devices and the fact the licensed rights are identical regardless of the access device.

³⁵ Questionnaire to customers, question 3; Questionnaire to competitors, question 3.

³⁶ Questionnaire to competitors, question 4

³⁷ Questionnaire to customers, question 7; Questionnaire to competitors, question 7.

- (40) Likewise, the market investigation confirmed that it is not appropriate to distinguish separate markets within the exploitation of online rights according to genres because licensing of online rights occurs regardless of genres involved³⁸. Further, while there are a few publishers that specialize in certain genres only, the importance of such publishers is marginal as most publishers are involved in all genres.³⁹
- (41) As to the potential market subdivision for the exploitation of online rights based on the retail model (streaming and downloading), a majority of respondents considered that such distinction is not appropriate.⁴⁰ The reason appears to be that the licensed rights are identical for both types of service and that terms and conditions do not differ to the extent that it would be justified to sub-divide the market.⁴¹ Some market participants, however, considered that royalty rates and other terms and conditions differ so much that the licensing of online rights should be subdivided along these lines.⁴² Given, however, the majority view as well as the recent precedent of *PRSfM / STIM / GEMA / JV*, the Commission considers that the market for the exploitation of online rights should not be further subdivided based on the retail model.
- (42) The Commission also notes that online platforms considered that downloading and streaming for consumers (that is to say a level further downstream from the level of the market for the exploitation of online rights, which concerns the relationship between publishers and online platforms), are substitutable and competing. By contrast, publishers considered that the two services are not substitutable as they are sold at very different price points. According to the latter view ad-supported streaming is free and even subscription based streaming is more attractive as consumers are able to access a full world repertoire for a monthly subscription fee as opposed to per download fee. These results are however not conclusive. Moreover, they are only of limited relevance, as they do not concern *per se* the market for the exploitation of online rights, but the market for online music retail services, which is one level downstream of the market for the exploitation of online rights.
- (43) With regard to the subdivision of the online market based on the type of the repertoire (Anglo-American versus Continental Europe), a large majority of respondents considered that a single market encompasses the exploitation of online rights for both repertoires because all platforms include both repertoires.⁴³
- (44) Respondents also agreed, however, that supply conditions differ for the two repertoires, as the Continental repertoire is controlled by collecting societies,

38 Questionnaire to competitors, question 8.1.

39 Questionnaire to competitors, questions 8.2 and 8.3.

40 Questionnaire to customers, question 8; Questionnaire to competitors question 9.

41 Questionnaire to customers, question 8.1; Questionnaire to competitors question 9.1.

42 Questionnaire to competitors, questions 9 and 9.1.

43 Questionnaire to competitors, questions 5 and 5.1; Questionnaire to customers, question 5 and 5.1.

whereas publishers have significant control over the Anglo-American repertoire.⁴⁴ Collecting societies are still obliged to license on fair and non-discriminatory conditions, whereas publishers are not bound by the same obligations.⁴⁵ A majority of respondents also considered that licensing rates differ.⁴⁶ The respondents also indicated that, due to the difference in supply regimes, market power of publishers needs to be assessed separately for the two repertoires.⁴⁷

- (45) Accordingly, the broadest possible product market definition is the exploitation of online rights encompassing both the Anglo-American and the Continental repertoire. However, due to the different supply conditions, the market power of publishers has to be assessed separately for each segment. Under a narrower market definition, the Commission would distinguish separate markets for the exploitation of online rights in the Anglo-American repertoire and for the exploitation of online rights in the Continental European repertoire. However, just like in *PRStM / STIM / GEMA / JV*, this question can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (46) Finally, it is not necessary to decide whether the market for the exploitation of synchronization rights should be further subdivided into the licensing of production music and the licensing of other types of music as no competition concerns arise regardless of the exact market definition in this regard (see recitals (29) and (34)).

5.1.4. *Conclusion on product market definition.*

- (47) The market investigation confirmed that the market definitions applied in precedents are still applicable for this case. Namely:
- i.) Publishers' upstream activity of providing publishing services to authors is a separate market.
 - ii.) The downstream activity of the exploiting publishing rights should be subdivided into separate markets based on the type of rights, i.e. mechanical rights; performance rights; synchronization rights; print rights; and online rights.
 - iii.) The market for the exploitation of online rights are not to be further subdivided according to genres, access devices and retail model (download vs. streaming).

⁴⁴ Questionnaire to competitors, questions 5, 5.1 and 6; Questionnaire to customers, question 5, 5.1 and 5.3.

⁴⁵ Questionnaire to competitors, question 6; Questionnaire to customers, question 6.

⁴⁶ Questionnaire to competitors, questions 5.2; Questionnaire to customers, question 5.2.

⁴⁷ Questionnaire to competitors, questions 5 and 5.1; Questionnaire to customers, question 5 and 5.1.

- iv.) The question whether the market for the exploitation of online rights should be further subdivided according to the type of repertoire (Anglo-American and the Continental) is left open.⁴⁸
- v.) The question whether the market for the exploitation of synchronization rights should be subdivided further based on production music and other music can be left open for the purposes of this decision.

5.2. Relevant geographic market

5.2.1. Commission precedents

- (48) In both *Universal/BMG Music Publishing* and *Sony/Mubadala/EMI* the Commission considered that the market for publishing services to the authors is rather national in character, as authors tend to turn to publishers with a local presence and tend to be members of national collecting societies. Nevertheless, in both cases the Commission left the market definition open.⁴⁹
- (49) In the 2007 *Universal/BMG Music Publishing* and in the 2012 *Sony/Mubadala/EMI* decision, the Commission considered the markets for the exploitation of the various categories of music publishing rights to be national, although it noted the tendency to restructure online rights through the withdrawal of online mechanical rights by major publishers from the traditional collecting society system.⁵⁰
- (50) In the 2012 *Sony/Mubadala/EMI* decision the Commission defined national markets for the exploitation of all categories of music publishing rights but noted that the exploitation of online rights could potentially be EEA wide in scope due to, again, the withdrawal of online mechanical rights in Anglo-American repertoire from the collecting society system and the resulting increase in multi-territory licensing.⁵¹ On closer examination the Commission found that online customers increasingly obtain EEA wide licences for the online use of the Anglo-American repertoire and that all major publishers and some independent publishers⁵² offered EEA-wide licences (through the appointment of a collecting society or rights management agency as their agent). At the same time, the Commission noted that national licences remained an option, and that royalty rates, minimum rates and other usage terms tend to vary per EEA country. EEA-wide licences often used so-called country of destination tariffs (which may vary country-by-country). In addition, some large platforms such as YouTube, or the majority of smaller platforms, still obtained a collection of national licences rather than an EEA-wide

⁴⁸ Nevertheless, the market power and competitive effects should be assessed separately for the Anglo-American and Continental repertoires as this would be necessary even under a broader market definition.

⁴⁹ M.4404 - *Universal/BMG Music Publishing*, recitals 62-64; *Sony/Mubadala/EMI*, recital 57.

⁵⁰ M.4404 - *Universal/BMG Music Publishing*, recitals 50-60.

⁵¹ *Sony/Mubadala/EMI*, recitals 57 and 59; *Universal/BMG Music Publishing*, recital 207.

⁵² The term major publishers designate the traditional big publishing companies, i.e. Universal, Sony (and EMI) and Warner Chappell; all other publishers are referred to as "independent" publishers.

or multi-territory licence.⁵³ Taking all facts into account, the Commission defined a national market for the exploitation of online rights, but noted that the market was moving towards an EEA wide market.

- (51) Most recently in *PRSfM / STIM / GEMA / JV*, in 2015, the Commission considered that the market for the licensing for online rights is EEA wide.⁵⁴ The Commission noted that the large "Option 3" publishers as well as the larger CMOs (collecting societies) license their repertoire on an EEA-wide basis. Smaller CMOs either issued national licences or relied on a larger CMO to license their repertoire on a multi-territorial basis. The Commission also noted that, from a demand perspective, most of the large online platforms (digital service providers or DSPs) are active in the whole of EEA and their licences tend to be multi-territorial and only the small DSPs (those that operate in one country only) have sometimes national licences.

5.2.2. *Notifying Party's view*

- (52) The Notifying Party is "unaware of any reason to depart from the Commission precedents in which national markets were defined for the upstream market for providing publishing services and thus provided information on the basis of national markets".⁵⁵ The Notifying Party takes the same approach with respect to the licensing of mechanical rights,⁵⁶ performance rights,⁵⁷ and synchronization rights⁵⁸ and print rights.⁵⁹
- (53) With regard to the market for the exploitation of online rights, the Notifying Party considers that since *Sony/Mubadala/EMI* the market further evolved into an EEA-wide market as the factors that the Commission relied on to define national markets no longer apply. The Notifying Party agrees with the finding in *PRSfM / STIM / GEMA / JV* that the market is EEA wide.⁶⁰
- (54) Specifically, the Notifying Party considers that all major online platforms now operate on the basis of EEA wide or wider licences.⁶¹ [Information on the scope of Sony/ATV's licences to online customers]. The Notifying Party points out that this represents a change compared to *Sony/Mubadala/EMI* when certain large online platforms, namely [name of a Sony/ATV and EMI MP customer], still had national licences. National licences account for [information on Sony/ATV's licensing practice] of Sony/ATV's and EMI MP's revenues.

⁵³ *Sony/Mubadala/EMI*, recital 60.

⁵⁴ *PRSfM / STIM / GEMA / JV* recital, 125.

⁵⁵ Form CO, chapter 1, paragraphs 6.6 and 6.7.

⁵⁶ Form CO, chapter 2, paragraphs 6.6 and 6.7.

⁵⁷ Form CO, chapter 3, paragraphs 6.4 to 6.6.

⁵⁸ Form CO, chapter 4, paragraphs 6.4 to 6.6.

⁵⁹ Form CO, chapter 5, paragraph 6.7.

⁶⁰ Form CO, chapter 6, paragraph 6.24.

⁶¹ Form CO, chapter 6, paragraph 6.25 to 6.28.

- (55) The Notifying Party further submits that even online platforms that are not active across the whole EEA nevertheless obtain EEA-wide licences.⁶² This proposition departs from *Sony/Mubadala/EMI* where online platforms that were present in certain countries only acquired single territory licences and obtained new licences as they expanded their operations. These services include [names of Sony/ATV's and EMI MP's customers].
- (56) [Information on Sony/ATV's and EMI MP's licensing practice], the Notifying Party also submits that, contrary to the facts assessed in *Sony/Mubadala/EMI*, royalty rates and usage terms are broadly uniform across the EEA⁶³. First, in all agreements with major online platforms Sony/ATV licenses [information on Sony/ATV's licensing practice]. Second, for both download and streaming services, [information on Sony/ATV's licensing terms]. Third, for each online platform, the agreements provide [information on Sony/ATV's licensing terms]. Fourth, other usage terms, such as the grant of rights enabling the licensee to offer free trials, family or student subscriptions, and/or promotional discounts at discounted royalties, [information on Sony/ATV's licensing terms]. Fifth, minima for both downloaded services and ad-funded streaming services [information on Sony/ATV's licensing terms]. Minima are guaranteed minimum prices that the licensee has to pay regardless of actual music consumption. It is part of the common pricing formula in licences whereby the licensee has to pay the higher of the percentage royalty rates or the minima.
- (57) [Information on Sony/ATV's licensing terms] variations in minima requested by these platforms were intended to reflect differences between Member States in consumer spending power and retail prices for subscription services⁶⁴.

5.2.3. *Commission's assessment*

- (58) The Commission considers that the market investigation did not reveal any facts that would make it necessary to reconsider the geographic market definition of the market for publishing services to the authors and the markets for the exploitation of mechanical rights, performance rights, synchronization rights and print rights. It appears therefore appropriate to consider that these markets are still national and not EEA-wide. In any event, the geographic market definition pertaining to these product markets can be left open as no competition concerns arise under any plausible market definitions.
- (59) With regard to the market for the licensing of online rights, the Transaction does not affect the licensing of the Continental European repertoire, which is controlled by the collecting societies (see above recitals (23) to (27)). Music publishers do not have market power in the licensing of the Continental European repertoire. The competitive effects, if any, will occur in the Anglo-American repertoire. As a result, the Commission focuses its assessment on the geographic dimension of the licensing of the Anglo-American repertoire.

⁶² Form CO, chapter 6, paragraph 6.30 to 6.31.

⁶³ Form CO, chapter 6, paragraph 6.34 to 6.36.

⁶⁴ Form CO, chapter 6, paragraph 6.35.

- (60) The market investigation confirmed that the licence of major online platforms is pan-European in scope.⁶⁵ The list of respondents included platforms that are present in all countries and also platforms that have a more limited presence. Publishers also confirmed that the scope of their licences for the online rights for their Anglo-American repertoire is EEA-wide or wider.⁶⁶
- (61) A large majority of respondents, including both online customers and publishers indicated that the percentage royalty rates in these licences tend to be uniform across the EEA.⁶⁷
- (62) Similarly, a large majority of respondents confirmed that advances are paid for the whole EEA territory, and not on a country by country basis.⁶⁸
- (63) Respondents confirmed that minima do differ more across countries; however, the market investigation indicated that this is due to the different purchasing power of consumers.⁶⁹ By adjusting the price floor to the consumer spending power (reducing it in countries where such power is lower) the parties decrease the chance that the minima are actually triggered instead of the royalty rates. Indeed, a large number of market participants believed that licensees generally pay the headline royalty rates and that the minima are usually not triggered.⁷⁰ Furthermore, the fact that the minima are adjusted to reflect consumer spending power shows that the variation is due to different levels of income and development rather than different competitive conditions in different countries. The market investigation did not show a pattern whereby the price differences across countries would be due to different intensity of the competitive process or that certain publishers' Anglo-American catalogue would be competitively stronger in one country as opposed to another.⁷¹
- (64) It appears, therefore, that price conditions are sufficiently similar across the EEA on the wholesale level, i.e. the level between the publishers and platforms.
- (65) As to major licensing terms that have an impact on the economics of the licensing agreement (i.e. terms that are not necessarily financial in nature, but have a material impact on the economics of the agreement) some market participants considered that major terms are uniform across Europe save for minima. Other market participants indicated that there is some variation in terms per country, but that such variation is not substantial. Overall the majority view appears to be that main terms and conditions do not vary to a degree that would justify the definition of separate markets.

⁶⁵ Questionnaire to customers, question 10. See also minutes of a phone calls with two online music providers.

⁶⁶ Questionnaire to competitors, question 11. See also minutes of a phone call with a competitor.

⁶⁷ Questionnaire to customers, question 13; Questionnaire to competitors, questions 11.3 and specifically 11.4.

⁶⁸ Questionnaire to customers, question 15, questionnaire to competitors, question 11.6.

⁶⁹ Questionnaire to customers, question 14 , questionnaire to competitors, question 11.3-11.5.

⁷⁰ Questionnaire to customers, question 14, questionnaire to competitors, question 11.3-11.5.

⁷¹ Questionnaire to customers, question 13-16, questionnaire to competitors, question 11.8.

- (66) The Commission also notes that the fact that licences have an EEA wide scope also means that they are centrally negotiated. In other words online platforms appear to source their licences on a European wide basis.
- (67) Therefore, the market investigation broadly confirmed the Notifying Party's view. Given the above considerations, the Commission takes the view that the market for licensing of online rights in relation to the Anglo-American repertoire is EEA wide. In any event, as discussed in more detail in Section 6.1.2.4 below, the Transaction would not give rise to serious doubts as to its compatibility with the internal market even if this market were to be national in scope. Finally, as explained above in recital (59) the definition of the geographic dimension of the exploitation of online rights can be left open with regard to the Continental European repertoire.

6. COMPETITIVE ASSESSMENT

- (68) In assessing the competitive effects of a proposed concentration, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. The competitive conditions existing at the time of the merger usually constitute the relevant comparison for evaluating the effects of a merger⁷².
- (69) In the case at hand, in line with the analytical framework developed in previous cases concerning the music publishing sector and, in particular, *Sony/Mubadala/EMI*, and following the concerns raised by some respondents, the Commission focused its investigation on whether the Transaction (and, in particular, the elimination of the Michael Jackson Estate as a jointly controlling shareholder of Sony/ATV) may lead to increased market power for Sony in the market for the exploitation of online rights relating to the Anglo-American repertoire. The Commission also checked the possible impact of the change from joint to sole control on the other relevant markets. The Commission also investigated a number of markets that would technically be affected by the Transaction with a view to assessing whether the Transaction would lead to an increased ability and/or incentive on the part of Sony to engage in input foreclosure in relation to certain Sony/ATV's publishing rights. These are explained below in sections 6.1, 6.2 and 6.3, respectively.

6.1. Market for the exploitation of online rights

- (70) In the market for the exploitation of online rights, the online customers need a licence not only for publishing rights but also for recording rights.⁷³ This is because to make a song available on an online platform it is necessary to license the right both to the notes and the lyrics of that song (publishing rights) and to the rights to the actual recorded version of the same song. In order to offer a title in its service, an online music provider must acquire licences not only for all co-publishing rights but also for recording rights relating to this title. As certain major publishers also

⁷² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p. 5-18, paragraph 9.

⁷³ In the music industry publishing rights represent the rights to the melody and the lyrics and are transferred from the authors to publishers. Recording rights represent rights to the particular recorded rendition of a song and are transferred by the recording artists to record labels.

have a recording business, recording rights also increase their market power. The fact that an integrated music company has both publishing and a recording business does not mean that its recording and publishing rights cover the same musical works: it happens very often that the publisher that holds the rights to a particular song does not form part of the company that holds the recording rights and vice versa. Both publishing and recording rights are often split between several entities. As a result, an integrated company controls, a large number of songs through recording rights, in addition to the songs controlled via publishing rights. In this case, the revenue shares from publishing may significantly understate the real market power of the music company.

- (71) Moreover, in many cases several authors under contract with different publishers write a song together, which leads to split copyrights (co-publishing) among publishers. Each author owns a share of the song and each publisher administers the shares of the author under contract. As, in order to offer the song, an online music provider needs to have a licence for all fractional publishing rights, each publisher can veto the inclusion of the song in the online platform's service. In this sense having a fractional ownership rights gives a publisher full control over the songs to which these rights relate, and thus over a share of the (Anglo-American) repertoire, yet on a revenue basis the publisher receives only the fraction of the licence fees related to the songs and as a result its market power would be underestimated on a revenue share basis. Co-published works account for a significant share of publishers' catalogues, which can reach 25%.
- (72) The Commission, therefore, considers that market shares on the basis of revenues alone might not fully reflect the market positions of the different publishers since they do not adequately take into account their power on the basis of co-publishing and recording rights.
- (73) To adequately reflect these factors and to give a better measure of the publishers' or integrated music company's market power, the Commission developed the concept of "control shares". A music company's control share is the share of the songs in the full Anglo-American repertoire that the particular music company controls through fractional or full publishing rights or recording rights.
- (74) Control shares can be calculated only for publishing control shares in order to address the problem of co-publishing. Control shares can also be calculated by aggregating publishing and recording control shares if the publisher belongs to an integrated company that also has a recording business. By their nature, control shares add up to more than 100 %. For example, if the publishing rights are split between several publishers, the song is counted in each publisher's control share. As a result, in *Universal/BMG Music Publishing* the Commission considered that the threshold for increased market power that would have a significant (negative) impact on competition is a control share of 50 %.⁷⁴ The relevance of this threshold was confirmed by respondents to the market investigation, including by those who have been more critical of the Transaction, in the case at hand.⁷⁵

⁷⁴ *Universal/BMG Music Publishing*, recital 305. See also *Sony/Mubadala/EMI* recital 177.

⁷⁵ Questionnaire to customers, question 26, Questionnaire to competitors, questions 21 and 54.

- (75) In principle, to calculate control shares it would be necessary to determine the controlling entities for all the titles in the Anglo-American repertoire. This, however, would be a disproportionately burdensome data collecting exercise that is hardly feasible within the context of a merger procedure given the many million songs that make up the Anglo-American repertoire. Consequently, the proxy the Commission used in *Universal/BMG Music Publishing* was the control shares in the weekly or annual chart hits.⁷⁶ The Commission considered that charts are of particular importance for online music providers, as they notably create traffic and attract customers on their platforms.⁷⁷
- (76) The Commission also applied the control share theory in *Sony/Mubadala/EMI*, when Sony and Mubadala jointly acquired EMI MP. The Commission aggregated the control shares of Sony/ATV and EMI MP to assess the combined market power of the two publishers.⁷⁸
- (77) At the same time the Commission did not aggregate the publishing control shares with Sony's recording control shares, which were held by Sony Music Entertainment ("Sony Music"), a company 100% controlled by Sony. An important reason for disregarding the Sony Music's control shares was the ownership structure of Sony/ATV and EMI MP.
- (78) The Commission noted that in order to jointly leverage Sony Music's recording rights with Sony/ATV's and EMI MP's publishing rights, the coordinated negotiations would have to take place across three entities (Sony/ATV, Sony Music, EMI MP), each of which has different interests and incentives. Sony Music is 100 % controlled by Sony, Sony/ATV is a 50/50 joint venture between Sony and the Michael Jackson Estate, while EMI MP was to be controlled jointly by Sony and Mubadala, with other investors also holding an interest.⁷⁹ The co-owners of Sony/ATV and EMI MP (the Michael Jackson Estate and Mubadala) do not share the same interests as Sony. Their only incentive is to maximize the publishing revenues of Sony/ATV and EMI MP, while Sony would be incentivized to maximize the combined revenues from its publishing and recording interest. Given Mubadala's and Michael Jackson Estate's control over Sony/ATV and EMI MP, they would cause these entities to follow the strategy of maximizing publishing revenues, which in turn would make it difficult for Sony to maximize combined revenues across its publishing and recording interests. In short, the Commission considered that the different strategic and commercial incentives stemming from the diverse ownership of the Sony publishing and recording interests would make it difficult to combine recording and publishing market power.⁸⁰
- (79) The conclusions in *Sony/Mubadala/EMI* were very specific to this case. This decision states that "*incentives of a company which is under common ownership to*

⁷⁶ *Universal/BMG Music Publishing*, recital 286.

⁷⁷ *Universal/BMG Music Publishing*, recital 275.

⁷⁸ *Sony/Mubadala/EMI* recital 197.

⁷⁹ *Sony/Mubadala/EMI* recital 203.

⁸⁰ *Sony/Mubadala/EMI* recitals 207-209.

leverage its market power across the two businesses may be different to that of Sony/ATV and Sony Music."⁸¹

- (80) Viewed in light of these precedents the Transaction does lead to a change that could potentially increase Sony's market power. The change from joint control to sole control removes one of the most important factors on the basis of which the Commission did not aggregate the control shares across Sony Music and Sony/ATV. The Transaction may, therefore, increase Sony's market power substantially in the market for the exploitation of online rights. This is the reason why this market required a closer examination..

6.1.1. Notifying Party's view

6.1.1.1. Applicability of the control share theory

- (81) According to the Notifying Party, the Transaction will not change Sony/ATV's and EMI MP's current positions. The Notifying Party considers that – contrary to the Commission precedents of *Universal/BMG Music Publishing, Sony/Mubadala/EMI* and *PRSfM/STIM/GEMA/JV* where the mergers resulted in an increment in market shares – the Transaction does not lead to an increase in Sony/ATV's or EMI MP's market share on the basis of revenues.⁸²
- (82) The Notifying Party further submits that the combined EEA market share of Sony/ATV and EMI MP of online revenues will remain below 30 %, namely [20-30] %.
- (83) The Notifying Party notes that the Commission's "control share" theory postulates a hold-up scenario, in which publishers with a large repertoire exercise pressure on online music platforms and impose higher rates by threatening not to license their repertoire. In the Notifying Party's view, this premise is inconsistent with publishers' incentives because publishers are under pressure to license their repertoire as widely as possible due to a number of constraints.⁸³
- (84) First, the ability to maximize licensing revenues as widely as possible is a central element of competition for authors. Any failure to license publishing rights for online dissemination would adversely affect a publisher's competitive position and their ability to retain existing authors and compete for new talent.⁸⁴
- (85) Second, right holders and platforms remain under pressure from piracy.⁸⁵ Sales of physical recorded music continued to decline and in 2015 they were 80 % lower than in 1999. Although digital sales have grown in recent years, overtaking revenues from CD sales in 2015, the music industry is significantly smaller than what it was 20 years ago. According to the Notifying Party digital piracy is one of

⁸¹ *Sony/Mubadala/EMI* recital 207.

⁸² Form CO, chapter 6, paragraphs 7.2 – 7.3.

⁸³ Form CO, chapter 6, paragraphs 7.8 – 7.10.

⁸⁴ Form CO, chapter 6, paragraphs 7.11 – 7.15.

⁸⁵ Form CO, chapter 6, paragraphs 7.16 – 7.25.

the main reasons for this decline. The Notifying Party refers to IFPI reports ⁸⁶, which estimate that 20% of fixed-line internet users worldwide still regularly access services offering copyright infringing music and that there were four billion music downloads via BitTorrent alone, the vast majority of which are infringing. MUSO, an anti-piracy technology company, monitored traffic to 14,000 of the largest global piracy websites and recorded 141 billion visits in 2015. Piracy puts strong pressure on right holders to license online content in a flexible manner to ensure its broad availability, as the more readily authorized music is made available, the less likely consumers are to turn to non-authorized sources. Further, even where music is licensed to one or more digital platforms, there is a material risk of significant piracy.

- (86) Third, online platforms enjoy significant buyer power.⁸⁷ Online music platforms have become more powerful as online revenues have assumed greater significance for music publishers due to the corresponding decline in offline revenues. The Notifying Party considers that since the 2012 *Sony/Mubadala/EMI* decision, when the Commission rejected the existence of online platforms' countervailing buyer power because the market on which these online platforms competed was highly dynamic, online music platforms have consolidated their market position and grown in strength.
- (87) Currently [the large majority] of Sony/ATV's and EMI MP's online rights revenues in the EEA are generated by [...] companies: [names of Sony/ATV's and EMI MP's customers], which shows the importance of these players to Sony/ATV and EMI MP. Given their importance to Sony/ATV's and EMI MP's business, they command considerable negotiating strength. These services are the same as those that were the leading ones at the time of *Sony/Mubadala/EMI*, which shows that demand has stabilized since 2012. Further, only two of these licensees focus on music alone ([names of Sony/ATV's and EMI MP's customers]). [Names of Sony/ATV's and EMI MP's customers], conversely, commercialize music in order to enhance the appeal of their respective platforms and to promote services that constitute their principal revenue source, which is not music related ([...]).
- (88) The Notifying Party also notes that smaller platforms are able to achieve similar rates as the largest platforms, showing Sony/ATV's lack of bargaining power.
- (89) In addition, Online Platforms can and do launch their services without clearing music publishing rights. The Notifying Party submits that the legal risks of running a platform without publishing licences were overstated in *Sony/Mubadala/EMI*. Typically, online platforms approach recorded music companies for a licence and, once they have cleared the recorded music rights, seek to launch their services as soon as possible. Platforms may then seek to regularize their position vis-à-vis music publishers retroactively. The Notifying Party lists a number of digital platforms ([names of Sony/ATV and EMI MP customers]), all of which operated for years without a publishing licence.
- (90) The Notifying Party submits that, despite the relative frequency with which online platforms operate unlicensed services exploiting Sony/ATV's and EMI MP's

⁸⁶ IFPI stands for the International Federation of the Phonographic Industry.

⁸⁷ Form CO, chapter 6, paragraphs 7.26 – 7.55.

repertoire, Sony/ATV has not brought infringement proceedings against any of these licensees. [Description of publishers' commercial strategies]. Contrary to record companies, [description of publishers' commercial strategies]. An important fact in this regard is that publishing royalties for Anglo- American repertoire represent only a small fraction of the retail price of an online music track. Although melody and lyrics constitute the foundation of a recorded song, as a commercial matter, they merely represent an input to the final recorded product. Recorded music companies produce the final recorded product and represent the performing artist who typically drives a track's popularity. [Information on publishers' and recording labels]. For a music publisher, [description of publishers' commercial strategies] reduces Sony/ATV's and increases online platforms' leverage in licence negotiations.

- (91) The Notifying Party also submits that decisions of music platforms are limited to the binary options of licensing or not licensing the publishers' catalogue. Licence negotiations are therefore reduced to an "all or nothing" game: if publishers reach no licence agreements they will generate no sales at all. This fundamentally weakens the negotiation position of publishers because their interest to grant a licence for their repertoire is substantially stronger than the pressure for operators of music platforms to obtain such a licence.
- (92) In summary, in the Notifying Party's view, as a result of these factors (competition for authors, piracy, and the countervailing buyer power of online platforms) a hold-up scenario is inconsistent music publishers' incentives and the constraints they face. Instead publishers' approach is to license as widely as possible. Against the meagre potential gains of a "hold-up" strategy stands the very real risk of a "hold-up" strategy disrupting the publisher's sales, throttling its cash-flows, and destroying its reputation with authors.
- (93) According to the Notifying Party, the growth of streaming services illustrates why it is important for publishers to license widely and flexibly. When Spotify launched it was a small start-up with an unproven business model, while currently it is the leading streaming music provider. Had Sony/ATV not been willing to license its and EMI MP's repertoire, the service may not have gained popularity and Sony/ATV would have foregone significant licensing revenues that it currently derives from Spotify and streaming. Publishers therefore seek to encourage the growth of new platforms with flexible licensing practices wherever possible.
- (94) Thus by disputing the plausibility of a "hold-up" scenario, which it considers to be a theoretical basis of the control share theory, the Notifying Party questions the appropriateness of calculating control shares in the first place.
- (95) Nonetheless, the Notifying Party submits that the combined control shares of SONY/ATV and EMI MP are [30-40] % (Sony/ATV [10-20] %, EMI MP [20-30] %) significantly below threshold of 50 % defined in precedents.⁸⁸

6.1.1.2. Control shares relating to EMI MP's music catalogue

- (96) The Notifying Party argues that there is no basis for generating control shares that combine Sony Music's recorded music rights with Sony/ATV's and EMI MP's

⁸⁸ Form CO, chapter 6, paragraphs 7.69 – 7.70.

music publishing repertoire. According to the Notifying Party such aggregation would imply that recording rights and publishing rights would be jointly negotiated or the negotiations would be coordinated, which has no basis in reality.

- (97) First, Sony ATV and Sony Music are separate and are expected to remain separate businesses subject to strict organizational segregation. Under such organizational structure joint negotiations over recording and publishing rights are impracticable.
- (98) Second, Sony/ATV has never invoked recorded music rights in online negotiations and there is no reason to believe it would do so post-Transaction. This is because the administration and ownership regimes of the types of rights are different and because the interests of Sony Music and Sony/ATV are not aligned.
- (99) [Information on Sony/ATV's and Sony Music's negotiation strategy].
- (100) Fourth, Sony will have no incentive to hold up recorded music rights to favour Sony/ATV. Recorded music companies generate significantly greater revenues per-stream or per-download than music publishing companies. Sony would therefore never have the incentive to hold up Sony Music's repertoire to benefit Sony/ATV (still less EMI MP, which will remain majority-owned by non- Sony shareholders).
- (101) Fifth, holding up publishing rights to favour Sony Music's recorded music business is not feasible either due to EMI MP's ownership structure. Along with negotiating to license its own catalogue, Sony/ATV is empowered to negotiate with online platforms on behalf of EMI MP by virtue of the Administration Agreement between Sony/ATV and DH Publishing, the entity that owns and manages EMI MP. According to the Notifying Party, it is inconceivable that Sony/ATV would hold up the licensing of EMI MP's publishing rights to raise prices of Sony Music's recorded music rights. Mubadala and DH Publishing would not countenance such a strategy, [information on EMI MP's governance structure].
- (102) The Notifying Party submits that the control exercised by the DH Publishing Consortium over Sony/ATV's licensing with respect to the EMI MP's catalogue is reinforced by the provisions of the Administration Agreement. Namely, the Agreement can be terminated if EMI MP [description of relevant provisions of the Administration Agreement], or if Sony/ATV is in material breach of the Agreement. Furthermore, the Agreement prevents Sony/ATV from taking any of the following actions without DH Publishing's prior written consent: [description of relevant provisions of the Administration Agreement].
- (103) More generally, the Agreement provides that Sony/ATV should deal with transactions concerning Sony Corporation or any of its Affiliates [description of relevant provisions of the Administration Agreement]. Furthermore, Sony/ATV is contractually obliged [description of relevant provisions of the Administration Agreement].
- (104) In summary, in the Notifying Party's view, combining negotiations for recording and publishing rights is not feasible or practicable and therefore control shares should not be aggregated across Sony Music and Sony/ATV and EMI MP. The Notifying Party submits, however, that even if the control shares included the rights to Sony Music, Sony/ATV and EMI MP repertoires, the resulting control shares would be [40-50] % on an EEA wide basis, i.e. below the 50 % level, which

was set in precedents as the threshold for significant market power and thus competition concerns.⁸⁹

6.1.2. *Commission's assessment*

- (105) As discussed in recitals (77) to (79) in more detail, the decision of the Commission in *Sony/Mubadala/EMI* not to aggregate control shares between Sony/ATV and EMI MP on the one hand and Sony Music on the other hand was based on the ownership and control structure of Sony/ATV and EMI MP. In this precedent, the Commission specifically noted that the conclusions it reached were specific to the case and that the incentives of a company which is under common ownership to leverage its market power across the two businesses may be different to that of Sony/ATV and Sony Music.⁹⁰
- (106) As the Transaction removes an important factor that the Commission relied on in deciding not to aggregate the control shares in *Sony/Mubadala/EMI Music*, the Transaction may lead to increased market power.
- (107) Whether or not this is the case depends on a number of factors, namely:
- i.) The applicability and validity of the control share theory in particular concerning the aggregation of control shares across publishing rights and recording rights;
 - ii.) Assuming the share theory is applicable across publishing and recording rights, the question whether or not control shares relating to EMI MP should be added to the control shares thus calculated; and
 - iii.) Given the proper level of aggregation based on i) and ii), the actual level of control shares.
- (108) These points will be examined in turn.

6.1.2.1. *Applicability of the control share theory*

- (109) The Commission considers that there are no compelling reasons to depart in the case at hand from the well-established application of the control share theory.
- (110) Contrary to the Notifying Party's claims (see recitals (85)-(92)), the market investigation does not confirm that the pressure from piracy or alleged buyer power would be sufficiently constraining for publishers not to engage in a hold-up strategy. As already noted in previous cases, even the Parties themselves recognised that initiatives have been launched to curb online piracy across the EEA.⁹¹ Furthermore, the respondents to the market investigation confirm that there has been a decrease in the piracy in the past years. This was due to amongst others, passing of anti-piracy legislation, growth in the digital industry, notably driven by

⁸⁹ Form CO, chapter 6, paragraphs 7.105 and 7.106.

⁹⁰ *Sony/Mubadala/EMI*, recital 207.

⁹¹ *Sony/Mubadala/EMI*, recital 238.

streaming, and availability of free offers by certain online platforms, which covers the entirety of the EEA.⁹²

- (111) All online platforms confirm that music remains a critical input for their overall service offering. Online platforms consider the bargaining position of the big publishers from moderate to very strong.⁹³ Furthermore, the market investigation produced examples of negotiations between music publishers and online platform that disprove the existence of buyer power on the side of the platforms. Customers list examples where they are faced with increases in licensing terms (royalty rate increases, increases in minima, increases in advances, by changing the type of advances, securing equity shares, etc.) that they are unable to countenance.⁹⁴ Therefore, the Commission finds that online platforms, including the large customers indicated by the Parties as accounting for a large share of their sales, would not be able to exert significant buyer power as the Notifying Party claims.
- (112) The majority of respondents to the market investigation indicated that negotiations for publishing and recording rights are conducted separately.⁹⁵ Responses were mixed on the question whether or not the timing of the negotiations are aligned.⁹⁶ Some respondents indicated that they are aligned or that they are aligned precisely to maximize leverage, while others replied that they are not aligned as a matter of business practice but can be aligned for specific, ad-hoc reasons and some indicated that they are not aligned.
- (113) Some respondents, however, indicated that these negotiations are centrally coordinated or at least are perceived by customers as being centrally coordinated.⁹⁷ Furthermore, half of the customers indicated that they experienced in practice that companies that control both sets of rights use the control over both sets of rights to extract better terms.⁹⁸ A respondent submitted that in order for a company to do so it is not necessary to explicitly make the terms relating to one set of rights dependent on the acceptance of the conditions relating to the other set of rights but that sophisticated companies have less explicit means to leverage control over both sets of rights. That being said, explicit linkage of the two sets of terms was also reported.
- (114) The market investigation revealed further specific examples of combined or coordinated negotiations of publishing and recording rights.⁹⁹

⁹² Questionnaire to customers, questions 29-33.

⁹³ Questionnaire to customers, questions 34-36.

⁹⁴ Questionnaire to customers, questions 37-39.

⁹⁵ Questionnaire to customers, question 21; Questionnaire to competitors, question 14.

⁹⁶ Questionnaire to customers, question 22; Questionnaire to competitors, question 15.

⁹⁷ Questionnaire to customers, questions 21-25; Questionnaire to competitors, questions 14 and 15.

⁹⁸ Questionnaire to customers, question 23.

⁹⁹ Questionnaire to competitors, questions 16.1, 16.2, 17.1, 17.2 and 18.2, Questionnaire to customers, question 23.

- (115) Moreover, a large majority of respondents agreed that post-Transaction Sony would have both the ability and the incentive to combine negotiations of recording rights and (at least some) publishing rights.¹⁰⁰
- (116) In addition, a majority of respondents indicated that control shares in general (that is to say, regardless of the fact whether they are aggregated across recording and publishing or used only for measuring publishing market power) are an appropriate way to measure market power of publishers and record companies.¹⁰¹
- (117) Some respondents also pointed out that with the increasing prevalence of streaming charts are becoming less important. However, the chart based methodology used by Sony in the case at hand was still considered to be relevant and sound.¹⁰²
- (118) As discussed in recital (75) above, calculating control shares involves an intensive data collecting exercise, which is not possible to carry out for the several million songs that make up the entire Anglo-American repertoire. A proxy to show market power has to be used therefore, and charts appear to be a reasonable one given that they represent a large enough sample in terms of revenues and traffic while keeping the number of songs in respect of which the controlling entities need to be identified to a minimum.
- (119) In addition, as the Commission noted in *Universal/BMG Music Publishing* the chart analysis of one or two years can only be a kind of "snapshot" to reflect the position of a music company in the recent past and proxy for its market position as control shares regularly alter from year to year and depend on the success and the combination of different authors and performing artists¹⁰³. Control shares are therefore not a precise measure of market power but rather a good indicator at a given point in time.
- (120) In any event, despite the potential measurement difficulties, the market investigation confirmed that control shares are a good metric to gauge the respective strength of music companies.
- (121) In conclusion, the chart based control share theory is applicable and is appropriate to measure music companies' market power. Given that Sony/ATV and Sony Music will be ultimately controlled by the same entity, the control shares need to be aggregated across Sony Music and Sony/ATV.
- (122) This conclusion is in line with past precedents: the Commission included the recording rights in the control shares in *Universal/BMG Music Publishing* and excluded them in *Sony/Mubadala/EMI* based on whether or not the recording and the publishing rights were under the control of the same undertaking.

¹⁰⁰ Questionnaire to competitors, questions 19 and 20.

¹⁰¹ Questionnaire to competitors, question 21, Questionnaire to customers, question 26

¹⁰² Minutes of phone calls with two online music providers ; Questionnaire to competitors, questions 21 and 23; Questionnaire to customers, question 26.

¹⁰³ *Universal/BMG Music Publishing*, recital 287.

6.1.2.2. Control shares relating to EMI MP's catalogue

- (123) The Commission recalls that EMI MP is 100 % controlled by DH Publishing, which in turn is owned by the DH Publishing Consortium. DH Publishing consortium members and their respective approximate share in DH Publishing are as follows: Mubadala ([...]), the Michael Jackson Estate ([...]), Sony ([...]) Jynwel Capital, GSO Capital Partners and a corporation associated with David Geffen (collectively [...]).¹⁰⁴ As the Commission concluded in *Sony/Mubadala/EMI*, EMI MP is jointly controlled by Sony and Mubadala.¹⁰⁵
- (124) Sony/ATV administers the EMI MP catalogue under the terms of an Administration Agreement,¹⁰⁶ which allows it to license the catalogue, collect the money from such licensing activity and identify potential new catalogue acquisitions on behalf of the consortium.
- (125) The Commission verified the Administration Agreement, which does contain the veto rights referred to by the Notifying Party in recital (102), along with several others. Namely under [description of relevant provisions of the Administration Agreement] Sony/ATV cannot take any of the following actions without DH Publishing's prior written consent: [description of relevant provisions of the Administration Agreement].
- (126) In addition, Sony/ATV also cannot [description of relevant provisions of the Administration Agreement].
- (127) All these veto rights afforded to DH Publishing are vested with Mubadala.¹⁰⁷
- (128) [Description of relevant provisions of the Administration Agreement] provides that Sony/ATV is contractually obliged to [description of relevant provisions of the Administration Agreement].
- (129) [Description of relevant provisions of the Administration Agreement] provides that Sony/ATV should deal with transactions concerning "Related Parties" – i.e., Sony Corporation or any of its Affiliates – [description of relevant provisions of the Administration Agreement].
- (130) The agreement governing the relationship between DH Publishing's shareholders entitles Mubadala [description of relevant provisions of DH Publishing's Limited Partnership Agreement].¹⁰⁸
- (131) It follows from the above contractual arrangements that Mubadala, which is independent from and not controlled by Sony, can exert control over Sony/ATV's licensing of the EMI MP catalogue.

¹⁰⁴ Form CO, chapter 6, paragraph 7.93.

¹⁰⁵ *Sony/Mubadala/EMI*, recitals 12-17. See also Form CO sections 1-5 & 8-10, paragraph 1.6.

¹⁰⁶ Form CO, Annex G(1).

¹⁰⁷ Form CO, chapter 6, footnote 162.

¹⁰⁸ Form CO, chapter 6, paragraph 7.96.

- (132) In line with the approach the Commission adopted in *Sony/Mubadala/EMI*,¹⁰⁹ this means that in order to jointly leverage EMI MP's publishing rights with Sony Music's recording rights and with Sony/ATV's publishing rights the coordinated negotiations would have to take place across three entities, one of which (EMI MP) has different interests and incentives than the other two (Sony Music and Sony/ATV). While, in line with section 6.1.2.1, it can be assumed that, being controlled by the same entity, Sony/ATV and Sony Music would aim to maximize their joint (publishing and recording) revenues, Mubadala's only incentive is to maximize publishing revenues only. Given Mubadala's control over EMI MP, it would cause EMI MP to follow the strategy of maximizing publishing revenues, which in turn would make it difficult for Sony to maximize combined revenues across its publishing and recording interests. In other words, the different strategic and commercial incentives stemming from the diverse ownership of EMI MP would make it difficult to combine Sony/ATV's and Sony Music's market power with EMI MP's.
- (133) For this reason it does not appear appropriate to aggregate EMI MP's control shares with those of Sony/ATV and Sony Music.
- (134) The Commission notes that this approach is consistent with the fact that in *Sony/Mubadala/EMI* the Commission aggregated Sony/ATV's and EMI MP's publishing control shares. The basis for that aggregation was that both entities were under the control of entities (the Michael Jackson Estate and Mubadala) that were interested exclusively in maximizing publishing revenues. Since both of them followed the same incentives, it was appropriate to aggregate these publishing control shares.
- (135) In the present situation, the incentives stemming from ownership align the strategic goals of Sony/ATV and Sony Music, which are different from the strategic goals of Mubadala; consequently, it appears appropriate to aggregate Sony/ATV's and Sony Music's control shares but to exclude EMI MP's.
- (136) For completeness, the Commission also notes that another possible reading of the arrangements cited above is that Mubadala can cause Sony/ATV to treat Sony Music [description provisions of contractual arrangements]. Also, as the [description of Sony/ATV's and EMI MP's licensing practice], and Mubadala controls EMI MP licensing, it is possible that the overall publishing repertoire is licensed in line with Mubadala's strategic goals. Under this reading the publishing control shares of EMI MP and Sony/ATV could be aggregated. In that case, the conflict would occur between the strategic goals of Sony/ATV and EMI MP (maximizing publishing revenues in line with Mubadala's priorities) on the one hand, and the strategic goal of Sony Music (maximizing recording revenues in line with Sony's priorities) on the other hand. This means that under this reading Sony/ATV's and EMI MP's publishing control shares would be aggregated, but Sony Music's recording control shares would be excluded (which would essentially reproduce the pre-Transaction situation).

¹⁰⁹ *Sony/Mubadala/EMI*, recitals 207-209.

6.1.2.3. Actual control shares

- (137) Although disputing the control share theory, the Notifying Party nevertheless submitted control share data both on a national and on an EEA level.
- (138) The control shares were calculated according to the following methodology
- i.) Control shares were calculated in respect of those EEA Member States where Sony/ATV licenses repertoire directly. These countries together account for over [the large majority] of total EEA music publishing revenues.
 - ii.) In each of these countries, Sony identified official weekly digital sales charts which provide the largest coverage of tracks. However not all EEA countries have official digital charts and certain official charts only include a limited number of tracks. In such cases the chart selected was the most reliable unofficial chart.
 - iii.) The weekly digital charts were consolidated to generate a list of unique tracks that appeared in the charts any time in 2015 in each country.
 - iv.) For each track on these lists, a search was conducted to determine whether Sony/ATV's or EMI MP's authors were involved in writing the song and whether the song is part of their publishing repertoire. All works that were written or co-written by Sony/ATV's and EMI MP's authors were included, i.e. track with both full and fractional ownership rights were included. Finally, for all tracks that were considered part of Sony/ATV's or EMI MP's repertoire, it was determined whether the track belongs to the Anglo-American or Continental European repertoire. Only the Anglo-American titles were included in the control shares.
 - v.) Control shares that take into account recorded music rights were also computed in a similar way as publishing control shares. All tracks were included where the recorded rights are held by Sony Music in 2015 irrespective of whether the track is considered Anglo-American or Continental European repertoire by Sony Music.
 - vi.) The “control shares” are expressed in percentage terms of the number of unique tracks that entered into each respective chart. This ensures that the “control shares” are comparable across EEA countries. There is no official EEA chart, so EEA “control shares” were generated by weighting the national shares according to total music publishing market size.
- (139) This methodology is reasonable and is partially in line with the methodology followed in *Universal/BMG Music Publishing*.¹¹⁰
- i.) Fractional publishing rights were counted in the control shares.¹¹¹

¹¹⁰ *Universal/BMG Music Publishing*, recitals 286, 288, 294, 295 and 296.

¹¹¹ *Universal/BMG Music Publishing*, recital 286.

- ii.) Only Anglo-American titles were counted in the publishing control shares.¹¹²
 - iii.) If the title could belong to both the Anglo-American and the Continental repertoire (for example because it was co-written by an Anglo-American and a Continental European author), the song was included in the control shares on the grounds that split publishing rights in Anglo-American titles is sufficient to block licensing.¹¹³
 - iv.) The recording rights control shares include titles both from Anglo-American and the Continental European repertoire as there is no need for such distinction in the recorded music industry. A record company directly controls the commercialization of all its titles, whatever the repertoire they belong to.¹¹⁴
- (140) In two aspects the methodology is better than the one used in *Universal/BMG Music Publishing*. First, in this calculation digital charts were used whereas in *Universal/BMG Music Publishing* digital charts were considered to be in their nascent stage and thus not very reliable.¹¹⁵ As the market power that the control shares measure relates to the online market and currently online music services are mature (or they are even on course to becoming the dominant form of accessing music), the use of digital charts is preferable. Second, in *Universal/BMG Music Publishing* mostly annual charts were used whereas this calculation used weekly charts, which were then aggregated into a single list that contained all the weekly chart hits in 2015. This method increases the number of songs in respect of which the control shares are calculated and thus increases the sample size of the estimate. This in turn improves the accuracy of the metric.
- (141) The calculated control shares for 2015 are reproduced in table 1 below. The table includes figures for both national and EEA level. It contains control shares for all three entities in question, i.e. Sony/ATV, EMI MP and Sony Music, as well as the different combination of aggregates between these entities.

¹¹² *Universal/BMG Music Publishing*, recital 286.

¹¹³ *Universal/BMG Music Publishing*, recital 286.

¹¹⁴ *Universal/BMG Music Publishing*, recital 296.

¹¹⁵ *Universal/BMG Music Publishing*, recital 289.

Sony/ATV, EMI MP, and Sony Music 2015 "Control Shares"

Territory	Sony/ATV	EMI MP	Sony/ATV & EMI MP Combined	Sony Music	Sony/ATV & Sony Music Combined	Sony/ATV, Sony Music & EMI MP Combined	Sample Size (number of tracks)
Austria	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[40-50]%	498
Belgium	[10-20]%	[20-30]%	[20-30]%	[10-20]%	[30-40]%	[30-40]%	554
Denmark	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[40-50]%	[50-60]%	440
Finland	[10-20]%	[20-30]%	[20-30]%	[20-30]%	[30-40]%	[40-50]%	198
France	[10-20]%	[10-20]%	[20-30]%	[10-20]%	[20-30]%	[30-40]%	1,495
Germany	[10-20]%	[20-30]%	[30-40]%	[20-30]%	[30-40]%	[40-50]%	564
Ireland	[30-40]%	[30-40]%	[40-50]%	[20-30]%	[40-50]%	[60-70]%	488
Italy	[10-20]%	[20-30]%	[30-40]%	[30-40]%	[40-50]%	[50-60]%	478
Netherlands	[20-30]%	[20-30]%	[30-40]%	[20-30]%	[30-40]%	[40-50]%	441
Norway	[20-30]%	[20-30]%	[30-40]%	[20-30]%	[40-50]%	[50-60]%	246
Poland	[10-20]%	[20-30]%	[30-40]%	[20-30]%	[30-40]%	[40-50]%	597
Spain	[10-20]%	[10-20]%	[20-30]%	[20-30]%	[30-40]%	[40-50]%	1,451
Sweden	[20-30]%	[20-30]%	[30-40]%	[30-40]%	[40-50]%	[50-60]%	515
UK	[20-30]%	[30-40]%	[40-50]%	[20-30]%	[40-50]%	[50-60]%	1,176
EEA (weighted average)	[10-20]%	[20-30]%	[30-40]%	[20-30]%	[30-40]%	[40-50]%	

Source: Weekly chart data and Sony/ATV and Sony Music ownership data

6.1.2.4. Assessment of market power post-Transaction

- (142) As the Commission considers that the relevant market is EEA wide (see section 5.2.3), the control shares remain below 50 % and therefore does not give rise to competition concerns even when aggregating the repertoires of each of Sony/ATV, EMI MP and Sony Music.
- (143) The Commission also notes, however, that, even if the relevant markets were to be considered as national in scope, then in line with the discussion in section 6.1.2.2
- i.) Either EMI MP's control shares should not be added to the combined control shares of Sony/ATV and Sony Music; or
 - ii.) Sony Music's control shares should not be added to the combined control shares of EMI MP and Sony/ATV.
- (144) Table 1 shows that, under both scenarios the combined control shares (EMI MP + Sony/ATV or Sony Music + Sony/ATV) remain below 50 % in all national markets. Moreover, the second scenario would be the pre-merger scenario and therefore the Transaction would not give rise to any increase in market power.
- (145) Finally, and for the sake of completeness, the Commission also notes that, even if the relevant markets were national in scope and even if it were to be assumed that, despite the discussion in section 6.1.2.2, post-Transaction it were to be possible for the Notifying Party to coordinate negotiating strategies across Sony Music, Sony/ATV and EMI MP (which would give rise to control shares in excess of 50% in some national markets)¹¹⁶, the Transaction would still not give rise to

¹¹⁶ According to Sony's estimations, this would be the case in six countries. During the market investigation, a third party also provided its own best estimations of control shares across publishing and recording for Sony, Sony/ATV and EMI MP combined in a number of six countries. According to these third party estimations, the three entities aggregated control share would be higher than the Parties' estimations (exceeding 50% in five out of the six countries). Nevertheless, the Commission

competition concerns. This reflects the fact that, this hypothetical scenario is premised on the assumption that pursuing joint negotiations and a joint strategy is possible despite diverse ownership and corporate control regimes and that Sony is therefore able to leverage the market power of all three entities. However, if this were to be the case, Sony could engage in this conduct already pre-Transaction, as it already controlled all three entities solely or jointly. All the Transaction does is to bring about a change in ownership and in the form of control over Sony/ATV. However, it does not increase the size of the repertoire over which Sony exercises such ownership and/or control. Therefore, if it is assumed that ownership and control does not matter, then such a change does not have any effect on the competitive position of Sony or Sony/ATV compared to the pre-merger situation.

- (146) Consequently, the Transaction does not lead to serious doubts as to its compatibility with the internal market on the market for the exploitation of online rights under any possible scenario of geographic market definition and under any assumption on the feasibility of joint negotiation strategy.

6.2. Competitive assessment of the Transaction in the other relevant markets

Publishing services to authors

- (147) In *Sony/Mubadala/EMI*, the Commission identified no concerns arising from the combination of Sony/ATV and EMI MP, including because of competition from other publishers on royalties, advances, contract terms, and retention periods¹¹⁷. Since then, competition has remained intense.¹¹⁸
- (148) The Transaction will have no effect on the provision of publishing services to authors. Sony today exercises joint control over Sony/ATV and has no other music publishing interests in Europe and the Transaction will not affect the ownership of EMI MP. The Transaction will not lead to any aggregation of market share or change the market position of Sony/ATV and EMI MP.¹¹⁹

Mechanical rights

- (149) Sony/ATV competes with a large number of other music publishers, including Universal, Warner/Chappell, BMG rights management, as well as an array of smaller publishers and new entrants. In *Sony/Mubadala/EMI*, the Commission excluded competition concerns because "control over pricing and licensing terms

notes that the third party included both Anglo-American and Continental tracks across each of publishing and recording, thus overestimating the control shares of Sony, Sony/ATV and EMI. By contrast, the Notifying Party followed the methodology employed in M.6458 *Universal Music Group/EMI Music* (see footnote 338), including all tracks that form part of the Anglo-American repertoire for deriving the "publishing" control shares.

¹¹⁷ *Sony/Mubadala/EMI*, recital 294.

¹¹⁸ Form CO, chapter 1, paragraph 6.49.

¹¹⁹ Nothing suggests that coordinated effects are possible in relation to the supply of publishing services to authors. The Commission's investigation in *Sony/Mubadala/EMI* did not find "any significant impediment to effective competition stemming from coordinated effects in the market for publishing services to authors" (recital 134) and the investigation of the present case does not invalidate this conclusion.

[was] to a large extent in the hands of the collecting societies". The situation has not changed in the meantime.¹²⁰

- (150) The Transaction will have no effect on the licensing of mechanical rights. Sony today exercises joint control over Sony/ATV and has no other music publishing interests in Europe and the Transaction will not affect the ownership of EMI MP. The Transaction will not lead to any aggregation of market share or change the market position of Sony/ATV and EMI MP.¹²¹

Performance rights

- (151) Sony/ATV competes with a large number of other music publishers, including Universal, Warner/Chappell, BMG rights management, as well as an array of smaller publishers and new entrants. In *Sony/Mubadala/EMI*, the Commission excluded competition concerns because "*control over pricing and licensing terms [was] to a large extent in the hands of the collecting societies*".¹²²
- (152) The Transaction will have no effect on the licensing of performance rights. Sony today exercises joint control over Sony/ATV and has no other music publishing interests in Europe and the Transaction will not affect the ownership of EMI MP. The Transaction will not lead to any aggregation of market share or change the market position of Sony/ATV and EMI MP.¹²³

Synchronisation rights

- (153) Sony/ATV competes with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, as well as an array of smaller publishers and new entrants. In *Sony/Mubadala/EMI Music Publishing*, the Commission excluded competition concerns in the licensing of synchronization rights, including because customer choice is typically driven by the choice of song, rather than the identity of the music publisher.¹²⁴
- (154) The Transaction will have no effect on the licensing of synchronisation rights. Sony today exercises joint control over Sony/ATV and has no other music publishing interests in Europe and the Transaction will not affect the ownership of EMI MP. The Transaction will not lead to any aggregation of market share or change the market position of Sony/ATV and EMI MP.¹²⁵

¹²⁰ Form CO, chapter 2, paragraph 6.61.

¹²¹ Nothing suggests that coordinated effects are possible in relation to the supply of publishing services to authors. The Commission's investigation in *Sony/Mubadala/EMI Music Publishing* did not find "any significant impediment to effective competition stemming from coordinated effects in the market for publishing services to authors" (recital 134) and the investigation of the present case does not invalidate this conclusion.

¹²² *Sony/Mubadala/EMI*, recital 100.

¹²³ Form CO, chapter 3, paragraph 6.43.

¹²⁴ *Sony/Mubadala/EMI*, recital 126.

¹²⁵ Form CO, chapter 4, paragraph 6.48.

Print rights

- (155) Sony/ATV competes with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, as well as an array of smaller publishers and new entrants. In *Sony/Mubadala/EMI*, the Commission excluded competition concerns in the licensing of print rights, including because Sony/ATV would continue to face competition from rival music publisher.¹²⁶
- (156) The Transaction will have no effect on the licensing of print rights. Sony today exercises joint control over Sony/ATV and has no other music publishing interests in Europe and the Transaction will not affect the ownership of EMI MP. The Transaction will not lead to any aggregation of market share or change the market position of Sony/ATV and EMI MP.¹²⁷

6.3. Vertical relationships

- (157) Sony/ATV's publishing rights are used in a number of downstream markets where other companies of the Sony Group are present, including: (1) recorded music; (2) the publishing of computer and videogames; (3) the production, acquisition and distribution of motion pictures; (4) the production and distribution of TV programmes, and (5) online music retail services¹²⁸.
- (158) The Transaction may bring a change in these vertical relationships. Due to the reasons outlined in recital (78) relating to ownership and the resulting incentives, pre-Transaction the interest of the Michael Jackson Estate was to maximize the licensing revenues and thus to license these rights as widely as possible. It could therefore be assumed that, given its control over Sony/ATV, it would not have allowed the latter to engage in a strategy of supporting the downstream businesses of Sony Group by refusing to license Sony/ATV's songs to the rivals of these downstream businesses. The change from joint to sole control may increase Sony/ATV's ability and/or its incentives to pursue such a strategy. Whether this change is liable to cause competitive concerns also needs to be assessed.
- (159) Considering the estimated combined market shares of Sony/ATV and EMI MP in the relevant upstream markets and the estimated market shares of the Sony group in the relevant downstream markets, a number of geographic markets are affected. In the upstream market for the exploitation of synchronisation publishing rights, Sony/ATV and EMI MP's market share is above 30% in the following 6 countries: Spain, the United Kingdom, the Czech Republic, Greece, Ireland and Portugal. In the upstream market for the exploitation of mechanical rights Sony/ATV and EMI MP's market share is above 30% in the following 9 countries: Spain, the United Kingdom, the Czech Republic, Denmark, Greece, Hungary, Ireland, Luxembourg and Slovenia. As regards the downstream market for recorded music, the market share of Sony Music is above 30% in the following 3 countries: Denmark, Italy and Spain. As regards the other downstream markets mentioned above in recital (157),

¹²⁶ *Sony/Mubadala/EMI*, recitals 103-110.

¹²⁷ Form CO, Chapter 5, paragraph 6.30.

¹²⁸ [Information on Sony Group's ownership interests in online platforms]. As this share does not grant Sony any control over VEVO, the vertical relationship between Sony/ATV and VEVO is not further discussed in this decision.

the market shares of Sony Group's downstream businesses do not exceed 30% in any EEA country.

6.3.1. *Market Characteristics*

Recorded Music

- (160) Sony is active in recorded music through Sony Music, which is the successor of a 50/50 joint venture formed in 2004 between Sony and Bertelsmann, which was known at the time as Sony BMG, before becoming wholly owned by Sony in 2008.
- (161) In order to record a CD or a Vinyl, record companies need to acquire licenses for mechanical rights, i.e. the right to reproduce a work in a sound recording. In its decision in *Sony/Mubadala/EMI*, the Commission considered that the control over offline mechanical rights was in the hands of collecting societies, which set the pricing as well as the licensing terms for those rights on a fair and non-discriminatory basis.¹²⁹
- (162) The Commission noted that, whereas under the Continental system mechanical rights had to be administered by collecting societies, under the Anglo-American system publishers could, in theory, withdraw their mechanical rights from collecting societies to administer them themselves. However, the Commission noted that such withdrawal had not happened and would not happen in the foreseeable future.¹³⁰ The Commission therefore considered that mechanical rights for both the Continental repertoire and the Anglo-American repertoires were controlled by the collecting societies (on which the publishers did not exercise control) and not by the publishers.
- (163) The Notifying Party submits that these considerations still prevail today.¹³¹ The collecting societies still administer mechanical rights on behalf of authors or, as regards the Anglo-American repertoire, of publishers. They set the royalty rates and grant licences for mechanical rights to recorded music companies on fair and non-discriminatory terms. Moreover, the Parties submit that, as regards the Anglo American repertoire, neither Sony/ATV nor any other publisher (including EMI MP) has withdrawn the administration of its mechanical rights from the collecting societies.
- (164) Based on the information available to it, the Commission understands that the above description of the licensing of mechanical rights is still valid today and, in particular, that publishers have not withdrawn mechanical rights to their Anglo-American repertoire from collecting societies.

The publishing of computer and videogames

- (165) In order to use copyrighted music synchronized with the visual image, videogames require license to synchronization rights held by publishers. Sony Group is active in videogame production through its wholly-owned subsidiary Sony Computer

¹²⁹ *Sony/Mubadala/EMI*, recital 100.

¹³⁰ *Sony/Mubadala/EMI*, recital 99.

¹³¹ Form CO chapter 7, paragraph 6.50.

Entertainment, which develops and publishes video game titles for its PlayStation range of handheld and home console video game systems.

- (166) Sony Computer Entertainment estimates that its shares of EEA videogame revenues are below 5%.¹³² Sony Computer Entertainment also estimates that its EEA-wide market shares in the following possible sub-segments/markets are all below 15%: games for handheld consoles only, games for mobile handsets, music games ([0-5]%), Games for TV consoles and handheld consoles ([5-10]%), offline games for Sony PlayStation consoles ([10-15]%).

The production, acquisition and distribution of motion pictures

- (167) In order to incorporate songs and music into Motion pictures, producers of motion pictures need to obtain a synchronization licence of the relevant musical work from publishers. Sony produces, acquires, and distributes motion pictures for theatrical release through its wholly-owned subsidiary Sony Pictures Entertainment (“SPE”). SPE’s motion picture interests include Columbia Pictures, Tri-Star Pictures, Sony Pictures Classics, and Screen Gems. SPE estimates that its share of revenues from motion pictures in 2015 was approximately [5-10]% in the EEA, and that it did not exceed 20% in any Member State.¹³³

The production and distribution of TV programmes

- (168) In order to incorporate songs and music into TV programmes, TV production companies need to obtain a synchronization licence of the relevant musical work from copyright holders/publishers. Sony Pictures Entertainment produces and distributes TV programmes. SPE’s principal TV operations are run through its wholly-owned subsidiary Sony Pictures Television Group (“SPTG”), which owns and distributes its own programmes, as well as programmes developed by a number of companies, including [names of TV programme developers]. SPTG estimates that its share of EEA TV production revenues is less than 5%.¹³⁴ It also believes that it is not higher than this in any EEA Member State.

6.3.2. *Input foreclosure*

Recorded Music

- (169) The Notifying Party submits that the Transaction will not give Sony Group the ability nor the incentive to engage in input foreclosure.¹³⁵ First, Sony/ATV would not have sufficient upstream power to engage in a successful input foreclosure strategy. Second, authors, who have the final say on whether to contract with a particular recorded music company, would not countenance such a strategy. Third mechanical rights are controlled by collecting societies, which set the pricing and the licensing terms for those rights on a fair and non-discriminatory basis, not by

¹³² Form CO, chapter 7 paragraph 6.44.

¹³³ Form CO, chapter 7, paragraph 6.29.

¹³⁴ Form CO, chapter 7, paragraph 6.37.

¹³⁵ Form CO, chapter 7, paragraph 6.50.

publishers. Fourth, such strategy would not have material effect, given the strong competition from other recorded music companies.

- (170) The Commission considers that any risk of input foreclosure by Sony/ATV to the benefit of Sony Music can be excluded from the outset. First, as explained above, the control over offline mechanical rights, which is the relevant input for the downstream recording music market, is in the hands of the collecting societies, which set the pricing and the licensing terms for those rights on a fair and non-discriminatory basis.¹³⁶ Second, given the ownership structure of EMI MP described in section 6.1.2.2, Sony/ATV will not be able to include the repertoire of EMI MP into an input foreclosure strategy. Indeed, Mubadala will most likely oppose to such a strategy, which would only benefit Sony Music and be detrimental to EMI MP as it would decrease its publishing rights revenues. Third, without EMI MP's share, Sony/ATV's share in offline mechanical rights is below 30% both at EEA level and at national level. Alone, Sony/ATV therefore does not enjoy a sufficient degree of market power to engage in a successful input foreclosure strategy.

Publishing of computer and videogames, production, acquisition and distribution of motion pictures, and production of TV programmes

- (171) As the relevant input for the Publishing of computer and videogames, the production, acquisition and distribution of motion pictures, and the production of TV programmes is the same (synchronisation rights) the vertical effects on these downstream markets will be analysed jointly by the Commission.
- (172) The Notifying Party submits first that, whilst music is generally needed to produce certain motion pictures, TV programmes and videogames, content producers have many alternatives to Sony/ATV's repertoire. Second, the Notifying Party submits that Synchronization fees represent a small proportion of the typical cost of producing a motion picture, TV programme, or videogame. On this basis, the Notifying Party considers that the Transaction will not give Sony Group the ability or the incentive to engage in input foreclosure.
- (173) In its decision in *Sony/Mubadala/EMI*, the Commission considered, as regards the ability of Sony/ATV to foreclose Sony Group's downstream competitors, that if Sony/ATV were to engage in foreclosure, content producers competing with Sony Group's downstream business would retain sufficient alternatives in the market for synchronisation publishing rights.¹³⁷ The Commission considered that it was unlikely that Sony/ATV would have the incentives to adopt such a strategy as it would forego revenues from synchronisation rights whereas the impact to increase revenues on the downstream markets (through the production costs for computer games, TV programmes or films) appeared to be *de minimis*.¹³⁸ The Commission also considered that any attempt at input foreclosure on the part of Sony/ATV would risk undermining its credibility and reputation on the market for publishing services to authors.

¹³⁶ The same approach was also followed by the Commission, in its decision in *Sony/Mubadala/EMI*, recital 270.

¹³⁷ *Sony/Mubadala/EMI*, recital 283.

¹³⁸ *Sony/Mubadala/EMI*, recital 284.

- (174) During the market investigation, the Commission consulted the views of competitors of Sony Group's videogame, motion picture and TV productions as regards the availability of songs to synchronise with the content they produce post Transaction. The majority of the respondents in each relevant downstream market confirmed that, post Transaction, they would still have a sufficient choice of songs to synchronise with their contents, even without Sony's songs.¹³⁹ They also confirmed that they did not expect that Sony Group would foreclose access to the catalogue of Sony/ATV.¹⁴⁰
- (175) Based on the above, the Commission considers that Sony/ATV does not have the ability nor the incentive to foreclose the competitors Sony Group's downstream businesses in the production of games, motion pictures and TV programs.

6.3.3. *Customer foreclosure*

Recorded Music

- (176) The Notifying Party submits that Sony music does not have the ability or the incentive to engage into a successful customer foreclosure strategy to the benefit of Sony/ATV.¹⁴¹ First, it would not have sufficient market power in the market for recorded music. [Description of Sony Music's commercial strategy].
- (177) The Commission considers that, as the Transaction does not lead to an increase the size of Sony Music recorded music business, it therefore does not make a possible customer foreclosure strategy more profitable than pre-merger. In any event, even pre-merger, it would not make sense for Sony Music not to source mechanical rights belonging to publishers other than Sony/ATV and/or EMI MP as these publishers only account for a limited portion of the upstream market and Sony Music has an incentive to offer to its customers (and its recording artists) songs from the broadest possible number of authors and composers.

Publishing of computer and videogames, production, acquisition and distribution of motion pictures, and production of TV programmes

- (178) The Notifying Party submits, first, that the market shares of Sony Group's downstream businesses in the relevant downstream markets are too low to constitute a sufficient customer base to engage in customer foreclosure. Second, the Notifying Party submits that engaging in customer foreclosure would be highly detrimental to Sony Group's downstream businesses and would have no effect on Sony/ATV's competitors.¹⁴²
- (179) The Commission notes, first, that Sony Group's businesses in the downstream markets for motion pictures, TV programmes, computer and videogames have limited market shares of 10% or less at the EEA-wide level. As regards possible

¹³⁹ Commission's request for information sent to downstream competitors on 5 July 2016, replies to question 1.

¹⁴⁰ Commission's request for information sent to downstream competitors on 5 July 2016, replies to question 2.

¹⁴¹ Form CO, chapter 7, paragraph 6.55.

¹⁴² Form CO, chapter 7, paragraph 6.55.

sub-markets, market shares do not exceed 25%. Even in those relevant markets, Sony Group businesses therefore do not constitute a sufficient customer base for Sony to have the ability to foreclose the Sony/ATV's competitors.

- (180) Second, the Commission notes evidence submitted by the Parties showing that Sony Group's businesses in the downstream markets for movies, TV programmes and computer games have not preferred Sony/ATV's repertoire. Data concerning the songs used in the top 15 grossing movies in the season 2014/2015 by Columbia Pictures (controlled by SPE) show that only [5-10%] of these songs involved synchronization licence from Sony/ATV. Data concerning the songs used in the TV programmes produced by Sony Pictures Television Group during the season 2014/2015 show that only [0-5%] of these songs involved synchronisation licence from Sony/ATV. Data concerning the use of songs in games produced by Sony Computer Entertainment Europe in 2015 show that [10-20%] of these songs involved synchronization rights licensed from Sony/ATV. These shares do not differ significantly from Sony's EEA market shares for synchronisation rights of [10-20%].

6.3.4. Conclusion on vertical effects

- (181) For the reasons above, the Commission concludes that the transaction does not raise serious doubts as to its compatibility with the internal market in relation to vertical effects in any of the affected downstream markets.

7. CONCLUSION

- (182) For the above reasons, the Commission has decided not to oppose the Transaction and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Vera JOUROVÁ

Member of the Commission