

EN

***Case No COMP/M.6459 - SONY/  
MUBADALA DEVELOPMENT/ EMI  
MUSIC PUBLISHING***

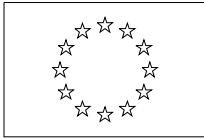
Only the English text is available and authentic.

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

---

Article 6(1)(b) in conjunction with Art 6(2)  
Date: 19/04/2012

***In electronic form on the EUR-Lex website under document  
number 32012M6459***



EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 19/04/2012  
C(2012) 2745

PUBLIC VERSION

MERGER PROCEDURE

**To the notifying parties:**

Dear Sir/Madam,

**Subject: Case No. COMP/M.6459– Sony/ Mubadala/ EMI Music Publishing**

**Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004<sup>1</sup>**

1. On 27 February 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Sony Corporation of America and Mubadala Development Company PJSC acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the whole of the undertaking EMI Music Publishing, which currently forms part of the EMI Group, by way of purchase of shares and assets. Sony and Mubadala are collectively referred to as “the Parties”. EMI Music Publishing will be administered by Sony/ATV.

## **I. THE PARTIES**

2. Sony Corporation of America ("Sony") is the US subsidiary of Sony Corporation, headquartered in Tokyo, Japan. Sony, directly and through its subsidiaries, is active globally in various businesses, including electronics products (i.e. audio, video, televisions, digital cameras, personal computers and tablets), entertainment services (e.g. motion pictures, TV programming, recorded music, music publishing), financial services and a variety of other businesses.

---

<sup>1</sup> 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.

3. Mubadala Development Company PJSC ("Mubadala") is an Abu Dhabi public joint stock company focused on investment and development which is wholly owned by the Government of the Emirate of Abu Dhabi in the United Arab Emirates. Mubadala is active in investing in a wide range of strategic sectors, including energy, utilities, real estate, basic industries and services.
4. EMI Music Publishing ("EMI MP") is the EMI Group's music publishing business.
5. Sony/ATV is not a party to the transaction but will administer the EMI MP catalogue. Sony/ATV is a music publishing company established in 1995 when Sony Music Publishing was transferred to a 50/50 joint venture with the singer-songwriter Michael Jackson, together with certain music catalogues owned by Michael Jackson. According to the Parties, Sony/ATV is jointly controlled within the meaning of the Merger Regulation by Sony and the Michael Jackson Estate and encompasses all music publishing activities of its parents.

## II. THE CONCENTRATION

6. According to the transaction documents submitted by the Parties, the proposed concentration would be structured as follows. A special purpose vehicle, DH Publishing LP ("DH Publishing"), would acquire EMI MP from Citigroup. DH Publishing would be owned by two consortium companies. The first consortium company is Nile Acquisition LLC ("Sony Sub"). Sony Sub is owned by Sony ([...] shareholding) and the Michael Jackson Estate ([...] shareholding). The second consortium company is Nile Acquisition Holding Company Limited ("Mubadala Sub"). Mubadala Sub would be owned by Mubadala ([...] shareholding), Jynwel ([...]), GSO ([...]) and EMI West ([...]).
7. Mubadala Sub would have a ca. [...] interest in DH Publishing and Sony Sub would hold a ca [...] interest in DH Publishing.

### *Sony's influence over EMI MP*

8. Sony would hold a [...] interest in Sony Sub and would therefore be able to exercise control over Sony Sub, which in turn would own [...] of the shares in DH Publishing. Although Sony Sub would only be a minority shareholder in DH Publishing, a number of important actions would require its approval. This would include the adoption of DH Publishing's budget and the annual business plan, which would be subject to unanimous approval of the shareholders in DH Publishing. The same would apply to investments in excess of USD [...]. Sony would also appoint 4 out of 12 members of DH Publishing's board of directors.
9. Furthermore, Sony/ATV, which is jointly controlled by Sony, would be appointed to act as the exclusive administrator of the EMI MP catalogue. As such, it would be Sony/ATV that would decide on the day-to-day licensing of the EMI MP catalogue. Ultimately, however, Sony would be allowed to exercise its rights with regard to the EMI MP catalogue unilaterally, without recourse to the Michael Jackson Estate.

*Mubadala's influence over EMI MP*

10. Mubadala would own the majority ([...]) of the shares in Mubadala Sub, which in turn would own [...] of the shares in DH Publishing. Mubadala would also have the right to appoint a majority (4 out of 7) of the board of directors of Mubadala Sub. However, according to a governance agreement among Mubadala Sub's shareholders, a majority of [...] of the equity of Mubadala Sub would be required in order for the latter to approve the adoption of DH Publishing's budget and annual business plan or approve capital expenditures above USD [...]. Therefore, Mubadala's agreement would always be necessary subject to forging alliances with either Jynwell or GSO in order to approve these measures.
11. [...]. In addition there are various arrangements, [...], that would strengthen its *de facto* influence over decisions taken in relation to the EMI MP repertoire.

*Joint control by Sony and Mubadala over EMI MP*

12. Control is acquired if an undertaking can exercise decisive influence over the strategic commercial behaviour of another undertaking.<sup>2</sup> A minority shareholder may be deemed to have control on a negative basis if it is able to block the adoption of strategic decisions in an undertaking without having the power, on its own, to impose such decisions.<sup>3</sup> Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3 (2) and therefore control within the meaning of the Merger Regulation.<sup>4</sup>
13. In the event of a minority shareholding, control may occur in situations where specific rights attached to the shareholding, such as additional rights enabling the minority shareholder to determine the strategic commercial behaviour of the undertaking to be acquired or majority requirements for strategic decision, in fact confer a veto right upon the minority shareholder.<sup>5</sup> Veto rights that confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management.<sup>6</sup> By contrast, veto rights that are normally accorded to minority shareholders in order to protect their financial interests as investors are usually insufficient to establish control.<sup>7</sup>
14. In the present case, both Sony and Mubadala would enjoy rights that enable them to block strategic decisions that determine the strategic commercial behaviour of DH Publishing and hence EMI MP. Sony, as an indirect minority shareholder in DH Publishing would be granted a veto right with regard to the adoption of DH Publishing's budget, the company's

---

<sup>2</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Jurisdictional Notice"), recitals 16, 54 and 62.

<sup>3</sup> Jurisdictional Notice, recital 54.

<sup>4</sup> Jurisdictional Notice, recital 54.

<sup>5</sup> Jurisdictional Notice, recitals 57, 58, 65 and 66.

<sup>6</sup> Jurisdictional Notice, recital 67.

<sup>7</sup> Jurisdictional Notice, recital 66.

annual business plan and investments in excess of USD [...]. At the same time, Sony/ATV, which is jointly controlled by Sony, would act as the administrator of the EMI MP catalogue.

15. Mubadala would enjoy a veto right that is identical to Sony's and in addition have the right to block any important investment proposed by Sony/ATV.
16. The Commission finds that in addition Mubadala would enjoy sole control over Mubadala Sub. The Commission reaches this conclusion in view of Mubadala's right to determine the majority of the members of the board and its ability to forge changing alliances either with GSO or Jynwell, depending on its interest. In contrast to the situation of joint negative control, sole negative control can exist if no other shareholders enjoy the same level of influence as the shareholder that is always needed to forge a majority. The shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. This would be the case for Mubadala with regard to Mubadala Sub.
17. In light of the above, the Commission concludes that the proposed concentration would confer upon Sony and Mubadala joint control over DH Publishing and hence EMI MP.

### **III. EU DIMENSION**

18. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Sony: EUR 61 779 million; Mubadala: [> EUR 5000 million]; EMI MP: [>EUR 500 million]). The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (Sony: [>EUR 10000 million]; Mubadala: [>EUR 4000 million]; EMI MP: [>EUR 200 million]). The proposed transaction therefore has an EU dimension.

### **IV. RELEVANT MARKETS**

#### ***1. Background***

19. Music publishers are active on two market levels. Upstream, they are active in the supply of publishing services to authors. These services include signing authors and providing them with financial, marketing and career support. As a counterpart to these services, authors transfer the rights in their musical work to the publisher or grant that publisher an economic interest in the musical work by providing the publishers the right to obtain a certain portion of the royalties collected. Downstream, music publishers are active in the exploitation of works of authors under contract or for a certain period of time following the expiration of the contract (so-called retention period). On that level, they either directly grant licences for use of the musical works to right users against the payment of royalties, or receive a part of the royalties collected by collecting societies (for licences issued by the societies). These two activities relate to separate markets as each one implies a distinct supply and demand relationship (between publishers and final users downstream, and between authors and publishers upstream).
20. In this decision, the Commission first describes the relevant markets for the exploitation of music publishing rights. The Commission then assesses the relevant market for the supply of publishing services to authors.

## 2. *Relevant product markets*

### 2.1. Markets for the exploitation of music publishing rights

*No single market for the exploitation of music publishing rights*

21. The Parties claim that there should be a single market encompassing the exploitation of all types of music publishing rights. This would be appropriate as authors contract with music publishers for the exploitation of all their music publishing rights.
22. The Commission has previously defined separate product markets for the exploitation of different categories of music publishing rights.<sup>8</sup> These categories of rights were:
  - (i) Mechanical rights: the right to reproduce a work in a sound recording (e.g. CDs);
  - (ii) Performance rights: the right for commercial users such as broadcasters (TV or radio stations), concert halls, theatres, night clubs, restaurants to divulge a work to the public;
  - (iii) Synchronisation rights: the right for commercial users such as advertising agencies or film companies to synchronise music with a visual image;
  - (iv) Print rights: the right to reproduce a work in sheet music; and
  - (v) Online rights: a combination of mechanical and performance rights for online applications, such as music downloading and/or streaming services.
23. The overwhelming majority of the respondents to the market investigation (both competitors and customers) confirmed that it is still appropriate to define markets in this manner. They indicate that from a demand-side perspective there is no substitutability between different categories of rights as different users require different sets of music publishing rights.<sup>9</sup>
24. From a supply-side perspective, there are also important differences between the various music publishing rights.
25. The main differences relate to the role of collecting societies in the licensing of various rights. The licensing of mechanical and performance rights for offline use is generally carried out by collecting societies on behalf of publishers. By contrast, synchronization and print rights are generally licensed and administered directly by the publishers without the involvement of collecting societies. Online rights are subject to a hybrid solution whereby some repertoire may be licensed directly by publishers or collecting societies/rights management entities acting as their agents and other repertoire is licensed by collecting societies without any influence from the publishers. Collecting societies are legally bound to grant licences in a non-discriminatory manner to different groups of

---

<sup>8</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraphs 18-25.

<sup>9</sup> Questionnaire 1 to Competitors, Question 4; Questionnaire 3 to Customers (offline markets), Question 4; Questionnaire 4 to Online Customers, Question 4; Questionnaire 5 to Collecting Societies, Question 13.

users. Publishers are not bound by the same regulations. The market investigation has shown that accordingly, there are differences in the way that royalties are established and paid and that licensing conditions differ per right category.

26. On the basis of the above, and in particular in view of the different user requirements for each category of publishing rights and the different role of collecting societies, the Commission concludes for the purpose of the present decision that the market for music publishing rights should be subdivided according to the categories of rights into (i) mechanical rights, (ii) performance rights, (iii) synchronisation rights, (iv) print rights and (v) online rights.

*Segmentation of online rights*

27. In view of the fact that the impact of the proposed transaction concentrates mainly on the market for online rights, the Commission further considers whether this market should further be subdivided according to the type of repertoire, retail model, genre and device.

*Segmentation according to the type of repertoire: Anglo-American v. Continental European repertoire*

28. The Parties argue that it would not be justified to subdivide the market for the exploitation of online rights further according to Anglo-American<sup>10</sup> repertoire and Continental European<sup>11</sup> repertoire. According to the Parties both demand-side and supply-side considerations back this statement.
29. The Parties are of the view that from a demand-side perspective there is substitutability between Anglo-American and Continental European repertoire and the origin or residence of an author does not represent a criterion for consumer choice. Moreover, the Parties consider that, from a supply-side perspective, all large publishers seek to develop a balanced repertoire comprising both Anglo-American and Continental European repertoire. The Parties further consider that co-authorship among Anglo-American authors and Continental European authors blurs any possible distinction for market definition purposes, as those musical works subject to co-authorship will qualify at the same time as part of both repertoires.
30. The market investigation in the present case did not confirm the need to subdivide the markets for the exploitation of online rights between rights over Anglo-American and rights over Continental European repertoire.<sup>12</sup> The vast majority of online customers consider that from a demand-side perspective a distinction is not appropriate as online platforms need full access to musical works, irrespective of whether they belong to Anglo-American and/or Continental European repertoire. Furthermore, licences obtained through

---

<sup>10</sup> Anglo-American repertoire comprises musical works of authors registered with collecting societies in the UK, Republic of Ireland, the US, and other English-speaking territories including Canada (except French-speaking Canadian territories), New Zealand and Australia, irrespective of the nationality of the authors and of the language of the lyrics of the works.

<sup>11</sup> Continental European repertoire is the repertoire of authors signed to Continental European collecting societies.

<sup>12</sup> Questionnaire 1 to Competitors, Question 10; Questionnaire 4 to Customers Online, Questions 5-6; Questionnaire 5 to Collecting Societies, Question 18.

the traditional collecting society system do not differentiate between Anglo-American and Continental European repertoire.

31. Supply conditions for the different sets of repertoire, however, can be different in particular in respect of EEA-wide or multi-territory licences. As explained further in paragraphs 77 to 78 below, due to the legal framework of ownership and transferability of rights, rights for Continental European repertoire remain with collecting societies, which are bound by regulation to grant licences in a non-discriminatory manner across user groups.
32. By contrast, all major music publishers have withdrawn their online mechanical rights for Anglo-American repertoire from collecting societies and assigned their administration to selected collecting societies or rights management entities acting as agents that are not bound by non-discrimination obligations. Some publishers have then re-aggregated their Anglo-American mechanical online rights to the traditional collecting society system in the sense that those societies are able to grant national licences to that Anglo-American repertoire.<sup>13</sup>
33. Important online customers see a trend by which some music publishers seek to increase rates for this repertoire, whereas rates for Continental European repertoire that is still licensed by collecting societies remained the same.<sup>14</sup> This confirms that at least for Anglo-American repertoire, licensing conditions for online rights have evolved differently from that of Continental European repertoire.
34. For the purposes of this decision, and taking into account the demand side considerations (as explained in paragraph 30 above) and the fact that the vast majority of both competitors and online customers did not consider that the market for the exploitation of online rights should be further segmented between Anglo-American and Continental European repertoire, the Commission assesses the effect of the proposed concentration on the market for the overall online rights.<sup>15</sup> Nevertheless, considering that music publishers can only have market power in respect of the exploitation of Anglo-American rights, the Commission takes into account the Parties' position in relation to these rights in the competitive assessment of the overall online rights market.

*Segmentation according to the retail model*

35. The Parties argue that it would not be justified to subdivide a market for the exploitation of online rights further in relation to the type of retail model and more specifically

---

<sup>13</sup> Sony/ATV has allowed national collecting societies to grant country-specific online licences for Sony/ATV's Anglo-American repertoire subject to Sony/ATV's approval above defined value thresholds. EMI MP appoints national collecting societies as sub-agents on a case-by-case basis for granting local online licences but a licence always requires EMI MP's specific approval.

<sup>14</sup> Questionnaire 4 to Online Customers, Questions 17, 43-45.

<sup>15</sup> Questionnaire 1 to Competitors, Question 9, Questionnaire 4 to Customers Online, Question 5. In Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 40, the Commission left open whether Anglo-American rights for online use could in future constitute a separate market. The Commission's assessment in that case was based on Universal's future market strength in Anglo-American repertoire on the overall online rights market (including Anglo-American and other titles)



between streaming and download. The Parties refer that, from a demand-side perspective, retail models compete with one another so that different online music services offer substitutable forms of consumed music and compete for consumer choice. Moreover, in the view of the Parties, the evolving nature of online retail models increasingly blurs the differences between download and streaming services. The Parties further argue that, from a supply-side perspective, the same type of rights and the same repertoire are involved.

36. The market investigation was inconclusive as regards the need to segment online rights on the basis of retail models, such as download or streaming. Although, download and streaming services each require a licence combining both mechanical and performance rights, licensing terms and conditions appear to regularly differ for the two types of platforms.
37. However, the question of whether the market for online rights should be further subdivided according to the retail model into download and streaming can be left open for the purpose of the present decision as the competitive assessment would remain the same irrespective of the conclusion on this point.

*Segmentation according to genres*

38. The Parties argue that a market for the exploitation of online rights should not be further subdivided according to different genres (chart hits, classical music etc.). The Parties refer that from a demand side perspective users generally licence rights covering a wide variety of genres. From a supply-side perspective, music publishers commercialise rights for a broad range of genres and licences and prices cover all repertoire.
39. The market investigation confirms that it is not appropriate to further divide the markets for online rights according to genres. Respondents indicated that, although there is a limited number of publishers specialized in one specific genre, music publishers are generally active across genres and do not specialise in specific segments.<sup>16</sup>
40. As a result, the effects of the proposed concentration are analysed on the overall market for the exploitation of online rights including all genres.

*Segmentation according to access devices*

41. The Parties are of the view that a segmentation of the market based on access devices into mobile and other online uses is not justified in the light of demand-side considerations. In fact, the Parties consider that the convergence between different access devices has increasingly blurred the borderline between online and mobile applications and music content is easily downloaded or streamed through a variety of different devices.
42. The market investigation, confirms that it is not appropriate to further divide the markets for online rights according to access devices. In particular, respondents indicated that such

---

<sup>16</sup> Questionnaire 1 to Competitors, Questions 7, 8, 12, 13; Questionnaire 3 to Customers (offline markets), Questions 6-7; Questionnaire 4 to Online Customers, Questions 8-9; Questionnaire 5 to Collecting Societies, Questions 20, 22.

distinction is not appropriate in the light of the convergence between access devices as well as the identity of licensed rights.<sup>17</sup>

43. As a result, the effects of the proposed concentration are analysed on the overall market for the exploitation of online rights including all types of access devices.

*Market for synchronisation rights and production music*

44. The Parties further argue that there is a single market encompassing the exploitation of synchronisation rights for all musical works, including production music (i.e. music specifically commissioned by publishers for synchronisation purposes and not for resale). In their view, a segmentation of the market is not appropriate as from a demand-side perspective, production music forms part of a range of options available for synchronisation purposes. In the view of the Parties, users can have a strong preference for a particular song or can be indifferent and choose an existing recording of a musical work, a musical work without an existing recording, production music, or can commission a new piece of work.
45. The Parties further argue that from a supply-side perspective there is generally no difference in the licensing of synchronisation rights for other musical works and production music as licences are typically negotiated on a bilateral basis between publisher and licensee.
46. One market participant argued that the market for the licensing of production music could be considered as a separate market from the overall market for the licensing of synchronisation rights. According to this market participant demand-side and supply-side considerations back this statement.
47. In the view of this market participant, from a demand-side perspective, production music is generally used as background music for media sources. From a supply-side perspective, the market participant argues that production music is subject to a different exploitation system than other musical works licensed for synchronisation purposes. Music publishers often operate production music activity through dedicated entities. In addition, music publishers own both recording and publishing rights to production music and therefore, the licensing of production music rights does not necessarily take place through collecting societies.
48. The market investigation was inconclusive as concerns the need to define separate markets for the exploitation of synchronisation rights and production music.<sup>18</sup>
49. The question of whether the market for synchronisation music includes production music can be left open for the purpose of the present decision as the competitive assessment would remain the same irrespective of the conclusion on this point.

---

<sup>17</sup> See Questionnaire 1 to Competitors, Question 10; Questionnaire 4 to Online Customers, Question 17; Questionnaire 5 to Collecting Societies, Question 17.

<sup>18</sup> See Questionnaire 1 to Competitors, Questions 62.5 and 62.5.1; Questionnaire 3 to Customers (offline market), Questions 48.2.5 and 48.2.5.1; Questionnaire 6 to Authors, Question 4.3.

### *Conclusion on product markets for exploitation of music publishing rights*

50. For the reasons explained above, the Commission considers that the market should be subdivided along the lines of different categories of rights since the economic conditions seem to differ mostly between these overall categories.
51. For the purposes of this decision, the market for the exploitation of music publishing rights for online use should not be further subdivided between different types of repertoire, access devices or genres. As regards a further subdivision by retail model (i.e. downloading v streaming), it can be left open whether these segments constitute separate product markets. As regards the market for the exploitation of synchronisation rights, it can also be left open whether production music constitutes a separate product market.

### **2.2. The market for publishing services to authors**

52. The Parties agree with the precedent of the Commission in *Universal/BMG Music Publishing*<sup>19</sup> on the relevant product market definition for publishing services to authors whereby a separate market for music publishing services to authors was defined.
53. According to the precedent of the Commission, the market for publishing services to authors refers to the market on which publishers provide authors with various services such as the payment of advances<sup>20</sup> and the management of the copyrights in their works. Apart from this, publishers provide services to authors that serve the promotion and further development of the author. This includes the provision of management services, as well as the promotion and further career development of the author (the latter comprising for instance the finding of producers, writing partners or creative guidance). In return for these services the authors transfer the rights connected to their own works to the publishers for exploitation, or give the publisher an economic interest in their works in the form of a portion of the royalties received. While from the perspective of publishers this market level constitutes a market for the acquisition of rights, from the viewpoint of authors it constitutes a market for publishing services. Authors should not only be considered as suppliers of songs, but also as customers receiving various publishing services. For new authors, in particular, a publisher usually provides strategic support to start a career as it gives to the author initial financial support and access to its established network of artists and record companies. More generally the administrative support given by publishers allows authors to focus on creative activities.
54. The market investigation confirmed the relevant product market definition as defined in *Universal/BMG Music Publishing*.<sup>21</sup> In addition, the market investigation confirmed that authors do not seem to use different publishers for the different categories of rights.<sup>22</sup>

---

<sup>19</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraphs 11-14 and 45-49.

<sup>20</sup> The advances usually have the character of a loan since the royalties which are earned by licences to users go fully to the publisher until the advances are amortised. Only then the author receives the share of royalties as agreed with the publisher.

<sup>21</sup> See Questionnaire 1 to Competitors, Question 13; Questionnaire 6 to Authors, Question 3.

<sup>22</sup> See Questionnaire 1 to Competitors, Questions 14; Questionnaire 6 to Authors, Question 4.

55. Therefore, the Commission considers that, unlike for the downstream market for the exploitation of music publishing rights, no further segmentation of this market appears to be appropriate. For the purposes of this decision therefore, the relevant product market will be that of music publishing services to authors.
56. Finally, only a minority of authors does not rely on publishers' services and self-publish their works. Self-publishing can notably be viable for established authors who do not need any publishing services and who can rely on collecting societies to collect the relevant royalties on behalf of the author. The market investigation confirmed that many authors would not envisage working without a publisher.<sup>23</sup> In any event, given that competition takes place between companies providing publishing services to those authors who wish to benefit from such services, self-publishing is not considered as forming part of the market for publishing services to authors.

### 3. *Relevant geographic markets*

#### 3.1. **Markets for the exploitation of music publishing rights**

57. The Commission previously defined national markets for the exploitation of the various categories of music publishing rights. The Parties recognise that there has been no material change for the licensing of music publishing rights since the adoption of the *Universal/BMG Music Publishing* decision in 2007. The market investigation in this case also confirmed that, with the possible exception of the market for online rights, the markets for the various publishing rights are national in scope.
58. The Parties argue that the market for the exploitation of online rights is EEA-wide. Already in *Universal/BMG Music Publishing*, the Commission recognised that online customers at that time had increased possibilities to obtain EEA-wide licences. The Commission therefore recognised that the market could develop into a multi-territorial or even EEA-wide market in the future. The Parties confirm this on-going evolution and submit that a large number of online music platforms obtain licences that have a broader than national scope. In particular, the Parties point to the fact that the large majority of revenues from online licences negotiated outside the traditional collecting society system are accounted for by licences that are multi-territorial or EEA-wide in scope.
59. The market investigation revealed that at present, the market for online rights is moving towards an EEA-wide market, although the existence of such a market has not been confirmed.<sup>24</sup> Online customers increasingly obtain EEA-wide licences for online rights to Anglo-American repertoire. All major music publishers and some independent music publishers have appointed collecting societies or rights management entities acting as agents to offer EEA-wide or multi-territory licences (but it remains possible to obtain national licences).

---

<sup>23</sup> This is in line with the Commission's findings in *Universal/BMG Music Publishing* that self-publishing can be viable only for established authors as a result of the existence of collecting societies who collect royalties on behalf of the authors. See Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 46.

<sup>24</sup> See Questionnaire 1 to Competitors, Question 20; Questionnaire 4 to Online Customers, Question 10; Questionnaire 5 to Collecting Societies, Question 25.

60. However, despite the wider territorial scope of these licences, evidence from customers shows that royalty rates, minimum rates and other usage terms tend to vary per EEA-country. EEA-wide licences often use so-called country of destination tariffs (which may vary country-by-country with higher rates applied to some of the major territories) or so-called "blended rates" (i.e. one or more average rates calculated for the EEA or for groups of countries within the EEA). In addition, some large platforms such as [...], as well as the majority of smaller platforms, still obtain a collection of national licences rather than an EEA-wide or multi-territory licence. Some of these platforms launch their online services on the basis of a national licence in one EEA country and then expand their operations on the basis of licences for other EEA countries. Even if licences, in particular those relating to Anglo-American repertoire, may be issued on an EEA-wide or multi-territory basis, any online customer is likely to assess the relevance of the licensed repertoire in relation to the different countries in which it is aiming to operate.
61. For the purposes of the present decision, the precise geographic market definition can be left open since serious doubts arise on an EEA-wide level as a result of the competition concerns arising at national level.

### **3.2. The markets for publishing services to authors**

62. The Parties agree with the precedent of the Commission in *Universal/BMG Music Publishing*<sup>25</sup> on the relevant geographic market definition for publishing services to authors. In that case the Commission considered that the markets for publishing services to authors are mainly national but ultimately left open the exact geographic market definition.
63. The market investigation indicated that although the geographic scope of the market for publishing services to authors could be broader than national, authors still tend to turn to publishers with a local presence and tend to be members of the national collecting societies.<sup>26</sup>
64. The exact geographic scope may, however, be left open since no serious doubts arise regardless of the geographic scope of the relevant market.

## **V. COMPETITIVE ASSESSMENT**

### **1. Background**

65. In 2010, the Parties estimated revenues in the overall music publishing market to amount to EUR [1000-1,500] million. The structure of the market is presented in the following table:

---

<sup>25</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 61.

<sup>26</sup> See Questionnaire 1 to Competitors, Questions 21-24; Questionnaire 6 to Authors, Questions 5 and 6.

### Revenue based market shares for overall music publishing rights (2010)

All rights	Sony/ ATV	EMI MP	Merged	Universal	Warner/ Chappell	BMG RM	Imagem	Kobalt	Peer- music	Others
	%	%	%	%	%	%	%	%	%	%
Austria	[5-10]	[10-20]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[50-60]
Belgium	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[10-20]
Bulgaria	[10-20]	[0-5]	[10-20]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Czech Republic	[10-20]	[10-20]	[20-30]	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Denmark	[5-10]	[10-20]	[20-30]	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Estonia	[10-20]	[10-20]	[30-40]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Finland	[5-10]	[5-10]	[10-20]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
France	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	--	--	[0-5]	[30-40]
Germany	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Greece	[10-20]	[10-20]	[30-40]	[20-30]	[20-30]	--	--	[0-5]	[0-5]	[20-30]
Hungary	[10-20]	[20-30]	[30-40]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[10-20]
Ireland	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
Italy	[5-10]	[10-20]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[50-60]
Latvia	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Lithuania	[0-5]	[0-5]	[0-5]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Luxembourg	[10-20]	[5-10]	[10-20]	[30-40]	[10-20]	[0-5]	--	--	--	[30-40]
Netherlands	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
Norway	[5-10]	[5-10]	[10-20]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Poland	[20-30]	[10-20]	[30-40]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Portugal	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	--	--	--	--	[30-40]
Romania	[10-20]	[20-30]	[40-50]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Slovakia	[10-20]	[0-5]	[10-20]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Slovenia	[10-20]	[0-5]	[10-20]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[20-30]
Spain	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Sweden	[10-20]	[10-20]	[30-40]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[10-20]
UK	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
<b>EEA Total</b>	<b>[5-10]</b>	<b>[10-20]</b>	<b>[20-30]</b>	<b>[20-30]</b>	<b>[10-20]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[30-40]</b>

Source: Sony/ATV estimates

66. Following the merger the four major music publishers - Universal Music Publishing ("Universal"), EMI MP, Warner/Chappell and Sony/ATV - will be reduced to three. The three majors would jointly generate more than 60% of overall publishing revenues in the EEA and in most affected Member States.
67. According to the above estimates, the Parties' combined share of overall music publishing revenues exceeds 40% only in Romania ([40-50]%). The Parties' combined share of such revenues ranges between 30-40% in seven countries (Belgium, Estonia, Greece, Hungary, Poland, Sweden and the UK). On an EEA-wide level the Parties estimate their combined share of overall music publishing revenues to be in the region of 25%, closely followed by Universal ([20-30]%).
68. However, other data sources indicate a higher share of publishing revenues for the Parties. First, Sony/ATV's internal documents clearly show that Sony/ATV expects the combined share in worldwide revenues to be [30-40]% post-merger, with Universal's global share of such revenues estimated at [20-30]% and Warner/Chappell's at [10-20]%.<sup>27</sup>
69. Second, in order to get a more reliable sense of the Parties' future approximate overall share of publishing revenues, the Commission requested the four major publishers to provide their EEA-wide publishing revenues for 2010. The Commission used these data to

<sup>27</sup> [...].

estimate the relative size of each major music publisher. The Commission also estimated the shares of overall publishing revenues of the four major publishers on an EEA-wide level assuming that the majors hold 60% or 70% of such revenues.<sup>28</sup>

70. On the basis of the overall information received during the market investigation, the Commission considers that on an EEA-wide level the Parties' combined share of overall music publishing revenues is likely to range between 28% and 33%.

## ***2. Markets for mechanical and performance publishing rights for offline use***

### **2.1. Market characteristics**

71. Mechanical rights for traditional offline use concern the reproduction of a work on a sound recording (for example a CD or digital track). Performance rights for traditional offline use concern the right for commercial users such as broadcasters (TV or radio stations), concert halls, theatres, night clubs or restaurants to divulge a work to the public.

72. At EEA-level, the Parties estimate the total revenues in the market for mechanical rights for offline use at EUR [...] ([20-30]% of the EEA overall music publishing market) and in the market for offline performance rights at EUR [...] ([50-60]% of the EEA overall music publishing market). The Parties have provided market shares based on estimates of revenues which are summarized in the following tables:<sup>29 30</sup>

---

<sup>28</sup> Music & Copyright estimate that the global market share of the independents has been around 30% in 2008, 2009 and 2010. <http://musicandcopyright.wordpress.com/2011/03/23/universal-music-group-reasserts-its-recorded-music-dominance-in-2010/>

<sup>29</sup> The Parties are unable to submit estimates for Cyprus, Liechtenstein and Malta as they do not have visibility as to the total revenues generated in these four countries. This is because these countries are covered by collecting societies in other countries: the UK mechanical collecting society (MCPS) covers Cyprus and Malta and the Swiss collecting society (SUISA) covers Liechtenstein and their reports do not break out data relating to these countries. In any event, Sony/ATV submits that it has no reason to believe that shares of revenues derived from these countries are materially different from the revenue shares of neighbouring countries, as neither Sony/ATV nor EMI MP has dedicated on-the-ground resources in these countries. As regards Iceland, the royalties are collected by the Nordisk Copyright Bureau and the Parties have been unable to establish estimates for Iceland. The Parties were also unable to provide market share estimates for Bulgaria.

<sup>30</sup> Note that these figures contain revenues for mechanical and performance rights for online use which amounted to EUR [...] in 2010. In a hypothetical overall market comprising both mechanical and performance rights for offline and online use, online rights thus account for [5-10]% of the revenues in such a hypothetical market. Given that it is difficult to differentiate between performance and mechanical rights for online use as they are negotiated together and splits differ according to business models of online platforms and countries, it is difficult to give precise market shares for mechanical and performance rights, respectively, for offline use (that is excluding online rights). In any case, the present figures are acceptable for the assessment (1) because online rights account for a relatively small percentage of these revenues and thus market shares excluding online revenues will not differ significantly from the figures given here, and (2) because the competitive assessment excludes competitive concerns in the markets for mechanical and performance rights for offline use independently from an assessment of market shares and on the basis of the role played by collecting societies with respect to these rights.

**Revenue based market shares for mechanical rights for offline use (2010)**

<b>Mechanical</b>	Sony/ ATV	EMI MP	Merged	Universal	Warner/ Chappell	BMG RM	Imagem	Kobalt	Peer- music	Others
	%	%	%	%	%	%	%	%	%	%
Austria	[5-10]	[5-10]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[50-60]
Belgium	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	--	[20-30]
Bulgaria	--	--	--	--	--	--	--	--	--	--
Czech Republic	[10-20]	[5-10]	[20-30]	[30-40]	[10-20]	--	[0-5]	[0-5]	[0-5]	[20-30]
Denmark	[5-10]	[10-20]	[20-30]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Estonia	[10-20]	[10-20]	[30-40]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Finland	[5-10]	[10-20]	[10-20]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
France	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	--	--	[0-5]	[30-40]
Germany	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Greece	[10-20]	[10-20]	[20-30]	[20-30]	[20-30]	--	--	[0-5]	[0-5]	[20-30]
Hungary	[10-20]	[20-30]	[30-40]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[5-10]
Ireland	[10-20]	[5-10]	[10-20]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[30-40]
Italy	[5-10]	[10-20]	[10-20]	[10-20]	[10-20]	[0-5]	--	--	[0-5]	[50-60]
Latvia	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Lithuania	[0-5]	[10-20]	[10-20]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Luxembourg	[5-10]	[70-80]	[70-80]	[10-20]	[5-10]	--	--	--	--	--
Netherlands	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
Norway	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Poland	[20-30]	[20-30]	[40-50]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Portugal	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	--	--	--	--	[30-40]
Romania	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Slovakia	[10-20]	[0-5]	[10-20]	[30-40]	[20-30]	--	[0-5]	[0-5]	[0-5]	[20-30]
Slovenia	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[10-20]
Spain	[5-10]	[20-30]	[20-30]	[20-30]	[10-20]	[0-5]	--	[0-5]	[0-5]	[20-30]
Sweden	[10-20]	[20-30]	[40-50]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	--
UK	[0-5]	[20-30]	[30-40]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
<b>EEA Total</b>	<b>[5-10]</b>	<b>[10-20]</b>	<b>[20-30]</b>	<b>[20-30]</b>	<b>[10-20]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[30-40]</b>

Source: Sony/ATV estimates

**Revenue based market shares for performance rights for offline use (2010)**

<b>Performance</b>	Sony/ ATV	EMI MP	Merged	Universal	Warner/ Chappell	BMG RM	Imagem	Kobalt	Peer- music	Others
	%	%	%	%	%	%	%	%	%	%
Austria	[5-10]	[10-20]	[20-30]	[5-10]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Belgium	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[10-20]
Bulgaria	[10-20]	[0-5]	[10-20]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Czech Republic	[10-20]	[20-30]	[30-40]	[30-40]	[10-20]	--	[0-5]	[0-5]	--	[10-20]
Denmark	[5-10]	[10-20]	[20-30]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Estonia	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[10-20]
Finland	[5-10]	[5-10]	[10-20]	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
France	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	--	--	[0-5]	[30-40]
Germany	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Greece	[10-20]	[20-30]	[30-40]	[20-30]	[20-30]	--	--	[0-5]	[0-5]	[10-20]
Hungary	[10-20]	[20-30]	[30-40]	[10-20]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[10-20]
Ireland	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
Italy	[5-10]	[5-10]	[10-20]	[10-20]	[10-20]	[0-5]	--	--	[0-5]	[50-60]
Latvia	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[0-5]	[0-5]	--	[0-5]	[10-20]
Lithuania	[0-5]	[0-5]	[0-5]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[40-50]
Luxembourg	[10-20]	[0-5]	[10-20]	[30-40]	[10-20]	[0-5]	--	--	--	[30-40]
Netherlands	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[20-30]
Norway	[5-10]	[5-10]	[10-20]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[30-40]
Poland	[20-30]	[10-20]	[30-40]	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Portugal	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	--	--	--	--	[40-50]
Romania	[10-20]	[20-30]	[40-50]	[5-10]	[5-10]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Slovakia	[10-20]	[0-5]	[10-20]	[30-40]	[20-30]	--	[0-5]	[0-5]	[0-5]	[20-30]
Slovenia	[10-20]	[0-5]	[10-20]	[20-30]	[10-20]	[10-20]	[0-5]	[0-5]	--	[20-30]
Spain	[5-10]	[10-20]	[10-20]	[20-30]	[10-20]	[0-5]	--	[0-5]	[0-5]	[30-40]
Sweden	[10-20]	[10-20]	[20-30]	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[10-20]
U.K	[10-20]	[20-30]	[30-40]	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[10-20]



EEA Total	[5-10]	[10-20]	[20-30]	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
-----------	--------	---------	---------	---------	---------	-------	-------	-------	-------	---------

Source: Sony/ATV estimates

73. According to this information, the horizontally affected market are those for:

- a. Mechanical rights in: Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.
- b. Performance rights in: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the UK

74. The Parties would, post-merger, acquire a leading position in the market of mechanical rights for offline use in three EEA countries, namely Luxemburg ([70-80]%), Poland ([40-50]%), and Sweden ([40-50]%). The Parties' combined market share would exceed 30% in Estonia, Hungary, Luxemburg, Poland and Sweden. In the UK, the combined market share would amount to [30-40]%. The combined market share in the whole of the EEA would account for [20-30]%.

75. Similarly, in relation to performance rights for offline use, the Parties' combined market share in the EEA would account for [20-30]%. They would be in a leading position in Romania ([40-50]%), with the other majors accounting for [5-10]% (Universal) and [5-10]% (Warner/Chappell). Their combined market share would account for more than 30% in three EEA countries - Latvia ([30-40]%), Poland ([30-40]%) and the UK ([30-40]).

## 2.2. Role of collecting societies

76. The Parties submit that the licensing of mechanical and performance rights for offline use is carried out by collecting societies who play a central role in administering these rights, granting the respective licences and collecting royalties. According to the Parties, given that collecting societies control the licensing of mechanical and performance rights for offline use (including royalty rates and other licensing terms and conditions), publishers have no ability to independently raise prices post-transaction or to influence other licensing conditions.

77. With respect to mechanical rights it is important to first understand the difference in the way in which these rights flow under the Anglo-American model compared with the Continental European model. Under the latter, authors do not transfer their rights to the publisher. Rather, they register their works with a collecting society directly who then licenses those rights and collects and distributes the royalties owed by licensees. While a publisher may have a contractual right with the author to receive a share of the royalties (as remuneration for the services it provides to the author), it does not own or control the rights themselves. Furthermore, under the Continental European model, the collecting societies guarantee a "writer's share" of royalties to the author. This is a fixed minimum percentage (in many countries 50% and in others 67%) that the author cannot share with a music publisher. The writer's share is paid directly to the author by the collecting society. The rest may be paid to the publisher (or sub-publisher) who will then onward distribute to the author according to the contract the publisher has with the author.

78. Under the Anglo-American model, authors transfer their mechanical rights to publishers (either by assignment or licence), who, in turn, appoints a collecting society to administer these rights. The music publisher is thereby entitled to receive all royalties directly from the collecting society. The publisher will then pay a share to the author – the split having been contractually agreed between the publisher and the author.
79. The Parties submit that the legal differences between these two models have limited practical implications in the licensing of mechanical rights for offline use. In particular, they claim that, from the licensee's perspective, it is irrelevant which administrative model is applicable as, under both models, collecting societies play a central role in licensing and administering mechanical rights, monitoring sales and collecting royalties on behalf of authors and their publishers.
80. With respect to performance rights for offline use, the Parties submit that the system for licensing performance rights is broadly similar for both Continental European and Anglo-American repertoire. In Europe, in both cases, authors transfer their rights directly to their chosen performance rights collecting society.<sup>31</sup> Publishers receive a split of the royalties collected by the collecting society.
81. The Parties submit that collecting societies are responsible for granting licences for both mechanical and performance rights to users on a fair and non-discriminatory basis and that the tariffs charged under these licences are standard. In particular, royalty rates for mechanical rights for offline use are set in accordance with industry wide agreements. For Continental European repertoire, the mechanical rates are defined in the standard agreement between BIEM (the Bureau International des Societes Gérant des Droits d'Enregistrement et de Reproduction Mécanique) and IFPI (the International Federation of the Phonographic Industry).<sup>32</sup> For the UK, the mechanical royalty rate is set by the UK Copyright Tribunal. Licences, therefore, are granted by collecting societies on standard terms, including standard royalty rates to all mechanical and performance rights licensees in each country. Therefore, music publishers are not able to influence users' decisions through price or other contractual terms.
82. Finally, the Parties submit that the publishers are not able to decisively influence the decisions made by collecting societies, due to the limited share of the voting rights granted to them as members of the Boards of collecting societies. Under these rules, the publishers' ability to influence royalty rates is very limited and will not change post-merger.
83. In its decision in *Universal/ BMG*, the Commission found that music publishers did not control rates and other licensing terms for mechanical and performance rights for offline use since collecting societies were responsible for negotiating the licences and setting all terms and conditions (for mechanical in line with industry-wide agreements). In addition,

---

<sup>31</sup> US performance rights, however, are not assigned by the author to the performing society. Rather, these societies receive their authorisation to administer these rights from music publishers on a non-exclusive basis. Therefore, music publishers can withdraw the US performance rights in block without individual author permission. Indeed, EMI MP has recently withdrawn part of its US repertoire from ASCAP in relation to online distribution.

<sup>32</sup> The BIEM-IFPI agreement continues to be applied in practice although technically the agreement has expired.

the Commission found that collecting societies were bound by legal obligations to set royalty rates in a non-discriminatory way, i.e., to charge the same tariff for every author's work (differing only by category of use) and not to refuse licences to users.<sup>33</sup> Finally, the Commission found that in the traditional system of collecting societies, publishers may influence the pricing decisions only indirectly via their representation on the boards. However, since generally all votes have equal weight, the publishers formally do not have a decisive influence on the collecting societies and even less so one single publisher.<sup>34</sup>

84. In this case the market investigation largely confirmed that these market conditions still exist today. In particular, in relation to the governance of the collecting societies, the majority of responding collecting societies confirms that publishers may be eligible to a seat on their Board of Directors and they seize this opportunity in practice. However, the number of seats that is open to publishers is usually limited in relation to the total number of seats and therefore their ability to exert power in relation to the standard licensing conditions is limited.<sup>35</sup> In addition, the market investigation confirmed that in most collecting societies decisions by the board are taken by simple majority. Since generally all votes have equal weight the publishers are not in a position to exert a decisive influence on the collecting societies' decisions.<sup>36</sup>
85. Moreover, according to the market investigation collecting societies are responsible for granting the licences for the mechanical and performance rights for offline use on reasonable and equal terms and subject to non-discrimination obligations<sup>37</sup> and not to refuse licences to users. Finally, the market investigation revealed that collecting societies set their tariffs either by following negotiations with the respective stakeholders/representatives of users and/or trade associations or in compliance with respective legislative frameworks in each country. In most cases, collecting societies apply the BIEM-IFPI standard model agreement tariffs or the rates set by the UK Copyright Tribunal for mechanical rights for offline uses.<sup>38</sup>
86. The Commission considers that the particular characteristics of the markets – namely the role of the collecting societies - prevent publishers from independently pricing or setting licensing terms for mechanical or performance rights for offline use. Moreover, publishers do not formally appear to exercise a decisive influence on relevant decisions (for instance those determining royalty rates) taken by collecting societies.

---

<sup>33</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 139.

<sup>34</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraphs 191, 192.

<sup>35</sup> Questionnaire 3 to Customers (offline markets), Question 20.

<sup>36</sup> Questionnaire 5 to Collecting Societies, Questions 4, 4.1, 4.2, 4.3.

<sup>37</sup> Questionnaire 5 to Collecting Societies, Question 6.2, 6.3.

<sup>38</sup> Questionnaire 5 to Collecting Societies, Questions 6.1.

### 2.3. Potential withdrawal of mechanical publishing rights for offline uses

87. For mechanical rights for offline use (i.e. mainly concerning licences to record companies), some respondents to the market investigation indicated that music publishers may be able to withdraw their offline mechanical rights for Anglo-American repertoire from collecting societies in the near future in the same way they have done for Anglo-American online mechanical rights. If this were to materialise, the licensing model for offline mechanical rights could become similar to the one for online mechanical rights for Anglo-American repertoire, where music publishers already control the licensing terms and conditions (see below at paragraphs 147 to 152 below).
88. Moreover, it is submitted that under the terms of the Cannes Agreement (which is an agreement between collecting societies and the major music publishers and regulates the central pan-European licensing of mechanical rights to record companies by collecting societies), the four major publishers are already able to exert veto rights over such licensing for their own repertoire (i.e. prevent their repertoire from being included in the central licensing agreement ("CLA") unless they are content with the terms being proposed). Post-merger, Sony/ATV would have a larger repertoire, which would make its potential veto over such arrangements more powerful. Sony/ATV could use its veto to hamper the ability of its competitors to conclude attractive central licensing agreements or could use its veto power to extract higher rates from record companies (in particular the smaller ones).
89. The Parties submit that with respect to offline performance rights and offline mechanical rights for Continental European repertoire, such withdrawal would not be feasible, since the rights of authors are directly transferred to the collecting societies, publishers thus not being able to own or control the rights themselves.
90. In its decision in *Universal/BMG*, the Commission confirmed that the publishers could in essence only withdraw Anglo-American mechanical rights on their own initiative, since only those are regularly assigned to them by the authors. All other rights (performance rights as well as mechanical rights for Continental European repertoire) are normally assigned by the authors to collecting societies. Any withdrawal of those rights by the publishers would normally require approval by the authors. Given that the approval of thousands of authors would be necessary, a withdrawal of offline performance rights and offline mechanical rights for Continental European repertoire did not seem likely.<sup>39</sup>
91. In relation to offline mechanical rights for the Anglo-American repertoire, the Parties submit that even if the possibility to withdraw rights exists, and even if certain publishers may have considered withdrawing mechanical rights from collecting societies (for instance as a negotiating device to improve the efficiency of, and the service provided by, collecting societies), publishers have not to date implemented alternative approaches to the licensing of mechanical rights in Anglo-American repertoire other than in relation to online distribution.

---

<sup>39</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 199.

92. The Parties further submit that there are overwhelming practical reasons why no publisher has withdrawn the administration of mechanical rights for offline use from the national collecting societies.
93. First, the administration of mechanical rights for traditional use is complex and burdensome.
94. Second, there is little incentive on publishers to seek an alternative centralized model for licensing mechanical rights for offline uses. The current central licensing agreements issued under the Cannes Agreement allows record companies (the principal users of mechanical offline rights) to obtain an EEA-wide licence for the repertoire of all collecting societies from a single society.
95. Third, the Cannes Agreement creates additional benefits for publishers [...] withdrawal would therefore result in the loss of efficiencies and benefits. A parallel licensing framework for the licensing of music publishers' mechanical rights for Anglo-American repertoire would mean duplicative costs and administrative burdens for music publishers.
96. Fourth, increased costs would not be likely to be compensated by higher licensing revenues. Record companies would not accept to pay higher royalties than the ones paid under the existing central licensing agreements.
97. Finally, the Parties submit that any potential withdrawal would not be merger-specific. Under the framework set up by the Cannes Agreement, no publisher has more or less 'veto' power than others. The Cannes Agreement is subject to review by the International Confederation of Music Publishers and voting within that organization does not turn on the size of individual publishers. Moreover, the benefits of the agreement apply equally to all music publishers and their authors irrespective of publisher size.
98. In its decision in *Universal/ BMG*, the Commission found that while significant changes to the rights administration are taking place for online rights, no such developments could be observed for mechanical and performance rights for offline uses.<sup>40</sup> In this context, the Commission observed that the withdrawal of mechanical and performance rights for traditional use is more difficult than the withdrawal of online rights. In particular, the administration of these rights would continue to require a high degree of local presence in the countries where the customers are located whereas online rights can, to a significant extent, be administered centrally. For a withdrawal of such rights, the assistance of collecting societies would be needed as they have at their disposal, for the respective territories, relevant information about right users as well as the necessary monitoring network.<sup>41</sup>
99. The Commission considers that these findings are still relevant today. Although all major publishers have withdrawn their mechanical online rights for Anglo-American repertoire

---

<sup>40</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 197.

<sup>41</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 198. The Commission found furthermore that due to better terms and easier European-wide administration of mechanical rights, the incentives for vertically integrated music companies to withdraw those rights have to be considered as lower than it is the case for online rights (paragraph 199).

from collecting societies since the Commission's decision in *Universal/BMG*, there has not been any similar move to withdraw the mechanical rights for offline use, which continue to be administered by the collecting societies. The market characteristics have not changed to any significant extent since that decision and the Commission does not have indications that they will change in a way that would make such a withdrawal more likely. Therefore, while the possibility of a withdrawal of mechanical rights for offline uses with respect to Anglo-American repertoire cannot be excluded in the long-term, this is not a probable development in the foreseeable future – the timeframe that is relevant for the competitive assessment of the present transaction. Furthermore, given that the major publishers are already able to veto the inclusion of their own repertoire in a CLA under the Cannes Agreement, withdrawing their repertoire from the scope of the agreement would not be merger specific and would in any event be limited to the inclusion of their repertoire in central licensing agreements under the Cannes Agreement. The Cannes Agreement does not affect the collecting societies' ability to issue national licences.

## **2.4. Conclusion**

100. The Commission considers that as regards mechanical and performance publishing rights for offline use the control over pricing and licensing terms is to a large extent in the hands of the collecting societies. Moreover, the Commission does not have indications that the current licensing system through collecting societies, notably with respect to offline mechanical rights for Anglo-American repertoire, will change in the foreseeable future – the timeframe that is relevant for the competitive assessment of the present transaction. Therefore, it can be concluded that the merger does not raise serious doubts as to its compatibility with the internal market in relation to the markets for mechanical and performance rights for offline uses.

## **3. Market for print publishing rights**

### **3.1. Market characteristics**

101. The market for print publishing rights is rather small in size. The Parties estimate the EEA-market value to have been around EUR [10-20] million in 2010 representing about 1% of the overall EEA publishing market. The Parties' combined EEA-wide market share is estimated at [10-20]%, with EMI MP accounting for [10-20]% and Sony/ATV accounting for [5-10]%. Other major publishers represent [10-20]% (Universal) and [10-20]% (Warner/Chappell) of that market. The Parties have provided market shares based on estimates of revenues which are summarized in the following table:<sup>42</sup>

---

<sup>42</sup> In a number of EEA countries total revenues are very small and are administered by publishers through regional offices located in other countries. The Parties submit that it is not possible to reliably estimate market shares for these countries, especially in light of the fact that print rights represent only 1% of publishers' overall revenues. Sony/ATV does not have direct visibility of the activities of competing publishers in countries where it is not present. Moreover, the provided market shares are the Parties' best estimates given that there is no public source of data at national level. Finally, the Parties are unable to submit estimates for Cyprus, Iceland, Liechtenstein and Malta as they do not have visibility as to the total revenues generated in these four countries given the *de minimis* sums generated. In any event, Sony/ATV does not believe it has licensed print rights in any of these countries.

**Revenue based market shares for print rights (2010)**

<b>Print</b>	Sony/ ATV	EMI MP	<b>Merged</b>	Universal	Warner/ Chappell	BMG RM	Imagem	Kobalt	Peer- music	Others
	%	%	%	%	%	%	%	%	%	%
Austria	[5-10]	--	<b>[5-10]</b>	[10-20]	[5-10]	[0-5]	--	--	--	[60-70]
Belgium	--	--	--	--	--	--	--	--	--	--
Bulgaria	--	--	--	--	--	--	--	--	--	--
Czech Republic	--	--	--	--	--	--	--	--	--	--
Denmark	[0-5]	[0-5]	<b>[0-5]</b>	[5-10]	[5-10]	--	--	--	--	[80-90]
Estonia	--	--	--	[5-10]	[5-10]	--	--	--	--	[90-100]
Finland	[0-5]	--	<b>[0-5]</b>	[5-10]	[40-50]	--	--	--	--	[50-60]
France	[5-10]	[0-5]	<b>[10-20]</b>	[20-30]	[10-20]	[0-5]	--	--	[0-5]	[40-50]
Germany	[10-20]	[20-30]	<b>[30-40]</b>	[10-20]	[10-20]	[0-5]	--	--	--	[30-40]
Greece	--	--	--	--	--	--	--	--	--	--
Hungary	--	--	--	--	--	--	--	--	--	--
Ireland	[10-20]	--	<b>[10-20]</b>	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	--	[30-40]
Italy	[0-5]	[0-5]	<b>[5-10]</b>	[30-40]	[5-10]	[0-5]	--	--	[0-5]	[50-60]
Latvia	--	--	--	[5-10]	[5-10]	--	--	--	--	[80-90]
Lithuania	--	--	--	[5-10]	[5-10]	--	--	--	--	[80-90]
Luxembourg	--	--	--	--	--	--	--	--	--	--
Netherlands	--	--	--	--	--	--	--	--	--	--
Norway	[0-5]	--	<b>[0-5]</b>	[5-10]	[5-10]	--	--	--	--	[80-90]
Poland	[20-30]	--	<b>[20-30]</b>	[10-20]	[10-20]	[0-5]	--	--	[0-5]	[40-50]
Portugal	[5-10]	[0-5]	<b>[5-10]</b>	[5-10]	[10-20]	--	--	--	--	[50-60]
Romania	--	--	--	--	--	--	--	--	--	--
Slovakia	--	--	--	--	--	--	--	--	--	--
Slovenia	--	--	--	--	--	--	--	--	--	--
Spain	[5-10]	--	<b>[5-10]</b>	[20-30]	[20-30]	[0-5]	--	--	--	[40-50]
Sweden	[0-5]	[0-5]	<b>[0-5]</b>	[5-10]	[5-10]	--	--	--	--	[80-90]
U.K.	[10-20]	[20-30]	<b>[30-40]</b>	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	--	[10-20]
<b>EEA Total</b>	<b>[5-10]</b>	<b>[10-20]</b>	<b>[10-20]</b>	<b>[10-20]</b>	<b>[10-20]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[40-50]</b>

Source: Sony/ATV estimates

102. On the basis of this information, the proposed transaction would give rise to horizontally affected markets in Germany and the UK. In Germany, the combined entity would have had a [30-40]% market share in 2010, with other major publishers accounting for [10-20]% (Universal) and [10-20]% (Warner/Chappell). In the UK, the combined entity would have had a market share of [30-40]% in 2010, with other major publishers representing [20-30]% (Universal) and [10-20]% (Warner/Chappell) of that market.

103. Print rights are regularly licensed directly by the publishers without any involvement of collecting societies.<sup>43</sup> The Parties do not produce sheet music themselves but license the rights to produce and distribute to specialist "print music publishers". The customer base is concentrated with three major print music publishers producing and distributing products based on Anglo-American repertoire and national smaller print music publishers producing and distributing products on the basis of Continental European repertoire. For the avoidance of doubt, neither Sony/ATV nor EMI MP operates a print music publishing business and according to the Parties, the investment required to provide this function in-house would be disproportionate to the limited revenues earned from print rights.

104. [...].

<sup>43</sup> Collecting societies play a limited role in relation to, for example, the licensing of lyrics for use in karaoke.

105. It is the print music publishers who negotiate the wholesale prices with retailers and the retailers in turn set the retail prices. The royalties paid back to the music publisher are a percentage of the retail price.
106. Music publishers also license print rights to online platforms, which display music and/or lyrics on their websites. These websites are typically advertisement-funded, with royalties calculated as a proportion of the website's advertising revenues apportioned according to the number of times each song is viewed.

### **3.2. Non-coordinated effects**

107. The Parties submit that the estimated shares are too low to raise concerns relating to non-coordinated effects. Moreover, post-transaction, a large number of rival music publishers will continue to be present allowing ultimate customers to switch to other publishers' works or other sources of supply were the Parties to try to raise their royalty rates that impacted on retail prices.
108. As regards the two affected markets in which there is an overlap (Germany and the UK) – which together account for more than 40% of revenues in the EEA – the Commission notes that although the combined entity would become the clear market leader with roughly a third of these markets ([30-40]% and [30-40]% respectively), Universal and Warner/Chappell together account roughly for another third of the German and UK markets, with a large number of independent and/or specialized publishers representing another third. On an EEA-wide level the Parties' combined market share is only [10-20]%.
109. The Commission therefore considers that a sufficient number of alternative publishers are present in licensing print rights to print music publishers in the Germany and the UK. In the event that the merged entity would raise prices, print music publishers would be able to include more musical works from alternative publishers in their products.

#### *Conclusion on non-coordinated effects*

110. For the above reasons, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to non-coordinated effects in any of the markets for print publishing rights which are affected at national level.

### **3.3. Coordinated effects**

111. To assess coordinated effects, well-established case law<sup>44</sup> and Commission guidelines on the assessment of horizontal mergers<sup>45</sup> require proof that the merger will make coordination more likely, more effective and more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.

---

<sup>44</sup> Case T-342/99, *Airtours plc v Commission*, Case T-464/04, *Impala v Commission*.

<sup>45</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p.5, paragraphs 39-57.



112. The Parties submit that coordinated effects concerns do not arise because, first, the market is not transparent since the licensing terms for print rights are (i) bilaterally negotiated between music publishers and print music publishers; (ii) are not publicly available; and (iii) cannot be “reverse-engineered”. Moreover, the royalty rates are generally calculated as a percentage of the retail price, paid on the recommended retail prices (“RRP”) set by the print music publisher for offline print music, and of the revenues received by the online retailer for online print music. The print music publisher is not constrained in any way by the music publisher in negotiating wholesale prices with retailers, nor from setting the RRP.
113. Second, the Parties submit that revenues from print rights are derived in particular from works of successful authors, and therefore from competition to sign successful authors in the upstream market. Third, the large number of other significant publishers would be able to undermine any co-ordination between the major music publishers. Moreover, the possibility of new entry and expansion – as witnessed in recent years – would further destabilise any possible attempt at coordination. Fourth, there is no plausible retaliatory mechanism that might sustain any tacit understanding in relation to the licensing of print rights.
114. The market investigation was inconclusive as to the transparency of the print rights market and as to whether prices charged by the major publishers for the licensing of print rights are aligned.<sup>46</sup> Some customer responses indicate that while royalty rates appear to be similar, advances and/or guaranteed minimum royalties may differ among publishers.
115. The Commission notes that the Parties' market shares between 2008 and 2010 fluctuated considerably both at EEA-level and in Germany and the UK.<sup>47</sup> This would appear to confirm the Parties' argument that the unpredictability of authors' success would have the effect of rendering coordination attempts more unstable.
116. Moreover, music publishers other than the three major publishers remaining post-transaction control a large portion of the print rights markets, notably between 50% and 60% of EEA print rights revenues (depending on the year).<sup>48</sup> In the UK, non-major music publishers account for market shares of [30-40]% (2010) and [50-60]% (2009). In Germany, they represented [30-40]% (2010) and [20-30]% (2009) of the print rights market. This multitude of smaller music publishers (even if the market share of significant independent music publishers does not exceed 5% on any national market) is likely to undermine any attempts of coordination among the major publishers.

---

<sup>46</sup> Questionnaire 3 to Customers (offline markets), Questions 41 and 42.

<sup>47</sup> At EEA-level, the parties' combined share was [10-20]% in 2010, [5-10]% in 2009 and [10-20]% in 2008. In the UK, the combined share was [30-40]% in 2010, [10-20]% in 2009 and [10-20]% in 2008. In Germany, the estimated combined share was [30-40]% in 2010, [40-50]% in 2009, and around 75% in 2008.

<sup>48</sup> This is also the case for 11 out of the 17 EEA countries for which the notifying parties provided estimates of national market shares (notably Austria, Denmark, Estonia, Finland, Ireland, Italy, Latvia, Lithuania, Portugal, Sweden, and Norway). However, there is no overlap in Finland and Norway. In Austria and Ireland, one party's revenues have been *de minimis* (...) over the last 3 years. Non-major music publishers have a share of above 44% in another 4 countries (France, Czech Republic, Poland, and Spain). However, there is no or a *de minimis* overlap in Czech Republic, Poland and Spain.

### *Conclusion on coordinated effects*

117. For the above reasons, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market in relation to coordinated effects in any of the markets for print publishing rights which are affected at national level.

## **4. Market for synchronisation publishing rights**

### **4.1. Market characteristics**

118. Synchronisation publishing rights are purchased in order to synchronise a musical work with a visual image for incorporation in audio-visual works such as a film, TV programme or advertisement. Final customers therefore include TV and film production companies, advertising agencies and computer game developers. Licences are usually commercialized directly by music publishers.<sup>49</sup>

119. The Parties submit that it is difficult to determine market shares for synchronisation rights given that there is no reliable data on the total market size, revenue splits of most music publishers is not available and a small number of licences per year can materially alter a particular company's revenue share. At EEA-level, the Parties estimate total revenues to be around EUR [100-200] million ([10-20]% of the EEA overall music publishing market). The Parties estimate that their combined EEA-wide market share (in revenues) would be [20-30]%, with EMI MP accounting for [10-20]% and Sony/ATV for [10-20]%. Universal would account for [20-30]% and Warner/Chappell for [10-20]%. The Parties further submit that BMG Rights Management's EEA-wide market share would have gone up to [5-10]% since 2010 due to its recent acquisitions of Chrysalis and Bug Music. The following table summarises market shares for the national markets:

---

<sup>49</sup> Collecting societies may be involved in the licensing of synchronisation rights in relation to "blanket" synchronisation licences that are granted to some TV broadcasters. The analysis does not consider these instances as they are subject to similar competition conditions as those prevailing for mechanical and performance publishing rights for offline use. Furthermore, to the extent that synchronisation rights are needed for online video streaming, such instances are included in the analysis of online publishing rights online mechanical and performance publishing rights would need to be required too and synchronisation rights would be generally included in such deal, to the extent that they are necessary.

**Revenue based market shares for synchronisation rights (2010)**

<b>Synchronization</b>	Sony/ ATV	EMI MP	<b>Merged</b>	Universal	Warner/ Chappell	BMG RM	Imagem	Kobalt	Peer- music	Others
	%	%	%	%	%	%	%	%	%	%
Austria	[5-10]	[0-5]	<b>[10-20]</b>	[10-20]	[5-10]	[0-5]	[0-5]	[0-5]	[0-5]	[60-70]
Belgium	[10-20]	[20-30]	<b>[40-50]</b>	[20-30]	[10-20]	[5-10]	[0-5]	[0-5]	--	[10-20]
Bulgaria	[10-20]	[5-10]	<b>[10-20]</b>	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Czech Republic	[10-20]	[5-10]	<b>[20-30]</b>	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	--	[10-20]
Denmark	[5-10]	[0-5]	<b>[5-10]</b>	[30-40]	[20-30]	[0-5]	--	--	[5-10]	[20-30]
Estonia	[10-20]	[5-10]	<b>[20-30]</b>	[30-40]	[10-20]	[0-5]	--	--	[0-5]	[20-30]
Finland	[5-10]	[0-5]	<b>[10-20]</b>	[30-40]	[20-30]	[0-5]	--	--	[5-10]	[20-30]
France	[5-10]	[10-20]	<b>[20-30]</b>	[30-40]	[10-20]	[0-5]	--	--	[0-5]	[20-30]
Germany	[10-20]	[20-30]	<b>[30-40]</b>	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Greece	[5-10]	[10-20]	<b>[20-30]</b>	[10-20]	[10-20]	--	--	[0-5]	[0-5]	[40-50]
Hungary	[0-5]	[90-100]	<b>[90-100]</b>	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	--	--
Ireland	[10-20]	[10-20]	<b>[30-40]</b>	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Italy	[5-10]	[10-20]	<b>[10-20]</b>	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[50-60]
Latvia	[5-10]	[0-5]	<b>[5-10]</b>	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Lithuania	[0-5]	[0-5]	<b>[0-5]</b>	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[5-10]	[30-40]
Luxembourg	[0-5]	[0-5]	<b>[0-5]</b>	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Netherlands	[5-10]	[10-20]	<b>[10-20]</b>	[20-30]	[10-20]	[5-10]	[5-10]	[0-5]	[0-5]	[30-40]
Norway	[5-10]	[5-10]	<b>[10-20]</b>	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[5-10]	[20-30]
Poland	[20-30]	[10-20]	<b>[30-40]</b>	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Portugal	[5-10]	[10-20]	<b>[20-30]</b>	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Romania	[10-20]	[20-30]	<b>[40-50]</b>	[10-20]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Slovakia	[10-20]	[0-5]	<b>[10-20]</b>	[30-40]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Slovenia	[10-20]	[0-5]	<b>[10-20]</b>	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[20-30]
Spain	[10-20]	[10-20]	<b>[20-30]</b>	[20-30]	[20-30]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
Sweden	[5-10]	[40-50]	<b>[40-50]</b>	[30-40]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
U.K.	[10-20]	[10-20]	<b>[20-30]</b>	[20-30]	[10-20]	[0-5]	[0-5]	[0-5]	[0-5]	[30-40]
<b>EEA Total</b>	<b>[10-20]</b>	<b>[10-20]</b>	<b>[20-30]</b>	<b>[20-30]</b>	<b>[10-20]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[0-5]</b>	<b>[30-40]</b>

Source: Sony/ATV estimates<sup>50</sup>

120. According to this information, the markets of 18 EEA countries are horizontally affected, namely those for Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, and the UK

121. Post-merger, the Parties would be the market leader in ten EEA countries, namely Belgium ([40-50]%), Germany ([30-40]%), Greece ([20-30]%), Hungary ([90-100]%), Ireland ([30-40]%), Poland ([30-40]%), Romania ([40-50]%), Spain ([20-30]%) and Sweden ([40-50]%) and the UK ([20-30]%).

**4.2. Non-coordinated effects**

122. The Parties submit that their share of [20-30]% at EEA-level is too low to raise concerns. Although the estimated shares are higher in some EEA countries, these likely overstate the merging Parties' position in these countries and their reliability is doubtful for several reasons. In addition to the general uncertainty and volatility of estimates, in some EEA countries, total revenues are very small and are therefore administered by publishers through regional offices located in other countries. For these countries, it is

<sup>50</sup> The parties submit that total revenues in Cyprus, Iceland, Liechtenstein and Malta are *de minimis*. [...].

particularly difficult to estimate shares of revenue with any accuracy.<sup>51</sup> Moreover, the revenues for Sony/ATV and EMI MP in many European countries include royalties for synchronisation rights exploited on a cross-border, pan-European (or even global) basis,<sup>52</sup> which may overstate the Parties' relative strength at national level in certain instances.

123. The Parties submit that licensees are either wedded to a particular song, in which case the transaction will have no effect (as the size of the catalogue does not matter), or have (and will continue to have), from a supply perspective, a wide range of alternatives capable of meeting their needs. These alternatives would include a large number of rival music publishing companies, the commissioning of new unique musical works or musical works that are no longer subject to copyright (such as classical music).<sup>53</sup> Furthermore, the Parties note that it is increasingly common for authors to retain a veto right over the licensing of synchronisation rights.

124. On the demand-side, the Parties submit that customers will usually select a song or a short list of songs, which will determine which publisher the customer will approach. Final users of the musical work commonly rely on an intermediate, such as an advertising agency or media consultant, to identify musical works of potential interest. In this sense, the licensing of synchronisation rights is a repeat business with sophisticated customers (such as film studios or intermediaries). Fees are typically negotiated bilaterally between the music publisher and author on the one hand, and the licensee and their intermediary on the other hand. They take the form of a fixed fee and/or a per usage fee.

125. In *Universal/BMG*, the Commission concluded that synchronisation customers usually select a particular song rather than a particular publisher.<sup>54</sup> Given these purchasing patterns, customers usually have sufficient alternatives to license the use of the song they desire. The Commission considered further that the high volatility in market shares at national level results from the revenues achieved with synchronisation rights sold for a few films or advertisement spots. Depending on the deals closed in a specific year, the market shares may therefore change significantly.

126. The market investigation generally confirmed the market characteristics described in the Commission's *Universal/BMG* decision. Customers confirm that the choice of musical works drives the decision which publisher to contact and that they rely on intermediaries in particular with respect to advertising.<sup>55</sup> A large majority of customers confirm that there is price competition between different publishers.<sup>56</sup> The negotiated price depends on a large

---

<sup>51</sup> [...].

<sup>52</sup> [...].

<sup>53</sup> However, the customer would need a licence from the recorded music company holding rights over a recording even if the publishing copyright has expired – unless the customer re-records the musical work.

<sup>54</sup> Commission Decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 107.

<sup>55</sup> Questionnaire 3 to Customers (offline markets), Questions 48 and 44.3.

<sup>56</sup> Questionnaire 3 to Customers (offline markets), Question 44.4.

number of variables including the popularity or type of the musical work, the intended use, the geographic scope and duration.<sup>57</sup>

127. One customer raised the concern that the merger would result in higher fees for synchronisation rights, a more restrictive scope for the use of the song and fewer opportunities to have original musical works commissioned as other repertoires cannot substitute for the musical works that this new entity would control (such as the Beatles songs controlled by Sony/ATV or the Motown catalogue controlled by EMI MP). In addition, the customer points out that due to fractional interests in the publishing rights for songs being relatively common, there is collective ownership/control over many songs leading to higher prices as typically every owner/controller demands to be compensated.
128. The Commission observes that while the market share of [20-30]% does not raise a presumption of significant market power at EEA-level, the combined 2010 market share of the Parties in a few EEA countries are very high, notably in Hungary ([90-100]%). However, the Commission notes, first, that there is a high volatility in the estimated market shares over the past three years.<sup>58</sup> Second, the estimated total market size in Hungary is very small and thus represents a relatively small number of licensing deals.<sup>59</sup>
129. Furthermore, the Commission considers that a number of practices confirmed by the market investigation, and in line with previous Commission findings, indicate that the merged entity will not be in a position to impose higher prices for synchronisation rights in any of the affected geographic markets. Customers usually select a song or certain musical works and not a publisher or a publisher's catalogue. In the event that customers are flexible as to which musical works to license, there will still be a large number of alternatives since all publishers – larger and small ones – have a vast number of different musical works in their catalogues. Even in those EEA countries in which the merged entity will have a *prima facie* high market share, it is not likely that competition concerns would arise since the merged entity's market position will remain contestable as a result of the fact that sufficient alternative musical works will remain.
130. In the event that a customer is wedded to a particular song (such as a Beatles song) or a catalogue of songs (such as the Motown catalogue), even a small publisher would have pricing power over these particular musical works. The merger would not affect this situation (since the size of the catalogue does not matter). As to the concern that fractional interests would lead to higher prices given that two or more music publishers often hold an interest in a given musical work, the Commission notes that this concern is not merger specific and, to the extent that price increases were to be driven by this mechanism, the merger may also result in less songs for which publishing rights are split among music publishers.

#### *Production music*

131. One market participant raised a potential competition issue in relation to so-called "production music" or "library music", i.e. original musical works specifically

---

<sup>57</sup> Questionnaire 3 to Customers (offline markets), Questions 45 and 46.

<sup>58</sup> The notifying parties estimate the combined market share at [50-60]% in 2009 and [60-70]% in 2010.

<sup>59</sup> Revenues are estimated at [...] in 2009 and [...] in 2008. This is less than [...] of the EEA-wide market.

commissioned by publishers for synchronisation purposes and in which the publisher also owns the recording rights. According to this claim, the merged entity would become a strong leader in the supply of production music, which it could use to extract favourable terms from licensees or to foreclose its competitors' access to customers by striking exclusive deals for that type of music.

132. First, the Commission notes that the market investigation was inconclusive as to whether production music should be considered as a separate market from the wider market for synchronisation rights in which other musical works are potential substitutes.<sup>60</sup> Second, even if production music were a separate market, the Parties' market shares in production music would remain under 40% except in Poland ([50-60]%) and Sweden ([40-50]%). The Parties estimate their EEA-wide share at [20-30]%, which is not significantly different from the EEA-wide market share in the market for synchronisation rights ([20-30]%). Third, music publishers generally have appointed collecting societies to grant licences for production music including for individual works under standard rates in some countries such as the UK and Ireland, which implies that the Parties would have little control over licensing conditions in these countries.<sup>61</sup> Moreover, as described in the footnote to paragraph 118 above, certain licensees such as producers of TV programmes obtain blanket licenses to production music via collecting societies in most other European countries, with the exception of Scandinavia and some Eastern European countries (but not Poland). As for the claim that the Parties may be able to strike exclusive deals, this appears unlikely given that Sony/ATV currently has a fragmented licensee pool, which would require it to bind a very large number of different licensees in order to effect a material change on its market position.<sup>62</sup>

#### *Conclusion on non-coordinated effects*

133. For the above reasons, the Commission concludes that the transaction does not raise serious doubts as to its compatibility with the internal market in relation to non-coordinated effects in any of the markets for synchronisation publishing rights (or in respect of production music were that to be considered as a separate market) which are affected at national level.

### **4.3. Coordinated effects**

134. To assess coordinated effects, well-established case law<sup>63</sup> and Commission guidelines on the assessment of horizontal mergers<sup>64</sup> require proof that the merger will make coordination more likely, more effective and more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to

---

<sup>60</sup> In any event, production music represents close to [...] of revenues in the EEA synchronisation market according to figures submitted by the parties.

<sup>61</sup> While music publishers may be able to withdraw these rights and engage in direct licence negotiations, this would necessitate them to also engage in monitoring exploitation and collecting royalties.

<sup>62</sup> [...].

<sup>63</sup> Case T-342/99, *Airtours plc v Commission*, Case T-464/04, *Impala v Commission*.

<sup>64</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, paragraphs 39-57.

monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.

135. In its decision in case *Universal/BMG*, the Commission concluded that coordination among major music publishing companies in the market for synchronisation publishing rights was unlikely, given the lack of transparency, the diversity of deals in terms of price, duration, territory, media, and recognition of work.

136. The Parties submit that coordinated effects do not arise because, first, the market is not transparent as the terms of synchronisation contracts are bilaterally negotiated, not publicly available and diverse in terms of price, duration, territory, media, and renown of the work. Second, demand for particular songs is unpredictable which would make it impossible to reach a tacit understanding to allocate customers. Third, a plausible retaliatory mechanism is lacking. Fourth, the fact that a large number of other publishers are active in the market would undermine any coordination.

137. The market investigation did not support the argument that the prices and deal terms for synchronisation rights, or indeed for production music rights, are sufficiently transparent to allow for coordination.<sup>65</sup> Moreover, the large majority of independent publishing competitors does not consider licensing terms to be transparent,<sup>66</sup> with the possible exception (mentioned by some respondents) for songs that are co-published by two or several publishers as the latter need to license their shares in the song to a customer.

138. The Commission notes that the fact that market shares between 2008 and 2010 fluctuated considerably in a large number of EEA countries<sup>67</sup> appear to confirm the argument that demand for the music to be licensed is unpredictable and would have the effect of rendering coordination attempts inherently more unstable.

#### *Conclusion on coordinated effects*

139. Given the lack of transparency on terms in synchronisation agreements, including for production music, the diversity of parameters determining the licence value, and the unpredictability of demand for synchronisation licences, the Commission concludes that the transaction does not raise serious doubts as to its compatibility with the internal market in relation to coordinated effects in the market for synchronisation publishing rights.

---

<sup>65</sup> Questionnaire 3 to Customers (offline markets), Questions 49, 61, 76.4.3. and 76.4.4.

<sup>66</sup> Questionnaire 1 to Competitors, Question 63 and Question 74 with specific respect to production music.

<sup>67</sup> For instance, Belgium, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Portugal, Spain, and Norway.

## 5. *The markets for the exploitation of online rights*

### 5.1. Introduction

140. Online music markets are important growth markets. According to IFPI, physical recorded music sales have fallen by more than 35% in the past three years.<sup>68</sup> While revenues from physical recorded music have fallen, revenues from online music have steadily grown and now represent a significant proportion of total recorded music revenues. Between 2004 and 2010, worldwide online music revenues (including recorded music rights) rose from USD 400 million to USD 4.6 billion. As a result, online music revenues now account for over 30% of total recorded music revenues.

141. According to the Parties, the continued decline of physical recorded music places strong pressure on publishers to promote and grow demand for authorised online music through the broad licensing of their rights.

#### *Customers for online rights*

142. Music publishing rights are licensed to online music platforms that make music available to consumers through various means. The principal means of online music dissemination are through downloading and streaming. The same copyrights and repertoires are typically licensed for both forms of online music dissemination.

143. Downloading involves the purchase and storage of a digital copy of a musical work on one or more computers or electronic devices. Prototypical examples of download platforms are Apple's iTunes service and Amazon's MP3 service.

144. With a streaming service, the user does not download music files and no permanent copy is stored on the user's computer or electronic device. Instead, the audio file is delivered in small data packets over the Internet and playback commences as soon as the Internet streaming is initiated. Streaming services can comprise a basic, ad-sponsored service that is available free of charge and a premium, paid-for service. Premium services are typically ad-free, offer additional functionality (for instance unlimited plays of songs, a larger music library or support of mobile devices) and may grant users the possibility to download and store tracks in order to listen to them offline during the period of the subscription (so-called "tethered downloads").<sup>69</sup> Important examples of streaming services available in the EEA include Spotify, Simfy, Deezer, We7 and Last FM. Google's YouTube is an important video streaming platform funded by advertising.

145. Streaming technology has also allowed for new platforms and business models to develop over the last few years. Internet service providers and mobile network operators increasingly offer music streaming services, either by developing their own branded services (often bundled with telecom subscriptions) or via partnerships with existing streaming platforms.<sup>70</sup> Some streaming services have also struck partnerships with social

---

<sup>68</sup> IFPI, Recording Industry In Numbers 2011.

<sup>69</sup> After termination of the subscription, the tracks are no longer available.

<sup>70</sup> The Parties note in this context that in Sony/ATV's experience, in either case, the licensing of music publishers' repertoire to the platform is typically the subject of a separate agreement. [...]



networking sites. For example, according to the Parties, a Facebook account is now a prerequisite for signing-up to Spotify's service. Finally, cloud music services that offer users the ability to store their acquired music on remote servers have emerged. An example of this type of service is Apple's iTunes Match, which was launched in the EEA at the end of 2011. iTunes Match scans a user's music library, matches those songs with the iTunes music catalogue hosted on Apple's servers and allows users to download or stream a song from the cloud locker to the device.

146. Downloads currently continue to account for the large majority of online revenues. According to the Parties, approximately [80-90]% of Sony/ATV's total EEA online revenues and around [80-90]% of EMI MP's online revenues are generated from downloads. Streaming services are, however, on the rise and many market participants expect streaming revenues to grow significantly in the future. As the Parties explain, within three years of its launch, the streaming service Spotify has grown into the second largest online music platform behind iTunes. In some EEA countries, in particular in Scandinavia, Spotify is now the leading online music platform.

*Restructuring of the licensing of online rights to Anglo-American repertoire*

147. The licensing of publishing rights for online use has undergone some significant changes. Prior to 2005, only national collecting societies issued licences (and determined the rates at which these rights were licensed) for online mechanical and performance rights. Those licences were limited to the home territory of the collecting society. An online music platform wishing to set up a service across multiple EEA countries therefore had to negotiate with the national collecting societies for each of those countries in addition to negotiating with recorded music companies.

148. Following the Commission's 2005 Recommendation on the cross-border collective management of copyright for online use<sup>71</sup>, which favoured a business model whereby publishers should be free to choose among collecting societies to manage their works on a pan-European basis (so-called Option 3 model), all the major music publishers have reorganised the way in which online licences to their Anglo-American repertoire are granted and administered. This reorganisation has taken the form of music publishers appointing individual collecting societies or collective rights management entities owned by one or several collecting societies to administer centrally the licensing of their Anglo-American repertoire for online dissemination. For both practical and legal reasons, these initiatives have concerned only Anglo-American repertoire.<sup>72</sup>

149. Moreover, given the difficulties in withdrawing the performance rights of Anglo repertoire from the UK collecting society PRS and the Irish collecting society IMRO (see paragraph 80 above), and the fact that the performance rights relating to American repertoire have been administered by European collecting societies on the basis of representation agreements with the US performance collecting societies ASCAP, BMI and SESAC, the publishers' initiatives have to date focused on mechanical rights for Anglo-

---

<sup>71</sup> Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

<sup>72</sup> See paragraphs 77 to 78 above.

American repertoire.<sup>73</sup> In order to include Anglo-American performance rights for online use with the mechanical rights for online use in a "one-stop-shop" pan-European licence, separate arrangements with the collecting societies administering Anglo-American rights have had to be concluded.

150. In the EEA, Sony/ATV has appointed PAECOL, a subsidiary of the German collecting society GEMA, to administer and license its mechanical online rights for Anglo-American repertoire on a pan-European or multi-territory basis or for an individual Member State. EMI MP has appointed CELAS, a joint venture between GEMA and the UK collecting society for performance rights PRS, for the same task.<sup>74</sup> [...] There are arrangements with the relevant performance rights collecting societies that allow these entities to negotiate licences for mechanical and performance rights for the Parties' Anglo-American repertoire.<sup>75</sup>
151. The appointment of PAECOL and CELAS is non-exclusive. As a result, Sony/ATV and EMI MP retain the possibility to entrust other entities with the negotiation of online licences, either on a permanent or ad-hoc basis. Both Parties have given examples of such appointments.<sup>76</sup> PAECOL and CELAS are also free to provide licensing and administration services to other music publishers.
152. In parallel with PAECOL, national collecting societies remain enabled to grant country-specific online licences for Sony/ATV's Anglo-American repertoire, subject to Sony/ATV's approval above defined value thresholds. In parallel with CELAS, EMI MP appoints national collecting societies as sub-agents on a case-by-case basis for granting local online licences.

*Key licensing terms and conditions*

153. Publisher royalties for online downloads are typically expressed as a percentage of the retail price of the download. They may be combined with a minimum per download fee.
154. In the case of streams, royalties are typically calculated as a percentage of the subscription fee that end users pay or of the advertising revenue generated by the service. They are usually weighted by the proportion of usage accounted for by a given music publisher's repertoire. The Parties have provided a mathematical example that illustrates the way that publisher revenues are obtained. For instance, if the monthly subscription fee costs EUR 4.50, the royalty rate charged by the publisher is 10% and the usage accounted for by the publisher's repertoire is 20%, then the revenue that the publisher would obtain would be 20% of 10% of EUR 4.50 per user of the streaming service.<sup>77</sup> Similar to

---

<sup>73</sup> It should be noted, however, that recently, EMI MP withdrew its performance online rights from ASCAP in the US (thus enabling it to license this repertoire directly) [...].

<sup>74</sup> Universal Music Publishing has appointed the French collecting society SACEM and Warner/Chappell has appointed a number of existing collecting societies.

<sup>75</sup> [...].

<sup>76</sup> [...].

<sup>77</sup> Form CO, Chapter 6, section 7.48.

downloads, such a percentage rate can be combined with a minimum per stream or per subscriber royalty.

155. Advance payments, on account payments or other lump sum payments also form part of the key licensing terms and conditions. A large number of online customers make these types of payments to the larger music publishers. These payments can be made in advance of actual payments that are based on the real usage accounted for by a music publisher's repertoire. The risk that revenues are not sufficient to cover all advance or minimum payments typically lies with the customers. These types of payments therefore generally constitute guaranteed revenue payments for music publishers.

156. Other terms and conditions include conditions on the promotional use of each music publisher's repertoire or restrictions on the usage that end user can make of that repertoire (for instance, limitation of number of streams of the same song or the number of songs that can be downloaded/streamed for free).

*The ability of the Parties to control the licensing terms and conditions of their Anglo-American repertoire*

157. The Parties argue that despite this re-organisation of their Anglo-American online rights, the Parties do not have pricing control over these rights. In this context, they make the following claims.

158. First, the [...].

159. Second, the tariffs set by PAECOL and CELAS cover both mechanical and performance rights. This implies that the single tariff applied must also be approved by the relevant performance rights societies (e.g. PRS).

160. Third, the single royalty is allocated between the publisher for the mechanical rights portion and the performance rights society for the performance rights portion.<sup>78</sup> This split varies between downloads and streams with a higher proportion going to the performance rights societies in the case of streams. The collecting societies determine the exact level of the split.

161. Fourth, the royalty rates for download platforms have not evolved differently for Anglo-American repertoire and Continental European repertoire that has remained wholly under the control of the collecting societies [...].

162. Fifth, royalty rates and minimum rates that music publishers grant to online platforms would still be constrained by the regulatory tariffs that collecting societies set for the licensing of publishing rights to online platforms. The Parties highlight that the collective

---

<sup>78</sup> The performance right portion is then allocated by the collecting society between the author and the publisher, after deduction of the collecting societies' administration fee.

rights management entities that they have appointed to license their online rights are affiliated to collecting societies.<sup>79</sup> [...].

163. Sixth, licensees have no reason to pay materially higher rates for Anglo-American repertoire than Continental European repertoire.

164. Even if all the Parties' arguments were to be true, *quod non*, it is ultimately Sony/ATV and EMI MP who have to approve every licence relating to Anglo-American repertoire. The market investigation showed that after the withdrawal of online rights from the traditional collecting society system, music publishers can and do exert control over rates and other commercial terms that are included in licences for those rights. Online customers have listed concrete examples of negotiations, including with the merging Parties, where licensing terms were either set by publishers directly or modified on the initiative of the publishers. The vast majority of customers and collecting societies agreed that the influence of collecting societies on the licensing of Anglo-American rights has diminished after the withdrawal of those rights from collecting societies.

165. The position of the collective rights management entities that have been appointed by the Parties, even if associated with collecting societies, remains markedly different. Given the fact that their appointment is non-exclusive and music publishers can and do appoint other entities to administer and license their online rights, their commercial influence vis-à-vis those publishers is likely to be lower than that of the traditional collecting societies. The market investigation has produced examples of music publishers, including the merging Parties, who have referred online platforms to other rights management entities in case negotiations with the primary entities that Sony/ATV and EMI MP have appointed reached a state of deadlock. The market investigation therefore confirmed that also in this regard music publishers can and do control rates and other licensing terms for their withdrawn Anglo-American repertoire.

166. This is in particular the case with regard to streaming services where the market investigation has provided evidence that licensing terms and conditions differ as between music publishers for Anglo-American rights.

## **5.2. Market shares and control shares**

167. The Parties have provided the following revenue market share estimates for the national markets for the exploitation of online rights:

---

<sup>79</sup> The collective rights management entity for the EMI MP catalogue, CELAS, is a joint venture of GEMA (Germany) and PRS (UK). PAECOL, the collective rights management entity for the Sony/ATV catalogue, is affiliated to GEMA.

**Table 1: Online rights (2010) (revenues)<sup>80</sup>**

	Sony/ATV	EMI MP	Combined	Universal	Warner/ Chappell	Others <sup>81</sup>
<b>Austria</b>	[5-10]%	[5-10]%	<b>[10-20]%</b>	[10-20]%	[10-20]%	[60-70]%
<b>Belgium</b>	[10-20]%	[5-10]%	<b>[10-20]%</b>	[20-30]%	[10-20]%	[40-50]%
<b>Bulgaria</b>	-	-	-	-	-	-
<b>Cyprus</b>	-	-	-	-	-	-
<b>Czech Republic</b>	[10-20]%	[0-5]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[40-50]%
<b>Denmark</b>	[10-20]%	[5-10]%	<b>[10-20]%</b>	[30-40]%	[20-30]%	[20-30]%
<b>Estonia</b>	[10-20]%	[0-5]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[30-40]%
<b>Finland</b>	[5-10]%	[5-10]%	<b>[10-20]%</b>	[30-40]%	[20-30]%	[20-30]%
<b>France</b>	[10-20]%	[5-10]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[30+- 40]%
<b>Germany</b>	[10-20]%	[10-20]%	<b>[20-30]%</b>	[10-20]%	[10-20]%	[40-50]%
<b>Greece</b>	-	[0-5]%	<b>[0-5]%</b>	[20-30]%	[10-20]%	[50-60]%
<b>Hungary</b>	[10-20]%	[0-5]%	<b>[10-20]%</b>	[10-20]%	[10-20]%	[50-60]%
<b>Ireland</b>	[10-20]%	[5-10]%	<b>[10-20]%</b>	[20-30]%	[10-20]%	[40-50]%
<b>Italy</b>	[5-10]%	[5-10]%	<b>[10-20]%</b>	[10-20]%	[10-20]%	[50-60]%
<b>Latvia</b>	[10-20]%	[0-5]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[30-40]%
<b>Lithuania</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[30-40]%	[10-20]%	[40-50]%
<b>Luxembourg</b>	[10-20]%	[5-10]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[30-40]%
<b>Malta</b>	-	-	-	-	-	-
<b>Netherlands</b>	[10-20]%	[10-20]%	<b>[20-30]%</b>	[20-30]%	[10-20]%	[30-40]%
<b>Poland</b>	[20-30]%	[0-5]%	<b>[20-30]%</b>	[10-20]%	[10-20]%	[40-50]%
<b>Portugal</b>	[5-10]%	[0-5]%	<b>[10-20]%</b>	[20-30]%	[10-20]%	[40-50]%
<b>Romania</b>	[10-20]%	[0-5]%	<b>[10-20]%</b>	[10-20]%	[10-20]%	[50-60]%
<b>Slovakia</b>	-	-	-	-	-	-
<b>Slovenia</b>	[10-20]%	-	<b>[10-20]%</b>	[20-30]%	[10-20]%	[40-50]%
<b>Spain</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>	[20-30]%	[20-30]%	[10-20]%
<b>Sweden</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>	[30-40]%	[10-20]%	[5-10]%
<b>UK</b>	[5-10]%	[10-20]%	<b>[10-20]%</b>	[20-30]%	[10-20]%	[40-50]%

<sup>80</sup> The parties are unable to estimate market shares for Bulgaria, Cyprus, Malta, Slovakia, Iceland and Liechtenstein for the following reasons: Sony/ATV and EMI MP have no visibility as to their total revenues generated in Cyprus, Iceland, Liechtenstein and Malta because these countries are covered by collecting societies in other countries. The UK societies PRS and MCPS cover Cyprus and Malta, the Swiss collecting society SUISA covers Liechtenstein and the Swedish collecting society STIM covers Iceland. In Bulgaria and Slovakia, only *de minimis*, [...] revenues have to date been distributed to Sony/ATV from online licensing activities. For example, PAECOL reported revenues of only [...] in Bulgaria in 2010.

<sup>81</sup> According to the parties, the category of "others" comprises companies such as BMG Rights Management, Kobalt and Imagem which have market shares of [0-5]%, [0-5]% and [0-5]%, [...] on the EEA level. In some countries such as the UK, the parties estimate these companies' market share to be even higher ([5-10]% for BMG Rights Management, [5-10]% for Imagem and [0-5]% for Kobalt). These companies have been growing fast and BMG Rights Management has recently announced some further catalogue acquisitions.

<b>Iceland</b>	-	-	-	-	-	-
<b>Norway</b>	[5-10]%	[5-10]%	<b>[10-20]%</b>	[30-40]%	[10-20]%	[30-40]%
<b>Liechtenstein</b>	-	-	-	-	-	-
<b>EU</b>	[5-10]%	[10-20]%	<b>[20-30]%</b>	[20-30]	[10-20]%	[40-50]%
<b>EEA</b>	[5-10]%	[10-20]%	<b>[20-30]%</b>	[20-30]%	[10-20]%	[40-50]%

Source: Sony/ATV's estimates

168. According to these estimates, the merged entity would be comparable in size to Universal. In a large number of countries, Universal's market share would be slightly higher than that of the merged entity. Furthermore, according to the Parties, historic data understate the revenue share of BMG Rights Management because they exclude revenue from Bug Music and Chrysalis, which were acquired by BMG Rights Management only recently.<sup>82</sup> Sony/ATV believes that including these revenues would double BMG Rights Management's estimated share to approximately [5-10] % at EEA level.

169. In order to get a more reliable sense of the future approximate market share of the Parties, the Commission requested the four major music publishers to estimate their EEA-wide revenues for online rights in 2010. The Commission used these data to estimate the relative size of each major music publisher. According to these data, the relative size of each major music publisher would be as follows:

	Sony/ATV	EMI MP	<b>Combined</b>	Universal	Warner/ Chappell
Relative size (EEA-wide revenues for online rights)	[10-20]	[30-40]	<b>[50-60]</b>	[20-30]	[20-30]

170. The Commission then estimated the revenue based market shares of the four major publishers on an EEA-wide level assuming that the four major publishers represent 60% to 70% of the market.<sup>83</sup>

171. On the basis of the overall information received during the market investigation, the Commission considers that on an EEA-wide level the Parties' combined online market share is likely to range between 30% and 35%.<sup>84</sup>

<sup>82</sup> In total, Bug Music and Chrysalis managed more than 320,000 copyrights.

<sup>83</sup> Music & Copyright estimate that the global market share of the independents has been around 30% in 2008, 2009 and 2010. <http://musicandcopyright.wordpress.com/2011/03/23/universal-music-group-reasserts-its-recorded-music-dominance-in-2010/>.

<sup>84</sup> The Commission also attempted to obtain revenue data (distributions to the major publishers and the total distributions to publishers) from collecting societies in order to calculate the Parties' revenue based market shares. However, the Commission found it impossible to reconstruct the markets on this basis due to the incompleteness of the data.

*Inadequacy of revenue based market shares to measure market power – the Universal/BMG precedent*

172. In *Universal/BMG*, the Commission considered that it is the overall size and the characteristics of the repertoire which are of major importance for the bargaining position of the publisher.<sup>85</sup> As such, revenue based market shares alone might not fully reflect the market position of the different publishers since they do not adequately take into account their power on the basis of co-publishing rights and recording rights.
173. As concerns co-publishing rights, it is common for many different publishing companies to own a fraction of a right to a particular musical work. This stems from the fact that a song may have been written by several authors under contract with different music publishers leading to split copyrights (co-publishing). Each co-author/publisher will therefore have only a partial copyright to that particular song and would need to give its consent to the licensing of the song to online music platforms. An online music platform that fails to reach a licensing agreement with a particular publisher does not only lose access to the titles for which the publisher has the full publishing rights but also for those for which only partial rights are owned.
174. In *Universal/BMG*, it was concluded that this implies that music publishers with fractional interests in the same musical work each wield a negative veto power towards that work. In order to capture this specific market situation, a further analysis was undertaken by counting each split right in a musical work as a full right. These so-called control shares were only calculated for Anglo-American titles, which were the titles over which, at the time of *Universal/BMG*, music publishers would gain pricing control (see paragraphs 157 - 166 above). Given the fact that music publishers can co-own rights to the same musical works, control shares can add up to more than 100%.
175. As regards recording rights, in *Universal/BMG*, the Commission also took account of the fact that Universal was an integrated music company that had both music publishing and recorded music businesses. Online customers need to license both recording and publishing rights held in a given repertoire in order to include it in their online offerings. In *Universal/BMG*, the Commission therefore calculated the number of songs over which Universal held either the publishing rights (full or fractional ownership interests) or the recording rights.<sup>86</sup> This effectively covered the repertoire for which Universal had the right to veto the licensing to online music providers, which need both the publishing and the recording rights.
176. As regards the methodology, in *Universal/BMG*, the Commission calculated control shares based on the number of Anglo-American titles in the annual top 100 singles chart hits in which the Parties had ownership rights (either recording or publishing rights).<sup>87</sup> In

---

<sup>85</sup> Commission decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 262.

<sup>86</sup> As record joint ventures (and hence co-ownership of recording rights) is rare, the Commission assumed in *Universal/BMG* that a market share of 10% on a national recording market corresponded to the control of 10 titles out of the universe of chart hits that was considered in that case.

<sup>87</sup> Those titles which were co-published by Universal and BMG were only counted once since the increment brought by BMG did not bring any additional market power in terms of control shares. For the same reason, titles over which Universal already had a recording right and where BMG had a publishing right were only

that decision the Commission explained that although online platforms license the whole repertoire of a given publisher rather than individual titles, and that the larger the size of the repertoire, the more important it becomes for the online platform, chart hits were specifically important to these customers. At that time, the Commission's market investigation showed that on average, approximately 60-80% of online customers' revenues came from chart hits.<sup>88</sup> The Commission acknowledged, however, that control shares based on annual top 100 chart hits can only be a "snapshot" of the position of a music company in the recent past and a further proxy for its market position. As the control shares regularly alter from year to year and depend on the success and the combination of different authors and performing artists, these control shares can only constitute indications for the market power of a music company.<sup>89</sup>

177. In *Universal/BMG*, the Commission concluded that a publisher with a higher control share would be able to extract a higher price for their repertoire. In a cautious approach, the Commission concluded that the merger would have had a significant negative impact in those markets where the merged entity reached or exceeded a control share of 50%.

*The applicability of control shares in this case (fractional rights in publishing)*

178. The Parties contest the use of control shares in this case. They indicate that market developments after *Universal/BMG* suggest that control shares are not a meaningful indicator of market power of music publishers for the reasons set out below.<sup>90</sup>

179. First, the Parties argue that higher control shares do not translate into higher royalties. On the contrary, the Parties provide evidence that Sony/ATV's and EMI MP's download royalties are identical in countries with higher and lower control shares. Even in a country like the UK, where EMI MP's publishing annual top 100 control share in 2010 was [50-60]%, the Anglo-American download royalty rate is [5-10]%, the same as in, for example, Italy, where EMI MP's control share in 2010 was only [20-30]%. Similarly, Sony/ATV's download rate in the UK for Anglo-American repertoire was [5-10]% despite it having an annual top 100 control share of only [30-40]%

180. Second, the Parties claim that co-publishing rights, upon which control shares are built, do not give their owners any market power.

181. In the Parties' view, fractional ownership rights in fact create a situation of "mutually assured destruction". This is because just like one publisher has fractional ownership interests in the songs of other publishers, other publishers will have fractional ownership

---

counted once. Furthermore, those titles which were co-written by an Anglo-American author and a Continental European author were considered as Anglo-American repertoire given that the fractional right deriving from the Anglo-American author's part is sufficient to influence the commercialisation of that title.

<sup>88</sup> *Universal/BMG Music Publishing*, paragraph 270. See also paragraph 273 where the Commission stated that "77% of online and mobile respondents indicated that chart hits are very important, representing 50-90% of their revenues".

<sup>89</sup> Commission decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 287.

<sup>90</sup> The Parties' arguments in respect of the inability of music publishers to control licensing terms are dealt with in paragraphs 157 - 166 above.



interests in the songs of that first publisher. If one publisher refuses to license its fractional rights, this would in effect prevent another publisher from monetizing its fractional rights in the same song (given that the online platform cannot include a song on its service for which it does not have a licence to the full copyright) thus potentially causing the other publisher to retaliate, resulting in a loss of revenues for all.

182. The Parties have provided data according to which around 80% of Sony/ATV's rights in the top 100 titles released in 2010 in the five largest Member States were fractional ownership rights. The Parties conclude that since most publishing rights are fractional, a publisher cannot provide an online music platform with full rights to a substantial repertoire, thus undermining the effectiveness of a hypothetical hold-up strategy.
183. Furthermore, including fractional ownership shares would lead to counter-intuitive results. The control share theory implies that a 5% fractional ownership in 10 songs confers more power than 100% ownership in 9 songs. According to the Parties this makes no sense.
184. Third, according to the Parties, legal provisions exist in some EEA countries that would limit the ability of co-authors to unreasonably refuse to license their fractional interest in a co-owned work.
185. Quite apart from contesting the relevance of control shares as a proxy for measuring market power, the Parties also contest the Commission's previous methodology in calculating these control shares. According to the Parties, an analysis based on the annual top 100 chart hits is inconsistent with market reality.
186. First, licences are negotiated for all repertoires and not separately for chart hits. Even if music publishers could predict which songs will be hits (which they cannot), there is no evidence that publishers could impose higher royalties for chart hits than for other repertoire.
187. Second, the parties explain that data based on a sample of annual top 100 chart hits is too small to be representative. Annual top 100 hits account for only a very small proportion of total sales. The Parties have provided data according to which annual top 100 chart hits represented in only [5-10]% of Sony/ATV's 2010 total publishing revenues and [10-20]% of Sony/ATV's online revenues for the same year. Furthermore, control shares are highly sensitive to small changes in sample size, rendering data based on an unduly small size unreliable. The Parties have provided data according to which the volatility of both Sony/ATV's and EMI MP's control shares reduces as the sample size approaches the full universe of hits (i.e. titles which have entered weekly charts during the course of a given year). Control shares based on a more representative sample give rise to much lower control shares.
188. The Parties therefore submit that if control shares are nevertheless deemed to be probative, which they contest, these shares should be derived using a broader sample that includes weekly charts. Under this methodology, the Parties' combined EEA-wide control share would be around 35%.
189. The market investigation has confirmed that control shares remain a valid proxy for market power. Generally, customers have explained that when faced with a music publisher with a large repertoire, they will negotiate on the basis of the perceived size and

value of that repertoire.<sup>91</sup> Online customers (or indeed any type of customer) face difficulties in identifying the musical works to which a specific publisher holds rights. This is exacerbated by the prevalence of fractional ownership rights. Online customers have explained that due to the legal risks they run when certain musical works are not fully licensed, they need to obtain licences that cover as many ownership interests in musical works as possible.<sup>92</sup> In undertaking these negotiations, customers are aware that if they do not agree to the full terms and conditions requested by the publishers, they face difficulties in offering both the repertoire in which the publisher holds a 100% interest and the repertoire in which it holds co-publishing rights. The market investigation showed that because of the fractional ownership structure of songs, customers generally consider that pure revenue based market shares do not necessarily equate to the effective control a publisher has over a range of songs and that the bargaining power of a publisher is the same if that publisher holds 100% in nine songs or a 25% interest in the same amount of songs.<sup>93</sup>

190. As regards the Parties' argument that were control shares to be a relevant proxy for market power one would have expected to see a difference in licence rates between countries where the Parties hold a higher or a lower control share, most market participants confirm that music publishers with a larger universe of musical works are able to extract more favourable licensing terms, in particular higher minimum payments or advances. The fact that for selected download platforms in the five largest EEA countries, the rates for the Parties' Anglo-American repertoire have not evolved differently from that of Continental European repertoire or that the rates have not evolved differently between countries where the Parties have a higher control share as opposed to a lower one does not demonstrate that the Parties do not derive market power from their control derived from publishing and co-publishing rights.

191. The Commission has indications that the commission fees that collecting societies or collective rights management entities obtain for the administration of Anglo-American repertoire that has been withdrawn from the collecting society system have gone down significantly in the past years. In a situation where music publishers are not able to exercise any market power vis-à-vis online customers, it could be expected that royalty rates for download platforms would have gone down as a result of the cost reductions that music publishers obtained. This has not occurred. One respondent explained that the linkage of download rates for Anglo-American repertoire with the country of destination tariffs (i.e. the tariffs set by collecting societies in the country where the music is being used) has been inserted on the initiative of music publishers in order to avoid download rates going down significantly. Some download platforms indicate that they are confronted with attempts by music publishers to increase significantly the rates for Anglo-American repertoire as opposed to Continental European repertoire. Customers clearly indicate that if licences are obtained via traditional collecting societies, there is no difference in rates between Anglo-American and Continental European repertoire.

---

<sup>91</sup> Questionnaire 4 to Online Customers, Questions 17, 20-24 and 42.

<sup>92</sup> Ibidem.

<sup>93</sup> Questionnaire 4 to Online Customers, Questions 42 and 52.

192. Moreover, the Commission's market investigation revealed that royalty rates for streaming platforms tend to be higher than those applied for download platforms and the tariffs that collecting societies have published for streaming platforms. Royalty rates and minima per streams also vary according to the size of the music publisher concerned. [Comparison of Sony/ATV and EMI MP licensing terms and conditions]
193. In any event, all online customers point to the importance of other terms, most notably the level of minimum or guaranteed payments and the size of advances they make to publishers for use of their repertoire. These terms can vary widely across music publishers, with music publishers with a larger repertoire often extracting more favourable terms than publishers with a smaller repertoire.
194. In conclusion, the Commission is of the view that for the reasons set out above, control shares, which take account of co-publishing rights on an equal base to full publishing rights, remain a valid proxy for assessing the market power of a music publisher.
195. As regards methodology, the market investigation has confirmed the importance of chart hits for the businesses of online customers. If online platforms are unable to offer music which appears in the charts, their business suffers since consumers will move to those platforms which are able to offer the fullest possible repertoire (including both chart hits and back catalogue). That being said, the market investigation also showed that the relevance of the annual top 100 chart hits is not as great as previously. Information obtained from online customers suggests that annual top 100 charts account for anywhere between 10% and 75% of the revenues of these customers, depending on the type of service offered. On an aggregate basis, for the three largest customers representing the majority of revenues for the Parties, the annual top 100 represented between 10-40% of these customers' revenues. On the other hand, all online customers indicated that titles which enter the weekly charts are important. New releases (which can generally be expected to contain those songs that enter the weekly charts) represent between 30% and 80% of revenues depending on the service in question. This indicates, in line with the Parties' claims, that it is more appropriate to take a wider sample of chart hits than the annual top 100 into account when assessing control shares and the market power that publishers derive from holding rights to chart hits.
196. The Commission therefore considers that the hits that have entered the weekly charts in a given year constitute an appropriate measure to estimate this control. A wider sample of titles is also more in line with the Commission's assessment that it is the perceived size and value of the overall repertoire held by each music publisher which translates into market power. The number of titles entering the weekly charts is more representative of the overall size and value of that repertoire as compared to annual top 100 chart hits. In the present decision, the Commission has therefore analysed control shares on the basis of the number of songs controlled by either party that have entered the weekly charts in a given year.
197. On this basis, the Parties' combined control shares over Anglo-American repertoire in 2011 would be as follows:

## Control shares based on aggregated weekly charts (2011)<sup>94</sup>

	Sony/ATV	EMI MP	Combined
<b>Austria</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Belgium</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Bulgaria</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Cyprus</b>	-	-	-
<b>Czech Republic</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Denmark</b>	[10-20]%	[20-30]%	<b>[20-30]%</b>
<b>Estonia</b>	-	-	-
<b>Finland</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>France</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Germany</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Greece</b>	-	-	-
<b>Hungary</b>	[10-20]%	[30-40]%	<b>[40-50]%</b>
<b>Ireland</b>	[30-40]%	[30-40]%	<b>[60-70]%</b>
<b>Italy</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Latvia</b>	-	-	-
<b>Lithuania</b>	-	-	-
<b>Luxembourg</b>	-	-	-
<b>Malta</b>	-	-	-
<b>Netherlands</b>	[10-20]%	[10-20]%	<b>[20-30]%</b>
<b>Poland</b>	[20-30]%	[20-30]%	<b>[40-50]%</b>
<b>Portugal</b>	[10-20]%	[20-30]%	<b>[40-50]%</b>
<b>Romania</b>	-	-	-
<b>Slovakia</b>	[20-30]%	[20-30]%	<b>[40-50]%</b>
<b>Slovenia</b>	-	-	-
<b>Spain</b>	[10-20]%	[10-20]%	<b>[20-30]%</b>
<b>Sweden</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>UK</b>	[20-30]%	[30-40]%	<b>[50-60]%</b>
<b>Iceland</b>	-	-	-
<b>Norway</b>	[20-30]%	[20-30]%	<b>[40-50]%</b>
<b>Liechtenstein</b>	-	-	-
<b>EEA (weighted average excluding Bulgaria, Czech Republic, Hungary, Poland and Slovakia )</b>	[10-20]%	[20-30]%	<b>[30-40]%</b>
<b>Weighted average for Bulgaria,</b>	[20-30]%	[20-30]%	<b>[40-50]%</b>

<sup>94</sup> The control shares for Bulgaria, Czech Republic, Hungary, Poland and Slovakia are based on radio airplay charts and limited to top 100 radio charts. For the countries where no control shares are mentioned, the parties have been unable to provide control shares due to the lack of data.

Czech Republic, Hungary, Poland and Slovakia			
--	--	--	--

Source: Aggregated Weekly Chart data and Sony/ATV<sup>95</sup> and EMI MP data

198. The only countries in which the Parties' control share would exceed 50% would be the UK and Ireland.

*The use of control shares in this case (recording and publishing)*

199. The Parties argue that even if the Commission was right in *Universal/BMG* to take account of the control shares deriving from a combination of music publishing and recorded music rights, it is not correct to do so in the context of the present case for the following reasons.

200. First, Sony/ATV's negotiations with online licensees remain entirely separate from Sony Music's negotiations for recorded music rights. This is evidenced *inter alia* by the fact that there is great divergence in the signing and expiry dates of the publishing and recorded music licences of the top EEA-wide online music platform customers of, respectively, Sony/ATV and Sony Music as well as respectively of EMI MP and EMI Recorded Music. Furthermore, the actual licences show that they are in no way conditioned on and remain independent of recorded music licences.

201. Second, an extensive review of Sony/ATV's internal documents made at the Commission's request disclosed no evidence that Sony/ATV leverages Sony Music rights (or vice-versa) in online licence negotiations. The Parties claim that neither Sony/ATV nor EMI MP nor their appointed collecting societies have ever invoked recorded music rights in negotiations with prospective licensees and there is no reason to believe that post-transaction Sony/ATV would (or could) do so. The administration regime of the publishing and recorded music rights is different, there is strong historic rivalry between the publishing and the recorded music businesses, including between publishers and labels of the same group and the fragmentation of rights means that even by combining its music publishing and recorded music rights a music company could not offer online customers a one-stop-shop to all rights to a well-defined catalogue of music tracks. This is exacerbated by the fact that singer-songwriters will frequently sign with record labels and music publishers from different groups.<sup>95</sup>

202. Third, Sony Music and Sony/ATV are operated separately and are subject to a strict organizational segregation. They do not share staff [...]

203. Fourth, any future coordinated negotiation would need to take place among three entities (Sony/ATV, EMI MP and Sony Music), each of which has different shareholders and commercial interests. Sony Music is 100% owned and controlled by Sony Corporation. Sony/ATV is a 50/50 joint venture between Sony Corporation and the Michael Jackson Estate. Sony/ATV must therefore take into account the interests of its co-

---

<sup>95</sup> In this context, Sony/ATV estimates that only around [20-30]% of 2011 chart hits in which Sony/ATV held a music publishing right were recorded by Sony Music artists.

owners and not only that of Sony Corporation.<sup>96</sup> Finally, EMI MP would be jointly controlled by Sony Corporation and Mubadala with the Michael Jackson Estate also holding an equity interest.

204. Fifth, Sony Music's and Sony/ATV's commercial interests are not necessarily aligned. Sony Music and Sony/ATV each seek to secure the largest share of online music royalties, often at the expense of the other company. In a joint negotiation scenario Sony Music would have the incentive to increase the royalties allocated to recorded music whereas the incentives for Sony/ATV would be reversed. The Parties claim that any increase in recorded music royalties would likely trigger a reduction in the music publishing royalties and vice versa. Accordingly, this tension frustrates coordination between Sony Music and Sony/ATV. The Parties submit that post-transaction, if anything, the divergence between Sony Music's and Sony/ATV's interests would increase since Sony/ATV would now also have to take into account the interests of Mubadala and the other investors in respect of the EMI MP repertoire.
205. In *Universal/BMG*<sup>97</sup> and *Sony/BMG I*,<sup>98</sup> when calculating control shares for the merging parties and their competitors, the Commission did not take account of control shares derived from Sony Music's recording business when estimating the market position of Sony/ATV in music publishing, and vice versa. This conclusion was reached in light of the corporate structure of Sony's recording and music publishing businesses. The Commission assessed whether it would be appropriate to follow this precedent in the present case.
206. The vast majority of online customers have confirmed that music publishing and recorded music online licence negotiations tend to be separate in general. Although a few examples of a type of behaviour by some music companies which suggests some sort of leveraging between the two businesses has come to light, none of these instances have involved Sony Music and Sony/ATV. Furthermore, generally it can be said that online customers tend to first agree a licence with the recorded music companies following which they negotiate the music publishing licences. This suggests that, at least in the past, leveraging between the two businesses in the market place is not common and the rights of the two businesses tend to be licensed separately. That being said, a prospective analysis must be carried out.
207. The Commission therefore assessed the ability and incentive of both Sony/ATV and Sony Music to engage in a "joint negotiations" strategy stemming from the acquisition of EMI MP's publishing rights portfolio whereby publishing and recording rights are jointly negotiated in order to extract better terms and conditions either on the recording or on the publishing side. Any ability and incentive would rely on the increased bargaining power that a larger portfolio including publishing and recording rights would give to an integrated company vis-à-vis its customers. This theory of harm would be relevant only

---

<sup>96</sup> The parties refer here to case law of the EU courts which recognises that joint ventures act autonomously from their parents and that there can be no presumption of a parent company exercising decisive control over the conduct of a joint venture.

<sup>97</sup> Commission Decision of 22 May 2007 in Case COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 301, footnote 1 and recital 303.

<sup>98</sup> Commission Decision of 19 July 2004 in Case COMP/M.3333, *Sony/BMG*, paragraph 177 and further.

when publishing rights and recording rights of the merging parties do not overlap on the same songs (and therefore increase the number of songs over which there is control (either in the form of recording or in the form of publishing rights), and where the company is fully integrated. In this regard, it should be noted that the Commission has paid particular attention to the specific corporate structure of Sony/ATV and EMI MP post-transaction and the Commission's conclusions are specific to this case. In short, the ability and incentives of a company which is under common ownership to leverage its market power across the two businesses may be different to that of Sony/ATV and Sony Music.

208. As regards the ability and incentive of Sony/ATV to jointly negotiate publishing and recording rights and holding up publishing rights in order to try and increase the recorded music royalty rates, the Commission is of the view that Sony/ATV would not have the ability to do so given the ownership structure of Sony/ATV and EMI MP. Since Sony/ATV must act in the best interest of its shareholders, Sony/ATV would not be in a position to act in a manner which would benefit a company in which some of its shareholders have no interest without gaining a corresponding benefit for Sony/ATV and EMI MP. Any such course of action would be a breach of its fiduciary duties to the shareholders of Sony/ATV and EMI MP.

209. Sony Corporation, on the other hand, would have the ability to cause Sony Music to jointly negotiate publishing and recording rights and to hold-up its recorded music rights in order to try and seek a better price for Sony/ATV and EMI MP. This course of action would not result in Sony/ATV breaching its fiduciary duties towards the various shareholders of Sony/ATV and EMI MP since any benefit of such hold-up strategy would flow to the music publishing side of the business. Sony Corporation would theoretically still have an incentive to cause Sony Music to engage in this type of behaviour since even 50% or 28% of any increase would be an additional income. However, this would require Sony Corporation to cause Sony Music to behave in this manner since Sony Music [...] would not directly benefit from such behaviour. The incentive of Sony Corporation to cause Sony Music and Sony/ATV to coordinate in such strategy are mitigated by the fact that the proportionate income from recorded music rights for any given musical work is higher than the income for music publishing rights.<sup>99</sup> Therefore, the expected gains of such strategy on the publishing market are expected to be quite small which in itself can decrease the incentive of Sony Corporation in architecting and undertaking such behaviour.

210. Overall therefore, taking account of all the facts at hand, the Commission considers that the specific corporate structure of Sony Music, Sony/ATV and EMI MP, limits the ability and incentives of the Parties to undertake negotiations conditional on publishing and recording rights. This is in particular the case since the only plausible way to benefit from market power across the two businesses would be to hold-up both sets of rights for the benefit of Sony/ATV and EMI MP (which in itself is already difficult given that licences for recorded music and music publishing are currently negotiated at different times) and that those benefits would be limited for Sony Corporation given the size of online publishing revenues and the fact that Sony Corporation would only receive a small

---

<sup>99</sup> The Parties have provided the following scenario as an example of the division of retail price revenues: if the retail price of a download is EUR 0.99, the royalties for recorded music rights will be EUR [0.70-0.75] and the royalties for music publishing rights will be EUR [0.05-0.10]. The music publishing royalty will be further split between mechanical rights (EUR [0.050-0.055]) and performance rights (EUR [0.015-0.020]).

proportion of any increase. In short, the efforts needed to engage in such a strategy would yield limited rewards.

211. In conclusion therefore, the Commission is of the view that it is unlikely that the Parties, given the specific corporate structure and the current distribution of revenues between the recording and the publishing markets, would have the ability and incentive to engage in joint negotiations strategies to the detriment of competition. For the purposes of this case therefore, in line with its approach adopted in relation to Sony in *Universal/BMG* and *Sony/BMG I* cases, the Commission has not taken account of any control shares derived from Sony Music's recorded music rights when estimating the market position of the Parties on the markets for the exploitation of online rights.

### **5.3. Non-coordinated effects**

#### *The Parties' arguments*

212. The Parties claim that even on the basis of a competitive analysis that takes account of both market shares and control shares calculated in accordance with section 5.2, the proposed concentration would not give rise to serious doubts in relation to any market for the exploitation of online rights.

213. The Parties submit that once a music publishing repertoire has exceeded a critical mass in terms of control shares, there would be no reason for assuming that further gains in control shares would result in a material increase in market power. They refer to an example in which the minimum viable scale of an online platform is 80% of chart hits. In that example, any repertoire with a control share of more than 20% would be in a blocking position and market power would not be materially different, irrespective of its control share being 21% or 60%. The publisher with 21% would have the exact same blocking power as the publisher with the 60%. The Parties underline that Sony/ATV on a standalone basis has a somewhat smaller control share than EMI MP ([10-20]% as compared to [20-30]% on an EEA-wide basis). There would accordingly be no reason to conclude that the proposed concentration would alter anything in the market position that Sony/ATV and EMI MP have pre-merger.

214. The Parties argue that in any event, the proposed concentration would not give rise to serious doubts as the merged entity would be precluded from raising rates or otherwise worsening licensing terms due to a number of important competitive constraints it would continue to face post-merger.

215. First, the Parties argue that given the impact of piracy, music publishers always have the incentive to licence as many digital platforms as possible and in the easiest and most flexible manner. In their view, music publishers would have this incentive as the more readily authorised music is made available through online platforms, the less likely consumers are to turn to non-authorised, pirated materials. The Parties highlight the impact that the launch of music streaming services such as Spotify has had in attracting consumers to legal music and reducing piracy levels. [...]

216. Second, royalty rates and minimum rates that music publishers grant to online platforms would remain constrained by the regulatory tariffs that collecting societies set for the licensing of publishing rights to online platforms.



217. Third, the Parties underline the close links that exist between obtaining revenues for the licensing of music publishing rights and their ability to retain author talent or attract new author talent. They claim that the ability to retain existing authors and compete for new author talent in the upstream market for publishing services to authors would depend on the publisher's ability to deliver rapid pay-out of royalties and license repertoire on the downstream markets for the exploitation of music publishing rights, including online rights. In this line of argument, any failure to license online platforms would adversely impact the merged entity's ability to attract talented authors. The Parties highlight that royalty rates represent 10-12% of the overall retail price for music. Hence, the modest gains that they would obtain from increasing these rates would need to be compared against the alleged bigger revenue losses they would suffer were they to fail to attract or retain author talent. According to the Parties, this would preclude the merged entity from embarking on "hold up" strategies by which it imposes higher rates or other unfavourable terms and conditions by threatening not to license music publishing rights to online platforms.
218. Fourth, the Parties argue that online platforms are powerful customers that could countenance any post-merger worsening of licensing terms by the merged entity. They refer to the fact that large online platforms such as Apple's iTunes and Amazon's MP3 services account for a larger share of their online revenues than they did in 2007, when the Commission adopted its decision in *Universal/BMG*. In their view, this means that the customer base on markets for the licensing of online rights has become more concentrated as compared to five years ago. The Parties claim that in addition to this, music has increasingly become an ancillary business for online platforms that also offer other services, such as consumer devices (Apple), e-tailer services (Amazon), telephones (Nokia) and telephone subscription services (T-Mobile and other telecom providers). This would have increased the bargaining power that these customers exert vis-à-vis music publishers.
219. Finally, the Parties refer to the competitive constraints that the merged entity would face from its music publishing competitors. This would include the other majors Universal and Warner/Chappell. The Parties point out that these competitors have adopted similar arrangements for the licensing of their Anglo-American repertoire and therefore wield the same control over online rights as the Parties. Universal has appointed the French collecting society SACEM for the licensing of its Anglo-American repertoire. Warner/Chappell has appointed a range of collecting societies that can license its online rights on a case-by-case basis. The Parties also refer to competitors such as BMG Rights Management, which launched in 2009 and has grown significantly over the past years by acquiring music publishers such as Bug Music and Chrysalis. The Parties finally also mention independent music publishers such as Imagem, Kobalt and Peermusic as significant competitors. According to the Parties, smaller independent music publishers have adopted collective solutions for the licensing of their online rights. A prominent example is IMPEL, which was formed by the UK collecting society PRS as a vehicle for the online licensing of mechanical rights and associated performance rights of independent music publishers. A number of small independent publishers are direct members of IMPEL. Imagem and Peermusic are aligned with IMPEL but have retained the ability to assign some rights separately from IMPEL if they so wish.

*The results of the market investigation*

220. Customers explain that they typically conclude general licence agreements with collecting societies for Continental European repertoire and with music publishers or the collective rights management entities acting as the publishers' agents for Anglo-American repertoire.<sup>100</sup> These agreements usually cover the entire repertoire owned or administered by the respective right owner or administered by the collecting society, the respective publisher or the respective collective rights management entity acting as agent.<sup>101</sup> The tendency for online platforms to conclude such agreements can be explained by the fact that their offer is permanently changing, so that they need to be able to put new songs immediately onto their platforms.<sup>102</sup> Under these circumstances, it would be extremely difficult and time-consuming to open negotiations for each song separately. The rights licence agreement (or framework agreement) determines the licensing terms and conditions, including the applicable tariff or tariff formula.<sup>103</sup>
221. The market investigation confirms that in the negotiation of these licences, the size and characteristics of the repertoire are of major importance for the bargaining position of the music publisher vis-à-vis the online customers.
222. Online customers explain that given that they are unaware as to the exact rights contained in each catalogue<sup>104</sup>, risk assessment plays an important role in their decision to obtain licences for songs.<sup>105</sup> If an online platform offers music without having all necessary rights for a song it runs the risk of litigation and damage claims by the right owners. This covers both full publishing rights and co-publishing rights.<sup>106</sup> In the absence of even a small fractional co-publishing right to a song, an online platform cannot offer the relevant song and that song would then not be available on that platform. Overall therefore, the larger the repertoire of the music publishers, the higher the risk that it contains a large number of fractional copyrights to a large number of songs.
223. The market investigation confirms that in their dealings with online platforms, large music publishers are able to impose higher royalty rates and minima and other licensing terms that are favourable to the music publishers, but unfavourable to their customers.
224. A number of download platforms indicate that they are confronted with attempts by music publishers to significantly increase the rates for Anglo-American repertoire as opposed to Continental European repertoire.<sup>107</sup> The platforms that reported such rate

---

<sup>100</sup> Questionnaire 4 to Online Customers, Question 30.

<sup>101</sup> Ibidem.

<sup>102</sup> Commission decision of 22 May 2007 in Case No COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 257.

<sup>103</sup> Questionnaire 4 to Online Customers, Question 30.

<sup>104</sup> Given that a large part of music publishing rights are co-publishing rights (i.e. rights arising from co-authored songs) and the lack of any comprehensive database which would clearly indicate who owns what rights to what song, customers are, in a certain sense, licensing "blind".

<sup>105</sup> Questionnaire 4 to Online Customers, Questions 17, 20-24 and 42.

<sup>106</sup> Questionnaire 4 to Online Customers, Questions 17, 20-24 and 42.

<sup>107</sup> Questionnaire 4 to Online Customers, Questions 17, 43-45.

differences referred to the stronger bargaining power of the major music publishers that have high market and control shares, as their catalogues are of greater importance to these customers.<sup>108</sup>

225. [Comparison of Sony/ATV and EMI MP licensing terms and conditions]

226. Online customers, in particular streaming platforms, also highlight the importance of advance payments, on account payments or other lump sum payments that they make to music publishers.<sup>109</sup> The evidence that they have provided show that these payments can vary widely across music publishers, with music publishers with a larger repertoire often extracting higher payments than publishers with a smaller repertoire.<sup>110</sup> [Comparison of Sony/ATV and EMI MP licensing terms and conditions] Online platforms explain the significant impact that the level of these payments can have on their business model and the expansion of that business model to other territories. These types of payments are usually non-refundable and in that sense constitute guaranteed revenue for the music publisher that is extracting them and eventually shifts the business risk from the publishing companies to the downstream streaming platforms. In that sense, advanced payments with the above characteristics, in particular the non-refundable nature, can be interpreted as an exercise of publishing companies' market power. Important streaming platforms explain that the high level of advance payments that they need to make to large music publishers affect their commercial ability to expand their operations across the EEA. They explain that this significantly hampers their ability to rapidly expand their operations from one EEA country to another.

227. Virtually all customers, download and streaming platforms, expect that due to the increased size and value of the Parties' repertoire after the merger, they would be able to extract higher rates, minima and other type of payments.<sup>111</sup> Streaming platforms in particular highlight the difficulties they would face in expanding their operations across the EEA if they have to make higher lump sum payments to the merged entity.<sup>112</sup> None of the customers (download and streaming platforms) believe that they are able to countenance any rate increase or worsening of other licensing terms by the merged entity.<sup>113</sup>

228. Although they do not have full knowledge of the licensing terms that the merging Parties offer to online platforms, competitors generally expect that that larger music publishers, such as EMI MP, are already able to extract better licensing terms and conditions.<sup>114</sup> They confirm that these terms and conditions apply across the entire repertoire of music publishers, including the fractional interests they hold in songs that are co-owned with other publishers. Competitors expect that with the combined repertoire of

---

<sup>108</sup> Questionnaire 4 to Online Customers, Questions 20-24 and 49-51.

<sup>109</sup> Questionnaire 4 to Online Customers, Questions 17 and 20-24.

<sup>110</sup> Questionnaire 4 to Online Customers, Questions 17 and 29-30.

<sup>111</sup> Questionnaire 4 to Online Customers, Questions 17, 53 and 55.

<sup>112</sup> Ibidem.

<sup>113</sup> Questionnaire 4 to Online Customers, Questions 49-51 and 58.

<sup>114</sup> Questionnaire 1 to Competitors, Questions 102, 106-108.

Sony/ATV, the merged entity be able to charge higher royalty rates, higher minimum rates, higher advances and/or higher minimum guarantee payments.<sup>115</sup> Important competitors also state that the merged entity would be able to exert more influence on the business models of online platforms, effectively pre-setting the licensing and usage terms for the smaller competitors.<sup>116</sup> Competitors point out, in particular, that with the merged entity extracting such favourable licensing terms, it would become more difficult for smaller competitors to obtain terms and conditions that would allow them to compete effectively with the Parties.<sup>117</sup> Deteriorated competitive conditions for rival publishers in terms of online licensing could weaken their ability to attract new songwriters upstream, which would in turn further strengthen that entity's position on the downstream market for online rights. Competitors argue that this dampened competition would ultimately result in higher prices for consumers and in less consumer choice.<sup>118</sup>

### *The Commission's assessment*

#### -Framework of analysis

229. 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.<sup>119</sup> The competitive conditions existing at the time of the merger usually constitute the relevant comparison for evaluating the effects of a merger.<sup>120</sup>

230. The Commission's competitive assessment in this case is limited to the likely competitive effects that the proposed combination of Sony/ATV and EMI MP's music publishing repertoires would bring about. In particular, the Commission has to assess the likely effects that would arise from the addition of Sony/ATV's music publishing repertoire to the larger music publishing repertoire of EMI MP.

#### -Market shares and control shares

231. The Parties estimate that post-merger, the market share of the merged entity would not exceed 40% in any EEA country. The parties estimate their combined market share in the UK to be around 20%. Data from other sources indicate that their revenue-based market share in the UK is likely to range between 30% and 36%.<sup>121</sup>

232. The Commission however also assesses the competitive effects of the proposed concentration on the basis of control shares. In *Universal/BMG*, the Commission raised serious doubts on markets for online rights where the control share of the combined

---

<sup>115</sup> Questionnaire 1 to Competitors, Questions 120-121 and 125.

<sup>116</sup> Ibidem.

<sup>117</sup> Ibidem.

<sup>118</sup> Ibidem.

<sup>119</sup> Horizontal Merger Guidelines, paragraph 9.

<sup>120</sup> Ibidem.

<sup>121</sup> Following the methodology set out in paragraph 170 above.

Universal and BMG exceeded 50%. The control share of the merged entity would reach this threshold in two Member States, namely the United Kingdom and Ireland. In the United Kingdom, the merged entity would control over 51% of the weekly aggregated chart hits. In Ireland, the merged entity would control around 60% of the weekly aggregated chart hits. The merged entity would therefore reach a particularly strong market position in terms of control shares in these two countries.

233. As concerns a possible EEA-wide market for the exploitation of online rights, the Parties estimate that post-merger, the merged entity' share in EEA-wide revenues for the licensing of online rights would be around 20% (see Table at paragraph 167 above). However, as explained in paragraphs 169 to 170 above, data from other sources indicate that this share is likely to range between 30% and 35%.

234. As regards control shares, at an EEA-wide level, the merged entity would control around 36% - 42% of the songs that enter the weekly aggregated charts (see Table at paragraph 197).

#### -Likely effects on competition

235. The United Kingdom and Ireland represent important markets for online rights in the EEA. Based on the Parties' own estimates, these two markets account for nearly [...] of Sony/ATV's and over [...] of EMI MP's total EEA-wide online revenues over the past three years. This fact can be taken as an approximation for the importance of these markets for the service offerings for online platforms, including those that are active across the EEA and obtain EEA-wide licences. It also indicates the importance of these markets for competitors to the merging Parties. It is in those two markets where the merged entity's control shares would exceed 50% if the proposed concentration were to go ahead.

236. As explained in paragraphs 221 to 228 above, the market investigation confirms that the perceived size and value of a music publisher's repertoire has a material impact on the licensing terms and conditions that online customers obtain. These terms include royalty rates, minimum revenue amounts per download/stream and the level of advances, on-account payments and other lump sum payments made by online customers.

237. Contrary to the Parties' claims that there is no material difference between their pre-merger positions on the basis of control shares, the market investigation confirms that the market position of EMI MP is already markedly different from that of Sony/ATV. In the UK, the repertoire of EMI MP is approximately twice the size of that of Sony/ATV and EMI MP's control shares are also higher ([30-40]% as compared to [20-30]%). In Ireland, EMI MP's control share is [30-40]% as compared to Sony/ATV's [30-40]% control share. [Comparison of Sony/ATV and EMI MP licensing terms and conditions] One effect of the proposed concentration could very well be that the merged entity would start applying [...] better licensing terms [...]. Customers and competitors<sup>122</sup> expect that after the merger, the Parties would be able to extract higher rates and other favourable licensing terms and conditions than they are currently extracting independently. This is also in line with the economic theory that predicts that, when publishing companies and online

---

<sup>122</sup> Questionnaire 4 to Online Customers, Questions 53, 54, 58 and 59. Questionnaire 1 to Competitors, Questions 120 and 125.

customers are bargaining, the larger the repertoire held by a music publisher, the larger is the threat imposed by the music publisher on the music portfolio of an online customer and consequently the larger is its bargaining power. Eventually this will lead to better licensing terms and conditions for the larger publishing company. The Commission therefore finds that in light of its post-merger control shares in the UK and Ireland, the merged entity would be able to impose more onerous licencing terms on online platforms including in the form of higher royalty rates, higher minima per download/streams and higher advances or other lump sum payments than Sony/ATV and EMI MP are extracting independently. Where in the remainder of this section, the Commission refers to the ability and the incentive of the merged entity to exert market power, this notion is intended to capture all of these likely effects.

238. The Commission does not consider it credible that the Parties' post-merger ability to exert market power in relation to the UK and Ireland would be sufficiently constrained by the existence of online piracy. As a preliminary observation, the Commission notes that the Parties also recognise that initiatives have been launched to curb online piracy across the EEA, including in the UK and Ireland. This includes the passing of anti-piracy legislation in some EEA countries, including the UK where anti-piracy legislation is intended to be implemented within the next year. It also includes the introduction of DRM-free music through download platforms, which covers the entirety of the EEA and hence also covers the UK and Ireland. In any event, in order to accept the argument that online piracy precludes the merged entity from exerting power in relation to these two countries, it would first have to be assumed that all online platforms pass increases in royalty rates, minima and/or advances on to their users in the form of higher prices for music downloads or higher subscription fees. Second, it would have to be assumed that even a small increase in the retail price for music would result in such a fall-out of consumer demand that the merged entity would by necessity avoid harming online platforms by applying higher rates or payments or other more onerous licensing terms.
239. The evidence listed in paragraphs 221 to 227 on the licensing terms that music publishers currently obtain does not support these assumptions. This evidence shows that royalty rates and other licensing terms vary between the different music publishers, with large publishers often extracting higher rates and better licensing terms than their smaller competitors. This indicates that the impact of piracy on consumer demand for online music is not such that it countenances the leverage that large music publishers have to extract such favourable licensing terms. As royalties for publishing rights represent a small portion of the retail price (approximately [10-20]%), the Commission considers that a rate increase would be unlikely to result in a material fall-out of consumer demand so as to avoid a situation where the merged entity would cause harm to online platforms in the form of higher rates or advances or other more onerous licensing terms. .
240. If a direct increase of a price for a download or of a subscription fee due to the more onerous licensing terms being imposed is not possible, the market investigation has confirmed that other potential reactions of online platforms, that are equivalent to an average increase of the price or subscription fee for their music offer, would be to alter their pricing structure in order to better monetise the repertoire of the music publishers over which those platforms face such onerous licensing terms. The market investigation has revealed that online platforms may have to add paid tiers to services that were intended to be free, ad-based services in order to compensate for the higher rates or

advances that publishers are requesting.<sup>123</sup> It also revealed that customers may have to agree to usage restrictions for the users of these platforms, for instance in the form of the limitation in the number of streams that are freely available.<sup>124</sup> Such responses by online platforms to increases in royalty rates, minima or advances or other more onerous licensing terms are unlikely to have a material impact on end consumer demand so as to take away the scope for the merged entity to harm online platforms by imposing such terms. It would however have a detrimental effect on end consumers as it reduces their choice in terms of having access to a wide range of innovative, comprehensive and cheap online music services. The impact on end consumers would need to be assessed against a prospective dimension. 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. According to Article 167 (4) of the TFEU, the Union shall take cultural diversity aspects into account in its actions under the other provisions of the Treaties, including the EU competition rules.

241. Even if one were to assume that there is perfect substitution between legal music content and illegal music content and that accordingly even a small price increase for legal music would result in a material migration of consumers to illegal content, a decision by the merged entity to increase royalty rates or advances or impose other onerous licensing terms would still likely result in anticompetitive effects. If a small price increase for their music offering would result in a fall-out of consumer demand for legal music, online platforms are likely not to choose to pass the increased cost of such terms on to the users of their online services, or to alter their business models to better monetise their music content. They would then absorb the higher rates, advances and other onerous licensing terms that the merged entity would extract as an increased cost. This would likely produce anticompetitive effects of another nature.
242. If online platforms were to take the increased cost for licensing of online rights in relation to the UK and Ireland without passing on price increases or altering their business models, their profitability would be reduced. This would be likely to hamper their ability to expand their operations in relation to these two EEA countries.
243. Finally, if online customers were to take the increased cost for licensing of online rights without passing on price increases or altering their business models, they could also seek to reduce the cost of their licences from competing music publishers. For instance, any higher rate or advance extracted by the music publisher with the larger repertoire is likely to negatively impact the level of advances that its smaller competitors can extract from those same platforms. As stated above, the UK and Ireland represent very important markets for online rights, also for the competitors of the merging Parties. The likely effect of this is that it would become more difficult for its smaller competitors to effectively compete with it in these key markets in the EEA. If the proposed concentration were to significantly handicap or marginalise the merged entity's competitors, this would ultimately result in a restriction of music choice for end consumers and of cultural diversity. As stated in paragraph 240 above, according to Article 167 (4) of the TFEU, the

---

<sup>123</sup> Questionnaire 4 to Online Customers, Questions 25-29.

<sup>124</sup> Questionnaire 4 to Online Customers, Questions 25-29.

Union shall take cultural diversity aspects into account in its actions under the other provisions of the Treaties, including the EU competition rules.

244. The Commission notes that competition concerns in relation to the possible national markets for the exploitation of online rights in the UK and Ireland would be projected at the EEA-wide level. Due to their sheer importance in terms of markets size, which would account for over 50% of online revenues of the merged entity, any impact on rates and advances for the UK and Ireland is by necessity likely to have a significant detrimental impact on the overall payments that online platforms make under EEA-wide licenses. Moreover, any increase in rates or advances or any other more onerous licensing terms in relation to these two EEA countries is likely to have a detrimental impact on their ability to expand their operations from the UK and Ireland to other EEA countries, or to expand their operations from other EEA countries into the UK and Ireland. This would in turn reduce the choice of consumers for innovative and comprehensive music services across the EEA.

-No impact from regulated collecting society tariffs

245. As set out in paragraphs 223 to 226, the Commission found no evidence that the regulated licensing tariffs of collecting societies currently constrain the ability of music publishers that license online rights for Anglo American repertoire outside of that system to request higher rates and advances or other onerous terms from online platforms.

246. The Commission considers that this would also apply if the proposed concentration were to go ahead.

-Competitors unlikely to constrain the merged entity

247. The Commission considers it equally unlikely that the remaining competitors of the merged entity would be able to constrain its market conduct.

248. None of the customers have expressed an expectation that Universal or Warner would constrain the conduct of the merged entity.<sup>125</sup> Competitor responses also point in that direction.<sup>126</sup> The vast majority of the remaining competitors have yet to gain a material scale on the markets for the exploitation of music publishing rights, including the markets for the licensing of online rights in the UK and Ireland. According to the Parties' estimates, none of the market shares of these entrants in these two countries exceed 5%. On an EEA-wide level, the share of each of these entrants in overall revenues for music publishing right is still [0-5]%. According to the same estimates, BMG Rights Management has gained a [0-5]% share of overall EEA-wide revenues for music publishing rights, although these figures do not yet take account of this competitor's acquisition of Bug Music and Chrysalis. Despite its growth in the past five years, the Parties estimate Kobalt to still have a [0-5]% share of the same revenues. The Commission therefore finds that these competitors would be unable to significantly constrain the merged entity.

---

<sup>125</sup> Questionnaire 4 to Online Customers, Question 53.

<sup>126</sup> Questionnaire 1 to Competitors, Question 120.



249. The Commission considers that the possibility for some independent music publishers to collectively licence their online rights via IMPEL does not materially alter this assessment. The market investigation confirms that a large number of online platforms do not obtain licences from IMPEL and instead continue to licence the repertoire of independent music publishers via national collecting societies. In January 2012, IMPEL announced that the revenues that it has collected from the licensing of online rights of its members since its launch in 2010, exceeded 1 million UK pound. This amount is very small under any comparison with revenues that the merged entity would obtain. It is therefore unlikely that through the existence of IMPEL, the small independent music publishers would be able to pose a significant competitive constraint on the merged entity.

-No countervailing buyer power

250. The Commission considers, when relevant, to what extent customers will be in a position to counter the increase in market power that a merger would otherwise be likely to create.<sup>127</sup> Countervailing buyer power cannot be found to sufficiently offset potential adverse effects of a merger if it only ensures that a particular segment of customers with particular bargaining strength is shielded from significantly higher prices or deteriorated conditions after the merger.<sup>128</sup> Furthermore, it is not sufficient that buyer power exists prior to the merger, it must also exist and remain effective following the merger.<sup>129</sup>

251. Even when large online platforms such as Apple's iTunes and Amazon's MP3 services currently account for a larger share of music publisher revenues as compared to five years ago, the fact remains that the customer base on the markets for the licensing of online rights is highly dynamic. As compared to 2007, important streaming platforms such as Spotify and Deezer, have gained traction and have emerged as important competitors to Apple and Amazon. Spotify has firmly established itself as the second largest online platform after Apple's iTunes and has even emerged as the largest online platform in some EEA countries. The Commission considers that this dynamism is not indicative of large online platforms being able to exert countervailing buyer power in the next three years.

252. The market investigation has produced examples of negotiations between music publishers and online platforms that are counter-indicative of the existence of buyer power on the side of the platforms. Customers list examples where they are faced with increases in royalty rates and advances that they are unable to countenance.<sup>130</sup> The market investigation also revealed that online platforms may have to alter their own business models in order to compensate for the higher rates and advances that large publishers were demanding.<sup>131</sup> For instance, the fact that some platforms may have to agree to add a paid tier to their free streaming services or to accept significant restrictions on the usage of

---

<sup>127</sup> Horizontal Merger Guidelines, paragraph 65.

<sup>128</sup> Horizontal Merger Guidelines, paragraph 67

<sup>129</sup> Ibidem.

<sup>130</sup> Questionnaire 4 to Online Customers, Questions 25-29 and 53.

<sup>131</sup> Questionnaire 4 to Online Customers, Questions 25-29.

repertoire by end users of their platforms<sup>132</sup> is counter-indicative of them exerting significant bargaining power.

253. All online platforms confirm that music remains a critical input for their overall service offerings and hence disagree with the Parties' view that music would have become an ancillary part of their business to such an extent that they would be able to exert significant bargaining power vis-à-vis publishers.<sup>133</sup> By contrast, all online platforms consider their bargaining position prior to the merger to be moderate to weak.<sup>134</sup> All online customers expect their bargaining power to decrease as a result of the proposed concentration.<sup>135</sup> They consider in particular that they would not be able to countenance rate increases or worsening of licensing terms and conditions by the merged entity.<sup>136</sup>

254. In light of this evidence, the Commission finds that none of the online customers, including the large customers listed by the Parties, would be able to exert buyer power to such an extent that they could prevent the anticompetitive effects that would likely arise from the proposed concentration.

255. In any event, buyer power must not only exist for a smaller group of online platforms that could shield themselves from price increases or other worsening of licensing terms. The Commission considers that it must also exist for emerging platforms, such as streaming platforms. These platforms are gaining traction as compared to download platforms and are important, innovative service providers for the future. The market investigation confirms that at the very least these customers would not be able to countenance any price increases or worsening of licensing terms by the merged entity.<sup>137</sup>

-No likely and sufficient entry

256. For entry to be considered a sufficient competitive constraint on the merged entity, it must be shown to be likely, timely and sufficient to deter or defeat any potential anticompetitive effects of the proposed concentration.<sup>138</sup> Entry is normally only considered timely if it occurs within two years.<sup>139</sup> Entry must moreover be of a sufficient scope and magnitude to deter or defeat the anticompetitive effects of the merger.<sup>140</sup> Small-scale entry, for instance into a market niche, may not be considered sufficient.

257. Evidence on past entry and exit on music publishing markets is indicative as to the likelihood that a timely and sufficient entry by competitors could countenance the anticompetitive effects of the proposed concentration. In the past four years, new entrants

---

<sup>132</sup> Questionnaire 4 to Online Customers, Questions 25-29.

<sup>133</sup> Questionnaire 4 to Online Customers, Questions 49-51.

<sup>134</sup> Ibidem.

<sup>135</sup> Questionnaire 4 to Online Customers, Question 58.

<sup>136</sup> Ibidem.

<sup>137</sup> Questionnaire 4 to Online Customers, Questions 49-51 and 58.

<sup>138</sup> Horizontal Merger Guidelines, paragraphs 68 and further.

<sup>139</sup> Horizontal Merger Guidelines, paragraph 74.

<sup>140</sup> Horizontal Merger Guidelines, paragraph 75.

have emerged on the different music publishing markets, including the markets for online rights. This includes BMG Rights Management (launched in 2009) and Iagem (launched in 2008). Kobalt has been active on the music publishing markets since 2000. Most of these entries concerned new publishing companies acquiring existing catalogues and publishers, rather than launching totally new operations. As set out in paragraph 248 above, the vast majority of these competitors have yet to gain a material scale on the markets for music publishing rights, including the markets for online rights in the UK and Ireland. On these two markets, none of these competitors have a market share that exceeds 5%. On an EEA-wide level, most of these entrants still have an approximate [0-5]% share of overall revenues for music publishing rights. According to the same estimates, BMG Rights Management has gained a [0-5]% share of overall EEA-wide revenues for music publishing rights, although these figures do not yet take account of this competitor's acquisition of Bug Music and Chrysalis. Despite its growth in the past five years, the Parties estimate Kobalt to still have a [0-5]% share of the same revenues.

258. The vast majority of customers and competitors expect there to be no significant new entry by music publishers in the different music publishing markets in the next three years, including the markets for online rights.<sup>141</sup> Some respondents refer to the trend on these markets that new publishers enter and are subsequently acquired by one of the major music publishers.

259. The Commission considers that the information on entry and exit on the music publishing markets taken together with the results of the market investigation indicates that it is unlikely that entry could occur on a sufficient scale so as to countenance the likely effects that would arise from the increase in size of the music catalogue and market position of the merging Parties. The Commission finds that it is likewise unlikely that entry could occur on a scale that would countenance a price increase or other worsening of licensing terms by the merged entity.

-Likely impact on ability to retain and attract author talent

260. The Commission also considers that, contrary to the Parties' view, any possible impact of extracting increased revenues from these and other online platforms is unlikely to be countenanced by the prospect of a reduced ability for music publishers in retaining authors. If anything, the interest of authors and music publishers in increasing revenues from online platforms would be aligned.

261. The Commission moreover considers the risk that price increases for online platforms would not result in additional revenues for the Parties not to be significant. This is the case as extracting such additional revenues is unlikely to result in such a fall-out of demand that the merged entity would be precluded from imposing higher rates, advances or other more onerous terms on online platforms (see paragraphs 238 to 244). It is also the case because the merged entity is unlikely to face competitive constraints that would countervail the price increase, in the form of regulated collecting society tariffs, powerful buyers or sufficient constraints exercised by actual or potential competitors (see paragraphs 245 to 259).

---

<sup>141</sup> Questionnaire 3 to Customers (offline markets), Questions 28 and 38 and Questionnaire 4 to Online Customers Question 53.

## *Conclusion*

262. For the reasons mentioned in paragraphs 229 to 261 above, the Commission concludes that the proposed concentration raises serious doubts with respect to the markets for the licensing of online rights in the UK and Ireland. For the reasons mentioned in paragraph 244 above, the Commission also concludes that the competition concerns in relation to UK and Ireland would be projected at the EEA-wide level.

### **5.4. Coordinated effects**

263. To assess coordinated effects, well-established case law<sup>142</sup> and Commission guidelines on the assessment of horizontal mergers<sup>143</sup> require proof that the merger would make coordination more likely, more effective and more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected and (iv) the reactions of outsiders such as potential competitors and customers.

264. The Parties submit that coordinated effects in relation to the licensing of Continental European repertoire can be excluded from the outset, since music publishers have no influence over the price of such repertoire.

265. In relation to Anglo-American repertoire, the Parties submit, first, that given the large number of small publishers, any attempt at coordination would leave a large group of outsiders that would undermine coordination attempts. Second, the possibility of new entry and expansion – as witnessed in recent years by BMG Rights Management, Kobalt, and Iagem - would destabilise any possible attempt at coordination (even if this entry has to date been limited in scale). Third, there is insufficient transparency in pricing to reach terms of coordination, monitor compliance with such terms, and detect deviation. The Parties submit that publishers do not know the online licensing terms of their rivals and have very limited information about shares of revenue. Fourth, there is no credible retaliatory mechanism to deter deviation. Last, the Parties submit that coordination would be frustrated by the widespread availability of pirated music and the countervailing bargaining power of online music platforms.

266. The market investigation was inconclusive as to the question whether the transaction eliminating EMI MP as a competitor increases the scope for coordination among the remaining majors in particular with respect to online rights.<sup>144</sup> One customer quotes an example of experiencing similar conduct by major publishers in the past during negotiations on online rights and expects attempts to align prices and other commercial terms (such as advances) after the closing of the proposed transaction.

267. The Commission however considers that the market for licensing online publishing rights is not sufficiently transparent as to rates and other deal terms to reach terms of

---

<sup>142</sup> Case T-342/99, *Airtours plc v Commission*, Case T-464/04, *Impala v Commission*.

<sup>143</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, paragraphs 39-57.

<sup>144</sup> Questionnaire 4 to Online Customers, Question 57, Questionnaire 1 to Competitors, Question 125.1.2.5.

coordination, monitor any tacit understanding, and to detect deviation. A review of the Parties' deal terms with a number of online music retail service providers shows that there are [...] differences in the negotiated deal terms including within a category of similar business models of service providers. [...] Given that all of these terms significantly influence the final price to be paid by streaming platforms to music publishers, it is unlikely that prices are sufficiently transparent for music publishers to be able to reach terms of coordination, monitor compliance with them and detect any deviation.

268. For the above reasons, the Commission therefore concludes that the proposed transaction does not raise serious doubts in relation to coordinated effects as to its compatibility with the internal market in the market for online publishing rights.

## **6. Vertical effects**

### **6.1. Introduction**

269. There is a vertical relationship of the merged entity with Sony Group operations in the following downstream markets: (1) recorded music; (2) the publishing of computer and videogames; (3) the production, acquisition and distribution of motion pictures; (4) the production and distribution of TV programmes, and (5) online music retail services.

270. As regards the link with Sony's recorded music, i.e. the use of Sony/ATV or EMI MP's mechanical offline rights as an input into recorded music, the Commission considers that given what is said in the context of the horizontal assessment relating to offline mechanical rights, Sony/ATV and EMI MP will not be in a position to prevent Sony's recorded music competitors from accessing the mechanical offline rights. As regards any alleged increase in market power resulting from a combination of Sony's recorded music business and Sony/ATV's and EMI MP's music publishing businesses, this is dealt with in the context of the discussion on the use of control shares across recorded music and music publishing in this case (see paragraphs 199 to 211 above).

271. Videogame, motion picture and TV programmes producers acquire synchronisation rights from music publishers. Online music retail services need to obtain online rights licenses (that include online mechanical and performance rights) from music publishers.

272. Considering the market shares for the exploitation of synchronisation publishing rights and for the exploitation of online publishing rights, a number of geographic markets<sup>145</sup> in the EEA are vertically affected. As for the upstream market for the exploitation of synchronisation publishing rights, the following 11 countries are affected: Belgium, France, Germany, Greece, Hungary, Ireland, Poland, Romania, Spain, Sweden and the United Kingdom. As for the upstream market for the exploitation of online publishing rights, the following four countries are affected: Germany, the Netherlands, Spain and Sweden. The Commission examined whether the operation would give rise to vertical concerns in any EEA country for all activities of Sony and Sony's affiliates and the assessment and conclusions reached are the same for all countries for the purpose of the present case.

---

<sup>145</sup> It should be noted that, as mentioned in section V.5.2 of this decision, control shares are not comparable to market shares and while they are a relevant means to assess the market they are not suitable to identify vertically affected markets.

273. The Parties submit that regardless of the specific downstream markets, Sony/ATV does not have the ability to foreclose Sony Group's downstream rivals to the benefit of a Sony Group downstream unit. First, Sony/ATV is a joint venture with the Michael Jackson Estate and the latter entity would not benefit from such treatment and would therefore oppose it. Second, Sony/ATV is required to administer the EMI MP catalogue in the interest of all the members of the acquiring consortium (that includes Mubadala as a co-controlling party who would oppose such treatment). [...]
274. Moreover, the Parties submit that any such policy would not be capable of materially affecting the competitive position of either Sony Group's downstream businesses or competitors of those businesses, due to the peripheral role generally played by the relevant music publishing rights in these businesses.

## 6.2. Market characteristics

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

275. Through its wholly-owned subsidiary Sony Pictures Entertainment ("SPE") – comprising also the wholly owned subsidiary Sony Pictures Television Group – Sony operates in the downstream markets for the production, acquisition and distribution of motion pictures and for the production and distribution of TV programmes. SPE produces, acquires and distributes motion pictures for theatrical releases and produces and distributes TV programmes. Sony's wholly-owned subsidiary Sony Computer Entertainment ("SCE") is active in the market for the publishing of computer and videogames. SCE develops and publishes videogames for Sony's home console video game products.
276. Sony estimates its 2010 EEA-wide market share in the downstream motion picture market to be around 10%. Furthermore, Sony's market share does not exceed 20% in any EEA Member State on the basis of the Parties' estimates. In a potential motion picture production market limited to US-produced films, the Parties submit that Sony's EEA-wide market share would still be below 25%.<sup>146</sup>
277. Based on its knowledge of its own revenues and estimates of likely total revenues (taking into account Sony's focus on English-language programmes and the relatively small number of TV programmes that it produces annually relative to other European TV programme producers), Sony estimates its 2010 EEA market share in the TV programmes market to amount to less than 5%. While submitting that there are no comprehensive public data on TV producers' shares of EEA or national TV programme content, Sony further submits that it has not reason to believe that its share would be higher in any EEA Member State.

---

<sup>146</sup> The parties further submit that because the large majority of motion picture synchronisation licences for US-produced motion pictures are procured in the United States and there is no reason to believe that the choice of music could materially affect a given studio's market position in any EEA country, national shares by Member States cannot possibly have any relevance for the purpose of analysing the vertical relationship between music publishing and motion picture production.

278. As for the computer and videogames market, Sony estimates its EEA-wide market share to be less than 5%. Sony estimates that its EEA-wide market shares in the following possible sub-segments/markets are all below 25%: online games, offline games for consoles and handheld devices excluding PC games (in which Sony is not active) ([5-10]%)<sup>147</sup>, offline games for Sony consoles ([10-20]%)<sup>148</sup>, and music games ([5-10]%)<sup>149</sup>.

#### *Online music retail services*

279. Sony has been active in the online music retail services market through Sony Ericsson, a joint venture between Sony and Telefonaktiebolaget LM Ericsson for which it is in the process of acquiring sole control.<sup>150</sup> Since 2004, Sony Ericsson has offered a download service, PlayNow, for music, ringtones, music tones and games to Sony Ericsson phone customers. Moreover, Sony has launched its own online music platform, Music Unlimited, in December 2010, which is accessible through a large range of devices.<sup>151</sup>

280. The Parties submit that Sony – through Music Unlimited and PlayNow – has a combined EEA-wide market share of less than 5% in the downstream market of online music retail services. Given that 2010 revenues for these services were insignificant, the Commission has no indication that Sony's online services would have a larger market share in any of these Member States.<sup>152</sup>

### **6.3. Input foreclosure**

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

281. The Parties submit that there is no risk of input foreclosure as content producers (of films, TV programmes or computer games) have alternatives to Sony/ATV's repertoire if the latter were to withhold licences to the competitors of Sony Group's downstream businesses. Moreover, the Parties submit that fees for synchronisation rights for the production of films, TV programmes or videogames constitute an immaterial cost that

---

<sup>147</sup> Based on a sample in the top nine EEA countries in terms of sales: Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden, and the UK Sony's share in each of those Member State was 10% or below (other than Finland, where its share was estimated to be [10-20]%).

<sup>148</sup> Based on a sample of the top nine EEA countries in terms of sales: Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden, and the UK Moreover, Sony's share in each of those Member State was below 25% (other than for Finland, where its share was estimated to be [20-30]%).

<sup>149</sup> Sony notes that its share in music games has fallen from [10-20]% in 2008 to [5-10]% in 2011.

<sup>150</sup> See Commission decision of 26 January 2012 in case COMP/ M. 6464, *Sony/ Sony Ericsson*.

<sup>151</sup> Sony Group also has a minority, non-controlling interest in Vevo LLC, a music video website jointly owned by Sony Music, Universal Music, and Abu Dhabi Media. While Abu Dhabi Media is owned by the Government of the Emirate of Abu Dhabi as is Mubadala, both companies are not affiliated nor have a direct or indirect ownership interest in the other, and no Mubadala director is currently also a director of Abu Dhabi Media. Moreover, the notifying parties submit that Mubadala is an autonomous economic unit with an independent power of decision and as such there can be no coordination between Mubadala (and its subsidiaries) and Abu Dhabi Media (or any other company owned or controlled by the Government of Abu Dhabi).

<sup>152</sup> [...].

very rarely exceeds 5% of the total development costs and in many cases is substantially lower (often less than 1% of the total cost). Therefore, even if Sony/ATV were to be able to set significantly higher royalty fees post-merger, or charge lower or no royalties to the Sony group downstream businesses, the impact on the total production cost of the end-product would remain extremely limited.

282. In its decision in the case *Sony/SonyBMG*<sup>153</sup> concerning the recorded music business, the Commission considered with respect to computer games, that for the vast majority of games, music is only one feature and rarely constitutes the main aspect. In the case that Sony decided not to commercialise its catalogue under non-competitive terms, with the objective to favour its own game publishing arm, other game publishers could easily license music from other companies.

283. The Commission considers that with regard to the merged entity's or Sony/ATV's ability to foreclose, Mubadala and the Michael Jackson Estate are likely to oppose such a strategy as they would not derive any benefit from potentially increasing Sony Group's sales downstream. Furthermore, even if Sony/ATV were to engage in foreclosure, content producers competing with Sony Group's downstream business would retain sufficient alternatives in the market for synchronisation publishing rights.

284. Moreover, the Commission considers that it is unlikely that the merged entity or Sony/ATV have the incentives to adopt such a strategy as they 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) appear to be *de minimis*. Further, Sony/ATV's credibility and reputation on the market for providing publishing services to authors would risk being undermined, which would impact its position to compete on the upstream market of synchronisation publishing rights.

#### *Online music retail services*

285. The Parties submit that music publishers increasingly rely on online platforms to exploit copyrights as physical recorded music sales are subjected to a steady decline. Moreover, Music Unlimited and PlayNow are relatively minor online platforms in comparison to iTunes, Amazon or Spotify. Therefore, Sony/ATV will not be able or have the incentive to foreclose competing online music retailers. Finally, the Parties submit that the conclusions reached in Commission decision in the case *Sony/BMG* for the recorded music market are valid also for the music publishing market. The Commission had concluded that Sony's recorded music company was unlikely to engage in vertical foreclosure in the downstream market of online music retail services to favour its own online platform including because downstream market players, such as Apple iTunes, were considerably stronger.

286. The Commission considers, first, that given that Sony only recently launched its new online music retail services platforms, its presence in this downstream market remains very limited. Second, by foreclosing competitors in the downstream market such as by denying digital music retailers access to music publishing rights controlled by the merged entity, Sony would forego licence revenues from online publishing rights which have been

---

<sup>153</sup> Commission decision of 15 September 2008 in Case M.5272, *Sony/ Sony BMG*.



growing significantly over the past years and are forecasted to continue to do so. Third, Mubadala and/or the Michael Jackson Estate would have no incentive to countenance such a strategy as they would forego licensing revenues from foreclosed competitors and it would be highly unlikely for Sony to gain sufficient market share in the downstream market to compensate for these losses. Finally, the Commission notes that the Commitments submitted by the Parties remedy the concern of market power in the upstream market for online publishing rights, thereby removing the merged entity's ability to effectively engage in input foreclosure on the market for online music retail services.

#### **6.4. Customer foreclosure**

287. The Parties submit that there is no risk of customer foreclosure. First, Sony's relevant downstream businesses have the incentives to choose the musical works that they consider to be the most appropriate. Any attempt to favour repertoire owned or administered by Sony/ATV would impair Sony's downstream units to compete in their relevant market where they face much stronger market players. Second, it would be economically irrational for Sony Group to forego revenues downstream for uncertain gains by the merged entity upstream in which it owns only [20-30]%. Third, the music publishing requirements of Sony Group's downstream businesses constitute an immaterial share of the overall demand for music publishing rights so that a potential policy of diverting business to Sony/ATV would not have any material effect in the EEA music publishing markets for synchronisation and/or online rights.

288. The Commission notes, first, that Sony Group's businesses in all overall downstream markets (concerning motion pictures, TV programmes, computer and videogames, and online music retail services) have limited market shares of 10% or less at the EEA-wide level. As regards possible sub-markets, market shares do not exceed 25%. Even in those relevant markets, Sony Group businesses therefore do not constitute a sufficient customer base for Sony to have the ability to foreclose the merged entity's and/or Sony/ATV's competitors.

289. Second, the Commission notes evidence submitted by the Parties showing that Sony Group's businesses in the downstream markets for movies, TV programmes and computer games have not preferred Sony/ATV's repertoire. Data concerning the top 15 grossing movies in 2010 produced by Sony-controlled Columbia Pictures, all TV programmes in the 2010/2011 season licensed by Sony Pictures Television as well as all computer games produced by SCE in 2010, show that Sony has not favoured Sony/ATV for synchronisation licenses. Sony/ATV's share of the number of total licences in each case<sup>154</sup> does not significantly differ from Sony/ATV'S EEA market share for synchronisation publishing rights of [10-20]%.

290. Third, it is unlikely that Sony would change its current policy with respect to the merged entity in which Sony would hold a smaller share ([...]) than in Sony/ATV (in which it holds [...]%).

---

<sup>154</sup> For motion pictures, Sony/ATV owned [10-20]% of the sample (that included a total of [...] licensed songs) if fractional rights are weighted. For TV programmes, Sony/ATV's share is [5-10]% (out of a total of [...] licensed songs). For computer games, Sony/ATV licenses [10-20]% (out of a total of [...] songs).

## 6.5. Conclusion on vertical effects

291. For the reasons above, the Commission concludes that the transaction does not raise serious doubts as to its compatibility with the internal market in relation to vertical effects in any of the markets for the exploitation of synchronisation publishing rights and for the exploitation of online publishing rights which are affected at national level.

## 7. *The markets for publishing services to authors*

### 7.1. Market structure

292. In *Universal/BMG Music Publishing*, the Commission considered that the market structure of the market for music publishing services is mirrored in the overall market for the exploitation of publishing rights.<sup>155</sup> The Commission recognised in that decision that the provision of publishing services to authors "*is partially characterised by a form of barter trade*"<sup>156</sup>. The publisher does not receive revenue directly in return for the provision of publishing services to an author rather the publisher receives a right to a share of future royalties due from downstream commercialisation of the author's work. Market shares on the downstream markets for commercial exploitation can therefore be used as a relevant proxy for assessing the Parties' position in the upstream market for the supply of publishing services to authors even if some deviations are possible due to different splits between authors and publishers (the revenue received by exploiting these rights (directly or via collecting societies) are shared between the publishers and the authors).

293. The Parties have sought to estimate their market shares in the provision of publishing services to authors on this basis, although the Parties note that revenue shares may not provide a good proxy for market power in music publishing services since these services are a differentiated product with authors selecting a publisher based on a variety of price and non-price related factors such as creative guidance, personal support, promotion of their works and introductions to co-authors and performing artists. According to the Parties, smaller publishers compete vigorously to sign new authors and their lower revenue shares are not indicative of the competitive constraint exerted by these publishers.

294. The market investigation confirmed that competition on the markets for publishing services to authors is indeed based on a variety of price and non-price related factors which are broadly in line with the Parties' submissions. As regards price related factors, respondents single out the size of advances and the royalty splits between publisher and author.

295. Nevertheless, market participants were of the view that it continues to be appropriate to assess the market power a music publisher has on the upstream market for the provision of services to authors by reference to the publishers' revenue based market shares on the downstream market(s) for the exploitation of publishing rights. This is, in particular, the case given that the better a publisher can exploit all the rights attached to an author's

---

<sup>155</sup> Commission decision in Case COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 63.

<sup>156</sup> Commission decision in Case COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 45.

works (and thus increase the revenues flowing back to the author), the more attractive the publisher becomes to the author.

296. The Commission therefore continues to consider that the market position of the Parties can be assessed by reference to the downstream markets shares. In this context, the Commission considers that since publishers generally have the right to represent authors and exploit their copyrights in respect of all types of rights (i.e. mechanical, performance, print and synchronisation), and the authors expect them to do so, the most appropriate proxy would seem to continue to be to consider the Parties' combined revenue based market shares arising from the exploitation of all types of rights rather than on the basis of any single type of right.

#### *Market shares*

297. On the above basis, the Parties estimate that their combined market share in the provision of publishing services to authors would exceed 15% in almost every Member State as well as on the EEA-level. As such, the operation would give rise to numerous horizontally affected markets.

298. According to the Parties' own estimates, their combined overall music publishing market shares exceed 40% only in Romania ([40-50]%). The Parties combined market share ranges between 30-40% in seven countries (Belgium, Estonia, Greece, Hungary, Poland, Sweden and the UK). On an EEA-wide level the Parties estimate their combined market share to be in the region of [20-30]%.<sup>157</sup>

299. As explained above in paragraphs 65 to 69 above, the Commission considers, on the basis of information received during the course of the market investigation, that the Parties EEA-wide market share in the overall music publishing market could rather be in the region of 28%-33%. Universal Music Publishing's market share would, in any event, be significantly lower, as would that of Warner/Chappell.

#### **7.2. Non-coordinated effects**

300. The Parties submit that regardless of the exact market shares, there is strong competition between publishers to sign and develop new artists. This competition is not limited to the "majors" but extends to many mid-size and smaller music publishers.

301. The Parties single out BMG Rights Management, Imagem, Kobalt and Peermusic as mid-sized publishers competing vigorously to sign and provide services to authors. In addition, the Parties point to a number of strong national or regional players such as Sugar Music (Italy), Melodie der Welt (Germany), Freibank (Germany) and Clipper's (Spain and Portugal).

302. However, during the market investigation, concerns were raised by authors in respect of the merger which mainly pointed at potential non-coordinated effects resulting from the proposed concentration. In particular, concerns were raised in respect of the reduction in the number of alternatives with sufficient scale available to authors and the potential deterioration of the conditions or the quality of services provided to authors post-merger.

---

<sup>157</sup> See table at paragraph 65.

Some concerns were also raised, in particular, by competitors, that the merged entity may be able to leverage its market power in the downstream market for the exploitation of publishing rights in order to strengthen its attractiveness and capacity to offer publishing services to authors and vice versa.

*Impact of the size of catalogue on the quality of services to authors*

303. Several market participants raised similar concerns to those raised in the context of *Universal/BMG Music Publishing*. Namely, market participants appear concerned that the larger the catalogue, the less attention the publisher pays to all registered works. Third Parties claim that because the majors deal with such numerous works, they do not have the incentive to focus on all of them but rather concentrate on those that are likely to generate the bulk of their revenue (such as classic hits or brand new hits).
304. The Parties contest any such argument, in particular any allegation that the service they provide would be inferior to that provided by publishers with smaller catalogues. A publisher's success in licensing other authors' works is an important consideration for new authors choosing between publishers and hence there is no incentive for the Parties to reduce the quality of the service they provide to authors.
305. The Commission is of the view that even if it were to be true that, following the proposed concentration, the quality of services offered by the Parties would deteriorate, this would, *a priori*, only affect the authors currently signed to the Parties and only to the extent that insufficient switching possibilities exist. As long as existing and new authors have a sufficient number of suitable alternative publishers to whom they could switch, any deterioration in the quality of service would not lead to a significant impediment to effective competition.
306. The Commission observes in this context, that competition between publishers generally takes place at the point in time when an author is searching for a publisher. This can take place when the author is new, i.e. in search of his first contract, when an author is in between contracts or when the author's current contract is about to expire. Following signing, the author in principle seems to be "locked in" for the duration of the contract.<sup>158</sup> However, it is also not uncommon for publishers to actively approach authors during the author's existing contract with a competitor and vice versa.<sup>159</sup> Therefore, authors are not necessarily prevented from switching publishers even during a contract, and could do so if the quality of the service offered by the publisher decreases.
307. In conclusion, irrespective of the increase in the size of the catalogue of the Parties post-transaction, the Commission considers that as long as a sufficient number of suitable alternative publishers remain on the market to which authors could switch, no competition concerns arise as a result of any deterioration in the quality of services provided by the Parties.

---

<sup>158</sup> The duration of contracts varies greatly from anywhere between 3-5 years to longer periods of 10 years. The more established and successful an author is, the more probability there is that the contract period is shorter.

<sup>159</sup> The Commission understands that a publisher may sign a contract with an author whilst that author is still under current contract with another publisher. The new publisher will pay the author an advance and the author will cause its current publisher to pay any royalties due to the author during the remainder of the current contract to the new publisher.

*Impact of the reduction in the alternatives available to authors*

308. A number of market participants raised concerns that the proposed concentration would lead to a potential reduction in suitable supply alternatives. This is particularly the case in relation to publishers who have the ability to promote authors on a wider scale (i.e. internationally and in terms of maximizing exploitation opportunities downstream and thus the revenue flows to the author), and to provide sufficiently large advances to those authors who need immediate financial support.
309. Furthermore, some market participants have raised a concern that the increased market power of the merged entity on the downstream markets for the exploitation of copyrights will entice authors to sign with the Parties even if the terms offered are less advantageous because authors will calculate that they will still benefit from the Parties' market power vis-à-vis licensees in terms of higher cash flows back to the author.
310. The Parties consider that given the strength of competing publishers – both established and recent entrants - authors will continue to have a wide choice of publishers post-merger and there can be no expectation that Sony/ATV and EMI MP would be able to act independently of normal competitive constraints or in a way that disadvantages authors.
311. First, the Parties argue that as the Commission found in *Universal/BMG Music Publishing*<sup>160</sup>, publishers need to constantly renew their catalogues of authors. This stems from the need to match the demands of licensees and satisfy consumer taste. There is therefore constant competition to discover new and sign both new and established authors.
312. Second, as regards the ability to pay advances, the Parties first highlight that publishers compete not only on the basis of advances but also in relation to the royalty percentage splits offered to authors. Publishers offer different "mixes" of royalty splits and advances to attract authors. An author will therefore consider the overall package when deciding among rival publishers. Whilst it may be the case that not all publishers pay large advances, they are, in the Parties' view, able to compensate by offering better royalty splits and/or other benefits in order to attract authors. The Parties refer to Kobalt as an example of a publisher that tends to pay lower advances but is ready to offer favourable royalty splits to authors (perhaps even as high as 90%:10%).<sup>161</sup>
313. The Parties also point to the fact that in *Universal/BMG Music Publishing*, the Commission concluded that even those authors seeking large advances would have a choice between four large publishers after the merger, with it in fact being sufficient that at least two comparable publishers (EMI and Warner/Chappell) to the merged entity existed on the market.<sup>162</sup> The Commission further considered in that case that apart from

---

<sup>160</sup> Commission decision in Case COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 76.

<sup>161</sup> See e.g. article in the Billboard magazine of 28 January 2012 "*Turning publishing upside-down*": "*Kobalt has no interest in owning copyrights and instead strikes shorter-term administration deals with songwriters under which creators receive smaller advances against royalties collected*" and "*another key aspect of Kobalt's appeal for songwriters is that it charges them only 5-10% of revenue for its administration services, as opposed to traditional music publishers that prefer to hold the full publisher's share of 50% or at least act as co-publishers and claim 25% of royalties*".

<sup>162</sup> See Commission decision in Case COMP/M.4404, *Universal/BMG Music Publishing*, paragraph 75: "*In terms of market shares, Universal will be in a leading position after the merger but will be closely followed*

the fourth major Sony/ATV, a few larger independents (e.g. Chrysalis – now part of BMG Rights Management) can also compete for renowned authors through the payment of large advances. The Commission accepted that the presence of these competitors meant no adverse effect on competition could be expected post-merger.

314. Third, the Parties consider barriers to entry to be low and there to be sufficient alternative music publishers who are able to offer an international service. New operators can and do enter the publishing industry and existing publishers can expand their activities for the following reasons: (i) there is a large pool of talent available – even authors that have current contracts are generally only "locked in" for a limited period of time, i.e. between 3-5 years; (ii) there are no material scale effects in that the personal rapport between a publisher and author, together with the financial terms of the contract negotiated are more important than the size of the publisher's activities; and (iii) no transnational presence is required since local publishers can benefit from the collecting society system and sub-publishing arrangements. The Parties refer to Kobalt as an example of a publisher that is active across Europe but does not have a presence in every country. Specifically in relation to online rights, the ability of a single collecting society to license online rights on a pan-European or multi-territory basis enables publishers to ensure their repertoire is widely disseminated. The Parties cite IMPEL<sup>163</sup> as an example.
315. According to the Parties, there is clear evidence of low barriers to entry in that a number of important new music publishers have emerged since the *Universal/BMG Music Publishing* decision (in particular BMG Rights Management, Imagem, and Kobalt). BMG Rights Management and Imagem have both entered the music publishing business in the last five years and have quickly accumulated in size and attractive repertoire. Kobalt started its business from scratch in 2000 and has attracted a large number of successful authors since then. Post-transaction, authors should therefore have a choice at least amongst Universal, Warner/Chappell, Sony/ATV/EMI MP, BMG Rights Management, Imagem, Kobalt, Peermusic, as well as other players.<sup>164</sup>
316. Fourth, given that the length of contracts is typically between three and five years, the Parties submit that competition for authors that are not new (i.e. authors that are not looking for their first contract) takes place more often than previously. Since the retention periods over the copyrights (i.e. the period during which a publisher can exploit a song which was written by the author while under contract with the publisher) are also decreasing, this competition applies not only to new songs but more and more also to previous works.

---

*by EMI and Warner. The existence of at least two comparable publishers leaves sufficient room for switching possibilities should Universal/BMG decide to deteriorate the terms offered to authors following the merger."*

<sup>163</sup> As mentioned in paragraph 219 above, IMPEL was formed by the UK collecting society PRS as a vehicle to facilitate the licensing of online rights and give "*independent publishers the same benefits that the individual major publishers have achieved by licensing their mechanical rights on a multi-territory basis through one rights manager*". See PRS website: <http://www.prsformusic.com/impel/pages/default.aspx>.

<sup>164</sup> The Parties also point to the fact that some of these new entrants are just as capable of paying similar advances as those paid by Sony/ATV or EMI MP. [...]By comparison, Kobalt recently secured an investment of USD 50 million from five investment firms to fund the paying of advances to authors (see Billboard magazine of 28 January 2012 "*Turning publishing upside-down*").

317. [Reference to Sony/ATV contractual terms] According to Sony/ATV, this reflects two factors: (i) many publishers compete for the same authors; and (ii) the trend for shorter retention periods (which means that authors are readily able to switch between publishers both in relation to new works and, to an increasing extent, for older songs for which the retention period has expired). Overall therefore, competition for authors takes place more frequently.
318. The market investigation has largely supported the Parties' arguments and has not confirmed the concerns raised by some authors and competitors.<sup>165</sup>
319. First, both majors and independents appear to actively seek to sign new authors. Equally, authors themselves usually contact more than one publisher.<sup>166</sup> [...]The majority of authors/author societies who responded to the relevant questions also confirmed during the market investigation that authors often succeed in finding better deals with new publishers or renegotiating the terms of existing contracts in their favour.<sup>167</sup>
320. Second, the market investigation showed that many respondents view independents in principle as being capable of promoting authors and exploiting their rights internationally although in practice this ability may vary between the independents. New entrants such as BMG Rights Management offer comparable services as the major publishers on an international scale. One can mention as anecdotal evidence the recent signing by BMG Rights Management (US) of a worldwide publishing deal with Bruno Mars, an established singer-songwriter (he is signed to Warner Music Group on the recorded music side).<sup>168</sup>
321. Third, the market investigation demonstrated that as regards price competition, publishers compete in relation to the royalty percentage splits offered to authors as well as advances and that lower advance payments can be compensated by a higher royalty share for the author.<sup>169</sup>
322. That being said, some market participants were of the view that it is likely that only more experienced authors can benefit from the option of lower advances and higher royalty percentage splits with the role of advances remaining important for those (often newer) authors who need immediate financial support. In this context some authors were of the view that the majors and independents do not compete on an equal footing in respect of advances (although they may do so in respect of other contract terms) given the majors' corporate fund raising abilities and the lower percentage a large advance would

---

<sup>165</sup> 22 authors or authors' societies responded to the Commission's market investigation questionnaire out of a total of 177 questionnaires sent to authors or their societies.

<sup>166</sup> Self-publishing is also viewed by some market participants as an option. The Commission considers that although this may be the case, self-publishing is unlikely to impose a strong competitive constraint on the publishing companies.

<sup>167</sup> Questionnaire 6 to Authors, Questions 31.1 and 31.2

<sup>168</sup> See <http://www.bmg.com/news/?id=54801>.

<sup>169</sup> Questionnaire 6 to Authors, Question 14.

represent of their total turnover (which in turn means the majors are able to take larger risks).<sup>170</sup>

323. Fourth, as regards the length of contracts and retention periods, the market investigation results were unclear. Some authors and authors' societies suggested that only established authors can benefit from shorter contracts terms and shorter retention periods. Competing publishers have mixed views as to whether the majors and independents are equally able to offer shorter contract terms and retention periods.
324. Overall, the authors and their societies who responded to the market investigation gave a mixed view as to whether a sufficient number of suitable alternatives would remain post-merger.
325. Having assessed all the facts put forward by the Parties and third Parties responding to the market investigation, the Commission considers that a sufficient number of suitable alternative music publishers will remain on the market post-merger, in particular for the reasons set out below.
326. First, the recent emergence of large independents such as BMG Rights Management Kobalt and Imagem show that it is possible to enter the market (whether through acquisitions of catalogue or via slightly different business models and organic growth) and compete. These companies provide services on an international level and have the finances allowing the promotion and support of their authors.
327. Second, advances are not the only parameter of competition in terms of publishing services to authors. Competitors can and do compete also in relation to royalty percentage splits, length of contract, retention periods as well in respect of the quality of service they give. Even if the Commission were to accept that smaller independents cannot compete in respect of advances and that this might be critical for some authors, the Parties would, post-transaction, still face competition in respect of advances from the other two majors Universal Music Publishing and Warner/Chappell, as well as from the larger independents such as BMG Rights Management, Imagem, Kobalt and Peermusic.
328. Third, at least for a proportion of authors, the length of contract and retention periods are reducing with the effect that competition for these authors and their works takes place more frequently.
329. Finally, as regards the specific argument that the Parties would, post-merger, be able to sign authors on less favourable terms because of their market power in the downstream markets for the exploitation of rights or that all things being equal in contract terms, authors would always choose the Parties because of their increased market power downstream, the Commission notes that ultimately authors will always evaluate the overall value proposition in front of them. It cannot be excluded that an author accepts *prima facie* worse contract terms because he anticipates higher revenues or better quality service from that particular publisher regardless of the "worse" contract terms. This overall evaluation approach by an author would not change as a result of the proposed concentration. It is up to the author to decide which aspect he values most. In any event, any residual concerns in the upstream market for services to authors arising out of the

---

<sup>170</sup> Questionnaire 6 to Authors, Question 15.



Parties' increased market power downstream would be resolved by the commitments proposed by the Parties to resolve the competition concerns downstream.

### 7.3. Coordinated effects

330. To assess coordinated effects, well-established case law<sup>171</sup> and Commission guidelines on the assessment of horizontal mergers<sup>172</sup> require proof that the merger would make coordination more likely, more effective and more sustainable. The analysis needs to focus in particular on: (i) the ability to reach terms of coordination; (ii) the ability to monitor deviations; (iii) the existence of a credible deterrent mechanism if deviation is detected; and (iv) the reactions of outsiders such as potential competitors and customers.
331. In its decision in case COMP/M.4404 Universal/ BMG, the Commission concluded that there was no risk of coordination among major music publishing companies in the market for publishing services to authors given the lack of transparency on exact terms in publishing agreements with authors, the unpredictability of the different authors' success, as well as the disruption through larger independents.
332. The Parties submit that coordinated effects concerns do not arise because, firstly, there is considerable complexity and volatility in the contracts between publishers and individual authors, with a lack of transparency as to the specific terms agreed. Second, there is no obvious basis on how publishers might tacitly collude over the authors that they sign, as there is not any certainty with regard to the popularity and commercial success of different authors or any obvious "punishment" mechanism by which a tacit coordination could be sustained. Third, the possibility of new entry and expansion – as witnessed in recent years would undermine any ability for established players to reach a tacit understanding. Fourth, any coordination among the major music publishing companies would be undermined by the great number of independent publishers, including the larger independents.
333. The market investigation indicated that the majority of respondents do not expect the proposed transaction to give rise to anticompetitive coordinated effects or increase the transparency on price and other contractual terms on the market for publishing services to authors.<sup>173</sup> Moreover, the large majority of responding authors' representatives confirms that the unpredictability of different authors' success would make coordination on prices or other conditions difficult.<sup>174</sup> Finally, authors do not reject the notion that the larger independent music publishers exercise significant competitive pressure on the "majors".<sup>175</sup>
334. Given the lack of transparency on exact terms in the multitude of publishing agreements with authors, the unpredictability of the different authors' success, as well as the possible disruption through larger independents of attempts by the major publishers to

---

<sup>171</sup> Case T-342/99, *Airtours plc v Commission*, Case T-464/04, *Impala v Commission*.

<sup>172</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5, paragraphs 39-57.

<sup>173</sup> Questionnaire 1 to Competitors, Question 124.1.2 and Questionnaire 6 to Authors, Question 26.

<sup>174</sup> Questionnaire 6 to Authors, Question 27.

<sup>175</sup> Questionnaire 6 to Authors, Question 47.1.

coordinate, the Commission concludes that it is unlikely that the proposed concentration would give rise to a significant impediment to effective competition stemming from coordinated effects in the market for publishing services to authors.

#### **7.4. Conclusion**

335. For the reasons set out above, no serious doubts arise as a result of the proposed concentration on the markets for the provision of publishing services to authors.

## VI. COMMITMENTS

### 1. Procedure

336. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the Parties to a transaction may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared.

337. In order to address serious doubts identified following the first phase market investigation in the markets for the exploitation of online rights in the UK, Ireland and the EEA, and therefore render the concentration compatible with the internal market, the Parties submitted commitments pursuant to Article 6(2) of the EU Merger Regulation<sup>176</sup>.

338. The initial commitments package was submitted on 26 March 2012 and subsequently amended on 27 March 2012. This latter package was subject to the market test launched on 28 March 2012.

339. In light of the results of the market test, the Parties submitted a revised set of commitments on 10 April 2012 and 17 April 2012.

### 2. Description of the commitments of 27 March 2012

340. Pursuant to the commitments package submitted on 27 March 2012, the Parties committed to divest within the EEA four of their publishing catalogues and their interests in works written by a number of Anglo-American contemporary authors. More specifically, the divestment package of 27 March 2012 included the following assets, together referred to as "Divestment Business":

- Virgin UK entities comprising the catalogues of EMI Virgin Music Limited, Circa Music Limited, EMI 10 Music Limited, and Dinsong Limited (together, "Virgin U.K.") and including the right to exploit in the EEA all works included in the Virgin U.K. catalogue<sup>177</sup>. The sale of Virgin U.K. would be subject to a licence back to Sony/ATV and/or EMI MP allowing the continued exploitation of those works outside the EEA. This catalogue includes the following authors with contracts continuing beyond the year 2012: Lenny Kravitz [...], Chris Difford [...]
- Licence to exploit all works included in EMI MP's Virgin U.S. catalogue ("Virgin U.S.") in the EEA. Under the proposed commitments, the Parties would license the rights to exploit music works in the Virgin U.S. catalogue in the EEA to a separate legal entity (or to Virgin U.K.) which would then be divested. This catalogue includes the following authors with ongoing contracts: Ben Harper [...], David Weiss and Don Fagenson of Was Not Was

---

<sup>176</sup> Initially, the Commission also found preliminary serious doubts in the upstream market for publishing services to authors in the EEA and at national level. However, the overall results of the market investigation finally showed that the proposed transaction does not give rise to serious doubts in this market (see section V.7 of this decision).

<sup>177</sup> The divestment does not include the "Virgin" brand as the Parties are not entitled to make such transfer.

- Virgin Europe entities comprising the catalogues of EMI Virgin Music Publishing Belgium NV, EMI Virgin Music Publishing France SA, EMI Virgin Music Publishing Germany GmbH, EMI Virgin Music Publishing Greece LLC, EMI Virgin Music Publishing Italy Srl, EMI Virgin Music Publishing Holland BV, and EMI Virgin Music Publishing Spain SA (together, "Virgin Europe") and including the right to exploit all works in the Virgin Europe catalogue across the EEA. The sale of Virgin Europe would be subject to a licence back to Sony/ATV and/or EMI MP allowing the continued exploitation of those works outside the EEA.
- Famous Music Publishing Limited ("Famous U.K.") including the right to exploit all works in the Famous U.K. catalogue across the EEA. The sale of Famous U.K. would be subject to a licence back to Sony/ATV and/or EMI MP allowing the continued exploitation of those works outside the EEA. The catalogue includes the publishing contracts with four authors having future obligations, namely Placebo [...]the Kooks [...]Paul Garred [...]and Dan Black [...]
- Sony/ATV's and EMI MP's EEA interests in existing and future copyrights that come into existence by virtue of the obligations with Sony/ATV or EMI MP in existing agreements with a number of Anglo-American authors, namely Wayne Hector, Eg White, Mark Ronson, Eric Appapoulay, Richard Cassell, Tom Wright-Goss (all three writers for Plan B), Jason Orange and Howard Donald (of the band Take That). [...]

341. In terms of revenues, the commitments package of 27 March 2012 generated overall revenue of EUR [10-20 million] in the EEA in 2011.

### ***3. Results of the market test of commitments of 27 March 2012***

342. To assess the suitability of the proposed commitments to solve serious doubts identified, the Commission launched the market test with Parties' competitors and customers, authors and collecting societies active in the relevant markets. The purpose of the market test was to obtain views of the relevant market participants on the suitability of the proposed remedy package to remedy the identified competition concerns, the ability of the proposed commitments and its various components to be implemented in practice and the likelihood that the proposed remedies would be effective in practice and would generate an interest among potential purchasers.

343. More specifically, the Commission sought to assess whether, in light of the theory of harm in this case, the scope of the proposed commitments is adequate in terms of revenues, whether the quality of catalogues to be divested is adequate, whether the geographic limitation of the rights to be divested to the EEA would not hamper the viability of the proposed commitments and whether there are any technical or other obstacles that would affect the effectiveness of the proposed commitments in practice.

### 3.1. The scope of the proposed commitments

344. The market test overall revealed that the scope of the proposed divestment was insufficient due to the geographic limitation of the rights divested and in comparison to the size of the merged entity's repertoire and the Parties' overall publishing revenues.<sup>178</sup>

#### *The quality of catalogues and writers to be divested*

345. As concerns the nature of the remedy, the market participants were overall confident that divestment of catalogues is a suitable measure to address competition concerns in this case<sup>179</sup>. For instance one market participant explained that *"in general, the divestment of catalogues will diminish the size of a merged catalogue-pool and should therefore result in a more balanced market situation"*<sup>180</sup> while another market participant pointed that *"if we are concerned that the merged company is too big and has too much power then reducing the catalogue and the size of the business would surely have the effect of reducing that power"*<sup>181</sup>.

346. The main criticism expressed during the market test related to the fact that the remedies package included principally attractive back catalogue but did not include a sufficient number of currently successful authors<sup>182</sup>. Indeed, a majority of market participants indicated that the proposed package lacks future hit making potential. In this context Impala noted that *"this package contains little by way of hits over the last three years, or earning catalogue or future potential"*<sup>183</sup> while a customer highlighted that *"these are important as good back catalogues with a potential for continued high revenues and there is potential amongst the current authors for future hits. However we do not feel that the potential for future hits is sufficient"*<sup>184</sup>.

#### *Geographic scope of the proposed commitments*

347. The remedies package of 27 March 2012 foresaw divestment of rights contained in the Divestment Business which would be limited to the EEA while the Parties would maintain non-EEA rights.

348. The market test indicated that such limitation of geographic scope to the EEA could be problematic as it would result in a forced sub-publishing type relationship with the merged entity potentially making it more difficult to fully exploit the repertoire. Customers found such geographic fragmentation of rights undesirable as it would hamper their ability to

---

<sup>178</sup> Responses to Questions 1 and 2 of Questionnaire Q11 to Customers – market test.

<sup>179</sup> Responses to Question 4 of Questionnaire Q11 to Customers – market test and Question 4 of Questionnaire Q10 to Competitors – market test.

<sup>180</sup> Deutsche Telekom AG, response to Question 4 of Questionnaire Q11 to Customers – market test.

<sup>181</sup> ITV (plc), response to Question 4 of Questionnaire Q11 to Customers – market test.

<sup>182</sup> Responses to Questions 10-33 of Questionnaire Q11 to Customers – market test and Questions 8-33 of Questionnaire Q10 to competitors – market test.

<sup>183</sup> Impala, response to Question 1 of Questionnaire Q10 to Competitors – market test.

<sup>184</sup> ITV (plc), response to Question 5 of Questionnaire Q11 to Customers – market test.

conclude global deals directly with publishing companies. Some customers also pointed out that it would affect the effectiveness of the remedies package as it would undermine the very purpose of the divestment<sup>185</sup>. Similarly, the Parties' competitors considered that limitation of divested rights to the EEA would have a significant impact on the use of the rights by the new acquirer and its ability to promote these rights. This is because the Parties would maintain the control of these rights outside the EEA while their incentive to actively exploit these rights would be limited which would adversely impact the revenues stemming from these rights. This would be particularly problematic for some of the Anglo-American repertoire subject to divestment which is inherently US centric as the purchaser would not control these rights in the US<sup>186</sup>.

#### *Other issues*

349. Generally the market test did not reveal any technical or other difficulty with the proposed transfer.<sup>187</sup> However, some market participants expressed concerns about the effectiveness of the proposed commitments in a sense that the divested authors could go back to the Parties post-divestment.

### **3.2. Purchaser criteria and interest from potential purchasers to acquire Divestment business**

350. As concerns the type of the purchaser which would be best suitable to acquire and develop the Divestment business, the market test revealed that preferably the Divestment business should be acquired by an undertaking already active in the publishing industry or having experience in the field<sup>188</sup>. However, one market participant pointed out that given the size of the catalogues anyone who buys the Divestment business can operate as a competitor<sup>189</sup>.

351. As concerns the question of whether the Divestment business should be sold as one package or independently to several purchasers, the market test indicated that this would depend on the type of purchaser. Indeed, should the purchaser be someone already active in the business, the various catalogues could be sold separately. Some respondents indicated that the package should be split up so that even smaller players can participate in the auction. On the other hand, some respondents stated that should the acquirer be someone who is not yet active in the industry, it would need to acquire all catalogues together to change the competitive landscape<sup>190</sup>.

352. The market test also revealed interest amongst Parties' competitors to acquire the Divestment business in parts or as a whole<sup>191</sup>.

---

<sup>185</sup> Responses to Question 42 of Questionnaire Q11 to Customers – market test.

<sup>186</sup> Responses to Question 40 of Questionnaire Q10 to Competitors – market test.

<sup>187</sup> Responses to Question 48 of Questionnaire Q10 to Competitors – market test.

<sup>188</sup> Responses to Question 42 of Questionnaire Q10 to Competitors – market test.

<sup>189</sup> A-Temp Verlag, response to Question 40 of Questionnaire Q10 to Competitors – market test.

<sup>190</sup> Responses to Question 40 of Questionnaire Q10 to Competitors – market test.

<sup>191</sup> Responses to Question 47 of Questionnaire Q10 to Competitors – market test.

#### **4. Final set of commitments submitted on 17 April 2012**

353. The Commission informed the Parties of the results of the market test on 4 April 2012. To address the shortcomings identified during the market test, the Parties offered a new set of commitments on 10 April 2012 which was subsequently amended on 17 April 2012.

354. The main features of the revised package include the following:

- The geographic scope of the rights to be divested was expanded from EEA-wide to worldwide;
- 7 contemporary Anglo-American authors having ongoing and future obligations with the Parties. These authors are: Alexa Dixon, Bullet For My Valentine (Matt Tuck, Michael Paget, Jason James, and Michael Thomas), Duffy, Matt Cardle, Nadine Coyle, Mona (Nick Brown, Vince Gard, Zach Lindsey and Jordan Young), and Scouting For Girls (Roy Stride).
- The total revenue associated with the new package increased from previous EUR [10-20] million to EUR [20-30] million;
- A [...] non-solicitation clause was included for the entire package, including all Anglo-American authors with ongoing and future obligations; and
- Purchaser criteria were defined [...]

#### **5. Commission's assessment of the final set of the commitments submitted on 17 April 2012**

##### **5.1. Legal test for acceptability of commitments offered in Phase I**

355. As set out in the Commission Notice on remedies<sup>192</sup>, the Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified.

356. In assessing whether or not the remedies will restore effective competition, the Commission considers inter alia the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

357. Commitments must be likely to eliminate the identified competition concerns entirely and have to be comprehensive and effective from all points of view. In merger cases, divestiture commitments having a structural effect on the market are typically preferable<sup>193</sup>.

358. In Phase I, commitments must clearly dispel all serious doubts.<sup>194</sup> It is also settled case law that in assessing whether the remedies constitute a direct and sufficient response

---

<sup>192</sup> Remedies Notice, paragraph 7.

<sup>193</sup> Remedies Notice, paragraph 15.

<sup>194</sup> Remedies Notice, paragraph 81.

capable of dispelling serious doubts, the Commission enjoys a broad discretion.<sup>195</sup> In its analysis the Commission relies on responses to the market test of remedies, submission of the Parties as well as additional evidence on the file.

## **5.2. Suitability of the commitments of 17 April 2011 to remedy serious doubts in this case**

359. As explained in section V.5.3 of this decision, the proposed transaction gives rise to serious doubts in the markets for the exploitation of online rights in the UK and Ireland as well as on an EEA-wide level. This is due to the fact that the proposed transaction, if implemented, would likely provide the merged entity with the ability to exert market power vis-à-vis its online customers, in particular in the UK and Ireland, as in these countries the merged entity reaches a particularly strong market position with control shares exceeding 50%. As explained above in paragraphs 235 and 244 above, the UK and Ireland represent around 50% of the Parties' EEA-wide online licensing revenues and therefore market power in those countries is likely to translate into market power also on the EEA-wide level when negotiating EEA-wide licences.

360. The Commission assessed to what extent the improved commitments of 17 April 2012 address these serious doubts.

### *The nature of the commitments and the content of Divestment business*

361. In the past cases in the music publishing industry the Commission accepted commitments consisting of divestitures of catalogues<sup>196</sup>. The market test also in this case showed that divestiture of catalogues is an appropriate measure to decrease the market power of the merged entity<sup>197</sup>.

362. As concerns the quality and composition of divested catalogues, the Commission stated in the *Universal/BMG* decision that a mixture of successful back catalogues and recent chart hits (which are also an indicator for the potential for future hits and consequently revenues) are two important requirements for a suitable remedy in online music publishing cases<sup>198</sup>.

363. As concerns the back catalogue, the market test of the commitments of 27 March 2012 showed that the package contained a valuable and very attractive back catalogue likely to generate revenues for the years to come.

364. To address the criticism expressed during the market test concerning the lack of recent hits and of future hit making potential of the commitments of 27 March 2012, the Parties included in the Divestment business seven additional authors with a track record of recent hits and future delivery obligations towards the Parties. Already today, these authors

---

<sup>195</sup> Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, paragraph 128 ff.

<sup>196</sup> Commission decision of 22 May 2007 in Case No COMP/M. 4404, *Universal/BMG Music Publishing*.

<sup>197</sup> Responses to Question 4 of Questionnaire Q11 to Customers – market test and Question 4 of Questionnaire Q10 to Competitors – market test.

<sup>198</sup> Commission decision of 22 May 2007 in Case No COMP/M. 4404, *Universal/BMG Music Publishing*, paragraphs 450 and 452.



together account for revenues of EUR [0-5] million in the EEA and EUR [5-10] million worldwide in 2011.

365. A detailed analysis of the information provided by the Parties with respect to these authors and in particular their recent hits, the revenues they generated in 2011, key contract terms (future obligations, expiry of contract and expiry of retention period) and the level of advances paid to these artists (which indicate the confidence the Parties themselves have into these authors' future potential) shows that that these seven additional authors are likely to constitute considerable future revenue streams<sup>199</sup>:

- Nadine Coyle, a member and writer of the band Girls Aloud, was signed by EMI MP [...] and was paid an advance of GBP [...]. In view of [...], her current collaboration in writing songs with other artists [...], it is likely that Nadine Coyle will generate substantial revenues in the years to come.
- Alesha Dixon, singer-songwriter, former member of the girl-band Mis-Teeq, and current judge on the popular TV show 'Britain's Got Talent', was signed by Sony/ATV and was paid an advance of GBP [...]. Dixon's second solo album was certified platinum and included two top 10 singles and two other top 20 hits in the UK. [...] It is therefore likely that she will generate substantial revenues in the years to come.
- Bullet For My Valentine, heavy metal band (signed by EMI MP) was paid an advance of GBP [...]. The band sold over one million albums in the United States and nearly 2.5 million albums worldwide, won several awards and had seven consecutive number one singles on the UK Rock Charts. It generated revenues of EUR [...] in 2011. [...], it is likely that the band will generate substantial revenues in the years to come.
- Singer-songwriter Duffy (signed by EMI MP) was paid an advance of GBP [...]. She holds an extensive awards collection and generated EUR [...] of worldwide revenues for EMI MP. Her first album entered the UK charts at number one and attained five times the platinum status. It was also the 2008 best-selling album in the UK and the fourth best-selling album worldwide. Given her success to date [...], it is likely that Duffy will generate substantial revenues in the future.
- Matt Cardle, singer-songwriter and 2010 winner of the TV show X Factor, was signed by Sony/ATV and was paid an advance of GBP [...]. Cardle received the award for Best Album and Best Song in The Guardian's Best Music of 2011 poll. He holds an ownership interest in songs co-written with other authors [...]. His debut single reached number one in the UK charts becoming the 2010 second biggest selling single, and his debut album reached number two of the UK Album Chart. [...], it is likely that he will generate substantial revenues in the years to come.

---

<sup>199</sup> The below information on the revenues achieved by these authors was provided by the Parties in the Form RM of 15 April 2012.

- Mona, a rock band signed by EMI MP, was paid an advance of GBP [...] and was awarded the "Brand New for 2011" title at the MTV Awards. [...], it is likely that the band will generate substantial revenues in the years to come.
- Scouting for Girls (with Roy Stride) is a pop band signed by EMI MP and was paid advances of GBP [...]. The band holds successful UK singles and album charts producing revenues for EMI MP of EUR [...] worldwide in 2011. Its first album reached number one of the U.K. Album Chart and attained triple platinum status. Its subsequent album (released in April 2010) reached number 2 in the U.K. Album Chart. [...], it is likely that the band will generate substantial revenues in the year to come.

366. On the basis of the improvements contained in the commitments of 17 April 2012 and in view of the competition concerns identified in this case, the Commission considers that the new package constitute adequate combination of back catalogue and writers with future hit making potential. The inclusion of authors with future hit making potential will ensure that the effects of the divestment on control shares will likely be projected in the future as opposed to having effect only on control shares resulting from today's snapshot.

*Geographic scope of the proposed commitments*

367. The Divestment business as set out in the commitments package of 17 April 2012 contains divestment of all rights on a worldwide basis, as compared to the EEA offered in the commitments of 27 March 2012. This improvement addresses in a clear-cut manner the criticism expressed during the market test and ensures that the acquirer of the Divestment business will have the ability to exploit the rights associated to the divested catalogues and authors to the full extent. This is likely to ensure lasting viability of the divestment business if acquired by a suitable purchaser.

*Scale and scope of the Divestment business*

368. The initial size of the Divestment business submitted to market test reached EUR [...] million. In light of the market test indicating that the Divestment business may be insufficient in terms of revenues and the concerns about the viability of Divestment business, the Parties substantially increased the size of the Divestment business principally through extension of the scope of the divested rights from the EEA to worldwide.

369. Indeed, the Divestment business as provided for in the final set of commitments of 17 April 2012 generated music publishing revenues of EUR [20-30] million worldwide. The parties' combined revenues resulting from the exploitation of online rights in the EEA amounted to EUR [10-20] million in 2010 (Sony/ATV EUR [5-10] million and EMI MP EUR [5-10] million)<sup>200</sup>. It follows that the Divestment business generates worldwide revenues from music publishing rights that are nearly twice the overall size of the

---

<sup>200</sup> Parties' submission of 13 April 2012. In addition, revenues generated by the Divestment business are around 80% of the worldwide revenues achieved by Sony/ATV from the exploitation of online rights for Anglo-American repertoire which were EUR 32 million.

revenues generated by the Parties in the market segment giving rise to competition concerns.<sup>201</sup>

370. The Divestment business is also considerably larger than the Parties' combined licensing revenues resulting from the exploitation of online rights in the UK and in Ireland where they reach respectively EUR [...] million and EUR [...] in 2011.

371. The commitments of 17 April 2012 also decrease the control shares in the UK below the threshold for a particularly strong market position of 50% as considered in *Universal/BMG* case<sup>202</sup> and based on aggregated weekly chart hits. The Divestment business includes more than 35 songs that were UK chart hits in 2011. The divestiture of the interests in these songs does not only reduce the control share in the UK below 50% but as a result of the divestiture of worldwide rights, the Parties' control share in other EEA Member States (where control shares are already below 50%) would also be reduced.

372. The only Member State, in which the control share would remain above 50% following the divestiture of the Divestment business is Ireland ([50-60]%). However, as concerns Ireland the control share analysis was based on the limited sample of 290 weekly chart hits that was available for Ireland. Given that this sample is much narrower in comparison to the weekly chart sample in the UK comprising 1489 titles) and the common tastes of UK and Irish consumers (as evidenced by the very similar songs charting in each country's respective charts; according to the Parties 90% of the songs that charted in Ireland also charted in the UK), it is likely that a similarly complete weekly charts sample would result in control shares in Ireland below 50% similar to the UK. Moreover, the Parties submit that all online Irish rights are negotiated and collected by the UK collecting society, PRS and neither of the Parties has an Irish company and no licences or agreements are negotiated for Ireland alone.

*Technicalities associated with the transfer of rights associated with the 12 authors which are not part of the catalogues*

373. As concerns these authors, the Parties explained that given that these authors are not part of a legal entity (as opposed to the catalogues) it is impossible to transfer to the purchaser the underlying contract the Parties have with these authors without the authors' agreement. However, the Parties commit to transfer all rights<sup>203</sup> held by Sony/ATV or EMI MP in the existing copyrights stemming from these contracts including copyrights in

---

201 If the worldwide revenues from online sales of Anglo-American repertoire were considered as relevant point of reference, the Divestment business would represent one third of these revenues reaching approximately EUR 73 million.

202 In that decision it was considered that 50% control share was a threshold above which the merger would have a significant impact. See paragraph 305: *"Any company with a high control share will be difficult to circumvent for the demand side. This is all the more the case where a company reaches 50% since only half or less of the repertoire remains available as substitute. In a cautious approach, the Commission therefore considers that the merger would have a significant impact in those markets where the merged entity would reach or exceed a control share of 50%."*

203 This includes all copyrights and the rights to grant licences for the copying, distribution, and other restricted acts.

the future works by these authors, which according to the Parties, is legally possible without authors' prior agreement. By transferring all interests in existing and future copyrights that come into existence by virtue of these authors' obligations in their existing agreements with the Parties on a world-wide basis, the Purchaser (and not the Parties) will have the exclusive relationship with these authors and control the commercial exploitation of these works on a worldwide basis.<sup>204</sup> The Purchaser would therefore have the exclusive right to collect all royalties, fees and other remuneration arising from the exploitation of the rights transferred.<sup>205</sup>

374. In addition, the commitments provide for a [...] non-solicitation clause whereby the Parties are precluded from signing these authors in the event that the contract with them would expire during this period or the contract would be transferred with the agreement of the author to the Purchaser. This provision ensures that this commitment will produce a structural effect on a lasting basis.

### *Conclusion*

375. It follows from the analysis that proceeds that the commitments submitted on 17 April 2012 are suitable to remedy serious doubts identified in this case. The submitted commitments constitute a comprehensive package bringing the control shares of the merged entity below the threshold indicative of market power, and containing a good mix of back catalogue and authors with future potential thereby ensuring sustainable viability of the Divestment business. In addition, the proposed commitments are likely to have a structural effect on the market as they provide for divestment of all rights (online, mechanical, performance, synchronisation and print rights) on a worldwide basis. As a result, not only do these commitments decrease the putative market power of the merged entity, they also provide the acquirer of the Divestment business with a solid platform to compete in the music publishing sector in the EEA and worldwide.

### **6. Purchaser criteria**

376. In terms of purchaser criteria, the market test indicated that the knowledge of industry is key for any purchaser to acquire the business and run it on a sustainable basis. [...]

377. The commitments of 17 April 2012 address all of these requirements.

## **VII. CONDITIONS AND OBLIGATIONS**

378. Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

---

<sup>204</sup> Form RM submitted on 15 April 2012.

<sup>205</sup> Sony/ATV and EMIMP would have no involvement in the collection or distribution of such royalties, fees or remuneration. The Purchaser will however enter into an agreement with Sony/ATV and EMI MP confirming that it will observe the obligations the Parties have under their contracts with these authors (e.g. obligation to license the works, collect and account for royalties, and offer creative support to the authors).

379. The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

380. In accordance with the basic distinction described above, the decision in this case is conditioned on the full compliance with the requirements set out in sections B, C and D of the commitments submitted by the Parties on 17 April 2012 which constitute conditions, whereas the other sections of the commitments constitute obligations on the Parties.

381. The full text of the commitments is annexed to this decision as Annex 1 and forms an integral part thereof.

### **VIII. CONCLUSION**

382. For the above reasons, the Commission has decided not to oppose the notified Transaction as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions and obligations laid down in the Commitments annexed to the present decision.

383. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004.

*For the Commission*  
(signed)  
*Joaquín ALMUNIA*  
*Vice-President*

## ANNEX 1

### Case COMP M.6459 – Sony Corporation of America/Mubadala Development Company/EMI Music Publishing

#### COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 (the “Merger Regulation”), Sony Corporation of America and Mubadala Development Company PJSC (together, the “Parties”) hereby provide the following Commitments (the “Commitments”) in order to enable the European Commission (the “Commission”) to declare the Parties’ acquisition of EMI Music Publishing (the “Notified Concentration”) compatible with the Common Market and the EEA Agreement in a decision rendered pursuant to Article 6(1)(b) of the EU Merger Regulation (the “Decision”).

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

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

#### Section A. Definitions

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

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of either of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the EU Merger Regulation and in the light of the Commission’s Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

**Closing:** the transfer of the legal title of the Divestment Business to the Purchaser.

**Divestment Business:** the business or businesses as defined in Section B and the Schedules that the Parties commit to divest, unless otherwise agreed by the Commission.

**Divestiture Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties and who has received from the Parties the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Effective Date:** [...]

**First Divestiture Period:** [...]

**Hold Separate Manager:** the person appointed by the Parties for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**Key Personnel:** the personnel currently employed by EMI MP or Sony/ATV who are identified in the Schedules to these Commitments [...]

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties compliance with the conditions and obligations attached to the Decision.

**Personnel:** any personnel forming part of the Divestment Business, including Key Personnel.

**Purchaser:** the entity or entities approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**Trustee(s):** the Monitoring Trustee and the Divestiture Trustee.

**Trustee Divestiture Period:** [...]

**Sony:** Sony Corporation of America, a New York State corporation having its principal place of business at 550 Madison Avenue, 5th Floor, New York, NY 10022 and registered office at 80 State Street, Albany, New York, 12207-2543. The name of its registered agent at that address is Corporation Service Company.

**Sony/ATV:** Sony/ATV Music Publishing LLC, a Delaware limited liability company having its principal place of business at 550 Madison Avenue, 5th Floor, New York, NY 10022 and registered office at 2711 Centerville Road, Suite 400, Wilmington, New Castle County, Delaware, 19808. The name of its registered agent at that address is The Prentice-Hall Corporation System, Inc.

**Mubadala:** Mubadala Development Company PJSC, an Abu Dhabi public joint stock company established in October 2002 through Emri Decree Number 12 of 2002, whose registered office is 5<sup>th</sup> floor, Al Mamoura Building 'A', Intersection of 15<sup>th</sup> Street and Muroor Road, PO Box 45005. Abu Dhabi, United Arab Emirates. For the avoidance of doubt, Mubadala does not include undertakings owned by the Emirate of Abu Dhabi but not controlled by Mubadala for the purposes of Article 3 of the EU Merger Regulation.

**EMI MP:** the music publishing business of the EMI Group.

## **Section B. The Divestment Business**

### Commitment to Divest

1. In order to restore effective competition, the Parties commit to divest, or procure the divestiture of, the Divestment Business to the maximum extent possible under applicable law by the end of the Trustee Divestiture Period as a going concern to a purchaser(s) and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 6. To carry out the divestiture, the Parties commit to find a purchaser(s) and to enter into a final binding agreement for the sale of the Divestment Business within the First Divestiture Period. If the Parties have not

entered into such an agreement at the end of the First Divestiture Period, the Parties shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 25 in the Trustee Divestiture Period.

2. The Parties shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, the Parties have entered into a final binding agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 16 and if the closing of the sale of the Divestment Business takes place within a period not exceeding [...] after the approval of the purchaser and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of [...] after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the notified concentration compatible with the Common Market, or as otherwise agreed with the Commission. The Parties shall also commit not to solicit any of the authors contracted to the Divestment Business (including those listed in Schedule 4) for a period of [...] after the Effective Date. For the avoidance of doubt, this clause shall not prevent Sony/ATV or EMI MP from retaining their existing contractual relationships with the authors listed in Schedule 4, subject always to the Parties' commitment to divest their rights in those authors' works.

#### Structure and Definition of the Divestment Business

4. The Divestment Business comprises a number of music publishing catalogues that contain the music publishing rights of varying durations, including the rights to future compositions, for a balanced and diverse portfolio of Anglo-American music catalogues, ranging from some of today's most successful authors, catalogue to evergreen tracks, and a number of up-and-coming authors. The Divestment Business, described in more detail in Schedules 1 to 5, includes:
  - (a) Intangible assets (including copyrights in musical works (“Copyrights”)) that contribute to the current operation of, or are necessary to ensure the viability and competitiveness of, the Divestment Business, including any existing licences to third parties, such as existing synchronization licences, and the benefit of any options held with respect to those authors that are part the Divestment Business;
  - (b) All licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
  - (c) All contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business (items referred to under (a)-(c) hereinafter collectively referred to as “Assets”); and
  - (d) All Copyrights in the works of the authors identified in Schedule 4, the key elements of which will be as follows:



- (i) [...]or
  - (ii) [...], the Parties or their Affiliated Undertakings shall have the contractual relationship with the rights owner for the duration of their respective contracts, and the Copyrights will include those currently in existence, and those to be delivered, under existing agreements, and those to be delivered following the exercise of any options provided for under existing agreements that, for the avoidance of doubt, may be exercised at the request of the Purchaser;
- (e) If the Purchaser is not currently active in the music publishing industry, the Parties will, upon request of that Purchaser, take reasonable steps and offer reasonable incentives to assist in procuring the transfer to the Purchaser of Key Personnel.
5. The Divestment Business may be sold to one or more Purchasers, provided [...]

### **Section C. Related Commitments**

#### Preservation of Viability, Marketability and Competitiveness

6. From the Effective Date until Closing, the Parties shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular the Parties undertake:
- (a) Not to carry out any act upon their own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
  - (b) To make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans
  - (c) To exercise options arising in contracts forming part of the Divestment Business, where it would be commercially reasonable to do so; and
  - (d) Not to transfer any Copyrights out of the Divestment Business.

#### Hold-Separate Obligations of Parties

7. The Parties commit, from the Effective Date until Closing, to keep the Divestment Business separate from Sony/ATV and to ensure that Key Personnel – including the Hold Separate Manager – have no involvement in any business retained and vice versa.
8. Until Closing, the Parties shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained by the Parties. The Parties shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the

supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the respective business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

#### Ring-Fencing

9. The Parties shall implement all necessary measures to ensure that neither the Parties nor Sony/ATV obtain, after the Effective Date, any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, other than in respect of royalty processing, copyright, registration and other administration and accounting services carried out in the ordinary course of business, such services to be overseen by the Monitoring Trustee insofar as they relate to the Divestment Business, and other than to the extent necessary to implement the Parties' commitment to divest rights to those authors listed in Schedule 4. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. The Parties or their Affiliated Undertakings may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to any Parties or their Affiliated Undertakings is required by law.

#### Non-Solicitation Clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, any Personnel transferred with the Divestment Business for a period of [...] after Closing.

#### Due Diligence

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, the Parties shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process, provide to potential purchasers sufficient information as regards the Divestment Business.

#### Reporting

13. The Parties shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
14. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

## **Section D. The Purchaser**

15. In order to ensure the immediate restoration of effective competition, and subject to the provisions of paragraph 5, the Purchaser, in order to be approved by the Commission, must:
  - (a) Be independent of and unconnected to the Parties;
  - (b) Have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - (c) Neither be likely to create, in the light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the Purchaser hereafter the “Purchaser Requirements”).
16. The final binding agreement or agreements and all ancillary agreements shall be conditional on the Commission’s approval. When the Parties have reached an agreement with a purchaser, they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

## **Section E. Trustee**

### **I. Appointment Procedure**

17. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If the Parties have not entered into a binding sale and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by the Parties at that time or thereafter, the Parties shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.
18. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be

remunerated by the Parties in a way that does not impede the independent and effective fulfillment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

*Proposal by the Parties*

19. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 18 and shall include:
- (a) The full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
  - (b) The outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and
  - (c) An indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

*Approval or Rejection by the Commission*

20. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New Proposal by the Parties*

21. If all the proposed Trustees are rejected, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 17 and 20.

*Trustee Nominated by the Commission*

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

## II. Functions of the Trustee

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

### *Duties and Obligations of the Monitoring Trustee*

24. The Monitoring Trustee shall:
- (i) Propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
  - (ii) Oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
    - (a) Monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 6 and 7 of the Commitments;
    - (b) Supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 8 of the Commitments;
    - (c) (i) in consultation with the Parties, determine all necessary measures to ensure that the Parties or their Affiliated Undertakings do not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, and in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to the Parties or their Affiliated Undertakings as the disclosure is reasonably necessary to allow the Parties or their Affiliated Undertakings to carry out the divestiture or as the disclosure is required by law;
    - (d) As applicable, monitor the splitting of assets and the allocation of Personnel between the Divestment Business and the Parties or Affiliated Undertakings;
  - (iii) Assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
  - (iv) Propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the

holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

- (v) Review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business, in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process;
- (vi) Provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with these Commitments;
- (vii) Within one week after receipt of the documented proposal referred to in paragraph 16, submit to the Commission, send the Parties a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

*Duties and Obligations of the Divestiture Trustee*

- 25. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser(s), provided that the Commission has approved both the purchaser(s) and the final binding sale and purchase agreement(s) in accordance with the procedure laid down in paragraph 16. The Divestiture Trustee shall include in the sale and purchase agreement(s) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement(s) such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of the Parties, subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 26. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

### III. Duties and Obligations of the Parties

27. The Parties shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties and the Divestment Business shall provide the Trustee upon request with copies of any document. The Parties and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
28. The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. The Parties shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. The Parties shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
29. The Parties shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, the Parties shall cause the documents required for effecting the sale and the Closing to be duly executed.
30. The Parties shall indemnify the Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
31. At the expense of the Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 30 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Parties during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, Discharge and Reappointment of the Trustee

32. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
- (a) The Commission may, after hearing the Trustee, require the Parties to replace the Trustee; or
  - (b) The Parties, with the prior approval of the Commission, may replace the Trustee.
33. If the Trustee is removed according to paragraph 32, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 17 to 22.
34. Beside the removal according to paragraph 32, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section F. The Review Clause**

35. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee:
- (i) Grant an extension of the time periods foreseen in the Commitments, or
  - (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where the Parties seek an extension of a time period, they shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

Duly authorized for and on behalf of  
Sony Corporation of America

.....

Duly authorized for and on behalf of  
Mubadala Development Company PJSC



**SCHEDULE 1**  
**Virgin U.K.**

**1. The Divestment Business as operated to date has the following legal and functional structure:**

1.1. The Parties would divest EMI Virgin Music Limited, Circa Music Limited, EMI 10 Music Limited, and Dinsong Limited (“Virgin U.K.”).<sup>206</sup>

1.2. Virgin U.K. has a catalogue comprising rights to over [30,000-40,000] works that generated revenue of €[5-10] million in the EEA and €[10-20] million worldwide in 2011. It includes the rights to classic and contemporary works by an extensive range of leading authors, including:

- **Andy McCluskey (Orchestral Manoeuvres in the Dark and Atomic Kitten).** Andy McCluskey is the lead singer and primary songwriter of the band, Orchestral Manoeuvres in the Dark (also known as OMD), having previously founded the U.K. pop group, Atomic Kitten (for whom he wrote *Whole Again* (#1 in the U.K.). Two of OMD’s singles were U.K top-10 hits, *Locomotion* (#5) and *Enola Gay* (#8). The band is best known in the U.S. for their song, *If You Leave*, which reached #4 on the Billboard Hot 100 after it was included in the *Pretty in Pink* soundtrack album. *The Best of OMD* album achieved triple platinum status in the U.K. and gold status in the U.S.
- **Bryan Ferry (Dene Jesmond Enterprises Ltd).** An English singer-songwriter, Bryan Ferry was the lead vocalist and songwriter for Roxy Music, before enjoying a highly successful solo career with three #1 albums, and ten singles that entered the top 10 U.K., including *Slave to Love*. More recently, his 2007 album, *Dylanesque* charted in the U.K. and Swedish Top 10, whilst his 2010 album, *Olympia* (which featured a number of highly acclaimed artists including the Scissor Sisters and David Gilmour), charted in the U.K. Top 20.
- **Craig Armstrong.** A Scottish composer of modern orchestral music, electronica, and film scores, Craig Armstrong has been nominated for, or won, three BAFTA Awards, a Golden Globe Award, an American Film Institute’s Composer of the Year Award and a Grammy Award. His score for Philips Noyce’s *The Quiet American* garnered him the Ivor Novello Award for Best Original Film Score. One of the most popular tracks composed by Armstrong is *Escape from Plunkett & Macleane*, which was used in the pilot of the 2000 science fiction series *Dark Angel*, in film trailers for *Spider-Man 2*, and *Daredevil*, and by various sports teams, including the England rugby union team on entering the national stadium. Craig Armstrong also composed the score of the hit 2003 Romantic Comedy film, *Love Actually*.
- **Culture Club.** A British rock band, Culture Club’s first three albums achieved platinum status in the U.S. and U.K., and their second album, *Colour by*

---

<sup>206</sup> The Parties are not entitled to, and would not have the right to, transfer the “Virgin” brand.

*Numbers*, sold more than 10 million copies worldwide. Culture Club released several international hits with songs such as *Karma Chameleon* (which was #1 in 16 countries including in the U.K.), *Do You Really Want to Hurt Me* (#1 in 7 countries, including in the U.K.), and *Church of the Poison Mind* (#2 in the U.K. and Top 10 in the U.S. and Canada).

- **Devo.** An American band formed in 1972, Devo had a #14 Billboard Chart hit in 1980 with the single *Whip It*, and have maintained a cult following since. Their song *Uncontrollable Urge* is featured in the video music games *Rock Band* and *Rock Band 2*.
- **Fine Young Cannibals (David Steele, Roland Gift and Andy Cox).** Songwriter and bass guitarist, David Steel, singer Roland Gift, and guitarist Andy Cox, were members of the British band, Fine Young Cannibals. Their hits include *She Drives me Crazy* (#5 in the U.K.) and *Good Thing* (#7 in the U.K., #1 in the U.S. on Billboard Hot 100, and top 10 in four other countries).
- **Gary Barlow.** An English singer-songwriter, the lead vocalist and principal songwriter of Take That, Gary Barlow has had two #1 singles and a #1 album as a solo artist, and 16 Top 5 hits, 11 #1 singles and seven #1 albums with Take That, who have sold 45 million records worldwide. His U.K. #1 singles included in the Virgin U.K. catalogue include *Back For Good* (which went on to reach #1 in over 31 countries, making it the most successful song ever recorded by a boy band), *Never Forget, Pray* (which sold over 410,000 copies in the U.K. and won Best British Single at the 1994 Brit Awards), *Pray*, and *Everything Changes*. Other hits included are *A Million Love Songs* and *Babe* (U.K. #7).
- **Goldcrest Films (The Mission).** The music from the film “The Mission” (1986, winner of the Palme d’Or and the Academy Award for Best Cinematography) was scored by Italian composer Ennio Morricone, was nominated for an Academy Award for Best Original Score, and won the Golden Globe Award for Best Original Score.
- **Iggy Pop.** An American singer-songwriter and musician, Iggy Pop was the vocalist of influential protopunk, The Stooges, for which he has garnered acclaim as an innovator of punk rock. Iggy Pop has written and recorded a number of classic songs, including *Lust for Life*, *China Girl* (which was written and recorded with David Bowie and reached #2 in the U.K. and #10 in the U.S.), *Nightclubbing*, and *The Passenger*.
- **Lenny Kravitz.** An American singer-songwriter, multi-instrumentalist and record producer, Lenny Kravitz won the Grammy for Best Male Rock Vocal Performance four years in a row from 1999 to 2002, and has sold over 40 million albums worldwide. He has won and been nominated for American Music Awards, MTV Video Music Awards, Radio Music Awards, BRIT Awards, and Blockbuster Entertainment Awards. All of his albums received certifications of gold or higher in the U.S., three of which reached multi-platinum status. His global hits include such titles as *Fly Away* (#1 in the U.K.), *It Ain’t Over Til It’s Over* (#2 in the U.S. and #11 in the U.K.), and *Are You Gonna Go My Way*. His eighth studio album released in 2008, *It Is Time*

for a *Love Revolution*, sold 1.5 million copies worldwide, and includes the singles *Dancin' Til Dawn*, as well as *I'll Be Waiting*, which peaked at #13 in the European Hot 100 Singles. His most recent album, *Black and White America*, was released in 2011.

- **Liam Howlett.** Liam Howlett is the principal songwriter behind the English electronic dance music group, The Prodigy. The Prodigy has sold over 25 million records worldwide and won numerous music awards, including two Brit Awards, three MTV Video Music Awards, two Kerrang! Awards, five MTV Europe Music Awards, and has been twice nominated for Grammy Awards. Their album, *Fat Of The Land*, debuted at #1 on the Billboard Top 200 chart, reached double platinum status, and entered the Guinness World Records in 1999 as the fastest-selling U.K. album in history. Singles *Omen* and *Invaders Must Die*, released in 2009, were top five hits in the U.K., whilst *Warrior Dance* reached the U.K. top 10. A live album, *World's on Fire*, was released in 2011, and a new studio album is expected to be released in 2012.
- **Martha and the Muffins.** A Canadian New Wave band, Martha and the Muffins had international success with the hit, *Echo Beach* (1980), which peaked at #10 in the U.K.
- **Paul Walden (aka Guru Josh).** Guru Josh was an icon of the British post-acid house music scene. His debut single *Infinity* achieved top 10 success in many European countries, such as Germany and Austria, in 1989 and peaked at #5 in the U.K. in 1990. The song was re-released in 2008 by the German artist, DJKlaas, and reached #1 in France, Belgium, Denmark, as well as on the Eurochart Hot 100, #2 on the German dance chart, and #3 in the U.K.
- **Richard Ashcroft.** An English singer-songwriter, Richard Ashcroft was the lead singer for the alternative rock band, The Verve (1990-1999), which reached acclaim with hits such as *The Drugs Don't Work* (#1 in the U.K.) and *Lucky Man* (#7 in the U.K.).
- **Robbie Williams.** An English singer-songwriter and a member of the pop group Take That, Robbie Williams is the best-selling British solo artist in the U.K., with total album sales standing at over 57 million worldwide. Six of his albums are among the top 100 biggest-selling albums in the U.K. He has also been honoured with 17 BRIT Awards - more than any other artist - and seven ECHO Awards. In 2004, he was inducted into the U.K. Music Hall of Fame after being voted as the "Greatest Artist of the 1990s." The Virgin U.K. catalogue includes *Angels* (which peaked at #4 in the U.K., achieved double platinum status, and was voted the best song of the past 25 years at the BRIT Awards), *Rock DJ* (U.K. #1), *Kids* (U.K. #2), *Let Me Entertain You* (U.K. #3), *No Regrets* (U.K. #4), and *Strong* (U.K. #4).
- **Soul II Soul.** A British Group formed in 1988, Soul II Soul is best known for their U.K. #1 hit, *Back to Life (However, Do You Want Me)*.
- **Stereo MC's.** Stereo MC's are an English electronic dance group who are best known worldwide for their album *Connected*, which contained the hit singles

*Connected*, and *Step It Up*. In 1992, they won the Brit Award for Best Group and Best Albums.

- **Tears for Fears (including Roland Orzabal, Curt Smith, Ian Stanley, and Nicky Holland).** English pop/rock band, Tears for Fears, formed in 1981. *Head Over Heels* (1985) from their seminal album, *Songs from the Big Chair*, went five times platinum in the U.S. and three times platinum in the U.K.; and *Sowing the Seeds of Love* (1989) from their third album, *Seeds of Love*, reached the top 10 in numerous countries, debuting at #1 on the U.K. Album chart and reaching #8 in the US.
- **Terence Trent D'Arby.** An American singer-songwriter who came to fame with his album *Introducing the Hardline According to Terence Trent D'Arby*, released in 1987, and which included the U.K. top 10 singles, *Wishing Well* (#4), *Sign Your Name* (#2), and *If You Let Me Stay* (#7). This album sold over a million copies in the first three days of its release, and its sales have totaled over 14 million. In 1987 the album reached #1 in the U.K. and China, and was in the Top 5 in the U.S., Australia, New Zealand, Switzerland, Netherlands, Norway, Germany, and Sweden. The album earned Terence Trent D'Arby a Grammy Award in 1988. His third album *Symphony or Damn* included the single *Delicate*, and peaked at #4 on the U.K. Album Charts in 1993.
- **Texas (including Sharleen Spiteri, Johny McElhone, Andrew Connell, and Alistair McErlaine).** The Scottish pop band Texas shot to international acclaim in 1989 with their debut album, *Southside*, along with the debut single *I Don't Want a Lover*, which charted at #8 on the U.K. Chart, and enjoyed high charting positions in other European countries. Texas' fourth album, *White on Blonde*, has been certified six times platinum in the U.K. and includes the U.K. #3 hit, *Say What You Want*.
- **The Beloved.** An English electronic dance music group, the Beloved, had success with a string of hit singles, including *Sweet Harmony* (#8 in the U.K.), which has been covered three times since its release in 1993.
- **The Human League (including singer-songwriter Phil Oakley, and Philip Adrian Wright).** The Human League released a large number of international hits from the early 1980s to the mid 1990s. They shot to fame in 1981 with the release of the triple platinum album *Dare* and the singles *Love Action (I Believe in Love)*, a U.K. #3, and *Don't You Want Me*, a U.K. #1 which sold over two million copies worldwide, and led the band to winning a BRIT Award for Best British Breakthrough Act. Their follow-up single, *(Keep Feeling) Fascination*, was released in 1983 and reached #2 in the U.K., and in 1984 lead singer Phil Oakley released the classic hit *Together in Electric Dreams* (a U.K. #3).

**2. Following paragraph 4 of these Commitments, the Divestment Business includes, but is not limited to:**

**(a) the following main tangible assets:**

- 2.1. Virgin U.K. does not own any material tangible assets.

**(b) the following main intangible assets:**

2.2. The main assets of Virgin U.K. are its catalogue of music publishing copyrights, which are of varying duration. Annex 3 contains a list of the top copyrights (by EEA 2011 revenue) which represented c. [...] of Virgin U.K.'s EEA revenues in 2011.<sup>207</sup>

**(c) the following main licenses, permits and authorizations:**

2.3. Not applicable.

**(d) the following main contracts, agreements, leases, commitments and understandings:**

2.4. Virgin U.K. will be sold with all current songwriter agreements and subject to all prior licenses. The following table shows the top 10 EEA revenue earning authors for Virgin U.K. in 2011.

**Virgin U.K. Top Authors (2011)**

<b>Author</b>	<b>Total EEA Revenues, 2011 (€)</b>
Lenny Kravitz	[...]
Robbie Williams	[...]
Gary Barlow	[...]
Liam Howlett	[...]
Brian Ferry (Dene Jesmond Enterprises)	[...]
Texas	[...]
Guru Josh (Paul Walden)	[...]
Craig Armstrong	[...]
David Steele	[...]
Orzabal Roland	[...]

**(e) the following customer, credit and other records:**

2.5. Not applicable.

**(f) the following Key Personnel:**

2.6. The Key Personnel who may be transferred to the Purchaser in accordance with paragraph 4(e) of the Commitments are:

- [...]
- [...]
- [...]

---

<sup>207</sup> EMI has identified a small number of works included in the previous version of Form RM for which the retention periods have expired. These works have now been removed from Annex 3.

**(g) the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period after Closing:**

- 2.7. It is not anticipated that it would be necessary for arrangements to be put in place for the supply of any necessary services for a transitional period, but the Notifying Parties would be prepared to agree to supply any such services on arm's length terms, if required by the Commission at the request of the Purchaser, for a reasonable transition period.

**3. The Divestment Business shall not include:**

- 3.1. For contractual reasons, the Notifying Parties are unable to transfer the right to use the Virgin brand name.

**SCHEDULE 2**  
**Virgin U.S.**

**1. The Divestment Business as operated to date has the following legal and functional structure:**

- 1.1. The Parties would divest EMI Virgin Music, Inc.<sup>208</sup> and EMI Virgin Songs, Inc. (“Virgin U.S.”).<sup>209</sup>
- 1.2. Virgin U.S. has a catalogue of [5,000-10,000] songs that generated 2011 revenues of c. [<€] million in the EEA and c. €[5-10] million worldwide. It includes the rights in classic and contemporary works by a variety of authors, including:
  - **Ben Harper.** An American singer-songwriter and guitarist, Ben Harper plays an eclectic mix of blues, folk, soul, reggae and rock music, and has a wide fan base across several continents. He is a two-time Grammy Award winner and has collaborated with numerous other artists. Harper is currently active through his band, Relentless7.
  - **Bruce Swedien.** A five time Grammy Award-winning writer and producer known for his work with Michael Jackson and Quincy Jones. Bruce Swedien co-wrote the song *Jam* which was recorded by Michael Jackson for his *Dangerous* album and reached #26 on the Billboard Hot 100 chart, as well as charting in the top 10 around the world.
  - **Gene Griffin.** An American music producer and executive. He co-wrote and produced the hit single *My Prerogative* which was a #1 in the U.S. for Bobby Brown in 1988 and 1989. *My Prerogative* has been sampled and covered by many artists from different genres, including Britney Spears, LL Cool J, Beenie Man and Public Enemy. The song has also been featured on various films, including *Love & Basketball* (2000) and *Wild Hogs* (2007).
  - **Goo Goo Dolls.** An American rock band formed in 1986, Goo Goo Dolls have 14 top 10 singles and have sold more than 10 million albums worldwide. The band came to stardom with the single, *Iris*, which stayed on the top of the Billboard Hot 100 Airplay Chart for a record-breaking 18 weeks and later in September 2011 reached #1 in the U.K. 13 years after its original release.
  - **John Barry.** An English conductor and composer of film music, Barry won an Academy Award in 1990 and a Grammy Award in 1991 for his soundtrack to the film *Dances with Wolves*. Barry was inducted into the Songwriters Hall of Fame in 1998.

---

<sup>208</sup> Windriva Music, Inc. (a subsidiary of EMI Virgin Music, Inc.) and the assets forming the Windswept business are excluded, as they do not form part of the Virgin U.S. catalogue.

<sup>209</sup> The Parties are not entitled to, and would not have the right to, transfer the “Virgin” brand.

- **John “Ozzy” Osbourne.** The vocalist and songwriter of the pioneering English heavy metal band, Black Sabbath, Ozzy Osbourne’s musical career has spanned over 40 years, and he has reached iconic status as the “Prince of Darkness.” He has sold over 100 million albums worldwide as a solo artist and with Black Sabbath. In 2005, he was inducted into the U.K. Hall of Fame, as a solo artist and as a member of Black Sabbath. Virgin U.S.’s song catalogue includes *Bark At the Moon* (1983), *Mama, I’m Coming Home* (1991), *I Don’t Want to Stop* (2007), and *Not Going Away* (2007). His career further grew in the early 2000s when he became a star in his own reality show, *The Osbournes*. In November 2011, it was announced that Black Sabbath would reunite for a world tour and new album.
- **Kurt Cobain.** Kurt Cobain was the singer-guitarist and principal songwriter of Nirvana, an American band formed in 1987 which reached international acclaim for breaking out “grunge” into the mainstream. Three of Nirvana’s albums debuted at the top of the Billboard album chart, and in 1994 the band received a Grammy Award for Best Alternative Music Album. Hit singles by Nirvana include *Come As You Are* (#9 in the U.K. Singles Chart 1992), *Smells Like Teen Spirit* (#7 in the U.K. Singles Chart 1991), and *Heart Shaped Box* (#5 in the U.K. Singles Chart 1993). Following his death in 1994, Cobain was described as the “voice of a generation,” and although it marked the end of Nirvana the band have retained their legendary status to the present day.
- **Oliver Leiber.** Oliver Leiber is a songwriter who wrote the hit *Opposites Attract* for Paula Abdul, which reached #1 in the U.S. and Australia and achieved success in many other countries. *Opposites Attract* was Paula Abdul’s fourth #1 single on the Billboard Hot 100 and made her only the fourth artist in history to score four #1 hits from a single album.
- **Patrick Moten.** Patrick Moten is the songwriter of *Lola’s Theme* which was performed by the New Zealand band, Shapeshifter. Moten also co-wrote Bobby Womack's *If You Think You're Lonely Now* (which peaked at #3 on the 1982 Billboard Hot Soul Singles chart) and *Love Has Finally Come at Last*, performed by Bobby Womack with Patti LaBelle, which reached #3 in the U.S. R&B Chart in 1984.
- **Richard “Jim” Steinman.** An American composer, lyricist and Grammy Award-winning record producer, Jim Steinman was the writer behind Meat Loaf’s 1977 album, *Bat out of Hell*, which sold over 40 million copies worldwide, and the 1993 album, *Bat Out of Hell II: Back Into Hell*, which included *I’d Do Anything for Love (But I Won’t Do That)*, which reached #1 in 28 countries. Steinman has also written many “power ballads” made famous by popular artists such as Bonnie Tyler (*Total Eclipse of the Heart*, which peaked at #1 in a number of countries, including the U.S. and U.K., and sold more than 6,000,000 copies), and Air Supply (*Making Love Out of Nothing at All*, which reached #2 on the Billboard Hot 100).
- **The Crystal Method.** An electronic music duo that was created by Ken Jordan and Scott Kirkland in the early 1990s. Their best-selling album, *Vegas*, was released in 1997 and was certified platinum in the U.S. in 2007. Five of the ten



tracks on the album were released as singles, including *High Roller* and *Keep Hope Alive*, which are both on Virgin U.S.'s catalogue.

- **Tool.** An American heavy metal band formed in 1990, Tool have won three Grammy Awards, including for the singles *Schism* (2002) and *10,000 Days* (2006). Their album *10,000 Days* (2006) brought the band international acclaim, selling three million copies by the end of that year. Virgin U.S.'s catalogue includes hits such as *Schism*, *Parabola*, *Vicarious*, *Jambi*, *10,000 Days (Wings Pt 2)*, *The Pot*, *Rosetta Stoned*, *Right In Two*, *Intension*, *Wings For Marie (Pt 1)*, and *Viginti Tres*.
- **Warrant.** A heavy metal band, Warrant have released five albums with international sales of over 10 million. Their first two albums each sold two million copies: *Heaven* reached #2 on the Billboard Hot 100 and *Cherry Pie* reached the top 10 and has gone on to become a rock anthem.

**2. Following paragraph 4 of these Commitments, the Divestment Business includes, but is not limited to:**

**(a) the following main tangible assets:**

2.1. Virgin U.S. does not own any material tangible assets.

**(b) the following main intangible assets:**

2.2. The main assets of Virgin U.S. are its catalogue of music publishing copyrights, which are of varying duration. Annex 3 contains a list of the top copyrights (by EEA 2011 revenue) which represented c. [...] of Virgin U.S.'s EEA revenues in 2011.<sup>210</sup>

**(c) the following main licenses, permits and authorizations:**

2.3. Not applicable.

**(d) the following main contracts, agreements, leases, commitments and understandings:**

2.4. Virgin U.S. will be sold with all current songwriter agreements and subject to all prior licenses. The following table shows the top EEA revenue earning authors for Virgin U.S. in 2011.

---

<sup>210</sup> EMI has identified a small number of works included in the previous version of Form RM for which the retention periods have expired. These works have now been removed from Annex 3.

### **Virgin U.S. Top Authors (2011)**

<b>Author</b>	<b>Total EEA Revenues, 2011 (€)</b>
<b>Kurt Cobain (Nirvana)<sup>211</sup></b>	[...]
<b>Ben Harper</b>	[...]
<b>Jim Steinman</b>	[...]
<b>John “Ozzy” Osbourne</b>	[...]
<b>Goo Goo Dolls</b>	[...]
<b>Tool</b>	[...]

**(e) the following customer, credit and other records:**

2.5. Not applicable.

**(f) the following Key Personnel:**

2.6. The Key Personnel who may be transferred to the Purchaser in accordance with paragraph 4(e) of the Commitments are:

- [...]
- [...]
- [...]

**(g) the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period after Closing:**

2.7. It is not anticipated that it would be necessary for arrangements to be put in place for the supply of any necessary services for a transitional period, but the Notifying Parties would be prepared to agree to supply any such services on arm's length terms, if required by the Commission at the request of the Purchaser, for a reasonable transition period.

### **3. The Divestment Business shall not include:**

3.1. For contractual reasons, the Notifying Parties are unable to transfer the right to use the Virgin brand name.

---

<sup>211</sup> Virgin U.S.'s agreement with the Kurt Cobain estate is an administration deal.

**SCHEDULE 3**  
**Famous Music U.K.**

**1. The Divestment Business as operated to date has the following legal and functional structure:**

- 1.1. Under the proposed Commitments, the Parties would divest Famous Music Publishing Limited (“Famous U.K.”).
- 1.2. Famous Music U.K. has an [500-1,000] song catalogue that generated revenues of [<€ million] in the EEA and [<€ million] worldwide in 2011. It includes the rights to classic and contemporary works by a variety of British authors, including:
  - **Brassy.** An English rock/hip hop band active between 1994 and 2003. They released two albums with singles such as *Boss*, *Straighten Out* and *Sure Thing*. Their song *Play Some D* was used in Motorola’s “Hellomoto” advertising campaign.
  - **Dan Black.** An English singer-songwriter, Dan Black was originally the lead singer and rhythm guitarist of alternative rock band The Servant. Since their split in 2007, Dan Black has released several solo singles, including *Symphonies*, which was the U.S. iTunes “Single of the Week” in December 2009.
  - **Ian Dury and Chaz Jankel of The Blockheads.** Ian Dury and Chaz Jankel were members of an English rock and roll band formerly known as “Ian Dury and the Blockheads”. The band released several hit singles such as *Hit Me With Your Rhythm Stick* (#1 UK Singles Chart in January 1979), *What a Waste* (#9 U.K. Singles Chart in 1978), *Reasons to be Cheerful, Part 3* (#3 U.K. Singles Chart in 1979), and *Sex & Drugs & Rock & Roll*.
  - **Jean Maunick.** A British guitarist, composer and record producer, Jean Maunick has led the British acid jazz band Incognito since its formation in 1979. Incognito have released fourteen studio albums in addition to live albums, remix albums, and compilation albums. Amongst Incognito’s successes include the album *100 Degrees and Rising* which reached #11 in the U.K. Album Chart, and the single *Always There* which peaked at #6 in the U.K. Album Chart in 1992.
  - **Mushtaq.** Mushtaq has co-written songs with the British R&B band Mis-Teeq, producing songs such as *My Song*, *B With Me* (#5 U.K. Singles Chart in 2001) and *How Does It Feel*, and worked in cooperation with Terry Hall to produce the album *The Hour of Two Lights* and songs such as *Ten Eleven* and *Grow*.
  - **Placebo.** An English alternative rock band from London, Placebo were formed in 1994 by singer-guitarist Brian Molko, and bass guitarist Stefan Olsdal. To date, they have released six studio albums (all of which have reached the top 20 in the U.K., and five have reached the top 20 in Germany), six EPs and twenty nine singles. Placebo have sold over ten million records worldwide. Their main hits are: *Nancy Boy* (peaked at #4 in the U.K. charts in 1997); *Pure Morning* (peaked at #4 in the U.K. charts in 1998); and *You Don't Care About Us* (peaked at #5 in the U.K. charts in 1998).

- **The Kooks.** An English rock band from Brighton, U.K., The Kooks were formed in 2001. They broke into the musical mainstream with their debut album *Inside In/Inside Out* (which sold over two million copies, achieving quadruple platinum status in the U.K. within a year of its 2006 release). Their follow-up album *Konk* debuted at number one on the UK Albums Chart in 2008 (and reached #6 in the German album chart and #7 in the Dutch Album chart) and achieved gold status in the UK and Ireland. Their third studio album, *Junk of the Heart*, was released in September 2001 (and reached #6 in the Dutch Album chart). The Kooks reached the Top 10 chart in the U.K. with *Always Where I Need to Be* (peaked at #3 in the U.K. charts in 2008); and *Naïve* (peaked at #5 in the U.K. in 2006).

**2. Following paragraph 4 of these Commitments, the Divestment Business includes, but is not limited to:**

**(a) the following main tangible assets:**

2.1. Famous Music U.K. does not own any material tangible assets.

**(b) the following main intangible assets:**

2.2. The main assets of Famous Music U.K. are its catalogue of music publishing copyrights, which are of varying duration. Annex 3 contains a list of top copyrights (by 2011 revenue) owned by Famous Music U.K.

**(c) the following main licenses, permits and authorizations:**

2.3. Not applicable.

**(d) the following main contracts, agreements, leases, commitments and understandings:**

2.4. Famous Music U.K. will be sold with all current songwriter agreements and subject to all prior licenses. The following table shows the top 10 EEA revenue earning authors for Famous Music U.K. in 2011.

**Famous U.K.'s Top Authors (2011)**

<b>Author</b>	<b>Total EEA Revenues, 2011 (€)</b>
Placebo	[...]
The Kooks	[...]
Dan Black	[...]
Chaz Jankel	[...]
Jean-Paul Maunick	[...]
Bilu Music Limited	[...]
Mushtaq Omar Uddin	[...]
Paddy Dalton	[...]
Paul Garred	[...]
Brassy	[...]

**(e) the following customer, credit and other records:**

2.5. Not applicable.

**(f) the following Key Personnel:**

2.6. The Key Personnel who may be transferred to the Purchaser in accordance with paragraph 4(e) of the Commitments are:

▪ [...]

**(g) the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period after Closing:**

2.7. It is not anticipated that it would be necessary for arrangements to be put in place for the supply of any necessary services for a transitional period, but the Notifying Parties would be prepared to agree to supply any such services on arm's length terms, if required by the Commission at the request of the Purchaser, for a reasonable transition period.

### **3. The Divestment Business shall not include:**

3.1. Not applicable.

**SCHEDULE 4**  
**Current Authors And Writers/Producers**

**1. The Divestment Business as operated to date has the following legal and functional structure:**

- 1.1. To ensure the Catalogues include a significant number of high profile modern authors, the Parties have identified what they consider to be among the most successful and highly prized current authors administered by Sony/ATV or EMI MP. They are also among their highest earning authors in the EEA. Together these authors generated revenues of c. [€ million] in the EEA and [€5-10 million] worldwide in 2011.
- 1.2. Under the proposed Commitments, the Parties would be prepared to transfer the worldwide rights in the catalogue of songs under these contracts (including future songs where applicable) to a new legal entity (or to Virgin U.K. and/or Famous U.K.) that could be divested, or directly to the purchaser.
  - **Alesha Dixon.** Alesha Dixon came to prominence in the early 1990s as a member of the enormously successful girlband Mis-Teeq, who are primarily remembered for Alesha and her unique vocal delivery. Following the band's split in 2005, Dixon has pursued a successful solo career which was boosted by her popularity on the BBC's Strictly Come Dancing show, first as a contestant then as a long-running judge. Dixon's second solo album, The Alesha Show, reached #11 in the U.K. Albums Chart and was certified platinum. The album included two top 10 singles, The Boy Does Nothing (#1 in the U.K. charts), and Breathe Slow (#3 in the U.K. charts), as well as two other top 20 hits in the U.K. Alesha is currently a judge on the popular TV show, Britain's Got Talent. Sony/ATV holds interests to a catalogue of songs written by Alesha Dixon.
  - **Bullet For My Valentine (Matt Tuck, Michael Paget, Jason James and Michael Thomas).** Formed in 1998, this Welsh heavy metal band consists of Matt Tuck (lead vocals, rhythm guitar), Michael Paget (lead guitar, backing vocals), Jason James (bass guitar, backing vocals), and Michael Thomas (drums). The band has sold over one million albums in the U.S. and nearly 2,500,000 albums worldwide. They have won four Kerrang! Awards (Best British Single, Best British Newcomer, Best British Band and Best Live Band), a Welsh Music Award for Best Newcomer, and two Metal Hammer Golden God Awards for Best British Band. Bullet For My Valentine have stormed to #1 on the U.K. Rock Chart with seven consecutive singles. EMI MP holds interests to a catalogue of songs written by Matt Tuck, Michael Paget, Jason James and Michael Thomas.
  - **Duffy.** One of the most successful British acts of the past decade, Duffy has been recognised as a leading singer-songwriter across the globe. Duffy's first album entered the U.K. charts at #1 and attained five times platinum status. Her debut release was the best-selling album in the U.K. in 2008 and the fourth best-selling album worldwide for the same year, producing hits including Mercy (#1 in the U.K. charts) and Warwick Avenue (#3 in the U.K. charts). Duffy's extensive awards collection includes the 2009 Grammy Award for Best Pop Vocal Album, three Brit Awards (including Best Female Solo artist and British Breakthrough

act), and Song of the Year at the 2008 MOJO Awards. EMI MP holds interests to a catalogue of songs written by Duffy.

- **Eg White.** British musician, songwriter, and producer Eg White has worked with many successful pop artists, including Adele, Duffy, Will Young, Rebecca Ferguson, and James Morrison. He has written a large number of successful songs, including Will Young's *Leave Right Now* (#1 in the U.K. and Ireland Singles Charts), Sara Jorge's *Dirty Business* (#1 in the U.K. Dance and Club Charts), Diana Vickers's *Once* (#1 in the U.K. Singles Chart in 2010), and Duffy's *Warwick Avenue* (#3 in the U.K. Singles Charts). Sony/ATV holds interests to a catalogue of songs written by Eg White.
- **Eric Appapoulay, Richard Cassell and Tom Wright-Goss (writers for Plan B).** Eric Appapoulay, Richard Cassell, and Tom Wright-Goss co-wrote a number of tracks performed by Plan B, a highly successful British artist and singer-songwriter, on his album *The Defamation of Strickland Banks*, which reached #1 in the U.K. Albums Chart. Sony/ATV holds interests to a catalogue of songs written by Eric Appapoulay, Richard Cassell, and Tom Wright-Goss.
- **Jason Orange and Howard Donald (of Take That).** In addition to Take That repertoire that is part of the Virgin U.K. Catalogue, the Parties would divest EMI MP's interest in a catalogue of songs composed by Howard Donald and Jason Orange, two members of Take That, including EMI MP's interest in future songs. Take That are one of Britain's most successful bands of the last 20 years who remain among the most popular and highest earning acts in the U.K. today. EMI MP holds interests to a catalogue of songs written by Jason Orange and Howard Donald.
- **Mark Ronson.** Mark Ronson is an American DJ, guitarist, music producer, artist, and co-founder of Allido Records. His second album, *Version*, included three top 10 hits and won him a BRIT Award for Best Male Artist 2008. Ronson has since produced multiple songs on the albums of singers Lamya, Macy Gray, Christina Aguilera, Lily Allen, and Robbie Williams. Ronson has also produced for the renowned soul-jazz singer Amy Winehouse, including her album *Back to Black*, which sold over 3.5 million copies in the U.K. to become the U.K.'s second best-selling album of the 21<sup>st</sup> century. Mark Ronson has co-written Rufus Wainwright's soon-to-be released album and has also been writing with Bruno Mars. His productions include the hit single *Valerie*, which features his vocals together with Amy Winehouse and reached #2 in the U.K. Singles Chart, selling half a million copies in the U.K. and spending a total of 36 consecutive weeks on the U.K. charts. EMI MP holds interests to a catalogue of songs written by Mark Ronson.
- **Matt Cardle.** Cardle is an English singer-songwriter who shot to fame after winning the popular TV show *X-Factor* in 2010. His smash hit debut single, *When We Collide*, was Christmas #1 in the U.K. and remained in the top spot for three consecutive weeks. It became the second biggest selling single of 2010 and has since sold over 980,000 copies in the U.K. Cardle's debut album, *Letters*, peaked at #2 in the U.K. Albums Chart and has sold over a quarter of a million copies to date. The album spawned the hit single, *Run for Your Life*, which was

written by Gary Barlow and reached #6 in the U.K. charts. Sony/ATV holds interests to a catalogue of songs written by Matt Cardle.

- **Mona (Nick Brown, Vince Gard, Zach Lindsey and Jordan Young).** Mona are an American rock band that have been tipped for widespread success in the U.K. and U.S., and were recently awarded the Brand New for 2011 title at the MTV Awards. In addition to playing at the world's most prestigious music festivals, including Glastonbury (U.K.), Reading and Leeds Festival (U.K.), Summer Sonic Festival (Japan), and Splendour in the Grass (Australia), Mona have supported leading acts such as Kings of Leon. The band was recognised in the BBC's Sound of 2011 poll, which predicts future hit artists. Mona have just released an album in the U.S. and Nick Brown is currently writing an album with a Kings of Leon writer. EMI MP holds interests to a catalogue of songs written by Nick Brown, Vince Gard, Zach Lindsey and Jordan Young.
- **Nadine Coyle (Girls Aloud).** Nadine Coyle is an Irish singer, songwriter, actress and model who shot to stardom with the popular girl-group, Girls Aloud. With the band, Coyle amassed a string of 20 consecutive top 10 singles in the U.K. (including four #1 hits), as well two hit albums that both charted at #1 in the U.K. The group also received nominations for five BRIT Awards, winning one for Best Single in 2009. Coyle kick-started a solo career in 2010 with her debut solo album *Insatiable*. The album was released on her own label, Black Pen Records, and peaked at #20 in the Irish Album Charts. Coyle worked with a number of famous songwriters and producers for *Insatiable*, including Desmond Child, Guy Chambers, Mike Elizondo, Steve Booker and Toby Gad, as well as Matchbox Twenty's Kyle Cook, William Orbit, and Tiesto. EMI MP holds interests to a catalogue of songs written by Nadine Coyle.
- **Scouting For Girls (Roy Stride).** This leading British pop group has achieved huge success in the U.K. singles and album charts, boasting a debut album that reached #1 in the U.K. and went on to attain triple platinum status. The group's hits include *This Ain't A Love Song* (#1 in the U.K. charts), *Elvis Ain't Dead* (#8 in the U.K. charts), and *She's So Lovely* (#7 in the U.K. charts). They have also had two smash hit albums, *Scouting for Girls* and *Everybody Wants to Be on TV*, which peaked at #1 and #2 in the U.K. *Scouting for Girls* has been nominated for several of the most prestigious awards in the music industry, including four BRIT Awards, a MTV Europe Music Award, and an Ivor Novello Award. EMI MP holds interests to a catalogue of songs written by Roy Stride.
- **Wayne Hector.** One of the best known contemporary U.K. songwriters, Wayne Hector has written for many popular artists, including Britney Spears, Pussycat Dolls, Susan Boyle, James Harrison, Westlife, Cheryl Cole, and Enrique Iglesias. He has also written many successful Westlife tracks, including *Flying Without Wings* (#1 in the U.K. and Ireland Singles Chart), *What Makes a Man* (#2 in the U.K. and Ireland Singles Charts) and *Swear It Again* (#1 in the U.K. and Ireland Singles Charts, as well as charting in the U.S. Billboard Top 40). In 2010, Hector won a BRIT Award in the Best Single Category for *Beat Again*, performed by JLS (#1 in the U.K. Singles Charts and #6 in the European Hot 100 Singles). Sony/ATV holds interests to a catalogue of songs written by Wayne Hector.



**2. Following paragraph 4 of these Commitments, the Divestment Business includes, but is not limited to:**

**(a) the following main tangible assets:**

2.1. No tangible assets are included in the rights in the catalogue of songs under these contracts.

**(b) the following main intangible assets:**

2.2. A list of the works in which rights would be transferred is provided at Annex 3.

**(c) the following main licenses, permits and authorizations:**

2.3. Not applicable.

**(d) the following main contracts, agreements, leases, commitments and understandings:**

2.4. The worldwide rights to contracts with the following authors will be transferred subject to all prior licenses.

**Details of Author Contracts**

<b>Author</b>	<b>Term</b>	<b>Future Delivery Obligations</b>	<b>Retention Period</b>	<b>2011 Worldwide Revenues (€)</b>
<b>Alesha Dixon</b>	[...]	[...]	[...]	[...]
<b>Bullet For My Valentine (Matt Tuck, Michael Paget, Jason James and Michael Thomas)</b>	[...]	[...]	[...]	[...]
<b>Duffy</b>	[...]	[...]	[...]	[...]
<b>Eg White</b>	[...]	[...]	[...]	[...]
<b>Eric Appapoulay (Plan B)</b>	[...]	[...]	[...]	[...]
<b>Jason Orange and Howard Donald (Take That)</b>	[...]	[...]	[...]	[...]

<b>Author</b>	<b>Term</b>	<b>Future Delivery Obligations</b>	<b>Retention Period</b>	<b>2011 Worldwide Revenues (€)</b>
<b>Mark Ronson</b>	[...]	[...]	[...]	[...]
<b>Matt Cardle</b>	[...]	[...]	[...]	[...] <sup>212</sup>
<b>Nadine Coyle (solo works)</b>	[...]	[...]	[...]	[...]
<b>Nadine Coyle (Girls Aloud)</b>	[...]	[...]	[...]	[...]
<b>Mona (Nick Brown, Vince Gard, Zach Lindsey and Jordan Young)</b>	[...]	[...]	[...]	[...]
<b>Richard Cassell (Plan B)</b>	[...]	[...]	[...]	[...]
<b>Scouting For Girls (Roy Stride)</b>	[...]	[...]	[...]	[...]
<b>Tom Wright-Goss (Plan B)</b>	[...]	[...]	[...]	[...]
<b>Wayne Hector</b>	[...]	[...]	[...]	[...]

(e) **the following customer, credit and other records:**

2.5. Not applicable.

(f) **the following Key Personnel:**

2.6. The Key Personnel who may be transferred to the Purchaser in accordance with paragraph 4(e) of the Commitments are:

---

<sup>212</sup> EMI MP signed Matt Cardle during 2011, after he won the U.K.'s X Factor and reached the Christmas #1 spot in the U.K.. His first album was released at the end of 2011 and for this reason no revenues were received in 2011. However, this does not detract from the fact that he is a significant name in the U.K. pop music industry and is expected to generate material revenues in 2012 and in the future, his first album having reached #2 in the U.K. and Irish album charts.

- [..]
- [...]
- [...]
- [...]

**(g) the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period after Closing:**

2.7. It is not anticipated that it would be necessary for arrangements to be put in place for the supply of any necessary services for a transitional period, but the Notifying Parties would be prepared to agree to supply any such services on arm's length terms, if required by the Commission at the request of the Purchaser, for a reasonable transition period.

**3. The Divestment Business shall not include:**

3.1. Not applicable.

**SCHEDULE 5**  
**Virgin Europe**

**1. The Divestment Business as operated to date has the following legal and functional structure:**

- 1.1. The Parties would divest the following entities (together “Virgin Europe”): EMI Virgin Music Publishing Belgium NV, EMI Virgin Music Publishing France SA, EMI Virgin Music Publishing Germany GmbH, EMI Virgin Music Publishing Greece LLC, EMI Virgin Music Publishing Italy Srl, EMI Virgin Music Publishing Holland BV, and EMI Virgin Music Publishing Spain SA.<sup>213</sup>
- 1.2. Virgin Europe has a catalogue comprising rights that generated revenue of c. [<€ million] in the EEA and c. [<€ million] worldwide in 2011. It includes the rights to classic and contemporary works by an extensive range of leading authors, including:
- **Andrea Bocelli.** Andrea Bocelli is a hugely successful Italian tenor, multi-instrumentalist and classical crossover artist. Bocelli was awarded a place in the Guinness Book of World Records for occupying the first, second, and third place in the American classical music charts at the same time. Andrea Bocelli’s song *Il Diavolo E L’angelo* was one of Virgin Europe’s highest selling songs in 2011 and features on Bocelli’s album *Cieli Di Toscana* which spent 2 weeks at #2 in the official UK albums chart, the highest position that a foreign-language pop album had received in the U.K. at that time. The album peaked at #1 in Sweden and the Netherlands, reaching #2 in Ireland, Italy, Portugal and Norway.
  - **Fela Anikulapo Kuti.** A Nigerian multi-instrumentalist musician and composer, and pioneer of Afrobeat music. In 2008, an off-Broadway production of Fela Kuti’s life titled *Fela!* began with a collaborative workshop between the Afrobeat band Antibalas and Tony award-winner Bill T. Jones. The show was a massive success and in 2010, *Fela!* was nominated for 11 Tony Awards, including Best Musical. In addition, a movie by Focus Features, directed by Steve McQueen and written by Biyi Bandele about the life of Fela Kuti went into production in 2010.
  - **Guy Houllier and Yves Honoré.** Guy Houllier and Yves Honore are writers, composers and performers, as well as members of the band Experience 7 and founders of the group Zouk Machine, whose single *Maldon* (written by Houllier and Honoré) remained #1 in French charts for seven weeks in 1990. The song has been covered several times, including by Valérie Lemerrier at the 2007 César Awards ceremony and also by by Jenifer Bartoli, Sandrine Kiberlain and Natasha St-Pier for Les Enfoirés’ 2006 album “Le Village des Enfoirés” and included in a medley named “Medley Vie quotidienne”.

---

<sup>213</sup> The Parties are not entitled to, and would not have the right to, transfer the “Virgin” brand.

- **Khaled Hadj Ibrahim.** A singer-songwriter and multi-instrumentalist born in Algeria, Khaled began recording in his early teens under the name Cheb Khaled and has become the most internationally famous Algerian singer in the Arab world. His most famous songs are *Aïcha* and *Didi*. The song *Didi* peaked at #9 in French SNEP Singles Chart and was also used in a Bollywood film titled *Shreeman Aashiq*. *Aïcha* peaked at #1 in France, #1 in Belgium, and #10 in the Netherlands.
- **Manu Chao (Jose Manuel Chao).** Manu Chao is a French singer of Spanish roots. He sings in French, Spanish, English, Italian, Galician, Arabic and Portuguese and occasionally in other languages. In 1987 he was part of the alternative band 'Mano Negra', which reached #5 in the Netherlands, Italy and Germany. After Mano Negra disbanded, Manu Chao released the album *Clandestino* under his own name, which earned the "Best World Music Album" award in 1999's Victoires de la Musique awards and sold in excess of 5 million copies. His second album, *Próxima Estación: Esperanza*, was an international success and was listed in 2010 at #65 in Rolling Stone magazine's "Best Albums of the Decade." His next album, *La Radiolina*, reached #1 in Switzerland and Belgium, and #2 in France and Italy. His songs *Bongo Bong* and *Je ne t'aime plus*, which appear back-to-back on *Clandestino*, were covered by British singers Robbie Williams and Lily Allen, who recorded them as a single track, *Bongo Bong and Je Ne T'aime Plus* and released it as a single from the album Rudebox.
- **Miguel Bosé.** An award winning-Spanish/Italian musician and actor, Bosé has enjoyed great success in both Latin America and Europe. Throughout his career, Bosé has sold more than 13 million album copies. His 2007 album, *Papito*, sold more copies than any album that year in Spain, attaining quadruple platinum status and remaining at #1 for thirteen weeks as well as winning a Latin Grammy Award in the U.S. The single, *Nena*, was a great success, having been nominated for a Grammy and becoming the best selling download of Spain in 2007. In addition, Bosé has worked with artists including Ricky Martin and Shakira.
- **Nicholas Leteutre and Nicholas Sirchis (Indochine).** Nicholas Leteutre and Nicholas Sirchis are founding members of the French band Indochine. Indochine is a French cult new wave/rock band that has been successful in France and throughout Europe for over 30 years and has been reported to be the most successful French group of all time. Well known Indochine records written by Leteutre include *3ieme sexe* and *Canary Bay*.
- **Youssou N'Dour.** A Senegalese singer, percussionist, songwriter, composer, in 2004 Rolling Stone described him as, "perhaps the most famous singer alive" in Senegal and much of Africa. In the Europe and America, N'Dour has collaborated with Peter Gabriel, Sting, Alan Stivell, Paul Simon, Bruce Springsteen, Tracy Chapman, Branford Marsalis, Ryuichi Sakamoto, Dido and others. He wrote and performed the official anthem of the 1998 FIFA World Cup with Axelle Red - *La Cour des Grands*. He won his first American Grammy Award (best contemporary world music album) for his record *Egypt* in 2005. His song *7 Seconds* peaked at #3 in the U.K., at #1 in France, and at #3 in Germany.

**2. Following paragraph 4 of these Commitments, the Divestment Business includes, but is not limited to:**

**(a) the following main tangible assets:**

2.1. Virgin Europe does not own any material tangible assets.

**(b) the following main intangible assets:**

2.2. The main assets of Virgin Europe are its interests in its catalogue of music publishing copyrights, which are of varying duration. Annex 3 contains a list of the top copyrights (by EEA 2011 revenue) which represented c. [...] of Virgin Europe’s EEA revenues in 2011.

**(c) the following main licenses, permits and authorizations:**

2.3. Not applicable.

**(d) the following main contracts, agreements, leases, commitments and understandings:**

2.4. Virgin Europe will be sold with all current songwriter agreements and subject to all prior licenses. The following table shows the top EEA revenue earning authors for Virgin Europe in 2011.<sup>214</sup>

**Virgin Europe Top Authors (2011)**

<b>Author</b>	<b>Total EEA Revenues, 2011 (€)</b>
<b>Nicolas Sirchis (Indochine)</b>	[...]
<b>Nicolas Dominique Leteurtre (Indochine)</b>	[...]
<b>Khaled Hadj Brahim</b>	[...]
<b>Youssou N'dour</b>	[...]
<b>Jean-Jacques Goldman</b>	[...]
<b>Yves Honore</b>	[...]
<b>Guy Houllier</b>	[...]
<b>Andrea Bocelli</b>	[...]
<b>Stephane Ewa Mellino</b>	[...]

**(e) the following customer, credit and other records:**

2.5. Not applicable.

**(f) the following Key Personnel:**

2.6. The Key Personnel who may be transferred to the Purchaser in accordance with paragraph 4(e) of the Commitments are:

<sup>214</sup> EMI has identified a small number of works included in the previous version of Form RM for which the retention periods have expired. These works have now been removed from Annex 3.

- [...]
- [...]
- [...]

**(g) the arrangements for the supply with the following products or services by the Parties or Affiliated Undertakings for a transitional period after Closing:**

2.7. It is not anticipated that it would be necessary for arrangements to be put in place for the supply of any necessary services for a transitional period, but the Notifying Parties would be prepared to agree to supply any such services on arm's length terms, if required by the Commission at the request of the Purchaser, for a reasonable transition period.

**3. The Divestment Business shall not include:**

3.1. For contractual reasons, the Notifying Parties are unable to transfer the right to use the Virgin brand name.