

**COMPLETED ACQUISITION OF
AWAL AND KOBALT NEIGHBOURING RIGHTS BY SONY MUSIC
ENTERTAINMENT**

SME'S OBSERVATIONS ON THE CMA'S PROVISIONAL FINDINGS

**CONFIDENTIAL
CONTAINS BUSINESS SECRETS**

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Acquisition by Sony Music Entertainment (SME) of AWAL and Kobalt Neighbouring Rights (KNR) from Kobalt Music Group Limited (Kobalt)

This submission contains SME's Observations on the CMA's Provisional Findings of 11 February 2022 (the **PFs**) concerning SME's acquisition of AWAL and KNR (together with SME, the **Parties**) (the **Transaction**). It takes account of comments provided by AWAL. References to the PFs cite the non-confidential version published on the CMA's website.

Executive Summary

1. SME welcomes the CMA's provisional conclusion that the Transaction will not result in a substantial lessening of competition (**SLC**) in the UK. This conclusion is compelled by an array of evidence demonstrating the following:
 - **AWAL does not compete closely with SME.** The PFs recognise that AWAL and SME have "*fundamentally different*" offerings (PFs, fn. 71) and target different artists: "*AWAL is focused on the 'middle' of the market, not 'stars'*" (PFs, para. 8.29(a)); by contrast, SME is focused on "*superstar artists*" (PFs, para. 8.31). The evidence gathered by the CMA on this critical question could not be clearer. First, not a single AWAL client surveyed by the CMA considered SME an alternative to AWAL (PFs, Figure C5). Second, "*SME's documents do not refer to a meaningful threat*" from AWAL (PFs, para. 8.36) and AWAL similarly does not "*monitor SME*" (PFs, para. 8.28). Third, AWAL is unwilling to accept "*the level of risk that major and independent labels*" take on individual artists (PFs, para. 2.45). Fourth, AWAL would not have competed more closely with SME in the future because the evidence shows it was "*becoming less disruptive*" over time (PFs, para. 8.56).
 - **AWAL does not compete closely with The Orchard in artist and label (A&L) services.** The PFs find that AWAL does not compete closely with The Orchard in A&L services because "*The Orchard [focuses] on label services and AWAL [focuses] on artists services*" (PFs, para. 7.152). The PFs also recognise that "*AWAL's rate of growth could reasonably be expected to slow*" (PFs, para. 7.52) and that "*a number of strong and moderate constraints [...] will likely remain*" post-Transaction (PFs, para. 7.156) – the PFs identify ADA, Virgin, INgrooves, Believe, PIAS, FUGA, BMG, and Empire.
 - **Dozens of music companies compete in a wide competitive landscape.** Driven by changing technology, the PFs recognise that the recorded music sector has been through a "*period of fundamental transformation*" (PFs, para. 2.3) that has substantially increased "*options for artists*" (PFs, para. 8.13). The PFs further find that SME competes intensely with Universal, Warner, and more than "*450 independent labels*" (PFs, para. 2.39), to sign top artists; and that emerging and mid-tier artists can choose among dozens of artist and DIY services providers. In response to the CMA's questionnaire, each of AWAL's and The Orchard's clients mentioned 22 non-merger alternatives; collectively, they mentioned 30 alternatives (PFs, Figures C5 and C6).

- **No loss of competition in neighbouring rights administration.** The PFs recognise that no issue arises in neighbouring rights, as SME does not provide a neighbouring rights collection service. SME’s independently-operated music publishing affiliate, Sony Music Publishing, does, but “*has no material market presence*” (PFs, para. 6.62) and there are “*a number of other close competitors to KNR operating in the UK*” (PFs, para. 6.63).
2. SME welcomes and agrees with these findings. SME will not therefore repeat prior submissions in these Observations, but instead addresses three aspects of the PFs’ assessment that it suggests should be revised in the Final Report:
- First, certain passages of the PFs could be misinterpreted as suggesting that SME has market power. SME does not have market power and the PFs’ substantive findings do not suggest that it does (**Section I**).
 - Second, the PFs’ analysis of the second theory of harm (**Theory of Harm 2**) – whether the Transaction could lead to an SLC in the supply of high-touch services – is incomplete because it focuses only on constraints on AWAL and ignores constraints on SME from other record labels (**Section II**).
 - Third, the PFs’ conclusion that DIY services impose a weak constraint on A&L services is inconsistent with the evidence and based on speculation that DIY services target lower-range artists and cannot compete unless DIY artists have expertise from elsewhere. The Final Report should properly take account of the constraint from DIY providers on A&L services, consistent with the evidence from customers, competitors, and the Parties’ internal documents (**Section III**).
3. **Annex 1** contains an annotated version of the PFs containing SME’s detailed comments on the PFs’ assessment and treatment of the evidence.

I. The Final Report Should Make Clear That SME Does Not Have Market Power

4. In places, the PFs could be misinterpreted to suggest that SME has been found by the CMA to have market power. At para. 8.1, for example, the PFs state that the context for Theory of Harm 2 “*is that the majors have had a very large and stable share of overall streams for a number of years*” and that “*in such circumstances, even small increments in market power may give rise to competition concerns*” (PFs, para. 8.1, emphasis added).¹
5. At Phase 1, the CMA considered but did not maintain the possibility that SME might have market power. Specifically, the Issues Letter posited that SME has market power and referred to the size and stability of the global music companies’ combined market shares and the DCMS Committee’s claim that the global music companies collectively dominate the music industry.² SME demonstrated in its response to the Issues Letter that

¹ See too PFs, para. 8.6 (“*In this context we note that where a market is already concentrated, even small increments in market power may give rise to competition concerns*”).

² See House of Commons Digital, Culture, Media and Sport (DCMS) Committee Report, pages 54-62.

SME did not hold market power,³ and, faced with that evidence, the Phase 1 Decision did not maintain the Issues Letter's claim.

6. At Phase 2, the Issues Statement did not suggest that SME has market power, while the Annotated Issues Statement (AIS) posited only that the Transaction could “reinforce existing network effects” (AIS, para. 36(b)(viii)) and thereby increase SME's “market power” (AIS, para. 42(b)(ee)). SME explained in response to the AIS that the recorded music market is not characterized by network effects.⁴ The PFs, rightly, make no reference to network effects and contain no assessment of whether SME has market power. There is therefore no basis for any such finding.
7. Any suggestion that SME may have market power would in any event be unsustainable:
 - **SME has a moderate and declining share.** The PFs suggest that SME may have market power because “the majors have had a very large and stable share of overall streams” (PFs, para. 8.1). But SME has a UK share of only █%,⁵ which has fallen since 2016 (PFs, Table F1).⁶ And it trails Universal – “the undisputed market leader”⁷ – by a large margin, given Universal's c. █% share (PFs, Table 12). There is therefore no basis for maintaining that SME alone has market power when it trails the market leader and has a moderate share that has fallen in recent years. Nor is there any basis for finding that SME together with the other global music companies exercises collective dominance.⁸
 - **SME competes intensely for artists.** The PFs suggest that SME may have market power because “concentration in the sector has increased over the years due to numerous mergers and acquisitions by the major labels” (PFs, para. 8.6). The contention that concentration has increased (even if correct) does not mean, still less show, that competition has diminished. On the contrary, the PFs' own evidence demonstrates that competition has become more intense. Among other things, the PFs find that there is vigorous competition to sign frontline artists (the focus of this theory of harm): “Once artists are at a certain level, they are mobile,

³ See Section I.C of SME's Observations on the Issues Letter.

⁴ See para. 85 of SME's Observations on the AIS.

⁵ See PFs, Table 12. Theory of Harm2 concerns the possibility that the Transaction could result in an SLC in the supply of high-touch services to artists. In assessing SME's market position for purposes of testing this Theory of Harm, no account should be taken of The Orchard's █% share because: (i) The Orchard does not provide high-touch services to artists, and (ii) The Orchard's share is almost entirely attributable to The Orchard's label clients, many of which compete with SME to provide high-touch services to artists.

⁶ It is far below the 50% market share level at which dominance can be presumed (see *Flynn Pharma Ltd v Competition and Markets Authority* [2018] CAT 11 at [237], citing *C-62/86 AKZO Chemie BV v Commission* EU:C:1991:286 at para. 60). It is well below the level that the CMA has associated with market power in other merger cases (see, e.g., *Completed acquisition by Facebook, Inc of Giphy, Inc.*, Final Report, 30 November 2021, Tables 3, 4 and 5; and *Anticipated acquisition by Thermo Fisher Scientific Inc of Gatan*, Provisional Findings Report, 17 April 2019, paras. 10.40-10.42 and 10.55-10.58). It is even below the 30% threshold set out in the Retained Vertical Block Exemption Regulation.

⁷ Case COMP/M.6458 *Universal Music Group/EMI Music*, para. 372 and 662.

⁸ A “group of undertakings may collectively possess market power”, for example, where they have “agreed explicitly or tacitly not to compete with each other” (see CMA, *Assessment of market power*, para. 1.5).

and want different things, and there is lots of competition for them from the majors, PIAS and others” (PFs, para. 7.70(d)),⁹ and that SME competes strongly for top artists with Universal, Warner, and more than “450 independent labels” (PFs, para. 2.39).

- **SME is constrained by DSP customers.** The DSPs are extraordinarily powerful digital gatekeepers. They are unavoidable trading partners that account for an ever-increasing portion of SME’s revenues and have extracted better terms from SME over time.¹⁰ The PFs find that DSP “*terms feed back into the quality of a Provider’s offering to artists*” (PFs, para. 6.47), which suggests that DSPs also constrain SME on the artist-facing side of the market.
8. In short, SME is constrained by competitors, artists, and DSPs. SME therefore suggests that the context for Theory of Harm 2 should be clarified to make clear that the CMA has not reached a finding that SME has market power.¹¹ Any suggestion to the contrary (i) would be incorrect given the unambiguous evidence on the record, and (ii) could have prejudicial implications for SME in future proceedings.

II. The Final Report Should Account For the Significant Constraint that Other Record Labels Place on SME

9. Theory of Harm 2 assesses whether the Transaction could result in an SLC in the supply of high-touch services to artists. The PFs consider whether the removal of AWAL’s “*limited competitive constraint*” on SME (PFs, para. 8.59) in the supply of such services could result in an SLC, correctly finding that this possibility may be excluded because the “*current and ongoing constraints from third parties*” are “*sufficient to ensure that rivalry will continue to discipline the commercial behaviour of the Parties*” post-Transaction (PFs, para. 8.121).
10. The PFs’ reasoning is, however, incomplete because, in seeking to assess the future competitive constraint that AWAL might have imposed on SME, the PFs focus only on “*close competitors to AWAL*” (PFs, para. 8.9) and not, as they should have done, on close competitors to SME.
11. The PFs, rightly, acknowledge that “*high-touch*” services are principally provided by the global music companies (PFs, para. 2.33) and “*approximately 450 independent labels*” which “*can in some cases dedicate greater focus to certain types of artists*” than the global music companies (PFs, para. 2.41). On the PFs’ premises, therefore, record labels are the main competitive constraint on SME when competing for top artists. Yet, as the

⁹ The statement is also inconsistent with the European Commission’s findings in its review of one such acquisition – *Universal/EMI* – which found that “*Competition between record companies to sign artists is intense*” (Case COMP/M.6458 *Universal Music Group/EMI Music*, para. 28).

¹⁰ See para. 82 of SME’s Observations on the AIS (“*For SME’s fiscal year ended March 2021, Spotify represented █████ of SME’s worldwide revenues. Apple, Amazon, and Google represented █████, █████, and █████, respectively, of SME’s worldwide revenues*”); “*SME’s revenue share and data access terms with DSPs – the “key elements” according to Merlin (Third Party Evidence WP, page 33) – have moved in DSPs’ favour in successive negotiations*”).

¹¹ See pages 128 and 130 of Annex 1.

following two examples show, the PFs' treatment of SME's competitors is inconsistent with this core finding:

- Universal is the global market leader and SME's undisputed closest competitor. Accordingly, in assessing the constraint imposed on SME by AWAL relative to the constraints imposed by other service providers, account should clearly have been taken of Universal. But, the relevant section of the PFs does not refer to Universal. The PFs' finding that Universal is not a close competitor to AWAL (because Universal, like SME, provides high-touch services in return for "more 'traditional' record deals" (PFs, para. 8.105)) provides no basis for excluding Universal as a constraint on SME in high-touch services. If anything, it simply confirms that Universal, not AWAL, is SME's closest competitor.
- Empire told the CMA that it competes "more closely with the major labels than AWAL" (PFs, paras. 8.71) and that it focuses on deals that "are not presently the focus of AWAL's business" (PFs, paras. 8.73-8.74), i.e., Empire competes more closely with SME than AWAL. Yet the PFs conclude that AWAL competes more closely with SME than Empire does, a finding that is inconsistent with Empire's own evidence.

12. As a result, the constraints on SME from the global music companies and indie labels are not properly accounted for in the PFs. The evidence – from SME's internal documents,¹² responses at the Main Party Hearing,¹³ witness testimony,¹⁴ and third-party statements¹⁵ – shows that the global music companies and the indies are SME's closest competitors.¹⁶ They contribute more significantly than AWAL to SME's improving artists terms.¹⁷

¹² See para. 62 of SME's Observations on the Issues Statement ("SME's internal documents gathered in response to the CMA's s109 Notice show that Universal and Warner are mentioned c. [REDACTED] times and c. [REDACTED] times, respectively, whereas AWAL was mentioned only c. [REDACTED] times). [REDACTED]
[REDACTED].

¹³ See SME Main Party Hearing Transcript, page 86 (in response to a comment from the Inquiry Group that it seems that "there is a limited number of players" that are options for artists who have "a choice between the likes of an AWAL and a major label", [REDACTED], explained "I can tell you. It is hundreds [...] It is not four or five. It is hundreds").

¹⁴ See para. 48 of SME's Observations on the Issues Statement ([REDACTED]
[REDACTED]
[REDACTED]).

¹⁵ A respondent to the CMA's questionnaire "attributed changes to the majors' models to 'tons of competition', including labels and 'new companies'" (PFs, para. 8.11(a)).

¹⁶ See para. 26 of SME's Observations on the AIS ([REDACTED]
[REDACTED]).

¹⁷ See Appendix 7 of SME's Observations on the Issues Statement ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]).

And, unlike A&L services providers, they operate similar business models and assume a similar level of risk in investing in individual artists (PFs, para. 2.45).

13. Accordingly, in assessing the “*limited*” constraint on SME exercised by AWAL (relative to other sources of competition), SME suggests that the Final Report should take account of all the constraints that SME faces in competing to supply high-touch services. In particular, it should take account of the significant constraints on SME from the other global music companies and independent record labels, which, on the PFs’ own evidence, compete more closely with SME than AWAL.

III. The Final Report Should Reflect That DIY Services Compete Strongly With A&L Services Providers

14. The evidence available to the CMA and cited in the PFs shows that DIY services providers compete closely with A&L services providers:
- DIY services providers “*were mentioned by customers*” as alternatives to each of The Orchard and AWAL (PFs, para. 7.147);
 - DIY services providers were mentioned as “*competitors in Sony’s internal documents*” (PFs, para. 7.147);
 - The PFs recognise that “*AWAL appears to informally monitor a number of DIY providers*” (PFs, para. 7.40), which are “*mentioned frequently*” in AWAL’s documents (PFs, para. 8.65(c));
 - The CMA’s review of third parties’ documents found that “*Competitors’ internal documents typically monitor DIY providers*” (Third Party Evidence WP, page 38);
 - The PFs find that DIY services providers offer digital distribution and data and analytics, which are the “*core offering of A&L services providers*” (PFs, para. 2.43) and the “*most commonly received services for both artists and labels*” (PFs, para. 7.15); and
 - The PFs show that the DIY segment is the fastest growing sector of the music industry:¹⁸ the six fastest growing distributors identified in the PFs are DIY services providers, which have grown between 327% to 4,543% from 2016-2021 (PFs, Table 12).
15. Notwithstanding this strong body of evidence, the PFs conclude that DIY services exert a “*weak constraint on the Parties in A&L services and do not have the incentive or ability to materially expand*” (PFs, para. 7.149). This conclusion is founded on three contentions: (i) DIY services “*typically target lower-range artists*”; (ii) DIY services are an alternative to A&L services only in instances “*where an artist is able to source additional services and expertise from other third parties*”; and (iii) sourcing such

¹⁸ A study in March 2021 showed that the DIY artist sector grew 34% compared to 7% for the overall music industry (see Music Week, 25 January 2022, [TuneCore CEO Andreea Gleeson on how DIY artists are building audiences on TikTok, Twitch and Peloton](#)).

expertise is not “*an option for most artists*” (PFs, para. 7.148). Respectfully, none of these three claims is supported by the evidence.

16. **First, DIY services compete for artists across the spectrum.** DIY services do not target lower-tier artists. They offer distribution to any artist who wants that type of service and offer additional services to professional artists.¹⁹ DIY services cater to lower-tier artists who upload tracks from their bedroom; emerging artists looking to build traction and attract a record label;²⁰ mid-tier artists with millions of Spotify monthly listeners; and top artists with billions of streams.²¹ Many famous artists have used DIY services, including Frank Ocean (Stem), Ludacris (Distrokid), Ed Sheeran, Sam Smith, Stormzy (all Ditto), Nine Inch Nails, Drake, Ziggy Marley, Keith Richards, Jay-Z, Cheap Trick, Moby, Public Enemy (all Tunecore).²² In 2021, Ditto, DistroKid and Amuse each had more streams than AWAL in the UK’s weekly top 200 chart.²³
17. **Second, DIY services providers compete with A&L services providers even without third-party support.** A&L services providers have higher and lower tiers of service. “*Usually, lower-service tiers focus on distribution (typically digital distribution)*” (PFs, para. 2.44) possibly for “*a relatively small percentage revenue share and [for a] very short term*” (PFs, fn. 71). On the PFs’ reasoning, DIY services would compete closely with lower-tier A&L services because they each cater to the same “*needs of artist and label customers*” and offer the same “*capabilities*” (PFs, para. 7.26). In this connection, a third-party A&L services provider told the CMA that DIY services compete “*with its artist distribution in the UK*” and with “*AWAL’s lower-tier artist distribution services*” (PFs, Appendix C, para. 84). In response to the CMA’s questionnaire, AWAL’s artists mentioned DIY services providers 16 times as an alternative to AWAL, which is more than double the number of mentions for The Orchard (PFs, Figure C5).
18. **Third, DIY artists can easily source additional services from managers and third parties if necessary.** DIY services providers also constrain A&L services providers at the higher tiers. Advancements in technology have meant that DIY artists can do more themselves than ever before.²⁴ They can achieve chart success without needing expertise

¹⁹ See SME’s letter to the CMA dated 21 January 2022.

²⁰ See SME Main Party Hearing Transcript, page 44 (“”).

²¹ *E.g.*, Ditto. See para. 76 of SME’s Observations on the AIS.

²² See Tunecore, [Why Choose Tunecore?](#)

²³ See SME’s letter to the CMA Concerning Updated Streaming Data, 14 December 2021.

²⁴ See Appendix 7 of SME’s Observations on the Issues Statement (“*Technology has created virtually unlimited ways for artists to get their music to consumers. Artists have the tools to record music in their own homes, at their own (and minimal) expense. They can reach consumers by uploading tracks for free on certain DSPs (e.g., SoundCloud, YouTube) or social media platforms (e.g., TikTok, Facebook)*”). See too Music Week, 25 January 2022, [TuneCore CEO Andreea Gleeson on how DIY artists are building audiences on TikTok, Twitch and Peloton](#) (“*TikTok is really becoming how music is discovered*”).

from elsewhere.²⁵ Nevertheless, for those artists who want more support than a DIY service can provide, the expertise is readily available.²⁶ The PFs highlight that “*artists [do] secure the services of a manager and team for various levels of promotion and other support*” (PFs, para. 2.30(e)). The PFs adduce no evidence that such expertise is unavailable to DIY artists and SME is not aware of any such evidence.

19. Accordingly, the evidence is clear that DIY providers compete fiercely in A&L services and that the PFs’ reasons for suggesting otherwise are misplaced. The Final Report should take account of competition between DIY services and A&L services in assessing the Parties’ competitive constraints that will remain post-Transaction.

IV. Conclusion

20. SME welcomes the CMA’s conclusion that the Transaction will not result in an SLC and commends it on a thorough investigation of facts and theories of harm. SME considers that the Final Report would more accurately capture the competitive landscape if it clarified that SME does not have market power, that SME competes intensely with other record labels to supply high-touch services, and that DIY services compete fiercely with A&L services for artists and labels.

²⁵ Self-releasing TuneCore artist, Lauren Spencer-Smith, had a top 5 single in January 2022 after going viral on TikTok (see Music Week, 25 January 2022, [TuneCore CEO Andreea Gleeson on how DIY artists are building audiences on TikTok, Twitch and Peloton](#)).

²⁶ E.g., AJ Tracey, who has approximately 6.5 million monthly listeners on Spotify, uses FUGA for digital distribution, PIAS for physical distribution, All Ears for radio promotion, Wired PR for public relations services, and Supernature for marketing. See too SME’s letter to the CMA dated 21 January 2022 (“*For those artists who want a higher-level of people-based support than certain DIY services can provide, DIY artists can “work with experienced [third party] managers and promotional and marketing teams” (Nature of Competition WP, para. 2.16(c)), including specialists in radio plugging, TV promotion, digital marketing, and press [...] These independent marketing and promotional companies offer services on an à la carte basis, giving artists greater choice and flexibility*”).