EUROPEAN COMMISSION
DG Competition

Case M.8989 - SONY / EMI MUSIC PUBLISHING

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 26/10/2018

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EUROPEAN COMMISSION

Brussels, 26.10.2018
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying parties

Subject: **Case M.8989 – Sony / EMI Music Publishing**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 21 September 2018, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Sony Corporation of America ("Sony" or the "Notifying Party", USA), belonging to the group Sony will acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of EMI Music Publishing ("EMI MP", United Kingdom) (the "Transaction"). Sony is hereafter referred to as "the Notifying Party" and Sony and EMI MP are hereafter collectively referred to as "Parties".

1. THE PARTIES

(2) Sony is a U.S. subsidiary of Sony Corporation of Japan, which, directly and through its subsidiaries, is active globally in various businesses, including electronics products, games, entertainment services – including motion pictures, television programming, recorded music, and music publishing –, and financial services.

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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').

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(3) EMI MP is a music publishing business currently jointly controlled by Sony and the Mubadala Investment Company PJSC's ("Mubadala"), an investment fund based in the United Arab Emirates.

(4) Sony/ATV Music Publishing ("Sony/ATV") is not a party to the Transaction, but has administered EMI MP's catalogue since 2012. Sony/ATV is a music publishing company established in 1995 when Sony Music Publishing (a then fully owned Sony Corporation subsidiary) and the music publishing business of ATV (which Michael Jackson acquired in 1985) were transferred to a 50/50 venture jointly owned by Sony and the singer/songwriter Michael Jackson. In 2016, Sony purchased the 50% interest owned by the Michael Jackson Estate, which manages the assets formerly owned by Mr. Jackson, thereby acquiring sole control of Sony/ATV.[3]

2. THE CONCENTRATION

(5) Pursuant to an Agreement and Plan of Merger dated 29 June 2018, Sony will purchase the circa 60% interest in EMI MP controlled by Mubadala for a cash consideration of around USD 2.3 billion, acquiring sole control over EMI MP.

(6) The Transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

(7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2 500 million (Sony: EUR […]; EMI MP: EUR […]).[4] Each of them has an EU-wide turnover in excess of EUR 100 million (Sony: EUR […]; EMI MP: EUR […]). In each of France, Germany and the United Kingdom, the combined turnover of the Parties exceeds EUR 100 million and their individual turnover exceeds EUR 25 million (Germany: Sony: EUR […]; EMI MP: EUR […]; France: Sony: EUR […]; EMI MP: EUR […]; the United Kingdom: Sony: […]; EMI MP: EUR […]). Lastly, the Parties do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension pursuant to Art 1(3) of the Merger Regulation.

4. CHANGE FROM JOINT TO SOLE CONTROL

(8) The Transaction involves the acquisition by Sony of sole control over EMI MP 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*

3 Commission decision of 1 August 2016 in Case M.8018 *Sony Corporation of America/Sony-ATV*.

4 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).

concentrations under Council Regulation (EC) No 139/2004 (the "Notice on simplified procedure").[5]

(9) In considering whether or not to apply the simplified procedure, it is important context that in *Sony/Mubadala/EMI*,[6] 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.[7] As the Transaction gives Sony sole control over EMI MP, 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.

(10) The Transaction follows a second transaction involving Sony. This one involved Sony acquiring sole control over Sony/ATV previously jointly controlled by Sony and the Michael Jackson Estate, through the acquisition of Michael Jackson Estate's 50% stake. The Commission declared this transaction, pursuant to article 6(1)(b) of the Merger Regulation, to be compatible with the internal market in August 2016.[8]

(11) As a result of these two previous transactions Sony already exercises joint control over EMI MP together with Mubadala and has sole control over Sony/ATV, its wholly-owned music publishing subsidiary, in charge of licensing publishing rights, i.e. the rights to the melody and the lyrics which are transferred from the authors (i.e. the writers and composers) to music publishers, which in turn license them to record companies and other commercial users such as online platforms.

(12) Sony/ATV has administered EMI MP's catalogue on an exclusive basis under an administration agreement since 2012, managing relationships with EMI MP's existing authors and signing agreements for new authors whose rights are co-owned by Sony/ATV and EMI MP. Sony/ATV and EMI MP have not competed for new authors since 2012. Downstream, EMI MP has had no independent role in licensing its repertoire. Instead, Sony/ATV has had the sole and exclusive right to license EMI MP's various publishing rights offline, while online, Sony/ATV has negotiated "blanket" licences[9] of Sony/ATV and EMI MP content and has represented Sony/ATV and EMI repertoire in direct negotiations with Digital Service Providers (hereinafter "DSPs").

(13) Moreover, Sony has no other music publishing interests. The Transaction will therefore not lead to any increase in market share in the various markets involving music publishing (unlike in Sony/Mubadala/EMI, where the acquisition led to an increase in Sony's market shares).

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5 OJ C 366/5 14.12.2013.

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

7 *Sony/Mubadala/EMI,* recital 210.

8 Case COMP/M.8018, *Sony Corporation of America/Sony-ATV Music Publishing*, European Commission decision of August 1, 2016 ("*Sony/Sony-ATV*")

9 i.e. licenses covering the entirety of both parties' Anglo-American repertoire.

(14) In addition, Sony has currently full control and ownership over Sony Music Entertainment ("Sony Music"), a record label (or record company) in charge of licensing recording rights, i.e. the rights to the particular recorded rendition of a song which are transferred by the recording artists to record labels. Sony is therefore an "integrated music company", having both a publishing division and a recorded music division. 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. This is because to make a song available on an online platform it is necessary to license the rights both to the notes and the lyrics of that song (publishing rights) and to the actual recorded version of the same song (recording rights). To the extent that these recording rights do not only cover songs over which Sony/ATV and/or EMI MP hold publishing rights (i.e. to the extent that they cover at least some songs whose publishing rights are held by third parties), these recording rights expand the list of songs over which Sony has control and may therefore increase Sony's market power vis-à-vis online music platforms.

(15) The main change brought about by the Transaction relates to the possibility of Mubadala to veto certain commercial decisions of EMI MP. Mubadala, through its joint control over EMI MP, can currently exercise a veto over the acquisition of music publishing catalogues or rights and interests in other musical works, as well as over the issuance of music publishing licenses negotiated by Sony/ATV that it considers not to be in EMI MP's interest. Mubadala's constraint over any possible strategy of Sony that would not be in the best interest of EMI MP will disappear post-Transaction.

5. RELEVANT MARKETS

(16) In past decisions, the Commission considered that music publishers are active on two market levels.[10] Upstream, they are active in the supply of publishing services to authors. Downstream, music publishers are active in the exploitation of works of authors.

5.1. Market for the provision of music publishing services to authors

5.1.1. Relevant product market

(17) The services provided to authors include providing artistic and financial support,[11] matching authors with co-writers and performing artists, ensuring legal protection of musical works, promoting authors' works to potential licensees, marketing and negotiating the licensing of rights, and administering authors' rights (including registrations with and collections from collecting

[10] *Sony/Mubadala/EMI,* recital 19; COMP/M.4404, *Universal/BMG Music Publishing*, Commission decision of May 22, 2007 ("*Universal/BMG*"), and M.1219 *Seagram/Polygram*, recitals 11 and 16. *Sony/Sony-ATV,* recitals 14, 35, and 47

[11] Publishers pay advances to authors against future royalty income. Where a publisher has paid an advance to an author, the royalties earned by that author's work will first be used to recoup the amount of the advance (other than any writer's share mandated by collecting societies). The author will receive royalties (split in the agreed proportions between the author and publisher) only once the publisher has recouped the amount paid out to the author in advance. The publisher assumes the risk of the revenues achieved from the exploitation of an author's work not covering the amount paid out in advance.

societies). In return for providing these services, a publisher receives a share of the royalties generated by an author's work.[12]

(18) In previous decisions, the Commission defined the upstream market as the market for publishing services to authors.[13]

(19) The Notifying Party submits that there is no reason to depart from this market definition, for the following reasons. In respect of any given song, authors generally contract with a music publisher to exploit all of their rights (rather than in relation to separate categories of rights (*e.g.* mechanical rights only)), and publishers are involved in the exploitation of all of those rights. Music publishers exploit the rights in a work for the duration of their contract with an author (plus any agreed retention period). No meaningful distinction is made between "front-line" and "back-catalogue" works, and music publishers compete to acquire rights to repertoire, and to identify and sign authors and catalogues.

(20) The market investigation in the present case has not provided any indications that the Commission should depart from its previous findings on the distinction between publishers' upstream and downstream markets. Indeed these activities are different and take place at different levels of the music value chain (although they are commercially related as music publishers are able to license downstream the works and the catalogues of the authors to whom they provide music publishing services upstream).

(21) Accordingly, and consistent with the Commission's approach in *Sony/Sony-ATV*, the Commission considers it appropriate to define the relevant upstream product market as comprising the provision of publishing services to authors.

5.1.2. Relevant geographic market

(22) In *Sony/Sony-ATV* and *Sony/Mubadala/EMI Music Publishing*, the Commission identified various factors suggesting that the market for publishing services provided to authors was national in geographic scope, although ultimately it did not reach a firm conclusion.[14] The Commission conducted its assessment of those two transactions on a national basis.

(23) Sony submits that there is no reason to depart from the approach followed by the Commission in *Sony/Sony-ATV* and *Sony/Mubadala/EMI Music Publishing*.

(24) The market investigation did not reveal any facts that would make it necessary to reconsider the geographic market definition of the market for the publishing services to the authors.

(25) The Commission therefore considers that the market for the provision of publishing services to authors is rather national in scope.

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12 Some authors – particularly more established authors – do not use the services of a music publisher and instead publish their works themselves.

13 *Sony/Sony-ATV*, recital 15.

14 *Sony/Sony-ATV*, paragraph 58, and *Sony/Mubadala/EMI*, paragraphs 62 to 64. *See also Case* COMP/M.4404, *Universal/BMG Music Publishing*, Commission decision of May 22, 2007 ("*Universal/BMG*"), recital 61.

5.2. Markets for the exploitation of copyrights

5.2.1. Relevant product markets

(26) In previous decisions in the music sector,[15] the Commission identified five different categories of copyrights constituting separate product markets at the market level where music publishers deal with (prospective) users of works:

(a) mechanical rights: the right to reproduce a work in a sound recording;

(b) 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;

(c) synchronisation rights: the right for commercial users such as advertising agencies or film companies to synchronise music with a visual image;

(d) print rights: the right to reproduce a work in sheet music;

(e) online rights: a combination of mechanical and performance rights to exploit a work via downloading and/or streaming services. The market for the exploitation of publishing rights for online use (hereafter the market for "online rights") is the market where music publishers, such as Sony/ATV and EMI, license their repertoire to DSPs, such as Apple, Spotify and Deezer.

(27) From a demand-side perspective, separate markets for the exploitation of each type of right exist 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.

(28) In addition, the Commission found important differences between the different types of rights from a supply-side perspective, the main difference being related to the role of the collecting societies.[16] 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 mechanical rights over songs authored by writers registered to "Anglo-American" collecting societies (hereinafter "Anglo-American repertoire") are generally licensed directly by publishers whereas performance rights over songs from the Anglo-American repertoire as well as mechanical and performance rights over songs authored by writers registered to "Continental European" collecting societies (hereinafter "Continental European repertoire") are licensed by collecting societies without any influence from the publishers as to the level of royalties and on whether or not to grant a license. The different role by the collecting societies resulted in different supply conditions as collecting societies

[15] *Universal/BMG, Sony/Mubadala/EMI and Sony/Sony-ATV*

[16] *Sony/Mubadala/EMI*, recital 25.

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.

(29) The Notifying Party did not contest this approach.

(30) The market investigation did not reveal any facts that would make it necessary to reconsider the product market definition of the markets for the exploitation of publishing copyrights. A majority of competitors and customers who replied to the market investigation consider that the market for music publishing rights should still be defined according to the distinction between (1) print rights; (2) synchronization rights; (3) performance rights (offline, traditional applications); (4) mechanical rights (offline, traditional applications); and (5) online (performance + mechanical) rights.[17] The Commission therefore considers it appropriate to follow the same approach as in previous decisions and to define a separate market for the exploitation of each major type of publishing right.

(31) As regards the market for online rights, in *Sony/Sony-ATV*, the Commission considered that the market for online rights should not be further segmented according to genres, access devices, and retail model (streaming *vs.* downloading). The Commission left open whether a distinction should be made according to the type of repertoire (Anglo-American *vs.* Continental).

(32) Sony considers that in the case of online rights, the relevant product market is the overall market for the licensing of online rights in musical works and that a further segmentation is not justified.

(33) With regard to the potential subdivisions within the market for the exploitation of online rights, during the market investigation the vast majority of the respondents to the market investigation considered that separate markets should not be distinguished according to genres.[18] Despite the fact that there exist music publishers that are specialised in certain genres of music only,[19] those publishers tend to be marginal as most publishers tend to offer all genres.[20]

(34) The market investigation confirmed that it is not appropriate to distinguish separate markets within the market for the exploitation of online rights according to access device, i.e. between the exploitation of online rights for use in mobile applications and the exploitation of online rights for use in other online applications, such as tablets and personal computers.[21] Market respondents generally agree that such a distinction is not necessary given (i) the convergence between access devices; (ii) the fact that rights are identical

[17] See Questionnaire Q1 to competitors, question 3.1; Questionnaire Q2 to online customers, question 3.1.

[18] See Questionnaire Q1 to competitors, question 7; Questionnaire Q2 to online customers, question 7.

[19] See Questionnaire Q1 to competitors, question 8; Questionnaire Q2 to online customers, question 8. Only one respondent identified a streaming service specialized in one genre.

[20] See Questionnaire Q1 to competitors, questions 8.1 and 8.2; Questionnaire Q2 to online customers, questions 8.1 and 8.2.

[21] See Questionnaire Q1 to competitors, question 6; Questionnaire Q2 to online customers, question 6.

irrespective of access device; and (iii) the fact that these forms of access are competing.[22]

(35) As to the potential segmentation of the market for the exploitation of online rights based on the retail model (streaming and downloading), a majority of competitors and customers considered that such a distinction is not appropriate.[23] Respondents pointed out that the licensed rights and the repertoire are identical with differences in licensing terms and conditions resulting only from the technical differences between a download and a streaming offering.[24] Furthermore, on the supply side, these rights are held by the same entities regardless of which service (download or streaming) is being provided.[25] Given, the majority view as well as the recent precedent of *Sony/Sony-ATV*, the Commission considers that the market for the exploitation of online rights should not be further subdivided based on the retail model.

(36) Finally, a majority of competitors and customers consider that the two repertoires (Anglo-American *vs.* Continental) are part of the same market.[26]

(37) In this regard, the Commission considers that no distinction should be made according to the type of repertoire. This is because 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. From a demand side perspective, DSPs aim at having licenses over the rights of as many songs as possible irrespective of whether they belong to the Anglo-American repertoire or the Continental European repertoire. All online platforms include both repertoires. In this context, the Commission considers that the market power of a music publisher vis-à-vis DSPs comes from the importance for DSPs of the catalogue of songs under the music publisher's direct control. The Commission considers that this market power can only be assessed by comparing the size and the quality of this catalogue with the overall set of songs the DSPs aim to get access to irrespective of whether these songs belong to the Anglo-American repertoire or the Continental European one. It would not be appropriate to measure the market power of a music publisher by reference to the share of songs it controls within one specific repertoire.

(38) That being said, the rights for the Continental European repertoire remain with collecting societies whereas all major publishers withdrew their online mechanical rights over the Anglo-American repertoire from the collecting society system and thus took control over these rights. The market power of publishers should therefore be assessed by reference to the size and quality of the Anglo-American repertoire that they control as compared to the overall sets of rights from both the Anglo-American and the Continental European catalogue that DSPs need to clear.

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[22] See Questionnaire Q1 to competitors, question 6.1; Questionnaire Q2 to online customers, question 6.1.
[23] See Questionnaire Q1 to competitors, question 9 and Questionnaire Q2 to online customers, question 9.
[24] See Questionnaire Q1 to competitors, question 9.1 and Questionnaire Q2 to online customers, question 9.1.
[25] See Questionnaire Q2 to online customers, question 9.1.
[26] See Questionnaire Q1 to competitors, question 5.1; Questionnaire Q2 to online customers, question 5.1.

(39) Overall, in view of the results of the market investigation, and the market definitions applied in previous decisions, the Commission takes the view that in relation to the downstream activity of the exploiting publishing rights:

(a) The market 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.

(b) The market for the exploitation of online rights is not to be further subdivided according to genres, access devices and retail model (download vs. streaming).

(c) The market for the exploitation of online rights should not be further subdivided according to the type of repertoire (Anglo-American and the Continental).

5.2.2. Relevant geographic market

Commission precedents

(40) As regards the geographic market definition, in previous decisions, the Commission took the view that, with the exception of the market for online rights, the markets for the exploitation of the various publishing rights are national in scope.

(41) With regard to the market for online rights, in Sony/Sony-ATV,[27] the Commission concluded that the market for licensing of online rights was EEA-wide, at least in relation to the Anglo-American repertoire.

Notifying Party's view

(42) Sony also considers that the relevant market for online rights is EEA-wide in scope for the following reasons. First, all major Digital Service Providers ("DSPs") operate on the basis of at least EEA-wide licences, and even DSPs that are not active across the EEA nevertheless generally obtain EEA-wide licences. Second, Sony/ATV's and EMI MP's royalty rates are uniform across EEA member states, as are most other terms and conditions ([information on Sony/ATV’s licensing terms]). Third, [information on Sony/ATV’s minima]. Minima are guaranteed minimum prices that the licensee has to pay regardless of the actual revenue generated by the online platforms downstream. It is part of the common pricing formula in licences whereby the licensee has to pay the higher of the contractual royalty rates or the guaranteed per-stream/per-subscriber minima. Sony submitted evidence showing that these variations in the minima are driven by differences in downstream DSP pricing across Member States to reflect differing levels of consumer purchasing power, rather than by market concentration and market shares.

Commission's assessment

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27 *Sony/Sony-ATV*, recital 67.

(43) 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 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.

(44) Overall, the Commission considers that the finding in *Sony/Sony-ATV* that the market for online rights is EEA-wide is still valid today.

(45) First, the Notifying Party provided evidence that all major DSPs operate on the basis of at least EEA-wide licences. More specifically, […]% of Sony/ATV's and EMI MP's revenue from the licensing of Anglo-American repertoire, are licensed under agreements with DSPs that are EEA-wide or broader in geographic scope, with […]% of revenues generated by multi-territory licence agreements narrower than the EEA and […]% national licenses ([…]).[28]The Notifying Party also provided evidence that even DSPs that are not active across the EEA nevertheless generally obtain EEA-wide licences. This contrasts with the situation at the time of Sony/Mubadala/EMI Music Publishing.[29]

(46) [Information on the current licences and licensing practice of Sony/ATV and EMI MP].[30]

(47) Second, the Notifying Party provided evidence that Sony/ATV's and EMI MP's royalty rates are uniform across EEA member states, as are most other terms and conditions ([information on Sony/ATV's licensing terms]). In practice, the Notifying Party submitted a review of Sony/ATV's licensing agreements with its principal online customers (by revenue). This review shows that [information on Sony/ATV's licensing terms]:[31]

(a) In each of the agreements, [information on Sony/ATV's licensing terms].

(b) For both download and streaming services, [information on Sony/ATV's licensing] the same royalty rate across all EEA Member States. For ad-funded and subscription streaming services, the royalty rate is typically […]%; for download services, the royalty rate is typically […]% or […]%, but for a given DSP, the rate is the same across all EEA Member States.[32]

(c) For each DSP, the agreements provide [information on Sony/ATV's licensing terms].[33]

(d) Minima for ad-funded streaming services [information on Sony/ATV's minima].[34]

[28] See Form CO, paragraphs 6.25-6.27.
[29] See Form CO, paragraphs 6.29-6.30.
[30] See Form CO, paragraphs 6.31- 6.32.
[31] See Form CO, paragraph 6.33.
[32] There are two isolated exceptions [information on Sony/ATV's licensing terms]. These variations were agreed [information on Sony/ATV's licensing negotiations], for ease of administration, [information on Sony/ATV's licensing terms].
[33] [Information on Sony/ATV's licensing terms].

(48) [Information on Sony/ATV's and EMI MP's licence negotiations with DSPs] variation across territories in the minima that apply for certain subscription streaming services. [Information on Sony/ATV's and EMI MP's licence negotiations with DSPs] to reflect their downstream pricing strategy, to reflect differing levels of consumer purchasing power, [information on Sony/ATV's and EMI MP's licence negotiations with DSPs].[35]

(49) In any event, Sony submitted empirical evidence showing that these variations in the minima correlate with consumer purchasing power, rather than with market concentration and market shares. More specifically, the Notifying Party provided the results of an empirical analysis showing that based on minima for [several DSPs], variation in music publishing and recorded music minima correlate closely with consumer purchasing power, as reported by Eurostat 2017 price level index for household final consumption expenditure. The correlation coefficient between these two series is 92% for each of music publishing and recorded music.[36] On the contrary, based on the same licensing agreements, the Notifying Party showed that there is no positive correlation between national "control shares" and minima. A music publisher's control share is the share of all songs made available for streaming or downloading by DSPs that that publisher controls through fractional or full publishing rights or even recording rights in the case of an integrated music company. The correlation coefficient for publishing (Sony/ATV and EMI MP combined) "control shares" against minima is -37%; while the correlation coefficient for Sony/ATV, EMI MP, and Sony Music's combined "control shares" against minima is -10%. This means that minima do not tend to increase when control shares increase.

(50) The Commission considers that the fact that the minima are adjusted to reflect consumer spending power and do not correlate with control shares shows that the variation is due to different levels of income and development rather than different competitive conditions in different countries. This suggests that a hypothetical monopolist in one specific Member State would not be able to profitably and significantly increase prices.

(51) The results of the market investigation confirm this conclusion.

(52) First, a majority of Sony's competitors confirmed that their licenses for online rights were either worldwide in scope or pan-European.[37] The major DSPs also confirmed that they mainly operate on the basis of at least pan-European licenses.[38]

(53) Furthermore, the vast majority of Sony's competitors expressing a view on the matter acknowledged that major terms and conditions of licensing agreements by music publishers do not vary across Member States, whether for streaming or

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34 [Information on Sony/ATV's licensing terms].

35 The Notifying Party explained that the purpose of contractual minima is to broadly reflect the value of online royalty rates while providing DSPs with flexibility in their consumer pricing models. [Information on Sony/ATV's licensing terms].

36 The correlation coefficient (a value between -1 and +1) measures how strongly two variables are related to each other. A correlation coefficient of 92% indicates a very strong positive correlation, i.e. i.e. minima tend to increase when purchasing power increases.

37 See Questionnaire Q1 to competitors, question 11.

38 See Questionnaire Q2 to online customers, question 11.

downloading. The only two competitors replying that, according to them, major terms and conditions vary across Member States, only claimed that minima per subscriber for streaming services vary across Member States and made a distinction in this respect between mainly Eastern European countries and to some extent Southern European countries versus North-Western countries.[39]

(54) DSPs also confirmed that, for a given licensor, the key terms and conditions do not differ significantly from one Member State to the other, with the exception of minima.[40]

(55) The market investigation aimed at verifying Sony's argument (and the evidence it submitted) according to which the only term that varies significantly from one Member State to the other is the minimum royalty, and that variations in the minima are driven by differences in downstream DSP pricing across Member States to reflect differing levels of consumer purchasing power, rather than by different levels of market concentration of publishers and market shares. The Commission therefore requested music publishers to provide their market share and details over the headline royalty rate and minima applied in each EEA member state with the major online platforms. Their responses confirm that, for a given DSP and licensor, headline royalty rates do not vary across Member States (with only few exceptions) whereas minima per subscriber (for streaming services platform) typically vary between different Member States. However, no relationship was found between contractual minima and revenue shares in a given Member State. Instead, as claimed by Sony, variations in the contractual minima seem to be driven by differences in downstream DSP pricing across Member States to reflect differing levels of consumer purchasing power, as minima per subscriber (for various streaming services) strongly correlate with price levels, as measured by Eurostat 2017 price level index for household final consumption expenditure.[41]

(56) Finally, Sony/ATV & EMI MP's competitors who negotiate online licenses directly with DSPs confirmed that advances do not vary across Member States, instead there is a single advance covering the pan-European license. They also confirmed that the Anglo-American repertoire and the service description licensed to a DSP is similar across all EEA Member States, and that 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, apply uniformly across all EEA Member States.[42]

(57) Given the above considerations, the Commission takes the view that the market for licensing of online rights is EEA wide.

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39 See Questionnaire Q1 to competitors, questions 13.1 and 13.2.

40 See Questionnaire Q2 to online customers, questions 13-16.

41 See Questionnaire Q1 to competitors, questions 14-15. Price level indices were sourced from data sourced from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services#Overall_price_levels

42 See Questionnaire Q1 to competitors, questions 16-18

6. COMPETITIVE ASSESSMENT

(58) 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 likely effects of a merger.[43]

(59) 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 *Sony/Sony-ATV*, and following the concerns raised by some respondents, the Commission focused its investigation primarily on whether the Transaction (and, in particular, the elimination of Mubadala as a jointly controlling shareholder of EMI MP) 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 assessed the possible impact of the change from joint to sole control on the other relevant markets, i.e. the market for the provision of music publishing services to authors, as well as the various markets for the exploitation of different categories of publishing rights offline. 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. Horizontal effects on the market for the exploitation of online rights

6.1.1. The merger specific concern in view of the Commission's precedents

(60) In relation to online rights, the potential concern which the Commission investigated is whether the Transaction would increase the merged entity's bargaining position vis-à-vis DSPs, in a way that Sony would be able to increase its price or otherwise worsen its licensing terms.

(61) In *Universal/BMG*, the Commission considered that publishers with a large repertoire may exercise bargaining power on online music platforms and impose higher rates or other unfavourable terms and conditions by threatening not to license music rights to online platforms. In its following decisions (*Sony/Mubadala/EMI* and *Sony/Sony-ATV*), the Commission continued to assess the impact of transactions in this framework.[44]

(62) In the context of the Transaction, one should recall that Sony has exercised joint control over EMI MP, and Sony/ATV has administered EMI MP's catalogue under an Administration Agreement. As a result, EMI MP has had no independent role in licensing its repertoire (or in signing and retaining authors) with DSPs. Instead, Sony/ATV has negotiated "blanket" licences of Sony/ATV and EMI MP content and has represented Sony/ATV and EMI repertoire in direct negotiations with DSPs as if Sony/ATV and EMI MP were one company.

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[43] 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.

[44] See e.g. *Universal/BMG*, recital 251. *Sony/Mubadala/EMI, recital 173 and Sony/Sony-ATV, recital 70.*

Therefore, taking music publishing rights on a standalone basis, the Transaction will have no effect on Sony/ATV's negotiation of online licenses with DSPs, as the size of its music publishing repertoire does not increase with the Transaction.

(63) Accordingly, the Transaction will also not increase Sony/ATV's and EMI MP's combined EEA share of online music publishing revenues, which amounted to around 25% in 2017 (see Table 1).

Table 1: Estimated EEA online music publishing rights revenues and market shares

Competitor	2015		2016		2017	
	Value (€'000)	**Share**	**Value (€'000)**	**Share**	**Value (€'000)**	**Share**
Sony/ATV	[…]	[10-20]%	[…]	[10-20]%	[…]	[10-20]%
EMI MP	[…]	[10-20]%	[…]	[10-20]%	[…]	[10-20]%
Combined	[…]	[20-30]%	[…]	[20-30]%	[…]	[20-30]%
Universal	[…]	[20-30]%	[…]	[20-30]%	[…]	[20-30]%
Warner/Chappell	[…]	[10-20]%	[…]	[10-20]%	[…]	[10-20]%
BMG	[…]	[5-10]%	[…]	[5-10]%	[…]	[5-10]%
Concord (formerly Imagem)	[…]	[0-5]%	[…]	[0-5]%	[…]	[0-5]%
Kobalt	[…]	[5-10]%	[…]	[0-5]%	[…]	[0-5]%
Peer	[…]	[0-5]%	[…]	[0-5]%	[…]	[0-5]%
Others	[…]	[20-30]%	[…]	[20-30]%	[…]	[20-30]%
Total	[…]	100%	[…]	100%	[…]	100%

Source: Sony/ATV estimates

(64) However, several of Sony's music publishing competitors complained that changing Sony's control over EMI MP from joint to sole control will significantly increase Sony's bargaining position vis-à-vis DSPs. They argue that the move from joint to sole control enables Sony to leverage across both its recording music rights (Sony Music) and music publishing rights (Sony/ATV and EMI MP) when negotiating with DSPs.

(65) As explained above (see recital (14)), 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.[45] 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.

(66) As Sony and other major publishers also have a recording business, recording rights may also increase their bargaining power vis-à-vis DSPs to the extent that the recording rights expand the list of songs over which the publisher has control. And this is the case in practice. Integrated music companies – i.e. having both a music publishing and a recorded music divisions – usually have recording and publishing rights covering different musical works with only partial overlaps. Indeed, it happens very often that for a specific song a publisher

[45] 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.

holds (part of) the publishing rights over that song whereas a totally independent record label holds the recording rights.

(67) Publishers who also have a recording business have control over a larger set of songs for which they can threaten not to license music publishing rights and/or recording rights to online platforms (hold up). This may increase their bargaining power vis-à-vis DSPs. In this case, the revenue shares from publishing may significantly understate the real market power of the music company.

(68) In the case at hand, the repertoire of songs over which Sony has publishing rights only partially overlaps with the repertoire of songs over which it holds recording rights. More specifically, based on the unweighted aggregated weekly charts control shares at an EEA-level (see section 6.1.3.3 below), Sony has no publishing rights over […]% of the songs over which it has recording rights. Only these songs potentially provide Sony with additional leverage vis-à-vis DSPs.

(69) 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.

(70) In line with previous cases (*Sony/Sony-ATV* and *Sony/Mubadala/EMI*), 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.

(71) 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 publisher's control share is the share of all songs made available for streaming or downloading by DSPs that that music publisher controls through fractional or full publishing rights or even recording rights in the case of an integrated music company. For the publishing rights, Sony/ATV only has control over the pricing negotiation with DSPs of the tracks that form part of the Anglo-American repertoire of Sony/ATV and EMI MP, since the rights over the tracks that form part of the Continental European repertoire are licensed by national collecting societies on a national or multi-territorial basis with no control by Sony/ATV or EMI MP. In contrast, for recording rights, Sony Music is in charge of licensing all tracks where the recorded rights are held by Sony Music, irrespective of whether the track is part of the Anglo-American or Continental European repertoire.

(72) In *Sony/Mubadala/EMI*, the Commission considered that Sony would be able to negotiate with DSPs by leveraging across both of its music publishing

catalogues (Sony/ATV and EMI MP), as the Commission considered that the interests of Mubadala and Sony would be aligned as regards maximising publishing revenues. The Commission therefore calculated the combined control shares of Sony/ATV and EMI MP. In contrast, the Commission considered that Sony would not be able to leverage the strength of both its publishing (Sony/ATV and EMI MP) and recording (Sony Music) repertoires in the negotiations with DSPs to obtain the best overall deal possible because of the ownership structure of Sony/ATV and EMI MP. As both would be partly controlled by an independent entity (Mubadala for EMI MP and the Michael Jackson Estate for Sony/ATV) and as the Commission considered that maximising combined revenues of publishing and recording would involve a sacrifice on the publishing side for the benefits of the recording interests,[46] the Commission concluded that it was unlikely that the merged entity would engage in joint negotiations of recording and publishing rights to optimise its bargaining power. The Commission therefore did not add the control shares of Sony Music.[47]

(73) In *Sony/Sony-ATV*, the Commission considered that post-transaction Sony would be able to leverage either across Sony/ATV and EMI MP (as it was already the case before the transaction) or across Sony/ATV and Sony Music – as a result of the transaction Sony/ATV would become fully controlled by Sony, as was Sony Music already, making it possible to adopt a strategy maximising combined profits. Control shares were therefore combined 2 by 2, and the increment caused by the transaction was the increased control share when comparing the combined control shares of Sony/ATV and Sony Music with the combined control shares of Sony/ATV and EMI MP. Again, the Commission considered that Sony would not be able to leverage across the three divisions, as Mubadala's interest was only to maximise publishing revenues, and Mubadala would have disagreed with a strategy to maximise combined revenues.

(74) With the Transaction, the constraint imposed by Mubadala will disappear. This implies that, in view of the Commission's precedents, the Transaction has the potential to enable Sony to leverage its publishing rights of both Sony/ATV and EMI MP together with its recorded music rights (Sony Music) to increase its bargaining power vis-à-vis DSPs. However, to the extent that the increased bargaining power of Sony would be used to extract better terms both on the recording and the publishing side, this would already have been possible pre-merger, as this would have benefitted Mubadala (the investment company having joined control over EMI MP with Sony), which would therefore not have vetoed such strategy.

(75) Therefore the only merger specific concern in view of the Commission's precedents is that the Transaction may enable Sony to sacrifice music publishing revenues to achieve higher revenues in recorded music, and overall. If this concern is confirmed the Commission would have to assess the increase in Sony's bargaining power vis-à-vis DSPs by analysing the increase in Sony's control shares caused by the addition of EMI MP's Anglo-American repertoire to the combined control shares of Sony/ATV and Sony Music.

[46] This was because Sony keeps a larger share of the recording revenues, as compared to publishing revenues. See *Sony/Mubadala/EMI*, footnote 99.

[47] See *Sony/Mubadala/EMI*, recitals 204-2011.

(76) Furthermore, according to one of the complainants (Impala, an association of independent music companies), the Transaction will also enable Sony to negotiate more guaranteed places on playlists. In particular, Impala explained that a music company with a greater control share is able to get its songs more prominently positioned in the important playlists (such as Spotify's "New Music Friday") of streaming services than what the strength of the represented catalogue would justify. As playlists enable labels and publishers to push their repertoire to consumers, the concern is that the Transaction would enable Sony to get a disproportional share of promotion through playlists, to the detriment of its competitors.[48]

(77) Finally, for the sake of completeness, the Commission looked at potential coordinated effects, even if the Commission considers that there is no reason whatsoever to expect the Transaction to give rise to coordinated effects concerns in the licensing of online rights in the EEA, and no third parties ever raised the issue.

6.1.2. Notifying Party's view

6.1.2.1. The Transaction will not affect the size or quality of the repertoire licensed by Sony/ATV nor its market share in music publishing.

(78) The Notifying Party argues that Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue and licensed it exclusively since 2012, so the Transaction will not affect the size or quality of the portfolio of music rights that Sony/ATV licenses today. As a practical matter, since 2012 EMI MP has had no independent Artists and Repertoire ("A&R"),[49] creative, or operational personnel, and maintains only a skeleton team of dedicated personnel whose principal function is to oversee the interests of EMI MP and its investors.

(79) Therefore the Transaction does not involve any increment in market shares, and the combined EEA market share of Sony/ATV and EMI MP of online revenues is below 30 %, namely [around 25]%.

6.1.2.2. The hold up theory postulated in *Universal/BMG* is not applicable.

(80) The Notifying Party notes that the Commission's theory of harm in *Universal/BMG* 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.[50]

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48 See Minutes of the meeting with Impala of 30 August 2018, Final Impala submission of 25 July 2018, and Impala supplementary submission of 15 October 2018.

49 Artists and repertoire (A&R) is the division of a music publishing company (or recorded music company) with responsibility for talent scouting and overseeing the artistic and commercial development of authors. It also acts as a liaison between authors and the music publishing company.

50 Form CO, chapter 6, paragraphs 7.10 – 7.15.

(81) 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. Not licensing important DSPs would result in significant losses for publishers and authors. And a "hold-up" strategy would not be rational with respect to smaller DSPs, because it would not lead to any material financial advantage and would go against the interest music publishers have in ensuring that downstream competition between DSPs is as effective as possible. [51]

(82) Second, right holders and platforms remain under pressure from piracy. According to the Notifying Party, the success of online streaming in (partially) combatting unauthorized use of music is evidence of the disciplining effect piracy has in licensing negotiations, and the pressure to make authorized music readily available. The risk of piracy is particularly pronounced where music is only made available on a limited number of DSPs, as would be the case in any hypothetical "hold-up". Music companies therefore face a constant pressure to license their music broadly (and resist both exclusives and "hold-ups"). [52]

(83) Third, online platforms enjoy significant buyer power which is inconsistent with the hold up theory.[53] Since the Commission's review of the *Sony/Sony-ATV* case in 2016, DSPs have continued to become more powerful as online revenues have assumed still greater significance for music companies and DSPs have continued to consolidate. Accordingly, as explained below, the largest platforms enjoy significant buyer power, while music publishers have a strong incentive to encourage the growth of the smaller platforms.

(84) Music companies rely on DSPs for the largest part of their revenues. Around […]% of Sony/ATV's and EMI MP's total 2017 music publishing revenues (and around […]% of Sony Music's total 2017 recorded music revenues) were generated from DSPs. These revenues are predominantly generated through the larger DSPs. The three largest DSPs (Spotify, Google and Apple) represented c. […]% of Sony/ATV's and EMI MP's online licensing revenues.[54]

(85) Any "hold-up" of rights would directly and immediately impact music companies' principal source of revenue; they would sacrifice those revenues for the company's entire catalogue (for instance, a "hold-up" of rights for three months would mean the loss of one-quarter of a year's revenues). It is highly unlikely that revenues foregone could be recouped. On the other hand, many platform operators, including both large and smaller platforms, are active in other areas and use music in large part as a means of promoting other areas of their business (*e.g.*, Apple, Amazon, Facebook, and Google). Online music is therefore not an essential element for these platforms, which can credibly threaten to walk away—or (continue to) operate on an unlicensed basis[55]—if the terms proposed by a publisher during contractual renegotiations are unacceptable to them.[56]

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51 Form CO, chapter 6, paragraphs 7.16 – 7.21.
52 Form CO, chapter 6, paragraphs 7.22 – 7.24.
53 Form CO, chapter 6, paragraphs 7.25 – 7.57.
54 Form CO, chapter 6, paragraph 7.26.
55 [Information on Sony/ATV's licensing practices].
56 Form CO, chapter 6, paragraphs 7.27 – 7.28.

(86) At the same time, the Notifying Party claims that music companies have a strong incentive to encourage competition among DSPs and to nurture entry from, and the growth of, smaller DSPs, so as to foster the continued growth of online distribution revenues and to avoid becoming dependent on only a handful of DSPs. They would have very little to gain by negotiating higher royalties from smaller DSPs (since they generate relatively little traffic and revenue), while in doing so would undermine these platforms' competitiveness against larger rivals, impeding the development of the online music industry on which music companies increasingly rely.[57]

(87) In addition, the Notifying Party claims that online platforms would not suffer much from a hold-up strategy, as they can and do launch their services without clearing music publishing rights. 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 [examples of digital platforms that operated for an initial period without a music publishing license in the past]. [58]

(88) [Information on Sony/ATV's licensing practices].

6.1.2.3. Sony would not have the ability and incentive to hold-up rights to the benefit of the recorded music division and to the detriment of publishing rights

(89) The Notifying Party explains that if the concern is that Sony would leverage across recording and publishing rights to negotiate joint agreements that would be to the benefit of both music publishing and recorded music revenues, Sony would already have had an incentive to do this. Mubadala would also have had no reason to object to any such strategy, since it would have resulted in better commercial terms for EMI MP's repertoire. Any "leveraging" to the benefit of both sets of rights (and thus to both authors and artists) would therefore be possible today. The Notifying Party claims that the Transaction will not change anything in this regard.[59]

(90) If instead, the concern is that Sony would sacrifice music publishing revenues for the benefit of increased recorded music revenues, the Notifying Party claims that Sony would have neither the ability nor the incentive to engage in such a strategy.[60]

(91) First, any attempt to engage in a "hold-up" of recorded music and music publishing rights to the detriment of Sony/ATV's and EMI MP's authors would be subject to a veto from the collecting societies, which control the Anglo-American online performance rights that are licensed together with the matching mechanical rights (controlled and supplied by Sony/ATV and EMI MP) licensed

57 Form CO, chapter 6, paragraphs 7.29 – 7.35.

58 [Information on Sony/ATV's licensing practices].

59 See Form CO, chapter 6, paragraph 7.79.

60 See Form CO, chapter 6, paragraph 7.79.

by Sony/ATV.[61] Their interest lies in maximising revenues from performance rights but also indirectly from mechanical rights, as authors are also direct members of performance right societies. Thus, they would oppose any attempt by Sony to shift value from publishing to recorded music, and they have veto authority, which means that Sony lacks any ability to do this.[62]

(92) Second, any increase in revenues from recording rights to the detriment of music publishing rights would be to the detriment of most of Sony/ATV's and EMI MP's authors, as […]% of Sony/ATV and EMI MP's authors are singer-songwriters that have recorded music contracts with Sony Music. Acting contrary to the interests of a large portion of its talent base would ruin Sony's reputation with its authors and/or artists, rendering Sony uncompetitive against other music companies and destroying the value of its business, as well as exposing Sony/ATV to potential claims from affected authors in relation to any damage they may have suffered, undermining Sony/ATV's ability to compete for new talent.

(93) Third, in any event, there are practical complications that inhibit the joint negotiation of music publishing and recorded music rights. In Sony/ATV's experience, DSPs do not typically approach recorded music and music publishing companies for licences to their repertoire at the same point in time or (even) seek to negotiate publishing licences for different geographic regions at the same time. Recorded music and music publishing negotiations are taking place at different times and the length, signature, and expiry dates of their respective agreements vary considerably. It would be difficult to re-align the contractual timings of publishing and recording rights.

6.1.2.4. Combined control shares are too low to raise concerns

(94) In any event, even assuming that the Transaction will enable Sony to leverage across all of its rights to increase its bargaining power, the Notifying Party argues that the combined control shares are too low to raise concerns. More specifically, even if the Commission were to rely on "control shares" that combined rights of Sony Music, Sony/ATV and EMI MP, the resulting combined "control shares" would be below 50%. This would be too low to raise competition concerns even when compared to the control share level, at which in its previous decisions, the Commission identified competition concerns.[63]

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61 The pan European licensing of Sony/ATV's and EMI MP's Anglo-American repertoire comprises both the mechanical rights (controlled and supplied by Sony/ATV and EMI MP) and the matching performance rights (controlled and supplied by the relevant national collecting societies through SOLAR). The licences are administered by SOLAR, a multi-territorial licensing vehicle, which is a wholly owned subsidiary of PRS and GEMA (the UK and German collecting societies) and administered by ICE (a wholly owned subsidiary of PRS, GEMA and STIM (Swedish collecting society). While Sony/ATV and EMI MP (along with other publishers) have withdrawn their Anglo-American mechanical rights from collecting societies, national collecting societies control Anglo-American online performance rights. These collecting societies can (and would) exercise a veto right over any music publishing agreement negotiated by Sony/ATV that did not represent the best interests of the collecting societies' authors. See Form CO, chapter 6, paragraph 7.73.

62 See further submission by Sony of 12 October 2018, to confirm the explanations provided by Sony/ATV on a conference call held on 11 October 2018.

63 By their nature, control shares add up to much more than 100 % because often several publishers hold fractional publishing rights over the same song and the recording rights and publishing rights over a

6.1.2.5. The Transaction will not increase Sony's ability to influence DSP playlists

(95) The Notifying Party argues that the Transaction will have no effect on Sony Music's and Sony/ATV's efforts to promote music publishing and recorded music repertoire on DSP playlists.

(96) First, the incentive of Sony Music and Sony/ATV to promote their repertoire for inclusion on DSP playlists will be unchanged by the Transaction. In particular, Sony/ATV has every incentive to promote its own authors today, and Mubadala's interest is exactly the same. [64]

(97) Second, it is unclear how Sony Music and Sony/ATV could coordinate their promotional activities as regards the majority of their respective catalogue. In promoting Sony/ATV authors, Sony/ATV necessarily promotes songs released by rival recorded music companies. Correspondingly, in promoting Sony Music artists, Sony Music necessarily promotes songs composed by writers signed to rival music. It would therefore be difficult for Sony, first, to devise a successful way to coordinate in the promotion of Sony/ATV & EMI MP and Sony Music respective repertoires, and, second, any such attempt would damage each Sony company's relationships with the great majority of authors and artists who were not signed to both companies. Only with respect to music in which Sony Music holds the recorded music rights and Sony/ATV/EMI MP hold the music publishing rights, could Sony Music and Sony/ATV coordinate their promotional activities. However, even with respect to those songs, the Transaction will not change Sony's incentive and ability to coordinate across Sony Music and Sony/ATV/EMI MP, as for these songs Mubadala's interest is already aligned with Sony Music's interest.[65]

(98) Third, the Notifying Party argues that, even if Sony Music and Sony/ATV were to combine their efforts after the Transaction, there is no reason why a single interlocutor representing both companies would be better able to influence DSP editorial teams than separate teams can today. In particular, the Notifying Party argues that there is no relationship between control share or market share and the ability to influence a given DSP's playlists. In fact, Sony estimates that it recorded or distributed [information on the representation of Sony Music tracks on DSP playlists]. For example, in the U.K. version of Spotify's "New Music Friday" playlist, which is an important promotional platform with over 2.5 million followers, on September 7, 2018, independent labels accounted for [30-40]% of the playlist's tracks [information on the representation of Sony Music tracks on DSP playlists].

song are often controlled by different integrated companies. As a result, in *Universal/BMG*, the Commission considered in a cautious approach "*that the merger would have a significant impact in those markets where the merged entity would reach or exceed a control share of 50%*". See *Universal/BMG*, recital 305. In Sony/Mubadala/EMI, the Commission found that "[*t]he only countries in which the Parties' control share would exceed 50% would be the UK and Ireland"*. See *Sony/Mubadala/EMI*, recital 198. In *Sony/Sony-ATV*, the Commission found that as it considered the relevant market to be EEA wide, "*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*". See *Sony/Sony-ATV*, recital 142.

64 Form CO, chapter 6, paragraph 7.100.

65 Form CO, chapter 6, paragraph 7.97.

(99) Finally, irrespective of the Transaction, music companies do not seem to have the ability, at least contractually, to influence playlist placement since DSPs' editorial teams are free to include whatever repertoire they want, and make their own decisions. [Information on the licensing terms of Sony/ATV and Sony Music]. Instead, interactions between music companies and DSPs with regard to playlists are rather a form of "lobbying" through which a music company seeks to influence playlist selection.[66]

6.1.3. Commission's assessment

(100) The Commission agrees with the Notifying Party's argument that the Transaction will not affect the size or quality of the repertoire licensed by Sony/ATV nor its market share in music publishing.

(101) However, as explained above, the Transaction may have the potential to enable Sony to leverage its publishing rights of both Sony/ATV and EMI MP together with its recorded music rights (Sony Music) to increase its bargaining power vis-à-vis DSPs, to the extent that it would involve sacrificing music publishing revenues to achieve higher revenues in recorded music, and overall.

6.1.3.1. Applicability of the hold-up theory

(102) In Universal/BMG, the Commission developed a "hold up" theory to assess the bargaining power of music publishers over online music platforms. This theory postulates what is in effect a "hold-up" scenario in which publishers with a large repertoire may exercise "pressure" on online music platforms and "impose higher rates" by threatening to withhold licensing rights, potentially across the recorded music and music publishing rights held under single ownership by an "integrated" music company.[67]

(103) In Sony/Sony-ATV, the Commission considered that the pressure from piracy or alleged buyer power would not be sufficiently constraining for publishers not to engage in a hold-up strategy.

(104) The Commission considers that there are not compelling reasons to depart from this view.[68]

(105) That said, by way of background, the Commission notes the following.

(106) First, online platforms and all competitors responding to the market investigation indicated that negotiations for publishing and recording rights are conducted separately.[69]

(107) Second, Sony claims that, to date, it never coordinated its negotiations of recorded music and music publishing licences,[70] which is also not disputed by online platforms responding to the market investigation. A majority of online

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66 Form CO, chapter 6, paragraphs 7.90, 7.93, 7.94 and 7.100.

67 *Universal/BMG*, paragraph 251.

68 *Sony/Sony-ATV*, paragraphs 110-111

69 See replies to Questionnaire to online customers, question 21; and to Questionnaire to competitors, question 23.

70 See for instance Form CO, Chapter 6, paragraph 7.66.

platforms responding to the market investigation even noted that Sony would not leverage its publishing rights of both Sony/ATV and EMI MP together with its recorded music rights to extract better terms from them.[71] This, in turn, indicates that Sony, up until today, even if it could already leverage recorded and publishing rights to extract better terms both on the recording and the publishing side (since Mubadala would have had no reasons to oppose such a strategy), it has not done so.

(108) However, as explained, theoretically the Transaction may enable Sony to sacrifice music publishing revenues to achieve higher revenues in recorded music, and overall. This merger specific concern is assessed in the next section.

6.1.3.2. Applicability of the merger specific concern that Sony would sacrifice music publishing revenues to achieve higher revenues in recorded music

(109) The Commission considers it very unlikely that Sony would engage in a strategy of leveraging recorded music and music publishing rights to extract overall better terms from DSPs to the detriment of music publishing revenues.

(110) First, as regards Sony's ability to engage in such strategy, the Notifying Party argued that Sony would not have the ability to engage in such strategy as any attempt to engage in a “hold-up” of recorded music and music publishing rights to the detriment of Sony/ATV’s and EMI MP’s authors would be subject to a veto from the collecting societies. The market investigation indicated the following:

– An overwhelming majority of collecting societies responding to the market investigation confirmed that Sony/ATV (directly or through SOLAR)[72] negotiates licensing agreements with DSPs covering the Anglo-American mechanical rights controlled by Sony/ATV and EMI MP, together with the corresponding Anglo-American performance rights controlled/administered by collecting societies.[73] Dissemination of online content involves both an act of reproduction and an act of making available and, therefore,

71 See replies to Questionnaire to online customers, question 29

72 SOLAR is a multi-territorial licensing vehicle, wholly owned by PRS (the U.K. collecting society) and GEMA (the German collecting society). Sony/ATV appointed SOLAR to administer its and EMI MP's mechanical rights for the online dissemination of Anglo-American repertoire. [Information on Sony/ATV’s licensing strategy.] See Form CO, chapter 6, paragraph 6.17.

73 See replies to Questionnaire Q3 to collecting societies, question 7.
In particular, PRS for Music explains that "Sony/ATV and EMI MP have both mandated SOLAR to provide copyright administration services in respect of licensing agreements which Sony/ATV negotiates with DSPs to include (i) the AA mechanical rights controlled by Sony/ATV and EMI MP, and (ii) the matching AA [Anglo-American] performing rights controlled/administered by the AA CMOs [Collective Management Organisations, i.e. collecting societies]. The licensing of both the mechanical rights and the performing rights by Sony/ATV through SOLAR allows the DSP to agree a licence for the whole of the relevant musical work (by which we mean the composition) for the DSP’s service through one licence. The AA performance rights are brought to SOLAR by PRS and GEMA by means of the agreements which PRS and GEMA have with the other AA collecting societies.
IMRO, the Irish Music Rights Organisation, explains that "SOLAR currently obtain the IMRO performing rights from PRS whom, pursuant to an agreement between IMRO and PRS, can sub-licence IMRO rights to other Option 3 special purpose vehicles provided that these SPVs comply with the terms of the IMRO/PRS agreement and on the basis that PRS remains liable to IMRO for all activities of any-sub agent"

implicates both mechanical rights (i.e. the rights to make copies of the protected work) and performance rights (i.e. the rights to make the protected work available or to communicate it to the public).

– An overwhelming majority of collecting societies responding to the market investigation confirmed that SOLAR requires prior approval from the Anglo-American collecting societies to include their rights in the licence.[74]

– The two European collecting societies controlling Anglo-American performance rights, IMRO (the Irish collecting society) and PRS for Music (the UK collecting society), confirmed that they have to approve the music publishing rights licensing agreement over the Anglo-American repertoire between Sony/ATV and DSPs, and that they could and would veto the inclusion of their members' performing rights in such licence, if they considered that their members would be disadvantaged.[75]

– That said, at least theoretically, Sony/ATV would still be free to license its relevant mechanical rights on a standalone basis.[76]

(111) The Commission therefore considers that collecting societies would not allow Sony to reduce the value of the performing rights. They would also most likely oppose any attempt by Sony to reduce the value of mechanical rights, as this would prejudice the interests of Sony/ATV's and EMI MP's authors, who are also direct members of collecting societies. However, the only threat is that they would withdraw their members' performing rights from the licencing agreement. Sony/ATV would still at least theoretically be free to license its relevant mechanical rights on a standalone basis. The DSPs would then have to negotiate licenses for performance rights with national collecting societies. Hence, the Commission considers that Sony would have at least the technical ability to engage in such strategy.

(112) The next question is therefore whether Sony would have the incentive to do so.

(113) As regards Sony's incentive to engage in such strategy, the Commission considers it very unlikely that Sony would have the incentive to engage in a strategy of leveraging recorded music and music publishing rights to extract overall better terms from DSPs but that would be to the detriment of music publishing revenues.

(114) Firstly, the Commission considers that the threat that performing societies would withdraw their members' performing rights from the licencing agreement may not be sufficient to discipline Sony. The Commission considered whether this threat (1) would be sufficiently credible and (2) would act as a sufficient deterrent so that Sony would not have the incentive to engage in such a strategy and risk having to licence its mechanical rights on a standalone basis. The market investigation suggests that the threat is credible, since respondents to the

[74] See replies to Questionnaire Q3 to collecting societies, question 8.
[75] See replies to Questionnaire Q3 to collecting societies, questions 9-11.
[76] See replies to Questionnaire Q3 to collecting societies, questions 9-11.

market investigation indicated that, in the past, collecting societies have used their control over performance rights to veto licensing agreements for online rights or influence the negotiations.[77] However, responses to the market investigation are not conclusive as regards the question whether this threat of veto would act as a sufficient deterrent.[78]

(115) Secondly, the Commission considers that the damaging impact such strategy would have on Sony's music publishing business would be such that Sony would not have the incentive to engage in such strategy. As explained by the Notifying Party, any increase in revenues from recording rights to the detriment of music publishing rights would be to the detriment of most of Sony/ATV’s and EMI MP’s authors. The Commission considers that the dissatisfaction of authors who sign a contract with Sony/ATV & EMI MP to get publishing services and the threat of losing them would have a disciplining effect on Sony:

– Sony/ATV estimates that […]% of its composer agreements come up for renewal each year. The Commission considers that the threat of these authors not renewing is credible as once the contract has come to an end there is no barrier to switching, and any “hold-up” or reduction of royalty rates would be evident to Sony/ATV’s and EMI MP’s authors. Just for the remainder of 2018 and 2019, the following authors' contracts are up for renewal and could therefore be lost by Sony/ATV: [details of Sony/ATV’s author contracts].[79]

– For ongoing contracts, the Commission considers that there would be a credible threat that authors would successfully seek termination of their contracts and potentially claim damages for breach of Sony's contractual obligation to maximise the value of their publishing rights. [Information on the terms of Sony/ATV’s contracts with authors]. Under common law legal systems (including those in the U.K. and U.S.), any “hold-up” or reduction of royalty rates would almost certainly be claimed to be a repudiatory breach of contract by a significant number of Sony/ATV’s and EMI MP’s authors, who would seek to immediately terminate their contracts and seek damages.[80]

– The Commission also considers that such strategy would significantly jeopardise Sony/ATV’s ability to sign (and retain) new talents, which are fundamental to the long-term success of a music publisher. Sony/ATV seeks to sign [a significant number] of authors each year. By way of example, in the U.K. alone Sony/ATV and EMI MP have signed […] authors this year, and signed an average of […] new authors each year over the last five years. Recruiting and retaining talent is unpredictable (the revenues generated by new authors can be modest in the early years), but fundamental to the long-term success of a music publisher. As Sony/ATV does not know the identity of “the next Ed Sheeran”

[77] See replies to Questionnaire Q2 to online customers (platforms), question 28
[78] See replies to Questionnaire Q1to competitors, questions 28-30
[79] See Notifying Party's reply to the Commission's information request of 4 October 2018, paragraph 1.3
[80] See Notifying Party's reply to the Commission's information request of 4 October 2018, paragraph 1.3

(who Sony/ATV signed before he achieved commercial success), it is vital that the business continues to sign and retain a wide variety of talented authors to maximise its chances of success. Any withdrawal of repertoire from DSPs or reduction in royalty rates achieved for digital exploitation in order to benefit Sony Music would seriously harm Sony/ATV's reputation (further exacerbated through the loss of established talent), jeopardising Sony/TAV's ability to sign (and retain) new talent, thereby threatening the future of its business.[81]

(116) The results of the market investigation support the idea that authors would react negatively to such strategy. All DSPs expressing a view on the question replied that the authors would react negatively. Deezer for instance considered that *"[t]he authors would likely react negatively and organize against the company / strategy"*. Similarly, all competitors expressing a view on the question replied that authors would react negatively and potentially try to terminate the contracts. For instance, Kobalt Music Group indicated that *"[w]e do not sacrifice publishing rates/advances for better rates/advances on our master catalogue. If we did and they understood this writers would be rightly outraged"*. Actually, the general view of competitors is that they would certainly not engage in a strategy that would sacrifice value for authors to the benefit of recorded rights.[82]

(117) The threat of authors switching is particularly significant given the level of competition in the upstream market for the provision of publishing services to authors. As explained further in section 6.2, Sony/ATV and EMI MP's combined share of revenue was only [20-30]% in 2017 at the EEA level and in any event below 30% in all Member States.

(118) The Notifying Party provided evidence that […] authors have actually switched to competitors in the recent past, although Sony/ATV never attempted to devalue their publishing rights to extract better terms for the recording rights. Since June 2012, successful bids by rival music publishers allowed them to sign [a number of] authors and catalogues formerly signed to Sony/ATV and EMI MP. For instance, Sony/ATV and EMI MP lost [examples of authors formerly signed with Sony/ATV or EMI MP].[83]

(119) Thirdly, all DSPs and integrated music companies responding to the market investigation confirmed that they have never been involved in licencing agreements where the integrated music company agreed less favourable terms regarding music publishing rights of Anglo-American repertoire, in exchange for better terms on recording rights.[84] Even those respondents to the market investigation, which acknowledge that a coordinated approach across recorded music and music publishing is possible, consider that the purpose of such strategy would be to maximise revenues for both sides and that authors would

81 See Notifying Party's reply to the Commission's information request of 4 October 2018, paragraph 1.3

82 See replies to Questionnaire Q2 to online customers (platforms), question 26.3; and Q1 to competitors, question 28.3

83 See Annex 1(1) to the Form CO

84 See replies to Questionnaire Q2 to online customers (platforms), question 26.4; and Q1 to competitors, question 28.4

react negatively to a strategy exclusively aimed at increasing revenues on the recorded music side to the detriment of music publishing.[85]

(120) Overall therefore, the Commission considers that, post Transaction, Sony will not have the incentive to coordinate the negotiations of its recorded and publishing rights to extract better terms for its recorded music division to the detriment of its music publishing business. As this is the only merger specific way in which the Transaction could have increased the bargaining power of Sony, the Commission considers that the Transaction will not increase the bargaining power of Sony vis-à-vis DSPs. However, for the sake of completeness, in the next section, the Commission will analyse the increase in Sony's control shares caused by the addition of EMI MP's Anglo-American repertoire to the combined control shares of Sony/ATV and Sony Music.

6.1.3.3. Analysis of control shares

(121) In previous cases (*Universal/BMG*, *Sony/Mubadala/EMI* and *Sony/Sony-ATV*), to assess the bargaining power of music companies vis-à-vis DSPs, the Commission calculated so-called "control shares" (see recital (49) for a definition). This was based on the idea that music publishers with only fractional interests in the same musical work all wield a negative veto power towards that work.

(122) Since 2007 all the major music publishers have withdrawn the online mechanical rights to their Anglo-American repertoire from the traditional collecting society system and retained the right to license the mechanical rights to Anglo-American repertoire directly to users. Therefore, they have the power to control pricing and licensing terms with regard to the Anglo-American repertoire. On the other hand, mechanical rights for the Continental catalogue (as well as performance rights for Anglo-American and Continental repertoires) remain under control of the collecting societies. Therefore the control share of Sony/ATV for instance is the share of all songs made available for streaming or downloading (irrespective of whether these songs belong to the Anglo-American repertoire or the Continental European one) in which Sony/ATV has fractional or full publishing rights and that belong to its Anglo-American repertoire.

(123) Sony controls the rights over three sets of catalogues: (1) the music publishing rights of Sony/ATV; (2) the music publishing right of EMI MP (jointly with Mubadala so far), and (3) the recording music rights of Sony Music.

(124) Following the removal of Mubadala, and assuming (contrary to the conclusion of the previous section) that the Transaction will enable and incentivise Sony to coordinate the negotiations of its recorded and publishing rights to extract better terms for its recorded music division to the detriment of its music publishing business, it would be appropriate to calculate control shares across Sony's recorded music and music publishing rights.

(125) Accordingly, the increase in Sony's bargaining power vis-à-vis DSPs could be analysed by calculating the increase in Sony's control shares caused by the

85 See reply of a respondent to Questionnaire Q1 to competitors, question 28.3

addition of EMI MP's Anglo-American repertoire to the combined catalogue of Sony/ATV and Sony Music, as following the Sony/Sony-ATV transaction, the Commission considered that Sony would already be able to leverage across Sony/ATV and Sony Music.

(126) In *Sony/Sony-ATV* and *Sony/Mubadala/EMI*, control shares were measured on the basis of the number of titles in the weekly top 100 singles chart hits in which a publisher or a record label had any ownership right (whether recording or publishing, fractional or full). For the publishing rights, only the Anglo-American titles were included in the control shares. The weekly digital charts were consolidated over the entire year to generate a list of unique songs that appeared in the chart during that year ("weekly chart unweighted control share" methodology). This means that each song was only counted once, even if it appeared in the chart for many weeks.

(127) While disputing the control share theory, the Notifying Party nevertheless submitted weekly chart control share data calculated following the methodology used in *Sony/Sony-ATV* and *Sony/Mubadala/EMI* (the "weekly chart unweighted control share" methodology), with some improvements to address comments from third parties.[86] In particular:

(a) For each EEA country with the exception of Cyprus, Liechtenstein, Luxembourg, and Malta,[87] Sony identified the relevant weekly charts. Where possible, Sony relied on the official weekly digital sales charts that provide the largest coverage of tracks. However, not all EEA countries have official digital charts, and certain official charts include only a limited number of tracks. In these situations, Sony identified the most reliable “unofficial” chart.

(b) Sony consolidated the weekly charts to generate a list of unique tracks that appeared in the charts during 2017 for each country.

(c) For each chart track that appears in these lists, Sony determined whether authors on Sony/ATV's and EMI MP’s roster were involved in writing the track, and therefore whether the track 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.[88]

86 See submission of 20 July 2018 by Warner Group CORP. (WMG) following the meeting with the case team of 29 June 2018; and Impala submission of 25 July 2018.

87 These are countries where it has not been practicable to generate data. These countries account for […]% of Sony’s EEA music publishing revenues, so would not have a material effect on the EEA-wide data.

88 The same track may be considered Anglo-American and Continental European in the event that the track is co-authored by two (or more) authors registered with collecting societies in different countries. Specifically, one (or more) authors may be registered with the U.K. or U.S. collecting society. The work of that author is therefore considered Anglo-American. Similarly, one (or more) authors may be registered with a collecting society in Europe. The work of that author is therefore considered Continental European. Sony adopted a conservative approach and treated these tracks as Anglo-American.

Only the Anglo-American titles were included in the control shares of Sony/ATV and EMI MP.

(d) Control shares that take into account recorded music rights were also computed in a similar way as publishing control shares. Sony included all tracks where the recorded rights are held by Sony Music in a given year, as well as third-party songs distributed by Sony Music, irrespective of whether the track is considered Anglo-American or Continental European repertoire by Sony Music.

(e) The "control shares" are expressed in percentage terms of the number of unique tracks that enter into each respective chart year. 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 and recorded music market sizes.

(128) As compared to *Sony/Sony-ATV* and *Sony/Mubadala/EMI*, the following improvements were made following suggestions made by third parties:[89]

(a) More EEA countries were added to the analysis.

(b) Third-party songs distributed by Sony Music were included in Sony Music's control share.

(c) EEA "control shares" were generated by weighting the national shares according to not only total music publishing but also recorded music market sizes.

(129) Table 2 below presents the EEA-wide control shares of Sony/ATV, EMI MP, and Sony Music on a standalone basis, as well as the combined position that Sony could achieve pre-Transaction and post-Transaction, assuming (contrary to the conclusion in the previous section) that the Transaction will enable and incentivise Sony to coordinate the negotiations of all of its recorded and publishing rights. In particular:

– The combined control share of Sony/ATV and EMI MP reflects the fact that following *Sony/Mubadala/EMI*, the Commission considered that Sony would be able to negotiate with DSPs by leveraging across both of its music publishing catalogues (Sony/ATV and EMI MP);

– The combined control share of Sony/ATV and Sony Music reflects the fact that following *Sony/Sony-ATV*, the Commission considered that Sony would be able to also leverage across Sony/ATV and Sony Music, because as a result of the transaction Sony/ATV became fully controlled by Sony, as was Sony Music already, making it possible to adopt a strategy maximising combined profits.

[89] See submission of 20 July 2018 by Warner Group CORP. (WMG) following the meeting with the case team of 29 June 2018; and Impala submission of 25 July 2018.

– The combined control share of Sony/ATV, EMI MP and Sony Music reflects the assumption that post-Transaction (contrary to the conclusion reached in the previous section) Sony would coordinate the negotiations of all of its recorded and publishing rights.

Table 2: 2017 weekly chart control shares at the EEA level

	Sony/ATV	EMI MP	Sony/ATV & EMI MP Combined	Sony Music	Sony/ATV & Sony Music Combined	Sony/ATV, Sony Music & EMI MP Combined
Weekly chart unweighted control share	**[20-30]%**	**[20-30]%**	**[30-40]%**	**[20-30]%**	**[30-40]%**	**[40-50]%**

Note: Combined control shares are lower than the sum of control shares because of the songs for which more than one division controls rights

(130) As explained in the previous section, the Commission considers that the Transaction will not incentivise Sony to coordinate the negotiations of its recorded and publishing rights to extract better terms from DSPs. Therefore, controls share should not be calculated by adding EMI MP's Anglo-American repertoire to the combined catalogue under control of Sony/ATV and Sony Music, i.e. control shares should not be calculated across Sony/ATV, Sony Music & EMI MP. However, even if the Commission assumed (which is not the case) that the appropriate combined control share of Sony included the rights to Sony Music, Sony/ATV and EMI MP repertoires, the resulting EEA-wide combined control share would be [40-50]%.

(131) This is below the 50% threshold, which was set in precedents as the threshold for significant market power and thus competition concerns.[90] Control shares should not be equated to market shares. By their nature, control shares add up to more than 100 % because often several publishers hold fractional publishing rights over the same song and the recording rights and publishing rights over a song are often controlled by different integrated companies. As a result, in *Universal/BMG* 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%.[91] This threshold was confirmed in *Sony/Mubadala/EMI* and in *Sony/Sony-ATV*.[92]

(132) As a sign that the threshold of 50% is reasonable it is worth noting that other major publishers also have very significant control shares. Although the Commission does not have recent control share estimates for Universal Music, based on its decision in *Universal Music Group/EMI Music* and despite the

[90] See *Universal/BMG*, recital 305; *Sony/Mubadala/EMI*, recital 198; and *Sony/Sony-ATV*, recital 142.
[91] *Universal/BMG,* recital 305.
[92] *Sony/Mubadala/EMI*, recital 198; and *Sony/Sony-ATV*, recital 142.

divestment of significant catalogues back then, Universal Music's current control share at an EEA level across music publishing and recording is estimated to be between 40% and 50%.[93]

(133) Furthermore, the 50% threshold has to be considered in the light of the important developments in the music industry over the last ten years. Online music in Europe (and worldwide) has experienced significant and sustained growth in recent years due to the increasing popularity of streaming, a trend that is set to continue. Just between 2012 and 2017, the EEA market for online music publishing rights increased fivefold (from circa €[…] million in 2012 to more than €[…] million in 2017). Given these developments, a 50% control share today is unlikely to provide as much bargaining power to a publisher than a 50% control share back in 2007 for the following reasons.

(134) Firstly, the growth of online music and in particular streaming services has lowered barriers to entry and expansion for publishers. The proliferation of streaming means that major record labels and publishers no longer hold the gate-keeping role they did by virtue of their influence over offline formats such as radio and physical music stores.[94] As a result, authors and artists are more willing to explore signing with smaller record labels and music publishers. This increased competition has resulted in advances to successful authors being at an all-time high, narrowing royalty splits in authors' favour, shorter contract terms and retention periods, and an increased prevalence of publishing contracts without retention periods.[95] Against this background, a hold-up strategy whereby a publisher would threaten not to license the rights to the repertoire it controls becomes less credible, as the threat of unsatisfied authors switching has become much more credible, especially in the context of a strategy (as the one that is the focus of the control share analysis in this section) that would involve sacrificing publishing revenues to the benefit of recording revenues.

(135) Secondly, DSPs today have much more buyer power than they used to have 5-10 years ago. Today, music companies rely on DSPs for the largest part of their revenues. This was not the case 5 years ago, and even less 10 years ago. In 2017, around […]% of Sony/ATV's and EMI MP's total 2017 music publishing revenues and around […]% of Sony Music's total 2017 recorded music revenues were generated from DSPs. Spotify, Apple, and Google/YouTube accounted for more than […]% of Sony/ATV and EMI MP's EEA online licensing revenues in 2017.[96]

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93 Case COMP/M.6458 *Universal Music Group/EMI Music.* Commission decision of 21 Septmber 2012 ("*Universal/EMI*").

94 For instance, Willard Ahdritz, CEO, Kobalt Music stated: "*Because of the proliferation of streaming, fans have unprecedented access to their artists of all shapes and sizes. Instead of gatekeepers deciding what fans should listen to, now the fans drive what they want to listen to*". See https://www kobaltmusic.com/blog/why-independent-artists-are-ruling-the-music-industry-according-to-willard-ahdritz

95 See Form CO, chapter 6, paragraph 7.19 and Chapter 1, paragraph 6.13.

96 See Form CO, chapter 6, paragraphs 7.25-7.26. The Notifying Party also claims that music publishers have strong incentives to encourage the growth of smaller DSPs and therefore not to insist on higher royalties from them as compared to the Spotify, Apple or Google/Youtube. This is because smaller DSPs can grow consumption and explore new methods of commercialising music (as exemplified by Spotify which launched its streaming service 10 years ago and which is now number one), and in any

(136) As regards the methodology used to calculate control shares, third parties claimed that in addition to the improvements presented above and made to the control share calculation methodology, the control share calculation should also take into account the greater control that comes from having rights in songs that maintain high chart positions over multiple weeks. In particular, they claimed that songs should be weighted according to the number of weeks they stay in the chart.[97]

(137) In the same logic, it is reasonable to expect that the popularity of songs also matters to assess the strength of a particular repertoire. A sensible measure which both takes into account the (instantaneous) popularity of a song and its longevity would be the share that the songs controlled by a music company account for in the total number of streams on a DSP platform, covering as many songs as possible.

(138) The Commission considers that such measure better captures the bargaining power of a music publisher than the measure proposed by third parties (see recital (136) above) which continues to focus on the Top 100 charts and which only weights songs based on the number of weeks it remains in the weekly charts.

(139) Firstly, in line with its precedents, the Commission considers that larger samples are preferable because they proxy better the actual control share of Sony, i.e. the share of the songs in DSPs' entire repertoires that Sony controls. In Sony/Sony-ATV, the Commission recognised that control shares in weekly charts are only a "proxy" for actual control shares and that "[i]n principle, to calculate control shares it would be necessary to determine the controlling entities for all the titles". This is confirmed by the results of the market investigation. Customers responding to the market investigation considered in particular that the chart based measure is too "*hit-centric*" and that a better method would be to use "*each digital music service’s usage data*". [98] The alternative measure proposed by the Commission would be based on DSP's usage data.

(140) Secondly, a stream-weighted control share methodology does not only take into account the greater control and bargaining power that comes from having rights in songs that are listened to over an extended period (the number of weeks they remain in the charts), but also the greater control and bargaining power that comes from having rights in a very popular song which everyone wants to listen to.

(141) The Commission therefore asked the Notifying Party to produce such measure.

(142) Notwithstanding its reservations about the “control share theory”, the Notifying Party nevertheless submitted control share data based on DSP usage data. These data assess Sony’s recorded music and music publishing rights across the top 75,000 most streamed songs on [a DSP]. The Commission considers that [the

event increasing royalty rates for smaller DSPs would not allow them to grow and even possibly survive, as the largest DSPs currently operate at loss or very low margins. See Form CO, chapter 6, paragraphs 7.29-7.35

97 See submission of 20 July 2018 by Warner Group CORP. (WMG) following the meeting with the case team of 29 June 2018; and Impala submission of 25 July 2018.

98 See Replies to questionnaire Q2 to online customers, question 32.1.

DSP in question] is representative of the overall online market for the following reasons. First, [information on the representativeness of the sample]. Second, [information on the representativeness of the sample].[99] And third, there is no reason to believe that Sony's control share would differ materially depending on whether we look at streams on [names of several DSPs]. [Information on the representativeness of the sample].

(143) Control shares calculated using this DSP usage data covers a much broader selection of songs than the chart data-based “control shares” considered above. Sony has used the following methodology to generate “stream-weighted control shares" for the […] EEA countries in which Sony/ATV and EMI MP directly license their repertoire, together accounting for [the vast majority] of Sony/ATV's EEA music publishing revenues:

(a) For each of the […] EEA countries, Sony obtained the 75,000 most streamed songs on [a DSP] for each month of the first quarter of 2017. [Details of how Sony sourced the sample in question].

(b) These data identify Anglo-American repertoire tracks for which an author of Sony/ATV or of EMI MP was involved in writing the track, regardless of the publishing share held (i.e., tracks with full and fractional rights were included). Only the Anglo-American titles were included in the control shares of Sony/ATV and EMI MP.

(c) Control shares that take into account recorded music rights were also computed in a similar way as publishing control shares. Sony included all tracks where the recorded rights are held by Sony Music in a given year, as well as third-party songs distributed by Sony Music, irrespective of whether the track is considered Anglo-American or Continental European repertoire by Sony Music. [Information on the identification of recorded music rights in the sample].

(d) Sony consolidated these monthly data to obtain a unique list of songs for each country for the first quarter of 2017.

(e) Each track in the sample was then weighted by the number of streams during that period.

(f) The “control shares” are expressed in percentage terms of the number of unique tracks that enter into each country DSP streaming dataset. This ensures that the “control shares” are comparable across EEA countries. The EEA “control shares” across these […] territories were generated by weighting the national shares according to total music publishing and recorded music market sizes.

(144) Table 3 below presents the EEA-wide "stream-weighted control shares" for the first quarter of 2017 of Sony/ATV, EMI MP, and Sony Music on a standalone basis, as well as the combined control share of Sony/ATV and EMI MP, the combined control share of Sony/ATV and Sony Music, and the combined control share of Sony/ATV, EMI MP and Sony Music.

99 See Form CO, chapter 6, recital 7.26.

Table 3: Q1 2017 Stream-weighted control shares on [a DSP] at the EEA level

	Sony/ATV	EMI MP	Sony/ATV & EMI MP Combined	Sony Music	Sony/ATV & Sony Music Combined	Sony/ATV, Sony Music & EMI MP Combined
Stream-weighted Control share	**[20-30]%**	**[10-20]%**	**[30-40]%**	**[30-40]%**	**[40-50]%**	**[40-50]%**

Note: Combined control shares are lower than the sum of control shares because of the songs for which more than one division controls rights.

(145) Even if the Commission assumed (which is not the case) that the appropriate combined control share of Sony included the rights to Sony Music, Sony/ A TV and EMI MP repertoires, under this improved stream-weighted control share methodology, the resulting EEA-wide combined control share of Sony would be [40-50]%. This is still below the 50 % threshold which was set in the precedents identified in paragraphs (93) and (130).

(146) For completeness, the Commission notes that Impala also submitted to the Commission weekly chart control shares estimates for the UK, Ireland, France, Spain, the Netherlands, Sweden and Italy. The methodology used by Impala was to take one chart from each month of 2017 for each territory. Impala then averaged the weekly control shares over the 12 months. This methodology therefore takes into account the number of weeks songs remain in the charts.[100]

(147) In line with the Commission's precedents, Impala only included the Anglo-American titles in the control shares of Sony/ATV and EMI MP, whereas for the control share of Sony Music it included all tracks where the recorded rights are held by Sony Music irrespective of whether the track belongs to the Anglo-American or Continental European repertoire. To take into account third-party songs distributed by Sony Music, Impala added a net increase of control shares for distributed repertoire of 2%. However, instead of calculating the combined control share of Sony/ATV, EMI MP and Sony Music as the share of the songs controlled jointly by these entities over the entire chart list, Impala restricted the scope of the denominator to only Anglo-American repertoire plus the songs of the Continental European repertoire controlled by Sony Music. [101]

(148) This methodology is inconsistent with the methodology used in the Commission's previous decisions where "*[t]he weekly digital charts were consolidated to generate a list of unique tracks*" and "*“control shares” [were] expressed in percentage terms of the number of unique tracks that entered into each respective chart*".[102] Hence, in previous decisions, the denominator clearly included all songs from the charts, not only Anglo-American repertoire plus the songs of the Continental European repertoire controlled by Sony Music.

[100] See Impala's submissions of 9 October 2018, 10 October 2018, 15 October 2018 and 16 October 2018.
[101] See Impala's submissions of 9 October 2018, 10 October 2018, 15 October 2018 and 16 October 2018.
[102] See *Sony/Sony-ATV*, paragraph 138

(149) Moreover, this measure does not proxy the bargaining power of Sony vis-à-vis DSPs (even assuming – wrongly (see previous section) – that Sony would leverage across recording and publishing). This is because a music publishing company's bargaining power vis-à-vis DSPs and therefore its market power depends on how critical its catalogue of songs is for DSPs when compared to the overall set of songs the DSPs aim to get access to irrespective of whether these songs belong to the Anglo-American repertoire or the Continental European one.

(150) It is easy to see this by considering a hypothetical country where Anglo-American songs are not popular. Assuming for instance that in that hypothetical country only 1 song of the top 100 chart belongs to the Anglo-American repertoire, and Sony/ATV or EMI MP holds full or fractional publishing rights over that song, then Impala's control share methodology would give a 100% control share to Sony (both pre- and post-Transaction), even if Sony Music does not hold any other rights over the 99 other songs part of the top 100 chart. This does not appropriately proxy the bargaining power of Sony, as effectively Sony would only be able to threaten the DSPs to withdraw its rights in relation to 1% of its entire repertoire (assuming the chart is representative of the DSPs' entire repertoire). In this hypothetical scenario, the Commission would not consider even a 100% control share following Impala's methodology as potentially raising competition concerns.

(151) The Commission also notes that the control shares estimates submitted by Impala were estimated at a national level, whereas as explained above the relevant geographic market for the exploitation of publishing rights for online use is EEA-wide.

(152) The Commission therefore considers that Impala's control share submission, as it does not measure correctly the bargaining power of Sony, does not cast doubts on the validity of the control share analysis carried out by the Commission and presented above.

6.1.3.4. The effect of the Transaction on Sony's ability to influence DSP playlists

(153) The Commission considers that contrary to Impala's claim, the Transaction will not enable Sony to achieve a disproportional share of promotion through playlists, in a way that would foreclose competition in the market for the exploitation of publishing rights for online use.[103]

(154) First, the Commission considers that, as claimed by the Notifying Party, irrespective of the Transaction, music companies seem to have limited ability to influence playlist placement. No music publisher or online platform questioned by the Commission in its market investigation disputes this claim.[104]

[103] See Minutes of the meeting with Impala of 30 August 2018, Final Impala submission of 25 July 2018, and Impala supplementary submission of 15 October 2018.

[104] See Universal Music Group's response to questions received from the European Commission on 31 August 2018 in respect of the Sony/EMI transaction, as well as replies to Questionnaire Q2 to online customers (platforms) and to Questionnaire Q1 to competitors.

(155) Second, assuming that the Transaction would enable Sony Music and Sony/ATV to coordinate their promotional activities in a way that was not possible before the Transaction (e.g. because in promoting Sony Music artists, Sony Music necessarily promotes songs composed by writers signed to rival music publishing companies, i.e. to the detriment of Mubadala), the Commission does not see why a single interlocutor representing both companies would be better able to influence DSP editorial teams than separate teams can today.

(156) In particular, licencing agreements do not contain any requirements as regards playlist placements. Therefore a hold-up scenario, by which publishers with a large repertoire would threaten not to license their repertoire in order to obtain a more prominent placement on playlists, is not conceivable.

(157) In this respect, only two market participants – Impala and Warner – claimed that a music company with a greater control share is able to get its songs more prominently positioned in the important playlists of streaming services than what the strength of the represented catalogue would justify. None of them has been able to provide even anecdotal evidence supporting this claim.[105] In contrast, the Notifying Party submitted some anecdotal evidence in support of its claim showing that [information on the representation of Sony Music tracks on DSP playlists] and the independents over-represented in one of Spotify's most important curated playlists.[106]

(158) Finally, even if the Transaction increased the ability of Sony to lobby for more prominent placements on DSPs playlists, the Commission considers that this would not have significant foreclosure effects. To the extent that music companies can influence at all the songs that are available on a given DSP's playlist, such influence is limited to curated playlists that are prepared by DSPs' editorial team.

(159) Other playlists are prepared by industry stakeholders and users, by algorithms, independently based on charts for instance, or even self-selecting, all without the involvement of music companies.

6.1.3.5. Coordinated effects

(160) In both *Universal/BMG* and *Sony/Mubadala/EMI*, the Commission excluded coordinated effects concerns in the online licensing of music publishing rights, *inter alia*, on the ground that it was unlikely that prices were sufficiently transparent for music publishers to be able to reach terms of coordination, monitor compliance with them and detect any deviation.[107]

(161) At the outset, the Commission notes that the Transaction will have no effect on whatever scope for tacit coordination, as Sony/ATV already negotiates online licences on behalf of EMI MP, and has done so since 2012.

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[105] See Minutes of the meeting with Impala of 30 August 2018, Warner Music Group (WMG)'s response to RFI dated 31 August 2018.

[106] See Form CO, chapter 6, paragraph 7.98.

[107] *Universal/BMG*, paragraph 87 and *Sony/Mubadala/EMI*, paragraph 267.

(162) For completeness, the Commission considers that, in any event, the Transaction could not raise coordinated effects concerns in the EEA market for the licensing of online music publishing rights because the market is not conducive to collusion, for the following reasons.

(163) First, coordinated effects concerns in relation to the licensing of Continental European repertoire can be excluded, since music publishers have no influence over the price of this repertoire.

(164) Second, as to the negotiation of online licenses for Anglo-American repertoire, there is insufficient transparency in pricing to support tacit coordination as pricing and other contractual terms are negotiated confidentially.

(165) Third, the publishing industry is not concentrated given the presence of hundreds of publishers active in this industry. Given the large number of publishers, any attempt at coordination would inevitably leave a large group of outsiders that would undermine any such attempt.

(166) Fourth, there has been significant new entry and expansion over recent years (including the entry and rapid growth of BMG, Kobalt, Concord, Round Hill Music, and others). As publishers enter and compete to sign authors in the upstream market, they create new works available for online licensing and thereby destabilise any possible attempt at coordination.

(167) Fifth, there exists no plausible retaliatory mechanism that could deter deviation. And even if a mechanism existed, since licence agreements for Anglo-American repertoire are negotiated bilaterally and feature differing durations and commencement dates, coordinating firms would need to wait until their own agreements with DSPs had expired before retaliating on price or other commercial terms. Any tacit understanding could not, therefore, be policed by timely or effective retaliation, and would be internally unstable.

(168) Sixth, any attempt at coordination would be frustrated by external pressures, including the countervailing bargaining power of DSPs such as Apple, Amazon, and Spotify.

(169) Finally, any attempt by integrated music companies to coordinate across their recorded music and music publishing businesses would be even more difficult due to the considerable difficulties in coordinating licensing terms between their respective recorded music and music publishing businesses, the absence of transparency in respect of the terms on which recorded music and music publishing terms are licensed, and the lack of any credible retaliation mechanism.

6.1.3.6. Conclusion

(170) For the above reasons, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for the exploitation of publishing rights for online use.

(171) Finally, given the absence of effects on this market, the Commission also dismisses IMPALA's concerns according to which if Sony were to be able to

increase its revenues downstream it would then be able to offer better terms for artists, while the opposite would happen to the independents.

6.2. Horizontal effects on other markets

Publishing services to authors

(172) 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 periods.[108] In *Sony/Sony-ATV*, the Commission reached the same conclusion noting that since then, competition had remained intense.[109]

(173) The Commission considers that the Transaction will have no effect on the market for the provision of publishing services to authors. While Sony/ATV and EMI MP are active in this market, the Transaction will not increase Sony's market share which remains unaffected by the Transaction. Since 2012 Sony/ATV has administered EMI MP's catalogue under an Administration Agreement, managing relationships with EMI MP's existing authors and signing agreements for new authors whose rights are co-owned by Sony/ATV and EMI MP. Sony/ATV and EMI MP have not competed to sign new authors since 2012.

(174) The Commission further notes that, in any event, Sony/ATV and EMI MP's combined market share by revenue was [20-30]% in 2017 EEA-wide and was below 20% in France, Italy, Bulgaria, Estonia, Hungary, Latvia, Lithuania and Luxembourg. In the other EEA countries, the combined market share of the Parties did not exceed 25% in Austria, Belgium, Cyprus, Iceland, Ireland, Malta, the Netherlands, Poland, Romania, Slovakia, Spain and Sweden. The Parties' combined market share was between 25% and 30% in the Czech Republic, Denmark, Germany, Greece, Norway, Portugal, Slovenia, and the United Kingdom.

(175) During the market investigation certain publishers claimed that the Transaction may harm authors and weaken competitors.[110] According to such complaints, post-merger, Sony would become financially more powerful and therefore be able to offer artists larger advances than its competitors, reducing competition in the market. Sony would also be able to obtain better terms for offline and online exploitation and therefore have a stronger position to persuade writers to sign to Sony for publishing services. Sony could, according to complainants, also leverage recording and publishing rights and persuade authors to sign for both. It was also claimed that the quality of services offered to authors suffers as Sony's repertoire increases and Sony does not exploit the rights of all authors as before, while authors cannot leave their publisher. In turn, associations of authors and composers claimed that post-merger, the quality of services provided to authors will deteriorate as the merged entity will merge two vast catalogues and creative teams and focus on the most valuable rights *(i.e.* the Anglo-American repertoire). They also claimed that Sony will use its market size in the allocation

[108] *Sony/Mubadala/EMI*, recital 294.

[109] *Sony/Sony-ATV*, paragraphs 147 and 148.

[110] See Questionnaire Q1 to competitors, question 42.1 and 43.

of promotional opportunities by DSPs to promote a small roster of artists, at the expense of cultural diversity and consumer choice, and make it more difficult for independent publishers to compete for such opportunities. Moreover, a complainant asked the Commission to carry out a "cultural diversity impact assessment," arguing that the Transaction would reduce the number of authors on Sony/ATV's roster and that Sony is more likely to focus on Anglo-American authors and artists. Finally, Impala also claimed that if Sony were to be able to offer better terms for artists it would dynamically increase its revenues downstream and that, also, the market for providing publishing services to authors is influenced by the ability of a publisher to secure better terms for exploitation and more opportunities for an author's works.[111]

(176) These claims are addressed in the following paragraphs.

(177) As to the claim that post-merger, Sony would become financially more powerful and therefore be able to offer artists larger advances than its competitors, the Commission recalls that Sony/ATV and EMI MP have not competed to sign new authors since 2012. Moreover, publishers compete for successful authors on all commercial terms of a publishing contract (including not only advances, but also royalty splits and retention periods, but also the type of attention and commitment offered to an author). Publishers offer different "mixes" of percentage rates and advances to attract authors. An author will consider the overall package when deciding among rival publishers. The Notifying Party has provided the example of Kobalt's, which had success by providing favourable percentage splits to authors.[112] In addition, if anything, if Sony were able to offer better deals to authors, this would be good for authors and for competition, unless and until it is demonstrated that this may result in other types of anti-competitive effects.

(178) As to the claim that the Transaction could potentially increase Sony's incentives to tie or bundle music publishing services with recorded music services to singer-songwriters, the Commission notes that, following the Transaction, Sony will benefit 100% of increments in profits of EMI MP when signing a new author (compared to previously when part of the profit increment would have had to be shared with Mubadala). However, the Commission considers, first, that a tying or bundling strategy would not foreclose competitors, as the vast majority of tracks are not recorded by the authors of the song. A large pool of common customers is normally required for foreclosure to be a potential concern.[113] Any hypothetical tying or bundling strategy could thus only arise in respect of the singer-songwriter sub-set of artists and authors, leaving the majority of demand available for rivals. Second, post-Transaction tying or bundling is unlikely to be a profitable strategy, as singer-songwriters generally prefer

[111] Impala's claim that if Sony were to be able to increase its revenues downstream it would then be able to offer better terms for artists is also addressed in each of the sections of this Decision dealing with the downstream markets, i.e. mechanical rights, performance rights, synchronization rights and print rights.

[112] Form CO, Chapter 1, para. 6.18. Authors receive royalties (split in the agreed proportions between the author and publisher) and publishers compete to offer authors more favourable percentage royalty splits. The lower the percentage of royalties paid to (or retained by) the publisher, the more attractive that offer will appear to the author (other things being equal).

[113] Non-Horizontal Guidelines, paragraph 100.

signing recording rights and publishing rights with different companies,[114] and therefore singer-songwriters would rather switch to one of the many rival music companies.

(179) As to the claim that the quality of services offered to authors would suffer, the Commission notes that the Transaction will have no effect on A&R[115] expenditure, as EMI MP is already commercially integrated with Sony/ATV and the companies' A&R teams were combined in 2012. Moreover, even if the Transaction did lead Sony/ATV to reduce A&R, this could potentially benefit competing music publishers (whether majors or independents), as they would be better able to compete for and sign any authors neglected by Sony. Moreover, there is no reason to believe that large music publishing companies have less incentive to maximize revenues than smaller companies. The ability to maximize licensing revenues is a central element of competition among music companies for authors. Therefore, Sony will have every incentive to extract maximum value from its authors' work, since any failure to licence publishing rights would impair its ability to retain existing authors and compete for new talent.

(180) Authors indeed can and do switch between music publishers. The Commission notes that typical contracts with authors appear to have a duration of no more than five years (sometimes with an option to extend). There is also a trend towards shorter retention periods (i.e., the period during which a publisher typically retains ownership in copyrighted work authored by a writer after the writer has left) in response to increasing competition among music publishers (including from Kobalt which applies a "no lock-in" policy, which requires no commitment that authors' repertoire remain with the publisher[116]). Exclusivity periods during which authors commit to deliver new repertoire to a single music publisher have been reduced to 1-3 years. Likewise, contract retention periods during which a music publisher may exploit an authors' repertoire have been also reduced to 1-3 years. In the past, it was relatively common for an author to agree retention periods for the duration of the copyright in the work (70 years after the death of the author). While it is still possible to enter contracts on this basis in France, Germany, and Italy, their incidence is declining. In Spain, Scandinavia, and Benelux, contract periods are typically three to five years in duration with retention periods of five to twenty years. In France the situation is similar, and it is unlawful to enter into a publishing contract of longer than five

[114] Only a small minority of authors signed to Sony/ATV have signed recorded music contracts with Sony Music. Sony/ATV manages the works of approximately […] authors, the majority of which are not singer-songwriters. Sony/ATV estimates that only around […]% of its and EMI MP's authors have recording contracts with Sony Music. Singer-songwriters who have a publishing agreement with Sony/ATV, but have signed recording contracts with recorded music companies other than Sony Music include: [examples of singer-songwriters signed to Sony/ATV but not Sony Music]. Examples of singer-songwriters who are signed to Sony/ATV (for music publishing) and Sony Music (under recording contracts) include: [examples of singer-songwriters signed to Sony Music and Sony/ATV].

[115] Artists and repertoire (A&R) is the division of a music publishing company (or recorded music company) with responsibility for talent scouting and overseeing the artistic and commercial development of authors. It also acts as a liaison between authors and the music publishing company.

[116] *See, e.g.*, "Kobalt Capital Raises $600m Fund To Spend On Buying Music Copyrights," *Music Business Worldwide*, November 6, 2017, citing Kobalt Founder and CEO Willard Ahdritz ("*This is a beautiful thing: our clients can leave our platform if they don't like us … With Kobalt, no-one is locked in*").

years' duration. In Germany, a writer can terminate after five years even if the publisher has not recouped any advances paid to the author.[117] In the U.K., Sony/ATV typically enters into contracts of [information on duration of Sony/ATV author contracts] years' duration plus retention periods from [information on duration of Sony/ATV author retention periods] years post-termination. Consequently, authors are readily able to switch between publishers both in relation to new works (which are not already subject to a retention period with another publisher) and, to an increasing extent, for older songs for which the retention period has expired. As a result, there is strong and regular competition for successful authors on all commercial terms of a publishing contract (including advances, royalty splits, and retention periods). This competition has strengthened since 2016, with narrowing royalty splits in authors' favour, shorter contract terms and retention periods, and an increased prevalence of publishing contracts without retention periods.

(181) As to the alleged impact on consumer choice and cultural diversity, there is no reason to assume that Sony has become (or will become more) biased towards Anglo-American repertoire[118] or will reduce the size of its roster[119] (although such a reduction would benefit Sony's competitors and result in a reduced "control share"). Further, since EMI MP is already commercially integrated with Sony/ATV, neither is there any reason to expect the Transaction to have any impact on the size or composition of Sony/ATV's roster. Finally, as to the request to carry out a "cultural diversity impact assessment," in *Sony/Mubadala/EMI Music Publishing* the Commission considered that as a result of its possible negative impact on competition, that transaction could also negatively impact cultural diversity.[120] Given that the present Transaction does not raise concerns as to the level of consumer choice, the Commission also considers that the Transaction does not raise concerns as to cultural diversity.

(182) Further, the Commission notes that during the market investigation, authors have expressed a neutral view on the Transaction as they do not believe that the Transaction will change anything for their business or the quality of the services provided by Sony to them. [121]

(183) Finally, given the absence of effects on the market for publishing services to authors, the Commission also dismisses IMPALA's concerns, according to which if Sony were to be able to offer better terms for artists it would dynamically increase its revenues downstream. Similarly, due to the absence of effects in the downstream market for the licensing of online rights, the Commission also does not consider that the Transaction would increase Sony's ability to attract artists in the upstream A&R market.

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[117] The collecting society will nevertheless continue to pay royalties to the publisher in these circumstances until the account is recouped.

[118] Sony/ATV has spent almost EUR […] million in 2017 on developing non-Anglo-American talent in the EEA (Sony submission of 4 September 2018, paragraph 48).

[119] [Description of EMI MP's internal organisational structure, and of Sony's future commercial strategy].

[120] The Commission took cultural diversity into account in *Sony/Mubadala/EMI Music Publishing,* where it noted: "*If end consumer choice for innovative, comprehensive and cheap online music services were to be reduced, this in turn would limit the number and breadth of music distribution channels that are available to competing music publishers. This ultimately reduces consumer choice for music and cultural diversity*" (paragraph 240).

[121] See Questionnaire Q4 to authors / composers, questions 2 and 3.

(184) In regard to coordinated effects, at the outset, the Commission recalls that the Transaction will have no effect on the market for the provision of publishing services to authors as the Transaction will not increase Sony's market share which remains unaffected by the Transaction. For completeness, the Commission notes that 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), this conclusion was no different in *Sony/Sony-ATV* and the investigation of the present case does not invalidate this conclusion. First, contracts with authors are negotiated bilaterally and are confidential. There is therefore no transparency as to the "pricing" or other terms agreed between authors and publishers. Second, publishers are in competition to win new author contracts, and a single song by a single author might generate more royalties than the catalogues of several other authors combined. There is therefore no obvious basis on how publishers might tacitly collude over the authors that they sign, nor any obvious "punishment" mechanism by which a tacit co-ordination could be sustained. The incentives to compete for new authors would therefore destabilize any putative co-ordination. Third, new publishers competing to sign new authors would undermine any putative ability for established players to reach a tacit understanding that would facilitate market-sharing. Fourth, there exists no plausible retaliatory mechanism that might sustain any tacit understanding in relation to the provision of publishing services to authors. Finally, in any event, in addition to the "major" music publishing companies, there are a large number of other publishers who would be able to undermine any coordination between them, including significant players like Kobalt, Concord, and Peermusic, as well as hundreds of smaller publishers.

Mechanical rights

(185) In *Sony/Mubadala/EMI*, the Commission excluded competition concerns on this market because "*control over pricing and licensing terms [was] to a large extent in the hands of the collecting societies*" and Sony/ATV had no plans to withdraw its offline rights from collecting societies.[122] The Commission reached the same conclusion in *Sony/Sony-ATV*,[123] and, as explained below, the situation has not changed in the meantime.

(186) In 2017, Sony/ATV and EMI MP together accounted for around [20-30]% of revenues generated from licensing mechanical rights in the EEA (between [10-20]% and [30-40]% depending on the Member State). This share will be unaffected by the Transaction. Since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue under an Administration Agreement. Sony/ATV has had the sole and exclusive right to license EMI MP's mechanical rights over that period. Accordingly, the Transaction will have no effect on the market for the licensing of mechanical rights.

[122] *Sony/Mubadala/EMI*, paragraph 100.
[123] *Sony/Sony-ATV*, paragraph 149.

(187) Post-Transaction, Sony will continue to compete with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, Kobalt, Concord, and Peermusic, as well as an array of smaller publishers and new entrants.

(188) Some publishers claimed that publishers, such as Sony, can, on the one hand, withdraw their rights from the traditional collecting society system and, on the other hand, exert significant control from within the collective societies.

(189) The Commission considers that those concerns can be dismissed for the following reasons.

(190) Most music publishers indicated during the market investigation that, as publishers, they would not be able to obtain control over mechanical rights (Continental repertoire), which are licensed by the collecting societies and they cannot or have no interest in obtaining control over such rights. Furthermore, while publishers have indicated during the market investigation that they could obtain control over the offline licensing of mechanical rights (Anglo-American repertoire)(except Universal and BMG), and some publishers in fact already do have such control, most publishers indicated that they would have no interest in withdrawing the offline licensing of mechanical rights (Anglo-American repertoire) from the collecting societies. Only a few collecting societies indicated that music publishing companies have withdrawn the exploitation of offline rights from the colleting society.

(191) With regard to publishers' influence over collecting societies' decisions, the Commission considers it unlikely that post-Transaction, Sony could gain control, whether formal or informal, over collecting societies in Europe.

(192) The decisions of collecting societies are taken by their boards, which comprise representatives of rights holders. The market investigation confirmed that most societies grant only a limited share of the voting rights to Sony/ATV or EMI MP.[124] Based on the Notifying Party's submission, in the majority of collecting societies, the number of seats open to publishers is limited to one-third of the total number of seats or less.[125]

(193) Sony today exercises joint control over EMI MP, and Sony/ATV's and EMI MP's negotiations with and representation on the boards of collecting societies have, since 2012, been managed by Sony/ATV. Accordingly, there will be no change to Sony/ATV's and EMI MP's relationship with collecting societies post-Transaction. Based on the Notifying Party's submission and as confirmed by the market investigation, as a result of the Transaction, Sony/ATV will gain no more seats on any collecting society board.[126]

(194) Furthermore, although it is technically possible to withdraw mechanical rights, based on the Notifying Party's submission, Sony has never contemplated doing so with respect to offline rights in Europe.

[124] See Questionnaire Q3 to collecting societies, question 3.

[125] Sony submission of 4 September 2018, paragraph 8.

[126] See Questionnaire Q3 to collecting societies, question 3.1.

(195) Furthermore, during the market investigation, collecting societies stated that the merged entity would have few or no voting rights in their boards, and will not gain additional voting rights post-Transaction. While a majority of collecting societies who replied to the market investigation consider that, if the publisher's catalogue is large enough[127], there exist other means through which that music publisher can influence their decisions (e.g. during the general assembly), not a single collecting society that replied to the market investigation has replied that post-Transaction Sony would be able to exert decisive influence over its decisions on offline publishing rights. [128]

(196) Therefore, as recognized by the Commission in Universal/BMG, in *Sony/Mubadala/EMI Music Publishing*, and most recently in *Sony/Sony-ATV*, the Commission concludes that publishers are not in a position to exert a decisive influence on the collecting societies' decisions and Sony is therefore unable to influence collecting societies' commercial terms.

(197) Finally, given the absence of effects on the market for mechanical rights, the Commission also dismisses IMPALA's concerns according to which if Sony were to be able to increase its revenues downstream it would then be able to offer better terms for artists, while the opposite would happen to the independents.

(198) In regard to coordinated effects, at the outset, the Commission recalls that the Transaction will have no effect on the market for mechanical rights as these are to a large extent in the hands of the collecting societies and the Transaction will not increase Sony's market share which remains unaffected by the Transaction. For completeness, the Commission notes that nothing suggests that coordinated effects are possible in relation to mechanical rights. First, given that publishers do not set prices there is no possibility of tacit co-ordination in relation to price. Second, there has been significant new entry and expansion over recent years (including BMG Rights Management, Kobalt, and Concord). As publishers enter and compete to sign new authors in the upstream market, they create new works that generate mechanical rights income, undermining any putative ability for established players to reach a tacit understanding that would facilitate market-sharing. Third, competition takes place in relation to individual songs and/or authors' works, not on the basis of publishers' repertoires as a whole. Because performing artists and their recorded music companies select individual songs for recording, publishers compete to have their authors' songs recorded on an individual song basis. Fourth, there exists no plausible retaliatory mechanism that might sustain any tacit understanding in relation to the licensing of mechanical rights. Finally, in addition to the "major" music publishing companies, there are a large number of other publishers who would be able to undermine any co-ordination between them, including significant players, Kobalt, Concord, and Peermusic.

Performance rights

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[127] A majority of publishers have also replied that a publisher with a large enough repertoire is able to exert decisive influence on collecting societies' decisions, see Questionnaire Q1 to competitors, question 41. However, as noted, collecting societies themselves do not consider that post-Transaction Sony would be able to exert decisive influence over its decisions on offline publishing rights.

[128] See Questionnaire Q3 to collecting societies, question 5.

(199) In *Sony/Mubadala/EMI*, the Commission excluded competition concerns on this market because "*control over pricing and licensing terms [was] to a large extent in the hands of the collecting societies*" and Sony/ATV had no plans to withdraw its offline rights from collecting societies.[129] The Commission reached the same conclusion in *Sony/Sony-ATV*,[130] and, as explained below, the situation has not changed in the meantime.

(200) The Parties' combined market shares in performing rights at an EEA-level in 2017 are [20-30]% and between [10-20]% and [20-30]% depending on the Member State. The Transaction will not increase Sony's market share. Moreover, since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue under an administration agreement. Sony/ATV has had the sole and exclusive right to license EMI MP's performance rights over that period.

(201) Post-Transaction, Sony will continue to compete with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, Kobalt, Concord, and Peermusic, as well as an array of smaller publishers and new entrants.

(202) Furthermore, most music publishers indicated during the market investigation that, as publishers, they would not be able to obtain control over performance rights (be it Anglo-American repertoire or Continental repertoire) which are licensed by the collecting societies and they cannot or have no interest in obtaining control over such rights. Only a few collecting societies indicated that music publishing companies have withdrawn the exploitation of offline rights from the colleting society.

(203) Finally, given the absence of effects on the market for performance rights, the Commission also dismisses IMPALA's concerns according to which if Sony were to be able to increase its revenues downstream it would then be able to offer better terms for artists, while the opposite would happen to the independents.

(204) In regard to coordinated effects, at the outset, the Commission recalls that the Transaction will have no effect on the market for performance rights as these are to a large extent in the hands of the collecting societies and the Transaction will not increase Sony's market share which remains unaffected by the Transaction. For completeness, the Commission notes that nothing suggests that coordinated effects are possible in relation to performance rights. First, given that prices are determined by collecting societies, there is no possibility of tacit co-ordination in relation to price. Second, there has been significant new entry and expansion over recent years (including BMG Rights Management, Kobalt, and Concord). As publishers enter and compete to sign new authors in the upstream market, they create new works that generate performance rights income, undermining any putative ability for established players to reach a tacit understanding that would facilitate market-sharing. Third, there would be no ability to reach a tacit understanding facilitating market-sharing given the considerable complexity and volatility in the number of users exploiting performance rights in particular

[129] *Sony/Mubadala/EMI*, paragraph 100.
[130] *Sony/Sony-ATV*, paragraph 149.

songs, which it would be impossible for publishers to discern. Licensees are numerous and widely spread. Authors and publishers' revenues derive from the exploitation of their rights by users with whom they have no direct relationship. For example, performance rights are exploited by a radio station playing a song or when a record is played in a restaurant. Fourth, there exists no plausible retaliatory mechanism that might sustain any tacit understanding in relation to the licensing of performance rights. Finally, in addition to the "major" music publishing companies, there are a large number of other publishers who would be able to undermine any co-ordination between them, including significant players, Kobalt, Concord, and Peermusic.

Synchronisation rights

(205) In *Sony/Mubadala/EMI*, 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.[131] The Commission reached the same conclusion in *Sony/Sony-ATV*,[132] and, as explained below, the situation has not changed in the meantime.

(206) The Parties' combined market shares at an EEA-level in 2017 are [20-30]% for synchronisation rights and between [10-20]% and [30-40]% depending on the Member State. The Transaction will not increase Sony's market share. Moreover, since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue under an administration agreement. Sony/ATV has had the sole and exclusive right to license EMI MP's synchronization rights over that period. Accordingly, the Transaction will have no effect on the market for the licensing of synchronization rights.

(207) Post-Transaction, Sony will continue to compete with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, Kobalt, Concord, and Peermusic, as well as an array of smaller publishers and new entrants.

(208) Given that these rights are typically licensed on a song-by-song basis, concerns can be excluded because customer choice is typically driven by the choice of song, rather than the identity of the music publisher, and many alternative publishers with a large choice of songs would remain post-transaction.

(209) Finally, given the absence of effects on the market for synchronisation rights, the Commission also dismisses IMPALA's concerns according to which if Sony were to be able to increase its revenues downstream it would then be able to offer better terms for artists, while the opposite would happen to the independents.

(210) In regard to coordinated effects, at the outset, the Commission recalls that the Transaction will have no effect on the market for synchronisation rights as the Transaction will not increase Sony's market share which remains unaffected by the Transaction. For completeness, the Commission notes that nothing suggests that coordinated effects are possible in relation to synchronization rights. First,

[131] *Sony/Mubadala/EMI*, paragraph 126.
[132] *Sony/Sony-ATV*, paragraph 153-154.

synchronization rights are negotiated bilaterally and the terms of such contracts are not publicly available. There is therefore no transparency in relation to the royalties charged for synchronization rights.[133] Second, given that there are alternative sources of such rights and a variety of end-users, with each song being to a degree unique, it would be impossible to reach a tacit understanding between publishers to share customers. Third, there exists no plausible retaliatory mechanism that might sustain any tacit understanding in relation to synchronization rights. Finally, in any event, in addition to the "major" music publishing companies, there are a large number of other publishers who would be able to undermine any coordination between them, including significant players like Kobalt, Concord, and Peermusic.

Print rights

(211) In *Sony/Mubadala/EMI*, the Commission excluded competition concerns in the licensing of print rights, including because Sony would continue to face competition from rival music publishers.[134] The Commission reached the same conclusion in *Sony/Sony-ATV*,[135] and, as explained below, the situation has not changed in the meantime.

(212) The Parties' combined market shares at an EEA-level in 2017 are [10-20]% for print rights and between [0-5]% and [20-30]% depending on the Member State. The Transaction will not increase Sony's market share. Moreover, since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue under an administration agreement. Sony/ATV has had the sole and exclusive right to license EMI MP's print rights over that period.

(213) Post-Transaction, Sony will continue to compete with a large number of other music publishers, including Universal, Warner/Chappell, BMG Rights Management, Kobalt, Concord, and Peermusic, as well as an array of smaller publishers and new entrants.

(214) Finally, given the absence of effects on the market for print rights, the Commission also dismisses IMPALA's concerns according to which if Sony were to be able to increase its revenues downstream it would then be able to offer better terms for artists, while the opposite would happen to the independents.

(215) In regard to coordinated effects, at the outset, the Commission recalls that the Transaction will have no effect on the market for print rights as the Transaction will not increase Sony's market share which remains unaffected by the Transaction. For completeness, the Commission notes that nothing suggests that coordinated effects are possible in relation to print rights. First, print rights are negotiated bilaterally between music publishers and print music publishers. The pricing terms for print rights are not transparent, as the terms of these contracts are confidential. As a result, music publishers are unable to monitor the prices charged by their rivals to print music publishers or other users. Second, revenues from print rights are derived from works of successful authors, and therefore

[133] See also in this regard: *Sony/Mubadala/EMI*, paragraph 137 and *Universal/BMG*, paragraph 125.
[134] *Sony/Mubadala/EMI*, paragraphs 103 and 110.
[135] *Sony/Sony-ATV*, paragraph 155-156.

from competition to sign successful authors in the upstream market. As already noted, there has been significant new entry and expansion in recent years (including BMG Rights Management, Kobalt, Concord, and Peermusic), undermining any putative ability for established players to reach a tacit understanding that would facilitate market-sharing. Third, there exists no plausible retaliatory mechanism that might sustain any tacit understanding in relation to the licensing of print rights. Finally, in any event, in addition to the "major" music publishing companies, there are a large number of other publishers who would be able to undermine any coordination between them, including significant players like Kobalt, Concord, and Peermusic.

6.3. Vertical relationships

(216) Music publishing rights are licensed for use in a number of downstream markets where other companies of the Sony Group are present, including:

(a) recorded music, which involves licensing mechanical publishing rights;

(b) online music platforms, which involves licensing online rights[136];

(c) motion picture production, which may involve licensing synchronization rights;

(d) TV programme production, which may involve licensing synchronization rights; and,

(e) videogame production, which may involve licensing synchronization rights.

(217) The Transaction may at least conceivably bring a change in these vertical relationships. Pre-Transaction Mubadala would not have allowed Sony to sacrifice revenues on the music publishing side in order to support the downstream business of Sony Group by foreclosing downstream rivals, whereas post-Transaction, if such strategy were to be profit maximising at a group level, this could be envisaged. Similarly, the incentive to engage in the foreclosure of upstream rivals may theoretically be increased due to the fact that profit increments upstream would no longer have to be split with Mubadala.

(218) Where there are vertically affected markets, two possible forms of foreclosure arise. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure).

(219) During the market investigation, Impala claimed that Sony Group's interests in (i) the production, acquisition and distribution of feature films; (ii) the production and distribution of videogames; and (iii) the production and distribution of television programmes may give rise to input foreclosure.

[136] Sony Group has a minority, non-controlling interest in Vevo, LLC ("VEVO"), a music video website owned by Sony Music, Universal Music, Abu Dhabi Media, and Google. 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.

According to Impala, pre-Transaction, Sony/ATV had a strong incentive to license its content to its own downstream businesses and to similar third-party controlled competitor businesses in order to maximise the revenues flowing back to Mubadala in respect of the EMI MP catalogue. The change from joint to sole control would increase Sony/ATV's incentive to pursue a strategy of refusing to license Sony/ATV's songs (including those in the EMI MP catalogue) or to license only on commercially unfavourable terms to those on which it licenses to other Sony businesses.[137]

(220) 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 relevant markets are affected:

(a) As noted, recorded music involves licensing mechanical publishing rights. In the upstream market for the exploitation of mechanical rights Sony/ATV and EMI MP's market share is 30% or higher in the following six countries: the Czech Republic, Denmark, Greece, Poland, Portugal and Slovenia. As regards the downstream market for recorded music, the market share of Sony Music is 30% or higher in the following three countries: Spain, Italy and Denmark.

(b) Motion picture production, TV programme production and videogame production may involve licensing synchronization rights. 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 six countries: Germany, the United Kingdom, the Czech Republic, Poland, Greece and Slovenia. As regards the other downstream markets mentioned above (motion picture production; TV programme production; and videogame production), the market shares of Sony Group's downstream businesses do not exceed 30%.

(221) Section 6.3.1 discusses the vertical link between the licensing of mechanical publishing rights and recorded music; Section 6.3.2 discusses the vertical link between the licensing of synchronization rights and motion picture production, TV programme production and videogame production.

6.3.1. Licensing mechanical rights for recorded music and recorded music

6.3.1.1. Recorded music - Product market definition

(222) Sony is active in recorded music through its wholly-owned subsidiary Sony Music Entertainment Inc. ("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.

(223) Recorded music is sold in physical form (mainly CDs) and digital form. When producing an album, recorded music companies require the grant of mechanical rights to each of the musical works that will be recorded by the artist. Royalty rates for licensing mechanical rights are determined by national collecting

[137] Final IMPALA Preliminary Submission, 14 August 2018, page 32.

societies, which play an essential role in the administration of such rights, through monitoring sales and collecting royalties on behalf of authors and their publishers.

(224) The Notifying Party submits that there is no reason to distinguish between physical and digital distribution channels of recorded music companies.

(225) In previous cases, the Commission has distinguished between physical and digital recorded music.[138] The market investigation in the present case has not provided any indications that the Commission should depart from its previous findings. In any event, no vertical concerns arise, regardless of whether separate physical and digital recorded music markets are distinguished or not.

6.3.1.2. Recorded music - Geographic market definition

(226) The Notifying Party submits that broad geographic market definitions are most appropriate for the purpose of assessing vertical effects in the present case.

(227) In *Sony/SonyBMG*, the Commission considered that the market for the sale of recorded music in physical format and market for the licensing of recorded music in digital format had a national scope.[139] In *Universal Music Group/EMI Music* the Commission concluded that the market for the wholesale distribution of physical recorded music and of digital music were national in scope and noted that in any event, the competitive assessment remained the same even if the wholesale distribution of digital music market were considered to be EEA-wide.[140]

(228) In the present case, it can be left open whether the geographic market definition is national or EEA wide as no vertical concerns arise, regardless of whether the geographic market is EEA wide or national.

[138] *Sony/SonyBMG*, paragraphs 12 and 18; *Universal Music Group/EMI Music*, paragraphs 117-167. To assess the vertical relationship between music publishers and recorded music companies, the Notifying Party submits that there is no reason to distinguish between physical and digital distribution channels of recorded music companies because of general considerations which apply to the vertical assessment of the present Transaction, *i.e.*:
- As regards potential concerns about customer foreclosure (i.e., a possible concern that Sony Group's downstream businesses could foreclose competition in upstream music publishing markets), the Notifying Party submits that such concerns are not likely to turn on the exact delineation of downstream markets or sub-markets. Instead, this analysis depends on the overall share of relevant purchases accounted for by the various downstream businesses. For example, for the licensing of synchronization rights, customer foreclosure effects do not turn on, e.g., market definition in videogame production, but on the overall importance of Sony Group's downstream businesses as a share of total synchronization rights consumption.
- As regards potential concerns about input foreclosure, (*i.e.*, a possible concern that Sony/ATV or EMI MP could foreclose competition in downstream markets) the Notifying Party submits that such concerns do not turn on the exact delineation of downstream markets or sub-markets either. Instead, this analysis depends on the combined position of Sony/ATV and EMI MP in the relevant upstream music publishing market and the importance of the input at issue. In the absence of a dominant position on any upstream market, downstream input foreclosure is unlikely, irrespective of the precise downstream market definition.

[139139] *Sony/SonyBMG*, paragraphs 37 and 41.

[140] *Universal Music Group/EMI Music*, paragraphs 231-232.

6.3.1.3. Input foreclosure

(229) In a merger between companies which operate at different levels of the supply chain, anti-competitive effects may arise when the merged entity's behaviour could limit or eliminate competitors' access to supplies (input foreclosure).

(230) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines: (i) whether the merged entity would have post-merger the ability to substantially foreclose access to input; (ii) whether the merged entity would have the incentive to do so; and (iii) whether a foreclosure strategy would have a significant detrimental impact on effective competition downstream.[141]

(231) The Notifying Party submits that the Transaction will not give Sony Group the ability or incentive to engage in input foreclosure. First, [information on Sony's future commercial strategy]. Second, Sony/ATV would not have sufficient upstream power to engage in a successful input foreclosure strategy. Third, authors, who have the final say on whether to contract with a particular music publisher or recorded music company, would not countenance any policy designed to favour Sony Music. Fourth, mechanical rights are administered and licensed for offline use by collecting societies, which set the pricing and the licensing terms for those rights on a fair and non-discriminatory basis, not by publishers. Fifth, such strategy would not have a material effect, given the strong competition from other recorded music companies (in particular Universal Music and Warner Music).

(232) 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. Second, the Parties' estimated combined share in publishing mechanical rights would be 30% or higher in just six EEA Member States: the Czech Republic ([30-40]%), Denmark ([30-40]%), Greece ([30-40]%), Poland ([30-40]%), Portugal ([30-40]%), and Slovenia ([30-40]%), and therefore, given these market shares do not enjoy a sufficient degree of market power to engage in a successful input foreclosure strategy. In any event, Sony's market share for the licensing of mechanical rights is unaffected by the Transaction given that, since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP's catalogue and had the sole and exclusive right to license EMI MP's mechanical rights over that period. Finally, other than IMPALA respondents to the market investigation did not raise input foreclosure concerns.

6.3.1.4. Customer foreclosure

(233) According to the Non-Horizontal Merger Guidelines a downstream firm being part of a vertical merger may refuse to buy inputs from its rivals input suppliers

141 See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p. 11, paragraph 32.

as a result of the Proposed Transaction. This incentive to foreclose access to customers downstream may result from the vertical integration of an upstream supplier with an important customer downstream. Due to their downstream presence, the merged entity may foreclose its upstream rivals' access to an important customer base. In turn this can inhibit upstream rivals to effectively compete.[142]

(234) 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. First, it would not have sufficient market power in the market for recorded music. Sony Music's estimated 2017 share of European recorded music sales was below 25%, with shares for physical and digital sales estimated at [20-30]% and [20-30]%, respectively. Sony Music's share is below 30% in all but three Member States[143] ([30-40]% in Denmark, [30-40]% in Italy, and [30-40]% in Spain). Second, the objective of Sony Music is to sell as many records as possible and it would be commercially ruinous for it to constantly overlook songs that it believed would be commercially successful, or to license songs that it thought would be unlikely to be successful, in order to prefer authors contracted to Sony/ATV or EMI MP.

(235) The Commission considers that, as the Transaction does not lead to an increase the size of Sony Music recorded music business, it 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. Finally, respondents to the market investigation did not raise customer foreclosure concerns.

6.3.2. *Licensing of synchronization rights for videogames, motion pictures and TV programmes and videogame production, production of motion pictures and production of TV programmes*

(236) As the relevant input for the videogames, the 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.

6.3.2.1. Product market definition

(a) Videogame production

(237) Sony Group is active in videogame production through its wholly-owned subsidiary Sony Interactive Entertainment, which develops and publishes video

[142] Non-Horizontal Merger Guidelines, paragraph 58.

[143] Sony Music's share in physical sales exceed 30% only in Italy ([30-40]%). Sony Music's share in digital sales exceeds 30% only in Italy ([30-40]%), Spain ([30-40]%), Portugal ([30-40]%), and Denmark ([30-40]%).

game titles for its PlayStation range of handheld and home console video game systems. Videogames require synchronization right licences to use copyrighted music synchronized with the visual image.

(238) In *Vivendi/Activision*[144], the Commission assessed the vertical relationship between Vivendi and Activision against an overall downstream market for all videogames.

(b) Production of motion pictures

(239) Motion pictures incorporate songs and music, which in turn require a synchronization licence of the relevant musical work.[145] 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 Colombia Pictures, Tri-Star Pictures, Sony Pictures Classics, and Screen Gems.

(240) In *Sony/SonyBMG,*[146] the Commission considered a vertical relationship with Sony's downstream motion picture production interests based on an overall market for motion pictures (assessed through box office revenues). Also in *Sony/Mubadala/EMI Music Publishing*[147], the Commission viewed motion picture production as a separate relevant market, with a possible sub-segment limited to U.S.-produced films.

(c) The production of TV programmes

(241) TV production companies require synchronization rights from the copyright holder/publisher to incorporate music in TV programmes. SPE 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 Tandem Productions, ELP Communications, and Barry & Enright Productions. The Commission notes that this market is also referred to as the production of "other TV content".[148]

(242) The Notifying Party submits that for the purpose of assessing vertical effects, consistent with the approach taken by the Commission in *Sony/Mubadala/EMI Music Publishing*, the relevant downstream market is TV programme production with no need for further delineation.[149] According to the Notifying Party the

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144 Vivendi/Activision, paragraphs 77-82.

145 Synchronization customers also require a recorded music licence if they choose to synchronize a pre-recorded version of a particular work. Alternatively, once a customer has been granted the music publishing synchronization right, they can choose to record a new version of the relevant work.

146 *Sony/SonyBMG*, paragraph 96.

147 Sony/Mubadala/EMI Music Publishing, paragraph 276.

148 With regard to the market for the production and supply of TV audio-visual content, in previous decisions, the Commission has concluded that there are separate markets for: (i) the production and supply of commissioned TV content; and (ii) the licensing of broadcasting rights for pre-produced TV content (available 'off-the-shelf') (see Commission decision of 7 April 2017 in case M.8354 – *Fox / Sky*. Commission decision of 24 February 2015 in case M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media*).

149 *Sony/Mubadala/EMI Music Publishing*, paragraph 277.

vertical relationship between music publishing and TV programme production does not give rise to any concerns, irrespective of the downstream market definition adopted.[150]

(243) The Commission considers that the question whether the market for TV programme production should be further segmented can be left open given that the Transaction does not give rise to vertical concerns irrespective of the precise product market definition.

6.3.2.2. Geographic Market definition

(244) The Notifying Party submits that broad geographic market definitions are most appropriate for the purpose of assessing vertical effects in the present case[151] and that accordingly, the relevant geographic markets for each downstream business are at least EEA-wide in scope. [152]

(245) The Commission considers that the question whether the downstream markets are national or EEA-wide can be left open as regards videogame production and the production of TV programmes as the Transaction does not raise serious doubts under any plausible geographic market definition, while the market for the production of motion pictures is EEA-wide.[153]

6.3.2.3. Input foreclosure

(246) The Notifying Party submits that, first, 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 and any such strategy would not be capable of materially affecting competition on any downstream market. 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.

(247) 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

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150 The Notifying Party submits that SPTG's TV programme production shares are well below 20% in each of the possible subsegmentations of this market (as used in past Commission decisions such as in Commission decision of 7 April 2017 in case M.8354, *Fox/Sky*) including in (i) the production and supply of commissioned TV content and (ii) the licencing of broadcasting rights for pre-produced TV content (and its possible subsegments by content type (films, sports and other TV content) and by exhibition window (SVOD, TVOD, PPV, First Pay-TV window, Second Pay-TV window, FTA).

151 See *Sony/Mubadala/EMI Music Publishing*, paragraph 288; *Sony/Sony-ATV*, paragraph 179.

152 The Notifying Party submits that producers of TV programmes, motion pictures, and videogames do not typically vary their selection of music publishing rights as between countries. Rather, the choice of songs used for a given motion picture, TV programme, or videogame is made by the production studio on a global basis, very often outside the EEA (e.g., the United States). For these reasons, an EEA-level geographic market definition is the most appropriate way to assess these vertical relationships.

153 Commission Decision of 13 July 2010 in Case M.5779 - *Comcast / NBC Universal*, at para. 54.

the market for synchronisation publishing rights.[154] 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*.[155] 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.

(248) In its Decision in *Sony/Sony-ATV*[156], the Commission noted that 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 had confirmed that, post Transaction, they would still have a sufficient choice of songs to synchronise with their contents, even without Sony's songs. They also confirmed that they did not expect that Sony Group would foreclose access to the catalogue of Sony/ATV.

(249) The Parties' estimated combined share at an EEA-level in 2017 are [20-30]% for synchronisation rights and is above 30% only in the following six Member States: Germany ([30-40]%), the United Kingdom ([30-40]%), the Czech Republic ([40-50]%), Poland ([30-40]%), Greece ([30-40]%) and Slovenia ([30-40]%) and therefore, given these market shares do not enjoy a sufficient degree of market power to engage in a successful input foreclosure strategy. Moreover, the Transaction will not increase Sony's market share for the licensing of synchronization rights given that since 2012, Sony has exercised joint control over EMI MP and Sony/ATV has administered EMI MP’s catalogue and has had the sole and exclusive right to license EMI MP’s synchronization rights over that period. Accordingly, the Transaction will have no effect on Sony's upstream market share.

(250) In addition, the Commission notes that during the market investigation, no competitors of Sony Group's videogame, motion picture and/ot TV productions complained about a potential input foreclosure. Furthermore, it is unlikely that Sony/ATV’s incentives would change post-Transaction because its reputation and ability to attract and retain authors depends, in part, on its ability to license their rights as widely as possible and on the best available terms. Any systematic policy that sought to favour Sony Group’s downstream businesses could jeopardize Sony/ATV’s reputation and impair its competitiveness. Furthermore, given the alternatives to Sony/ATV's repertoire and the small cost that synchronization rights represent in the overall cost of production of a videogame, a motion picture or a TV programme, even if Sony/ATV were to favour Sony Group’s downstream businesses, it is unlikely that any such policy would (or could) have a material effect on the competitive position of either Sony Group’s downstream businesses or competitors of those businesses.

[154] *Sony/Mubadala/EMI*, recital 283.

[155] *Sony/Mubadala/EMI*, recital 284.

[156] *Sony/Sony-ATV*, paragraph 174.

6.3.2.4. Customer foreclosure

(251) 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.

(252) First, the Commission notes that the market shares of Sony Group's businesses in the downstream markets for each of videogames, motion pictures and TV programmes are the following:

(a) Videogames: Sony estimates that its shares of EEA videogame revenues are below 5%. Sony also estimates that its EEA-wide market shares in all plausible market segments are the following: games for handled consoles only ([0-5]%), games for mobile handsets (handheld consoles and mobile and tablet devices) ([0-5]%), music games ([0-5]%); games for TV consoles and handled consoles ([10-20]%); offline games for Sony PlayStation consoles ([10-20]%);

(b) Motion pictures: Sony estimates that its share of revenues from the production of motion pictures is approximately [5-10]% in the EEA and that in a potential motion picture production market limited to US-produced films, the Parties submit that SPE's market share in the EEA would be below 25%; and

(253) TV programmes: Sony estimates that its share of revenues in TV programmes is below 5% in the EEA and that such share does not exceed 20% in any EEA Member State or linguistically homogenous area.

(254) Based on the above, the Commission considers that the relevant Sony Group businesses therefore do not constitute a sufficient customer base for Sony to have the ability to foreclose competing music publishers.

(255) Second, the Commission notes that the evidence submitted by the Parties shows that Sony Group's businesses in the downstream markets for motion pictures, TV programmes and video games have traditionally not preferred Sony/ATV's repertoire. Data concerning the songs used in the top 8 grossing movies in the season 2016/2017 by Columbia Pictures (controlled by SPE) show that only […]% of these songs involved synchronization licence from Sony/ATV, […]% from EMI MP and […]% from Sony Music. These shares are lower than Sony/ATV's and EMI MP's EEA market shares for synchronisation rights of [20-30]%. Data concerning the songs used in the TV programmes produced by Sony Pictures Television Group during the season 2016/2017 show that less than […]% of these songs involved synchronisation licence from Sony/ATV, less than […]% from EMI MP and around […]% from Sony Music. These figures are lower than Sony/ATV's and EMI MP's EEA market shares for synchronisation rights of [20-30]%. Data concerning the use of songs in videogames produced by Sony interactive Entertainment Europe in 2017 show that […]% of these songs involved synchronization rights licensed from Sony/ATV, […]% licensed from EMI MP and […]% licensed from Sony Music.

6.3.3. Conclusion on vertical effects

(256) 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.

7. CONCLUSION

(257) For the above reasons, the European Commission has decided not to oppose the notified operation 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)
Margrethe VESTAGER
Member of the Commission