

# **Completed acquisition by Sony Music Entertainment of AWAL and Kobalt Neighbouring rights businesses from Kobalt Music Group Limited**

## **Summary of provisional findings**

**Notified: 11 February 2022**

### **Background**

1. On 16 September 2021, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by Sony Music Entertainment (SME), a subsidiary of Sony Group Corporation (Sony), of all of the issued shares of the entities comprising the AWAL business (AWAL) and the Kobalt Neighbouring Rights business (KNR) from Kobalt Music Group Limited (Kobalt) for further investigation and report by a group of CMA panel members. We are required to answer the following statutory questions:
  - (a) whether a relevant merger situation has been created; and
  - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
2. The completed acquisition by Sony, through SME, of AWAL and KNR is referred to in this provisional findings report as the Merger. Throughout this document we refer to Sony, SME, and AWAL collectively as the Parties.<sup>1</sup>
3. Sony is active globally in various businesses including recorded music and music publishing. 'Recorded music' includes the distribution of physical and digital recorded music and revenue derived from artists' live performances. 'Music publishing' includes the management and licensing of the words and music of songs. SME is the subsidiary company engaged primarily in

---

<sup>1</sup> In view of the focus of these provisional findings on Sony's acquisition of AWAL (see paragraph 22), references in the remainder of this document to 'the Parties' exclude KNR, save where the context refers or relates to neighbouring rights.

providing services to artists through Sony-owned frontline labels (including 'Columbia Records', 'Epic Records', 'RCA Records' and other labels). SME develops, produces, markets and distributes recorded music in all commercial formats and genres.

4. Through its frontline labels, SME scouts, signs, develops and supports recording artists. These labels provide bespoke, 'high-touch' services to clients, which may include creative development, performance coaching, tour support, video production, marketing support, promotional campaigns and distribution (both digital and physical distribution) among a range of other services. SME's total turnover in the financial year ending in 2021 (FY21) was approximately \$[X] billion, of which \$[X] billion was generated in the UK.
5. SME also wholly owns The Orchard, EU Limited (The Orchard), a global music distribution company. The Orchard provides distribution and other services (including marketing, promotion, sync licensing, data analytics and video services) to independent artists and independent third-party record labels. The services provided by The Orchard are typically narrower in scope and smaller in scale than those provided by SME to its artists. The significant majority of The Orchard's current customers are independent labels. The Orchard's total turnover in FY21 was approximately \$[X] million, of which approximately \$[X] million was generated in the UK.
6. AWAL is a music platform providing marketing, distribution and other services to independent recording music artists and independent labels, formerly owned by Kobalt. AWAL's total turnover in FY20 was \$[X] million, of which \$[X] million was generated in the UK.
7. KNR collects neighbouring rights royalties arising from the public use of music recordings on behalf of artists. KNR's total turnover in FY20 was approximately £[X] million, of which approximately £[X] million was generated in the UK.

## **The industry**

8. In the UK, the Parties overlap in:
  - (a) the wholesale digital distribution of recorded music and related artist and repertoire (A&R) services, including artist and label (A&L) services; and
  - (b) the supply of neighbouring rights administration services.

## The wholesale distribution of recorded music

9. The wholesale distribution of recorded music is a two-sided market. One side is artist-facing where providers of recorded music distribution (Providers) compete to provide services to artists (eg music distribution, supporting A&R, marketing and promotion). The other side is where Providers compete to distribute their content, in particular to Digital Service Providers (DSPs) such as Spotify, Apple Music, Amazon Music and YouTube/Google for their streaming services, which account for the majority of consumer spending on music.
10. Recorded music distribution services have several elements, including:
  - (a) A&R services, which relate to the discovery, signing and development of artists, as well as the recording of their music (for example: talent scouting, signing and negotiating artist contracts, payment of any capital advances, funding and provision of artistic and creative support and direction, organising tour support and other supporting services).
  - (b) Marketing and promotion, for example: advertising, publicity, radio promotion and playlist promotion.
  - (c) Wholesale distribution of recorded music, which refers to music companies bringing their artists' music to market, primarily through DSPs. It is also common for providers to offer physical distribution and digital distribution to download formats although these are of declining importance.
11. A recording artist typically has five possible options when releasing music. Depending on their circumstances, an artist may:
  - (a) sign with one of three large companies who account for the majority of recorded music revenues, namely Sony, Universal Music Group (UMG) and Warner Music Group (Warner)). Together these are commonly known as the 'majors' or 'major labels';
  - (b) sign with a smaller, 'independent' label (such as Beggars Group, BMG Rights Management (BMG) and Domino Recording Company);
  - (c) use an 'artist services' provider (such as AWAL, Believe, PIAS, Empire and Virgin<sup>2</sup>);

---

<sup>2</sup> Virgin is owned by UMG.

- (d) choose to distribute their music as a self-releasing artist using an established platform (known as 'DIY' platforms, for example DistroKid, CDBaby, OneRPM, DITTO, United Masters and Amuse); or
  - (e) some artists secure the services of a manager and team for various levels of promotion and other support, and arrange distribution via a 'label services' provider.
- 12. Some independent record labels contract with a Provider (such as The Orchard or ADA<sup>3</sup>) for a variety of 'label services' covering wholesale distribution, but also some A&R and promotion activities.
- 13. The major labels typically offer services under what is known as the 'traditional' record label deal whereby:
  - (a) the label owns the underlying copyright to the recorded music, often in perpetuity<sup>4</sup>, or possesses exclusive long-term licences that could last in the region of 20 years;
  - (b) the label pays a large capital advance to artists;
  - (c) the label pays a proportion of royalties to artists, once certain costs have been recouped;
  - (d) artists are contracted under an 'exploitation period' where they are bound to contract exclusively with the label for future projects.
- 14. Independent labels usually offer deals on similar deal components as those offered by the major labels. They tend to offer a wide (sometimes full) range of A&R, marketing and promotion, and distribution services. Though resource constraints can mean that the range of services (along with marketing investments, advances and creative support) offered by independent labels are more limited than those offered by the major labels.
- 15. The core offering of A&L service providers is typically distribution with marketing and A&R service options from which artists can select on an à la carte basis, and artists typically independently create and retain full ownership of the copyrights of the recorded music. Some A&L service providers offer different service tiers, offering artists in higher-service tiers a wider scope and scale of services. A&L service providers typically offer a narrower set of A&R, marketing, and promotion services, and the scale of investment in the artist and the scope of creative support is usually less than would be expected from

---

<sup>3</sup> ADA is owned by Warner.

<sup>4</sup> References to 'in perpetuity' are more accurately for the copyright life of the recordings.

a major or independent label. Agreements with A&L service providers tend to be relatively short-term, and artists typically pay a relatively small distribution fee while all the A&L provider's costs are directly recoupable from the artist's portion of earnings.

16. DIY platforms offer distribution via streaming platforms to artists and smaller labels. These platforms typically charge a low fixed fee to digitally distribute music although some charge fees based on a percentage of revenues generated by the artist.<sup>5</sup> Some providers offer some additional supporting services. In these agreements, the rights holder retains ownership of the recordings and contracts with the provider are typically on a 30-day rolling basis.
17. Therefore, there are three broad deal structures available to artists:
  - (a) traditional recording agreements with the major labels or independent labels offering high-touch A&R, marketing and promotion, and distribution services, where the artist agrees to long-term commitments, and sometimes assigns their copyright for an extended period or in perpetuity;
  - (b) services deals with A&L service providers where an artist retains their copyright and receives marketing and A&R services; and
  - (c) distribution-only agreements with DIY providers.
18. In practice, the offerings available to artists within these different structures can vary substantially, and there is some blurring between the models of different Providers. For example, we were told that:
  - (a) various frontline labels of the major labels have started offering deal structures for artist services whereby they obtain long-term exclusive licences over the content rather than copyright in perpetuity;
  - (b) the majors are investing in and expanding their own A&L services divisions (in addition to SME's ownership of The Orchard, Warner own ADA, and UMG own Virgin);
  - (c) independent labels sometimes offer 'services deals' that resemble the types of deals offered by A&L service providers, or operate as both an independent label and an A&L service provider;

---

<sup>5</sup> See [AWAL website: FAQ](#).

- (d) some A&L providers sometimes offer contracts which are more like a traditional recording agreement; and
  - (e) some DIY providers offer some 'self service' promotion tools, and a few provide specific creative support and funding.
19. AWAL is an example of an A&L provider with a tiered offering. Its service offering is structured into three separate tiers:<sup>6</sup>
- (a) AWAL Core: Artists join AWAL Core via two routes: either by direct referral or, more commonly, following submission of their music to AWAL's online DIY platform;
  - (b) AWAL+: Select AWAL Core members are 'upstreamed' to AWAL+ based on factors such as [✂] and the judgement of AWAL's expert team. AWAL+ artists receive more extensive support than AWAL Core artists; and
  - (c) AWAL Recordings: this service offering is designed to support a select group of established and developing artists and provides a customised high-touch service (ie with significant artist support). Artists in this service tier are provided with any or all of the following: elevated funding, digital marketing support, press and radio promotion, sync licensing, physical distribution and local marketing plans in international territories.
20. AWAL's primary focus has been on offering services to artists. However, it also provides services through its B2B offering for independent labels.

## Neighbouring rights

21. The Parties overlap in the provision of neighbouring rights administration services. Neighbouring rights entitle performing artists and those who own copyright in the related sound recording to compensation for the public use of the recording. Artists and copyright owners collect royalties from Collective Management Organisations (CMOs) directly or use the services of neighbouring rights collection suppliers like KNR, which collect neighbouring rights royalties from CMOs on their behalf.
22. The Parties submitted that Sony's publishing arm Sony Music Publishing (SMP) has no material market presence in supplying neighbouring rights administration services. The CMA's phase 1 decision noted that there were a number of other close competitors to KNR operating in the UK. For these two

---

<sup>6</sup> See [AWAL website: How it works](#).

reasons the CMA found at phase 1 that it believed that the Merger did not give rise to a realistic prospect of an SLC.<sup>7</sup> We did not receive any significant submissions or new evidence on this subject and we have therefore not investigated the supply of neighbouring rights administration services.

## The Merger

23. Kobalt initiated a sales process in mid-2020. Its shareholders had explored options for the future of the business over the last two years, including whether to sell the whole business or to sell parts of it, before deciding to sell AWAL and KNR to SME. On 18 May 2021, Sony, through its wholly-owned subsidiary SME, acquired AWAL and KNR for approximately \$430 million (approximately £314 million) in cash.
24. SME told us that AWAL was focussed on artist services while The Orchard was focussed on offering label services.<sup>8</sup> It said:
- (a) [REDACTED];
  - (b) [REDACTED];
  - (c) [REDACTED];
  - (d) [REDACTED]; and
  - (e) [REDACTED].

## Relevant merger situation

25. We provisionally find that the Merger has created a relevant merger situation within the meaning of the Act because: (a) as a result of the Merger the enterprises of Sony (including SME), AWAL and KNR have ceased to be distinct, within the applicable statutory period for reference; and (b) the Parties overlap in the wholesale distribution of recorded music in the UK, with an estimated (by the Parties) combined share of supply of [20–30%] (with an increment of [0–5%] arising from the Merger), and therefore the share of supply test is met.

---

<sup>7</sup> Phase 1 Decision, paragraph 229.

<sup>8</sup> Sony's response to the Issues Statement, page 4.

## Counterfactual

26. The counterfactual is an analytical tool used in answering the question of whether a merger gives rise to an SLC.<sup>9</sup> Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger.<sup>10</sup> The latter is called the counterfactual.<sup>11</sup>
27. Sony told us that AWAL faced an uncertain future and it was inconceivable that, under Kobalt's ownership, AWAL could (still less would) have expanded into new markets, grown its current share, and/or become a closer competitor of SME in A&R services or The Orchard in A&L services.<sup>12</sup> The Parties considered this to be the case primarily because [REDACTED].
28. However, we observe that Kobalt had introduced a new business plan shortly before the Merger, its intention [REDACTED].
29. While there is naturally a degree of uncertainty and execution risk associated with Kobalt's [REDACTED] plan and how it might be expected to affect AWAL's prospects going forward, Kobalt's internal documents nonetheless show its intention and incentive to continue to grow AWAL, and that it believed it had the ability to do so. We note that while Kobalt's documents show its projections for revenue growth in AWAL, we have not been provided with documents which comment on the extent to which AWAL's projected growth was expected to change its competitive position (for example, the extent to which its market share was expected to evolve over its forecasting period).
30. We provisionally conclude that the appropriate counterfactual in this case is that AWAL would most likely have continued to supply services to both artists and labels and to compete in a similar way as prior to the Merger, with a focus on improving the profitability of the business but would not have been likely to materially expand its label business within the next two to three years. We provisionally find this counterfactual would most likely have prevailed regardless of AWAL's ownership, ie whether under its pre-Merger ownership by Kobalt or if it had been sold to an alternative purchaser.
31. We also provisionally conclude that, in the counterfactual, Sony would be most likely to have continued to compete in a similar way as prior to the Merger and would most likely provide high-touch services to artists (see paragraph 53) as it did prior to the Merger; and make ongoing efforts to

---

<sup>9</sup> [CMA's Merger Assessment Guidelines \(CMA129\)](#), March 2021 (MAGs), paragraph 3.1.

<sup>10</sup> MAGs, paragraph 3.1.

<sup>11</sup> MAGs, paragraph 3.1.

<sup>12</sup> [Sony's response to the Issues Statement](#), page 5.



expand its artist services offering in addition to continuing its label services through The Orchard.

## Competitive assessment

32. The Parties overlap in the wholesale digital distribution of recorded music in the UK and we consider that this is an appropriate frame of reference in which to consider the competitive effects of the Merger. The digital distribution of recorded music is a two-sided market where providers compete to provide services to artists in order to acquire repertoire which they then compete to distribute to DSPs. The relevant services of the Parties and their rivals in the digital distribution of recorded music are complex and differentiated and both the needs and preferences of artists and the services provided to them exist on a spectrum. We therefore provisionally consider that it is appropriate to take a simple approach to market definition in this case and to focus, within this frame of reference, on assessing the strength of the current and likely future constraint from different competitors or categories of competitors as part of the competitive assessment. Accordingly, our analysis does not seek to conclude on a bright-line definition of the relevant markets, but instead describes the competitive framework within which the Parties and their rivals operate.
33. Digital media, and in particular streaming, have become the most frequently used format for consumers to receive music. We have therefore concentrated our analysis on the effects of the Merger for competition in respect of streamed music, rather than the distribution of physical music media, as this is most likely to be the key medium for competition going forward in the context of the Merger.
34. In this report we refer to low, mid and high-range artists, where: low-range refers to artists with limited financial success (these are emerging artists at the start of their career or artists who are not making a career from their music); mid-range refers to artists with some success and who are able to sustain music as their main occupation through to those who are reasonably successful; and high-range, which refers to artists who are very successful and considered to be at the top end (and are most likely to be served by the majors).<sup>13</sup> However, we have not sought to provide precise definitions by artist revenue or other factors.

---

<sup>13</sup> Sony told us 'Although there is no commonly agreed categorisation, or any bright-line or objective distinctions, there are, broadly speaking, three tiers of artists: emerging, mid-tier, and top'.

35. We have assessed two theories of harm:
- (a) The first concerns a loss of current and potential (future) competition in the supply of A&L services. This is a theory of harm arising from horizontal unilateral effects concerning in particular the loss of potential (future) competition from the future growth of AWAL and The Orchard in A&L services, including the possible further diversification of The Orchard and AWAL within artist services and label services respectively.
  - (b) The second concerns a loss of current competition and potential (future and dynamic) competition in the supply of high-touch services to artists. This theory of harm considers the impact of the loss of competition between AWAL Recordings and SME on competition in the supply of services to artists. We considered the extent of current and potential (future and dynamic) competition between AWAL Recordings and SME and in particular the impact on SME of AWAL's high-service tier offering which combines non-traditional contracts and high-touch services to artists. Our assessment considered the extent to which this offering has been, and was likely to continue to be, an important competitive constraint on SME, as well as the extent of the remaining current and future constraint from other A&L providers, independent labels and other types of providers.
36. Our provisional assessment has considered only the impact of the Merger on competition in these areas.

### **Theory of harm – loss of current and potential (future) competition in the provision of A&L services**

37. This theory of harm relates horizontal unilateral effects concerning in particular the loss of potential (future) competition from the future growth of AWAL and The Orchard in A&L services.
38. The majors account for most digitally distributed recorded music in the UK, with a combined share of [70–80%] in 2021 (measured by share of streaming).<sup>14</sup> However, among other providers, The Orchard is the largest with a share of [0–5%] in 2021, and AWAL is the third largest with a share of [0–5%] in 2021. Both The Orchard and AWAL have grown their shares since 2016.

---

<sup>14</sup> Official Chart Company data for UK streaming shares for all Providers supplying music recordings to the major DSPs.

39. The Parties told us that The Orchard and AWAL are not close competitors because The Orchard focuses on distributing labels while AWAL focuses on providing services to artists.<sup>15</sup> We considered whether artist and label services should be treated as competitive substitutes. Our provisional view is that while there may be some differences between artist and label service providers there is not a clear distinction. The closeness of competition between artist and label service providers is primarily driven by the following two factors:
- (a) The needs of artist and label customers (which exist on a spectrum, for example according to the size and capabilities of a label).
  - (b) The capabilities of the providers (which also exist on a spectrum). On the supply side, a label service provider focused on distribution and lacking significant A&R capabilities will not typically be a good substitute for a high-touch artist service provider. However, some label service providers do have A&R capabilities and would be a closer substitute.
40. For these reasons, artist service providers and label service providers will be close substitutes in some cases but not in others, and consequently we have assessed the extent of constraints by specific providers.
41. We considered the extent to which The Orchard and AWAL currently compete in the provision of A&L services. Having reviewed a wide range of Sony's internal papers, these showed that The Orchard considered AWAL to be a competitor, albeit not in the category of its closest competitors and AWAL did not appear to be a major focus for monitoring. Though there were several occasions where AWAL was of particular interest to The Orchard, across the same range of documents many other competitors are also referenced. In our view, Sony and The Orchard's internal documents show that there was some pre-Merger competition between The Orchard and AWAL.
42. The few AWAL internal documents that mention competitors cover a wide range of competitors, although we found generally that it [~~is~~]. However, AWAL's internal documents do show that there was at least some pre-Merger competition between The Orchard and AWAL.
43. Evidence from third party customers also supports the view that there was some pre-Merger competition between AWAL and The Orchard. We asked AWAL's customers who they considered were the closest alternatives to AWAL. The Orchard was frequently mentioned as a strong alternative, more so than any other provider. It was also mentioned by both artists and labels.

---

<sup>15</sup> [Sony's response to the Issues Statement](#), page 4.

However, a wide variety of other A&L providers were also mentioned by AWAL's customers as alternatives.

44. Whilst we received a low response rate to our questionnaires to customers, the results received gave mixed views on the impact of the Merger. We asked artists and labels if they had any views on the Merger. Many (nearly half of them) did not have views and of those that did respond, nearly half considered it would have a negative impact, including that it would lead to a smaller pool of independent offerings and/or lead to worsening deal terms from AWAL. Conversely, over a third of respondents did not think there would be any impact or had no concerns about the Merger. The majority of competitors we spoke to were not concerned about the impact of the Merger and/or thought the Merger would have no impact on competition.
45. In assessing the constraint presented by other suppliers, we have primarily considered evidence from (i) the Parties' internal documents; (ii) the internal documents of third-party suppliers; (iii) submissions from third-party suppliers; (iv) questionnaire responses from AWAL/The Orchard's customers; and (v) streaming shares over time.
46. Based on these suppliers' plans, past growth, and capabilities we have assessed whether these suppliers have the combination of the intention, incentives and ability to expand in a timely, likely and sufficient manner to prevent any SLC from arising. In particular, and consistent with our assessment of the current and prospective competitive position of Sony and AWAL in the counterfactual, we have considered the prospects of expansion within the next two to three years. We have considered evidence relating to the constraints from larger A&L providers (including those owned by the majors), independent labels, smaller independent A&L service providers and DIY platforms.
47. Our provisional view is that, with respect to the Parties' label services activities, a number of strong or material constraints will likely remain following the Merger including ADA, Virgin and Ingrooves, Believe, PIAS, Empire and FUGA. Similarly, in artist services, Virgin, ADA and Believe will likely remain strong constraints, and Empire exerts a moderate and growing constraint. Our provisional view is that these constraints are collectively sufficient to ensure that rivalry continues to discipline the commercial behaviour of the Parties post-Merger.
48. Having considered the evidence in the round, we have provisionally found that The Orchard and AWAL do not currently compete closely in the provision of A&L services, due to their different areas of focus on label and artist services respectively and due to the constraints from other competitors. While Sony

would most likely have made ongoing efforts to expand its artist services offering and therefore The Orchard would most likely have become a closer competitor to AWAL in the provision of artist services in the foreseeable future, we have also identified a number of strong or moderate constraints with respect to both the Parties' artist services and label services that will likely remain following the Merger and that these constraints are collectively sufficient to ensure that rivalry continues to discipline the commercial behaviour of the Parties post-Merger.

49. Accordingly, we provisionally conclude that the Merger has not resulted, and may not be expected to result, in a SLC due to a loss of current and/or future competition in the supply of A&L services in the United Kingdom.

### **Theory of harm – the loss of current and potential (future and dynamic) competition in the supply of high-touch services to artists**

50. In this theory of harm we assess whether the loss of current and potential (future and dynamic) competition between AWAL Recordings and SME has resulted, or may be expected to result, in an SLC in the supply of high-touch services to artists. In particular, we assessed the current impact on SME's 'traditional' frontline label offers of the high-service tier offering of AWAL Recordings. AWAL Recordings' offering combines non-traditional contracts and high-touch services to artists and this theory of harm considers whether this offering might prove to be disruptive to the traditional frontline label offer. As part of this assessment, we therefore also considered the potential competition between AWAL and SME including that which may occur should AWAL take further steps to bridge the gap between A&L services and frontline label offers. The broader context of this theory of harm is that the majors have had a very large and stable share of overall streams for a number of years. We note that in such circumstances, even small increments in market power may give rise to competition concerns.
51. Traditionally, the majors have tended to offer long term contracts for high-touch services, with long-term or permanent copyright retention by the major, as described in paragraph 17(a) to their high-range artists through their frontline labels. Over recent years, SME has improved the terms it has offered to its artists in terms of improved average royalty rates and offering more deals where SME does not keep the rights to recorded music in perpetuity.
52. Our provisional view is that changes to SME's frontline model have been driven by both changing technology and the increase in options for artists. We consider that artists need alternative options in order to negotiate better deals. For example, the emergence of A&L service providers provided a credible

alternative to the majors for some artists and/or enabled them to grow a demonstratable fan base in order to negotiate a better deal with a major. This theory of harm considers whether AWAL may have been expected to play a significant and/or increasing role in constraining SME.

53. AWAL was, historically at least, a source of disruption and an early proponent of the artist services model. AWAL Recordings is the part of AWAL's business which currently offers high-touch services and as such could have been important in offering the kind of artists who might have been considered as signings by the majors an attractive alternative option. Absent the Merger we expect that AWAL would have sought to grow AWAL Recordings.
54. The Parties acknowledged that there could be limited circumstances where artists requiring high-touch services might choose between A&L service providers (such as AWAL Recordings) and the majors. Sony's internal documents indicated that A&L service providers have disrupted SME's traditional model, and some third parties also noted that changes to the majors' models had been driven by increased options including A&L service providers like AWAL.
55. However, AWAL Recordings is comparatively small, (it was estimated to have only generated £[X] million in the UK in 2020). Our provisional view is that AWAL has a history of disruption and the evidence shows that AWAL Recordings provided a credible option and an alternative to a major label deal for some artists. However, based on AWAL Recordings' size, the Parties' internal documents, and third party evidence, we consider that that AWAL Recordings was exercising a relatively limited competitive constraint on SME's frontline offerings pre-Merger. There is also limited evidence that AWAL Recordings is currently perceived as a significant dynamic competitor of SME.
56. We considered potential competition (future and dynamic) between AWAL (in particular AWAL Recordings) and SME as, going forward, potential growth of AWAL Recordings could provide a credible alternative for a greater number of more successful artists. If AWAL were making efforts to further bridge the gap between A&L services and frontline label offers it would likely compete more strongly with SME in an ongoing dynamic competitive process.<sup>16</sup> As such, the Merger could lead to not only a loss of future competition but also a loss of the ongoing dynamic competition between AWAL and SME.

---

<sup>16</sup> Incumbent firms that are making efforts to improve their own competitive offering may do so to mitigate the risk of losing future profits from rivals' potential expansion, or to potential entrants. In this sense, potentially expanding rivals (or potential entrants) can be thought of as dynamic competitors, even before actual expansion (or entry) occurs (MAGs, paragraph 5.3).

57. Our provisional view is that absent the Merger, AWAL would most likely have continued to impose a similar competitive constraint through AWAL Recordings as it had done prior to the Merger, offering a credible alternative, for some artists, to a major label deal. AWAL Recordings' customer data shows that it had been pursuing and winning more successful artists. However, its business model faced some challenges regarding its sustainability given the relatively short period over which AWAL Recordings is able to earn a return on its investments, given it does not retain ownership of copyright beyond the end of contracts. As such, we consider that AWAL Recordings would not have offered a materially greater competitive constraint absent the Merger in either static or dynamic terms. Indeed, there is some evidence that AWAL Recordings' offering was becoming more like that of its competitors in its deal terms.
58. Although limited, our provisional view is that there is some current and potential (future and dynamic) constraint from AWAL Recordings which will be lost following the Merger. In the light of this, we considered the strength of the constraint from third party competitors. We focused on assessing the strength of their constraint particularly with respect to AWAL given that, if they are close competitors to AWAL for artists requiring high-touch services, we would expect them to exert a similar constraint as AWAL on SME. We also considered how this constraint is expected to change as a result of expansion by existing competitors post-Merger. Specifically, we have assessed whether these competitors have the ability and incentives (including the intentions) to expand in a timely (that is, within the next two to three years), likely and sufficient manner, individually or in aggregate, so as to prevent any SLC arising.
59. We considered the constraints from other providers according to the following categories:
- (a) We found that three independent artist service providers, Believe, Empire and PIAS, while they may have a slightly different contract type or focus to AWAL, and may not offer services at the level of the majors' frontline offerings, collectively currently exert at least as strong a constraint on SME as AWAL exerts on SME and would likely constrain the Parties post-Merger.
  - (b) Warner and UMG own ADA and Virgin respectively which operate in A&L services. Our provisional view is that the major owned A&L service providers are likely to have somewhat dampened incentives to compete in a way which could contribute to bridging the gap between A&L service providers and the majors. This is because the majors likely have an incentive to protect their profitable 'traditional' record label deals against

any further attrition in terms of royalty rates and rights ownership. However, we consider that there is some constraint from the major-owned A&L service providers as, to the extent that there is competition from independent A&L service providers, they likely have an incentive to serve these artists, rather than letting them be served by a competitor.

- (c) Like the majors, larger independent labels typically offer artists more 'traditional' record deals. However, some larger independent labels are now also offering non-traditional contracts. Given their high cost structure, as well as the relative profitability of 'traditional' record deals and A&L services deals, we consider that larger independent labels would have an incentive to first offer 'traditional' deals to artists requiring high-touch services before offering deals with better terms. We provisionally find that BMG currently exerts at least as strong a constraint on SME as AWAL exerts on SME and would likely continue to exert a similar level of constraint on the Parties in future, while our provisional view is that Beggars currently exerts less of a constraint on SME than AWAL exerts on SME and would likely continue to exert at most a similar level of constraint on the Parties in future. There is limited evidence of a current and likely ongoing constraint on the Parties from other, smaller, independent label providers.
- (d) DIY platforms offer distribution to streaming platforms, typically target lower-service tier artists and typically do not provide significant marketing or promotional services or fund the creation of content. As such, our provisional view is that they do not currently exert a constraint on the Parties on a standalone basis without additional support from other sources.

60. Our provisional view is that, absent the Merger, AWAL would most likely have continued to impose a similar competitive constraint through AWAL Recordings as it had done prior to the Merger, offering a credible alternative, for some artists, to a major label deal. We consider, however, that AWAL Recordings' business model faced some challenges regarding its sustainability. As such, we consider that AWAL Recordings would not have materially improved its competitive offering absent the Merger. Indeed, there is some evidence that AWAL Recordings' offering was becoming more like that of its competitors. We note that several other A&L providers offer non-traditional contracts and high-touch services to artists and some of these have growing market shares. Further, a number of A&L service providers have credible expansion plans. In addition, the largest independent labels in the UK exert some current and ongoing constraint on the Parties. Considering the extent of the constraint from AWAL which will be lost and looking at the constraint from third parties in the round, our provisional view is that the



constraint from AWAL which will be lost is not significant because these third-party constraints are, in aggregate, sufficient to ensure that rivalry will continue to discipline the commercial behaviour of the Parties post-Merger in the supply of high-touch services to artists.

61. Therefore, we provisionally conclude that the Merger has not resulted, and may not be expected to result, in a SLC as a result of a loss of current and/or potential (future and dynamic) competition in the supply of high-touch services to artists.

## **Provisional conclusions**

62. As a result of our assessment, we have provisionally concluded that:
- (a) the completed acquisition by Sony, through SME, of AWAL and KNR has resulted in the creation of a relevant merger situation; and
  - (b) the creation of that situation has not resulted, and may not be expected to result, in an SLC within any market or markets in the United Kingdom as a result of:
    - (i) a loss of current and/or potential (future) competition in the supply of A&L services; and
    - (ii) a loss of current and/or potential (future and dynamic) competition in the supply of high-touch services to artists.
63. We invite any parties to make representations to us on these provisional findings no later than 17:00 on Friday 4 March 2022. Parties should refer to the notice of provisional findings for details of how to do this.