CMA
Competition & Markets Authority

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

Final report

16 March 2022

Website: www.gov.uk/cma

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The Competition and Markets Authority has excluded from this published version of the final report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

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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 final report as the Merger. Throughout this document we refer to Sony, SME, and AWAL collectively as the Parties.[1]

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 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

[1] In view of the focus of this report 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.

services. SME's total turnover in the financial year ending in 2021 (FY21) was approximately $[✂] billion, of which $[✂] 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 $[✂] million, of which approximately $[✂] 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 $[✂] million, of which $[✂] 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 £[✂] million, of which approximately £[✂] 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[2]);

(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[3]) for a variety of 'label services' covering wholesale distribution, but also some A&R and promotion activities.

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[2] Virgin is owned by UMG.
[3] ADA is owned by Warner.

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[4], 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 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.[5] Some providers offer some additional supporting services. In these agreements, the rights holder retains ownership of the

[4] References to ‘in perpetuity’ are more accurately for the copyright life of the recordings.
[5] See AWAL website: FAQ .

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 services for artists 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;

(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:[6]

(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;

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[6] See AWAL website: How it works.

(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 reasons the CMA found at Phase 1 that it believed that the Merger did not give rise to a realistic prospect of an SLC.[7] 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

[7] Phase 1 Decision, paragraph 229.

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.[8] It said:

(a) [✄];

(b) [✄];

(c) [✄];

(d) [✄]; and

(e) [✄].

Relevant merger situation

25. We have decided 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.

Counterfactual

26. The counterfactual is an analytical tool used in answering the question of whether a merger gives rise to an SLC.[9] Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger.[10] The latter is called the counterfactual.[11]

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

[8] Sony's response to the Issues Statement, page 4.
[9] CMA's Merger Assessment Guidelines (CMA129), March 2021 (MAGs), paragraph 3.1.
[10] MAGs, paragraph 3.1.
[11] MAGs, paragraph 3.1.

of SME in A&R services or The Orchard in A&L services.[12] The Parties considered this to be the case primarily because [✄].

28. However, we observe that Kobalt had introduced a new business plan shortly before the Merger, its intention [✄].

29. While there is naturally a degree of uncertainty and execution risk associated with Kobalt's [✄] 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 have concluded 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 have concluded 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 have also concluded 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 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 acquire repertoire, for example by providing services to artists, 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

[12] Sony's response to the Issues Statement, page 5.

differentiated and both the needs and preferences of artists and the services provided to them exist on a spectrum. We therefore 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).[13] However, we have not sought to provide precise definitions by artist revenue or other factors.

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

[13] 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’.

(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 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).[14] 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.

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.[15] We considered whether artist and label services should be treated as competitive substitutes. Our 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

[14] Official Chart Company data for UK streaming shares for all Providers supplying music recordings to the major DSPs.
[15] Sony's response to the Issues Statement, page 4.

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 [✂]. 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. 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 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. We have concluded 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 concluded 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 have decided 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 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 £[✂] million in the UK in 2020). Our 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.[16] 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.

57. Our 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. The CMA infers from AWAL Recordings' customer data that AWAL Recordings 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.

[16] 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).

58. Although limited, our 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 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 have concluded 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 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 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 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, we have concluded 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 have decided 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.

Conclusions

62. As a result of our assessment, we have decided 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.

Findings

1. The reference

1.1 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.

1.2 The terms of reference are set out in Appendix A and the conduct of inquiry is set out in Appendix B.

1.3 In exercise of its duty under section 35(1) of the Act, the CMA must decide:

(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 United Kingdom (UK) for goods or services.

1.4 This document, together with its appendices and glossary, constitutes our final report. Further information, including a non-commercially sensitive version of the Parties' responses to the Phase 1 Decision and the issues statement, can be found our inquiry webpage.[17]

1.5 The completed acquisition by Sony, through SME, of AWAL and KNR is referred to in this report as 'the Merger'. Throughout this document we refer to Sony, SME, and AWAL collectively as 'the Parties'.[18]

2. The industry

Introduction to the music industry

2.1 This chapter sets out the background to those aspects of the music industry in which the Parties compete with each other, namely the creation, distribution and licensing of sound recordings, which is referred to as 'recorded music'.

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[17] Sony/AWAL merger inquiry webpage.

[18] In view of the focus of this report on Sony's acquisition of AWAL, references in the remainder of this document to 'the Parties' are to the Parties excluding KNR, save where the context refers or relates to neighbouring rights.

Competition in recorded music occurs at two levels: to sign artists; and to distribute content created by artists to streaming services (and, to a lesser extent, physical retailers). The music industry also includes 'music publishing', which is the management and licensing of the composition of a song.[19] Separate copyrights are associated with the musical composition and the actual performance and recording of a song.

2.2 In this chapter, we first place recorded music in its historical context before providing a brief overview of the services offered within the category of wholesale digital distribution of recorded music. We then set out the different types of providers of recorded music distribution (Providers), and the types of contracts typically offered to artists and how this tends to correspond to the amount of revenue that an artist generates and the prospects and other characteristics of the artist (see paragraph 2.54). Last, we briefly describe neighbouring rights administration services.

How recorded music has changed

2.3 Over the last two decades, global recorded music has undergone a period of fundamental transformation: from physical to digital, from downloads to streaming and from consumer ownership to consumer access to music.

2.4 Before 2000, recorded music had experienced a period of sustained growth, when physically distributed recorded music (ie cassettes, CD, vinyl) was the only route for artists to sell their music to consumers (other than live performances). It is estimated that worldwide physical music sales peaked at $28 billion in 1999 before the beginning of the 'first digital music revolution', when recorded music became readily available online in digitised format.[20]

2.5 The rise of the internet allowed consumers to download and listen to music without owning a physical recording and online music piracy facilitated sharing of recorded music without the recognised rights holders being compensated. This led to a period of declining revenues across the industry and collapsing sales of physical music, with more than a decade of decline for global recorded music after the turn of the millennium. A 2018 report estimated that, by 2010, US consumer spending on physical music was back at the same levels as in the mid-1980s.[21]

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[19] Sony, like many music companies, also has its own music publishing operation. AWAL was the recorded music division of Kobalt, with other parts of the Kobalt business focussing on music publishing.
[20] Progressive Capital Partners Ltd., *The Music Never Stops Playing*, page 6.
[21] Citibank, *Putting the band back together: Remastering the world of music*, August 2018, page 10.

2.6 Only with the development of technology that enabled consumers to move from a model based on music ownership to music access, has the industry returned to growth. By unbundling music consumption from ownership, streaming has increased convenience, accessibility and personalisation, allowed greater sharing of music, and increased willingness to pay. Digital Service Providers (DSPs) such as Spotify, Apple Music, Amazon Music and YouTube/Google,[22] now typically offer streaming services from their music libraries in two ways:

(a) by providing users access to tens of millions of songs in exchange for a subscription fee, typically around £10 a month for a single user account; or

(b) by providing users access to tens of millions of songs via a 'free' service which is funded by advertisements inserted in the streams.

2.7 The availability of free, ad-funded streaming has also incentivised listeners to move away from illegal platforms and to a means of legal music consumption.[23]

2.8 In each year since 2015, music streaming has supported revenue growth in recorded music. The historic declines in recorded music sales and the importance of streaming in returning recorded music to growth can be seen in Figure 1.

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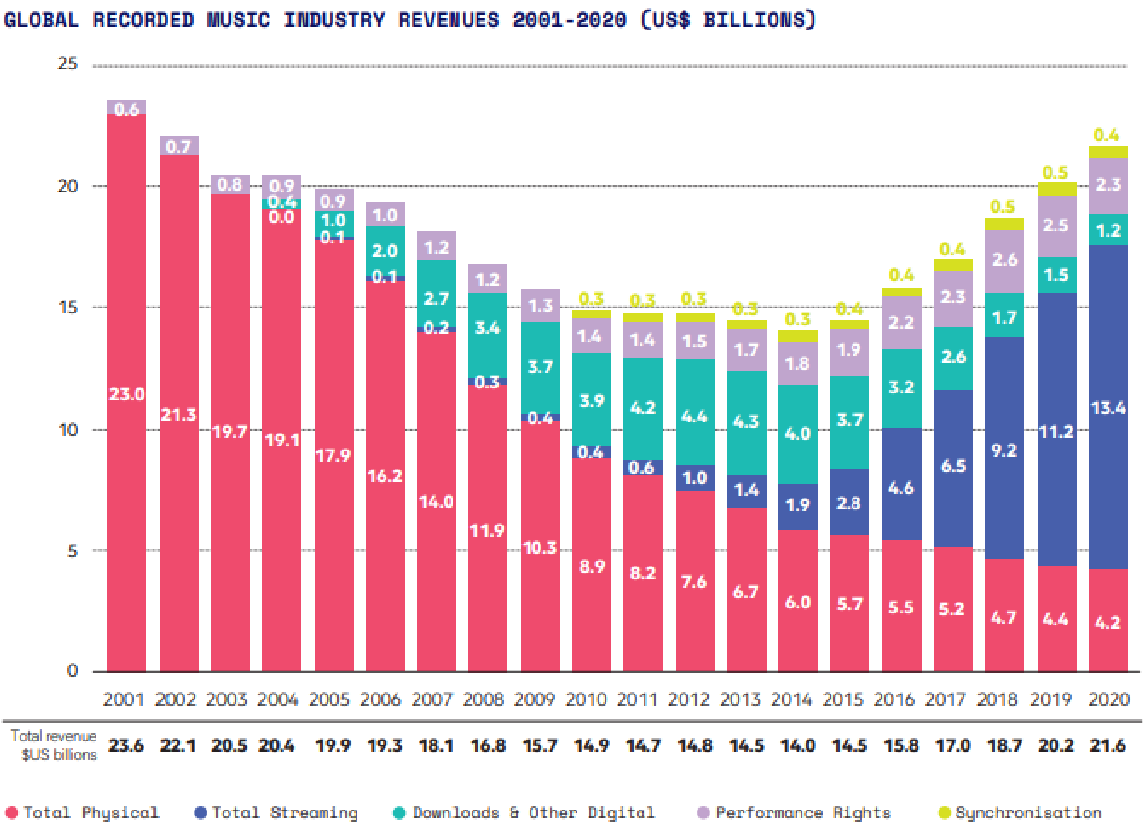
[22] There are also a number of smaller DSPs, for example Deezer, Tidal, Napster, Sonstream and SoundCloud Go. We were told that globally there are more than 400 DSPs. Between them, Spotify, Apple Music and Amazon Music account for roughly 94% of all UK subscription music streaming accounts (44%, 25% and 25% respectively), and these plus YouTube Music accounted for 98% of UK DSP premium subscription accounts in the first quarter of 2020. See Digital, Culture, Media and Sport Committee, *Economics of music streaming*, July 2021, page 15 and page 19. Also, UK Intellectual Property Office, *Music Creators' Earnings in the Digital Era*, September 2021, page 109.

[23] Goldman Sachs, *Music in the Air: Stairway to Heaven*, October 2016, page 4.

Figure 1: Global recorded music industry revenues 2001-2020 ($ billion)



Source: International Federation of the Phonographic Industry (IFPI), *Global Music Industry Report 2021*, page 11.

2.9 The revenues derived from recorded music are monetised through five primary means:

(a) **Streaming**: payments by consumers and advertisers for on-demand streaming of music (and music videos). Total revenues are usually split between DSPs and rightsholders on the basis of a pre-determined, negotiated agreement, with the DSP retaining an agreed percentage of all revenues generated. Remaining revenues are then paid out to song recording rightsholders and musical composition rightsholders. Payments to individual rightsholders are typically made in accordance with the share of streaming activity that is associated with the content of those rightsholders.[24]

(b) **Physical sales**: payments by consumers for the sale of physically reproduced sound recordings (on CDs, vinyl and cassettes).

(c) **Downloads**: payments by consumers for the online purchase of music in digital format.

[24] Spotify website: Loud and Clear; How do artists and songwriters get paid?.

(d) **Performance rights**: these include payments by TV and radio stations for the right to use music as part of broadcasts; and payments for the public performance of music in venues such as shops and restaurants.

(e) **Synchronisation (sync)**: payments for the use of music in (or 'synchronisation' of music with) film, TV shows, TV adverts, video games and other forms of audio-visual media.

2.10 In addition to income from recorded music, artists may generate additional income from live performances and tours and from the sale of merchandise. These sources of income may be separate from the terms of deals with their label or other distribution service provider or may be included in '360 degree deals'.

2.11 A recent report by the UK Intellectual Property Office (UK IPO)[25] found, based on a survey of 'music creators'[26], that they gained income from many different sources but that, prior to the Coronavirus (COVID-19) pandemic, live performances were the greatest source of income for artists. Streaming, despite being the biggest contributor to global recorded music revenues since 2017 (see Figure 1), contributed, on average, 6% of the survey respondents' music-related income.[27] A possible explanation for this may be because streaming income is focussed on a relatively small proportion of performers, who are generally contracted to the major labels (see paragraphs 2.33 to 2.38). The UK IPO found that between 2014 and 2020 the top 1% of artists accounted for 78–80% of streams, and the top 10% for 98%.[28]

2.12 Today, more than 60% of global recorded music revenues are derived from streaming. As can be seen from Figure 1, global streaming revenues increased by over $2 billion in 2020, up almost 20% year-on-year, while revenues from all other formats declined. According to the International Federation of the Phonographic Industry (IFPI), streaming revenues grew by 20% in 2020 and the global number of users of paid subscription accounts grew to 443 million.[29]

2.13 By contrast, physical revenues fell 5% year-on-year[30] and revenues from downloads declined by almost 16% over the same period.[31]

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[25] UK Intellectual Property Office, *Music Creators' Earnings in the Digital Era*, September 2021, pages 11-13.
[26] Survey respondents comprised various types of 'music creators', including songwriters and composers as well as performing artists.
[27] UK Intellectual Property Office, *Music Creators' Earnings in the Digital Era*, September 2021, page 171.
[28] UK Intellectual Property Office, *Music Creators' Earnings in the Digital Era*, September 2021, page 198.
[29] IFPI, *Global Music Industry Report 2021*, pages 10 and 13.
[30] IFPI, *Global Music Industry Report 2021*, page 13.
[31] IFPI, *Global Music Industry Report 2021*, page 13.

2.14 In its 2020 review of the music business, Goldman Sachs stated that paid streaming adoption had been 'faster than expected'[32] and projected that the streaming market would grow at a rate of 12% per year to 2030, reaching a value of $75 billion.[33] Over the same period, Goldman Sachs estimated that the share of recorded music revenues generated by streaming would increase to 86%.[34]

2.15 Streaming means that the cost to consumers of trying new music has been greatly reduced, as streaming models are generally based on access rather than ownership. Ad-funded and subscription streaming services allow users to access the libraries of millions of artists – from anywhere in the world – for a flat (or no) fee.

2.16 The growth of streaming also means that artists are no longer dependent on physical distribution to retailers (via record labels) to reach new audiences and have access to a range of new service options. It has also allowed many more artists to monetise their music. According to Spotify data, the number of artists whose catalogues have generated royalties on its platform has increased considerably in recent years. Table 1 shows how the number of earning artists on Spotify has grown since 2017.

Table 1: Earning artists on Spotify (2017-2020)

Royalties earned	*2017*	*2020*	*Total growth (%)*
Over $1 million	450	870	90
Over $500,000	950	1820	90
Over $100,000	4,200	7,800	85
Over $50,000	7,300	13,400	80
Over $10,000	22,900	42,100	80

Source: Spotify website: Loud and Clear; Revenue generation over the years.

Recorded music distribution services

2.17 Providers of recorded music distribution such as the Parties, compete to sign recording artists to their services. Recording artists (described in this document as 'artists') are those artists who perform the work of a songwriter or composer in the recording of a song. In some cases, the artist and the songwriter and/or composer may be the same person (or group of people). Providers also arrange for distribution of the music through DSPs and through physical sales.

[32] Goldman Sachs, Goldman Sachs Equity Research: The show must go on, May 2020, page 4.
[33] Goldman Sachs, Goldman Sachs Equity Research: The show must go on, May 2020, page 4.
[34] Goldman Sachs, Goldman Sachs Equity Research: The show must go on, May 2020, page 4.

2.18 In the following section, we provide a brief overview of the types of services available to artists in making their music available for public consumption.

Artist & repertoire services

2.19 Artist and repertoire (A&R) services relate to the discovery, signing and development of artists, as well as the recording of their music. Recorded music companies typically have A&R teams who are responsible for these services.

2.20 Examples of activities relating to A&R services include:

(a) talent scouting: eg identifying and signing artists who have developed a following on social media platforms and streaming services such as TikTok, YouTube, or Spotify;

(b) signing and negotiating artist contracts;

(c) payment of any capital advances (an upfront payment payable after contract signing);

(d) working with artists to find producers and identify collaborations and side artists;[35]

(e) funding and provision of artistic and creative support and direction;

(f) oversight of the recording process;

(g) archiving: services relating to the long term storage of recorded music; and

(h) organising tour support and other supporting services such as song writing camps.

2.21 The digitalisation of recorded music has changed how A&R teams scout new artists. Traditionally A&R scouts would attend live music events with a view to discovering new artists. Instead, A&R personnel can use specialist A&R tools[36] and analytics provided by DSPs such as Spotify or YouTube to identify emerging artists.

2.22 After signing a contract with an artist, a record company's A&R team will work with the artist to develop their repertoire and brand. A&R expenditure is an up-front cost that is traditionally paid by the recorded music company and

[35] Side artists are featured artists who are credited on the track and receive some royalties.
[36] See for example, the services of Soundcharts, Chartmetric, or Sodatone.

recouped from the future sales of an artist's recorded music. These expenditures represent a significant proportion of a record company's total spend.[37] However, even to industry experts, it is unclear which artists will become successful. As investment in the artist is an up-front cost, Providers are exposed to a financial risk of non-recoupment.

Marketing & promotion

2.23 The marketing and promotion of artists and their recorded music is a key aspect of the recorded music value chain and record companies spend comparable amounts on marketing and promotion as A&R services.[38]

2.24 Examples of activities relating to marketing and promotion include:

(a) marketing planning and funding;

(b) digital marketing;

(c) advertising;

(d) publicity;

(e) promotional appearances;

(f) brand partnerships;

(g) radio promotion;

(h) playlist promotion: promoting music through the playlist features of streaming services;

(i) the production of creative outputs such as artwork, photography and videos; and

(j) pitching and licensing for sync.[39]

2.25 The goal of these services is to boost the sales (or streams) of a particular artist's recorded music. As with A&R expenditure, marketing costs are funded on an upfront basis and therefore Providers incur a financial risk of non-recoupment.

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[37] An IFPI report, Investing in Music, 2015, indicates that music companies invested around 16% of their annual revenues into A&R (page 7).

[38] The IFPI report, Investing in Music, 2015, indicates that music companies invested around 13% of their annual revenues into marketing and promotion (page 7).

[39] Sync is the use of music in (or 'synchronisation' of music with) film, TV shows, TV adverts, video games and other forms of audio-visual media.

Wholesale distribution

2.26 The wholesale distribution of recorded music refers to music companies bringing their artists' music to market and comprises the sale or licensing by record companies of their music to retailers.

2.27 The central service provided by these Providers is digital wholesale distribution of recordings to DSPs, who in turn distribute this to consumers via streaming services. Some Providers distribute music using in-house delivery solutions, but others use third party providers. In either case the music and its metadata are delivered to digital partners and need to meet the professional specifications of each DSP.[40]

2.28 Digital wholesale distribution is typically provided alongside several other supporting services, for instance:

(a) Payments and accounting: the payment of royalties and other ancillary services eg royalty splitting (that is, splitting royalties between producers, songwriters, vocalists and others).

(b) Data and analytics: tech platforms or apps through which clients can track their streaming and revenue performance.

(c) The collection and processing of royalties from other revenue streams such as: neighbouring rights collection, sync, and publishing rights.

2.29 It is also common for record companies to provide physical distribution and digital distribution to download formats although these are of declining importance.[41] Over the last 20 years, streaming has become the predominant format used amongst all other digital mediums, with global streaming revenues approximately 11 times higher than download revenues and four times higher than physical music revenues in 2020.[42] Not all Providers are able to supply physical recorded music given the greater level of resources and investment required.

[40] See: Merlin, The Path to Merlin Membership | Merlin.
[41] In response to the Provisional Findings report (Provisional Findings, Sony / AWAL provisional findings, CMA 11 February 2022), IMPALA submitted that 'recorded music in physical formats remains important' including the 'growth of vinyl in recent years' (IMPALA response to the Provisional Findings, dated 4 March 2022, (**IMPALA response to the Provisional Findings**) page 1). As noted in paragraph 6.52, no evidence was presented by IMPALA or any party that taking into account physical distribution would have any impact on the assessment of the competitive effects of the Merger.
[42] IFPI, *Global Music Industry Report 2021*.

Types of recorded music distribution providers

2.30 Presently, an artist typically has five possible options in terms of Provider when releasing music. Depending on their circumstances, an artist may:

(a) sign with a major label (see paragraph 2.33);

(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[43]);

(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 (see paragraphs 2.47 and 2.48).

2.31 Some independent record labels may contract with a Provider for a variety of 'label services' covering wholesale distribution, but also some A&R and promotion activities.

2.32 The following section provides an overview of the different business models and offerings available to artists. These categories are not fixed, and Providers may operate across several categories or offer variations to the set of services described below. Outlining the types of Providers active in recorded music is important as there is significant variation in the scale and range of services offered by different types of Providers.

Major labels

2.33 The wholesale digital distribution of recorded music is currently characterised by the presence 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'. Each operates multiple labels (also known as frontline labels) that use different branding and typically focus on a particular

[43] Virgin is owned by UMG.

genre or type of artist.[44] The model and offering of the majors are characterised by the following:

(a) worldwide presence;

(b) a full range of A&R, marketing and promotion, and wholesale distribution services;

(c) typically, large A&R, marketing, and promotion budgets whereby the company funds the creation of artists' recordings and provides high levels of creative support (described as 'high-touch'); and

(d) focus on a limited number of 'headline acts' globally.

2.34 The shares of different Providers as measured by shares of streaming in the UK is set out in Table 12 in Chapter 6. In 2021 the majors together had a share of [70–80%], (Sony [20–30%], Warner [10–20%] and UMG [30–40%]).[45] The overall share has declined from [70–80%] in 2016.

2.35 Concentration in the sector has increased over the years due to numerous mergers and acquisitions by the major labels. The Digital, Culture, Media and Sport Committee Report 'The Economics of Music Streaming' states '…each of the three current major music companies have merged with or acquired the other 'Big Six' companies (PolyGram, Bertelsmann Music Group (BMG) and EMI Group Ltd) that existed in the 1990s'.[46] It added that in recent years 'the major music companies have continued to acquire competitors. In the last five years, the majors have acquired British indie companies such as Ministry of Sound Recordings in 2016 (by Sony Music), ZTT, Stiff Records and publisher Perfect Songs in 2017 (by UMG) and musical theatre record label First Night Records (by Warner) in 2019.[47] It was noted in the CMA's Phase 1 Decision that locally-focused suppliers in different countries can often become acquisition targets for the majors (for example, Sony has acquired The Orchard based in the US, Phonofile AS based in Norway, and finetunes GMbh based in Germany).[48]

[44] For example, SME's frontline labels include Columbia Records, RCA and Epic Records; Warner's include Atlantic Records, Elektra Music Group, and Parlophone; UMG's include Capitol, Decca, Def Jam, Island, Motown, and Polydor.
[45] This does not include the share of certain subsidiaries owned by the majors (The Orchard, Virgin and ADA, see paragraph 2.54(b)).
[46] House of Commons Digital, Culture, Media and Sport Committee Report 'The Economics of Music Streaming' 15 July 2021, paragraph 101.
[47] House of Commons Digital, Culture, Media and Sport Committee Report 'The Economics of Music Streaming' 15 July 2021, paragraph 102.
[48] Completed acquisition of AWAL and Kobalt Neighbouring rights by Sony: Decision on relevant merger situation and substantial lessening of competition (Phase 1 Decision), dated 11 October 2021, paragraph 85.

2.36 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,[49] 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, commonly in the range of 15–20%, once certain costs have been recouped;[50]

(d) artists are contracted under an ‘exploitation period’ where they are bound to contract exclusively with the label for future projects. It is common for these agreements to be specified in terms of projects (eg albums) for instance on a ‘1+4’ basis whereby the deal will cover the current project and four future projects. This means that artists are contractually tied on an exclusive basis to the label, often for more than seven years; and

(e) the label can terminate the agreement should artists have limited success.

2.37 Artists at the beginning of their careers (or those who have had limited commercial success) do not normally approach the label directly; they must be scouted or recommended by an industry expert.

2.38 In the UK, around 700 artists are signed to major labels.

Independent labels

2.39 Sony told us that there are approximately 450 independent labels currently active in the UK, working with thousands of artists. These smaller players have historically accounted for a small share of the wholesale distribution of recorded music (both individually and collectively).

2.40 Independent labels vary significantly in size. In addition, there appear to be a considerable further number of labels which represent only one or a very few artists. However, there are many well established independent labels with multiple clients. While it is difficult to generalise, such independent labels are typically characterised by the following:

(a) the larger independent labels offer high levels of A&R and marketing investment (including advances) and offer high-touch creative support. In

[49] References to ‘in perpetuity’ are more accurately for the copyright life of the recordings.
[50] Based on evidence from artists’ representatives.

return the independent label usually retains exclusive long-term licences and commitments from artists for future projects. In this respect, independent labels operate a similar model to the major labels although will typically pay a higher royalty share to the artist and operate at a much smaller scale;

(b) 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; and

(c) where they do not provide these services in house, independent labels distribute and receive A&R, and marketing and promotion support through artist and label service providers.[51]

2.41 Independent labels typically offer deals with similar deal components as those offered by the major labels, albeit the scale can in some cases be smaller, but conversely they can in some cases dedicate greater focus to certain types of artists as a result of their smaller client rosters. As noted at paragraph 2.58(c), some independent labels are now offering different contract types.

Artist and label service providers

2.42 Artist and label (A&L) service providers distribute music on behalf of artists and independent labels and provide supporting A&R and marketing and promotion services. A&L service providers are sometimes categorised by whether they primarily (or exclusively) provide their services to either artists or labels; though it is typical for a provider to focus on providing either 'artist services' or 'label services' most providers offer both. AWAL and The Orchard are examples of A&L service providers.

Artist services and distribution

2.43 For services to artists, the core offering of A&L service providers is digital (and sometimes physical) distribution. In addition, marketing and A&R service options are provided from which artists can select on an à la carte basis. As a result, some clients may receive higher or lower levels of services.

2.44 Some A&L service providers offer different service tiers, with higher-service tiers offering a wider scope and scale of services. Usually, lower-service tiers focus on distribution (typically digital distribution) whereas higher tiers offer a

[51] An AWAL internal document indicates that 75% of independent labels distribute through a third-party.

service which may be more comparable to that of a label with a higher level of service and artist engagement.[52] The higher tier offerings of A&L service providers are sometimes referred to as 'artist services', while lower-tier offerings are referred to as 'artist distribution'.

2.45 Higher tier offerings will incur higher fees for artists and frequently also entail longer contract lengths (and therefore longer periods during which fees are payable). This is because these offerings require upfront marketing and A&R investment by the provider, and the payment of advances, and these costs need to be recouped by the provider. Though A&L service providers take on risk in the paying of advances and upfront A&R investment, the level of risk they take on for an individual artist is typically lower than the level of risk that major and independent labels will accept.

2.46 For services to artists, the offering of A&L service providers is characterised by the following:

(a) A&L service providers typically offer a narrower set of A&R, marketing, and promotion services and provide these on a smaller scale (compared to major or independent labels).[53] For instance, they are unlikely to be able to supply tour support,[54] capital advances, or radio promotion to the same extent (as record labels) and are unlikely to offer creative support. Despite their smaller scale and scope, services may be provided globally.[55]

(b) Typically, the scale of investment in the artist and the scope of creative support is usually less than would be expected from a major or independent label.

(c) Under agreements with A&L service providers, artists usually independently create and retain full ownership of the copyrights of the recorded music. The A&L service provider is typically granted an exclusive licence to sell, distribute, make available and otherwise use the sound recording for an agreed period (typically two to three years).

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52 Many Providers offer multi-tier service structures. We were told the top tiers of an A&L provider and AWAL offer A&R and marketing budgets and higher touch services such as creative support. And more widely A&L service providers typically offer A&R and marketing services. However, Sony told us these are unlikely to be comparable to the services offered by SME in terms of breadth and depth of services, global support and taking on financial risk.
53 For example, AWAL was unable to provide [✂] support to [✂], who according to the Parties is [✂]. Instead, [✂] had to commission this support from elsewhere. [✂] support is generally provided by the major labels as part of their A&R services.
54 For example, under its initial deal with [✂], AWAL allowed up to $[✂] for tour support. This was considered to have [✂] total tour costs.
55 For example, [✂], [✂], Believe, ADA and PIAS each operate on a global basis.

(d) Agreements with A&L service providers tend to be relatively short-term (in some cases on a 30-day rolling basis where fewer services are provided). They typically do not require commitments to future projects, enabling artists to switch Providers more easily. Where upfront investment and advances are provided agreements are longer and can last for several years and include commitments to future projects. An example of this is AWAL Recordings; as discussed in Chapter 8, such offers can provide an alternative to high-service contracts with the majors or independent labels for some artists.[56]

(e) Under agreements with A&L service providers, artists typically pay a distribution fee (often 15–30%), with the A&L provider receiving a smaller portion of earnings than would be typical for a label. There are also key differences in how A&L service providers and labels fund the costs incurred in supporting artists. In the case of A&L service providers, typically all costs are directly recoupable from the artist’s portion of earnings.[57]

Label services

2.47 Regarding services to labels, the scope of services provided by A&L service providers varies. Label services can either replace or augment services provided by independent labels, which have different capabilities depending on their size and speciality. In part this is because ‘label’ is a broad term that can include very small labels with only a few artists and artist management companies which represent only one or just a few artist(s), through to much larger labels.[58]

2.48 A&L service providers’ core offering to labels is digital (and sometimes physical) distribution. It is also common for A&L service providers to provide marketing and promotion services including marketing funding and radio promotion to label clients.[59] Compared to artists, labels are less likely to require A&R services as labels often offer services such as creative support in-house. However, A&L service providers do provide A&R services, such as

[56] [✂].
[57] Evidence from artists’ representatives.
[58] For example [✂] supports ‘artist management companies’ as part of their label services. [✂] noted that ‘[s]ome distributors only deal with labels who are well-structured independent record labels’ further noting that ‘others, such as AWAL, also provide this service directly to individual artists or artist managers’. PIAS noted that it does ‘not differentiate between label clients and artists clients’ [✂].
[59] [✂], [✂] ADA and PIAS indicated that they provide radio support and marketing to label clients. In addition: [✂] noted that it advances ‘funds for marketing’, [✂] noted that it offers marketing funding, and ADA noted [✂].

creative support and project funding, to some labels.[60] In addition, A&L service providers sometimes offer advances to label clients.

DIY platforms (digital aggregators)

2.49 DIY platforms, also known as digital aggregators, offer artists and smaller labels distribution to streaming platforms.[61] These platforms typically charge a low fixed fee to digitally distribute music (eg TuneCore charges $9.99 to distribute a single for a year),[62] although some charge fees based on a percentage of revenues generated by the artist.[63] Some providers offer a wider range of supporting services eg tools to assist with publishing royalties or splitting royalties. Sony also told us that DIY services providers offer marketing and promotional services to artists. For example, some offer self-promotion resources for artists to use, and others offer active support options.

2.50 Notably, several A&L service providers operate DIY platforms either on a standalone basis or as part of a multi-tiered offering where the DIY platform is the lowest tier of service.

2.51 Contracts under these providers (or tiers of service) are standardised, distribution only agreements.[64] In these agreements, the rights holder retains ownership of the recordings and contracts with the provider are typically on a 30-day roiling basis.

2.52 Typically, these agreements target lower-range artists and do not usually provide for marketing or promotional services or fund the creation of content. Where DIY providers offer marketing and A&R services it is typically technology-driven and automated, as opposed to offering more personalised services.[65] For instance, some providers offer tools that assist artists with basic marketing and promotion such as digital tools to help artists create their own websites;[66] others offer digital tools that assist artists in the creation and

[60] For example, [✂] noted to the CMA that it 'provide[s] creative support to our labels but this is generally something that is mainly handled' by their clients.
[61] As an alternative or in addition, artists can upload their music and videos without charge to some platforms (eg SoundCloud and YouTube).
[62] See for example pricing at TuneCore - TuneCore Pricing | Music Distribution & Publishing.
[63] See AWAL website: FAQ.
[64] For example, AWAL's DIY platform offers standardised contracts with fixed terms and conditions.
[65] For example, Believe's IPO document describes it's higher-tier offerings as 'premium solutions' while its lower-tier DIY offering (TuneCore) is described as an 'automated' solution that offers 'a high value-added technological product targeting the needs of emerging artists'.
[66] See for example the products offered by United masters (https://unitedmasters.com/products).

production of their music or pay advances (based on projected earnings from existing music).[67]

Offers available to artists

2.53 AWAL's internal documents categorise artists [✂]. These categories are not a commonly accepted categorisation in the music industry and do not represent distinct groups of artists. Artists exist along a spectrum. Table 2 shows an AWAL analysis [✂] and estimating the number of artists and proportion of revenues [✂] (for English-language repertoire).

Table 2: Global 'English-Language' Streaming Market Value [✂] in 2019

[✂]	*Artist revenue per annum*	*Number of artists (000's)*	*Revenue share %*	*Revenue share (2025F)*
[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]	[✂]

Source: Kobalt.

2.54 For the purposes of this document, 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 ([✂]).[68] Other industry participants categorise artists into different tiers.[69] However, we have not sought to provide precise definitions by artist revenue or other factors. Artists may move between these ranges over time, for example moving up the tiers as they grow their fanbase.

2.55 The share of the market accounted for by mid-range artists is forecast to grow. A third-party competitor commented that growth in the 'middle tier' of artists is being driven by the switch from the traditional to the digital market,

[67] For example, in its IPO document Believe noted that its lower-tier offering provides artists 'additional services to assist them in the creation and production of their music. For example, the Group intends to develop technological tools for composition and arrangement, recording and mixing'.
[68] 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'.
[69] For example, [✂] views artists in a spectrum ranging from 'tier 0' (which include less than 100 headline acts worldwide and are targeted by major labels) to 'tier 6'. Tiers 2 and 3 involve about 10,000 acts globally which involve artists that are making a reliable living from recorded music distribution and live performances.

for example the move to digital and streaming delivers more opportunities to expose new artists to the market.

2.56 The segments listed above have given artists three broad deal structures through which to bring their music to market:

(a) Traditional recording agreements with the major labels or independent labels offering high touch A&R, marketing and promotion, and distribution services. Typically, these deals involve significant upfront investment by the label (with a risk of non-recoupment if the artist is not successful). This requires an artist to agree to long-term commitments, and sometimes assign their copyright for an extended period or in perpetuity. In the case of independent labels, some services may ultimately be contracted out to an A&L services provider.

(b) Service deals with A&L service providers where an artist retains their copyright and receives marketing and A&R services which were only historically available in traditional recording agreements. These deal structures involve smaller investments and are less risk-based: providers are less likely to take on deals with a high risk of non-recoupment.

(c) Distribution only agreements with DIY providers offering distribution to streaming platforms and low touch (tech-driven) marketing and promotion services. These deals structures typically do not involve upfront investment and therefore do not incur risk.

2.57 In practice, the terms within any deal structure can vary substantially,[70] and there is some blurring of the boundaries between these options so they can be credible alternatives for some (but not all) artists. Some A&L service providers have multi-tier offerings which seek to cater for a wide range of artists at all stages of their career,[71] and some providers offer more than one of these deal structures.

2.58 In addition, there are exceptions to the boundaries between the models of different Providers. For example, we were told that:

[70] For example, an A&L deal might be distribution only for a relatively small percentage revenue share and be very short term, or it might offer extensive support, promotion and other artist services for a larger percentage revenue share for several albums and with the provider keeping licensing rights over the music for several years. The latter shares some similarities with a traditional deal but is still fundamentally different.

[71] For example Believe's IPO document notes that it 'uses an integrated model to offer artists technological solutions adapted to each stage of their career development, whether they are emerging, established or top artists'.

(a) various frontline labels of the major labels have started offering deal structures for services for artists whereby they obtain long-term exclusive licences over the content rather than copyright in perpetuity;[72]

(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). This has been achieved by a combination of acquisitions and organic growth;[73]

(c) independent labels sometimes offer 'services deals' that resemble the types of deals offered by A&L service providers [74] or operate as both an independent label and an A&L service provider;

(d) some A&L providers sometimes offer contracts which are more like a traditional recording agreement;

(e) some DIY providers offer some 'self-service' promotion tools, and a few provide specific creative support and funding (see paragraph 2.49); and

(f) one prominent A&L service provider operates its own in-house labels.

2.59 The different deal structures identified in paragraph 2.53 are likely to be better suited to different types of artist, depending on whether they are an established, high-selling artist (or expected to become successful), whether they are a mid-range artist with some financial success, or lower-range artists just starting out or an artist without financial success.[75]

2.60 Typically, DIY platforms target lower-range artists, while the majors are likely to offer traditional contracts only to established and potential high-range artists. A&L service providers usually serve mid-range artists, either as direct customers or through an independent label. There are, however, notable exceptions to this position, not least because the categorisation of artists can be fluid depending on their career trajectory.

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72 Sony told us that examples include: Atlantic (a Warner frontline label) and various SME labels such as Columbia Records.
73 Sony acquired The Orchard in 2015, UMG acquired Ingrooves in 2019, and Warner has developed its own offering, ADA.
74 In addition, [✂] note that 'they now see more traditional record labels offering 'services deals' (which mirror the types of deals offered by artist and label services businesses) rather than traditional record deals'.
75 Sony told us 'Artists at different tiers have different wants and needs and, as a result, are generally serviced by different types of providers: top-tier or 'frontline' artists are generally serviced by global music companies and, to a lesser extent, indie labels, whereas mid-tier and emerging artists are usually serviced by artist and DIY service providers as well as indie labels'.

Neighbouring rights

2.61 Neighbouring rights entitle performing artists and those who own copyright in the related sound recording to compensation for the public use of the recording (eg a TV or radio broadcast, or for public performance of music in venues such as shops and restaurants).

2.62 In order to facilitate the payment of compensation, recordings need to be registered with Collective Management Organisations (CMOs) which, in turn, collect and distribute neighbouring rights royalties to artists and copyright owners. Different countries have different CMOs. The CMO for neighbouring rights collection in the UK is Phonographic Performance Ltd.[76] In most cases, the total royalty amount for a single recording is divided equally between the rightsholder and the artist.[77]

2.63 Artists and copyright owners collect royalties from CMOs directly, or use the services of neighbouring rights collection suppliers like KNR, which collect neighbouring rights royalties from CMOs on their behalf. These suppliers offer the convenience of collecting royalties from multiple CMOs in different countries in exchange for a fee. Neighbouring rights collection suppliers also distinguish their offerings by providing ancillary services to maximise royalty collection by, for example, assisting in accurate registration with CMOs, and may also offer advance payments to artists.

3. The Parties and the Merger

Introduction

3.1 This chapter provides an overview of the Parties' operations and relevant financial information. It then sets out the background to the Merger, including details of the transaction and the Parties' claimed rationale for the Merger. Finally, this section provides brief analysis of the valuation models prepared by each Party as part of the sales process.

3.2 In the UK, the Parties overlap in:

(a) the wholesale digital distribution of recorded music and related A&R services, including A&L services; and

(b) the supply of neighbouring rights administration services.

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[76] PPL website: What we do.
[77] PPL website: What happens to the licence fee – Step 3.

Sony

3.3 Sony Group Corporation (Sony) is active globally in various businesses including recorded music and music publishing, motion picture production and distribution, and game and network services for Sony's game console, PlayStation. Sony is listed on the Tokyo Stock Exchange and the New York Stock Exchange.[78] In the financial year ended 31 March 2021 (FY21), Sony's total turnover was approximately $82.2 billion.[79]

3.4 Sony Music Group (SMG) is the umbrella company for Sony's recorded music and music publishing operations outside of Japan.[80] '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.[81]

3.5 In FY21, Sony reported total revenues in the music segment of $8.5 billion.[82] Recorded music accounted for approximately 55% of total revenues ($4.7 billion), with music publishing generating around 17% ($1.4 billion).[83] Sony's 2021 annual report stated that it ranks second in the world in recorded music and first in the world in music publishing.[84]

3.6 In FY21, Sony's total music revenues grew by $0.8 billion (11%), driven by growth of $0.6 billion (22%) in revenue from recorded music streaming.[85] Total operating income increased from $1.3 billion in 2020 to $1.7 billion in 2021 (a 32% increase).

3.7 Sony Music Entertainment (SME) is the subsidiary company engaged primarily in providing services to artists through Sony-owned frontline labels.[86]

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[78] See Stock Information on Sony's investor relations website.
[79] Revenue converted from Japanese Yen to US dollar figures at a rate of 1 USD = 109.49 Yen.
[80] SMG was formed in 2019, bringing together Sony Music Entertainment, the recorded music division of Sony, and Sony/ATV Music Publishing, the publishing side of the businesses. Sony/ATV Music Publishing changed its name to Sony Music Publishing in January 2021. Sony Music Entertainment Japan focusses on recorded music and music publishing in the Japanese market.
[81] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 21.
[82] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 35. Revenue converted from Japanese Yen to US dollar figures at a rate of 1 USD = 109.49 Yen.
[83] The remainder of Sony's music revenue was attributable to the 'visual media and platform' segment. 'Visual media and platform' includes the production and distribution of animation titles, game applications based on animation titles, and various service offerings for music and visual products. Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 21.
[84] Sony 2021 Corporate Report, page 44.
[85] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 35. Revenue converted from Japanese Yen to US dollar figures at a rate of 1 USD = 109.49 Yen.
[86] In the music industry, 'frontline' typically refers to the creation of new music and 'catalogue' refers to the management of old music. Traditionally, 'frontline' is considered to be songs or albums that are less than 18 months old.

It conducts its business under ‘Columbia Records’, ‘Epic Records’, ‘RCA Records’ and other labels.[87] SME develops, produces, markets and distributes recorded music in all commercial formats and genres.

3.8 SME also wholly owns The Orchard, EU Limited (The Orchard), a global music distribution company. Sony describes The Orchard as ‘a leading music distribution company… with a comprehensive artist and label services offering including full-service marketing, sync licensing, video services, transparent data analysis, advertising, rights management, digital and physical distribution’.[88]

3.9 Sony provides neighbouring rights collection through its publishing arm Sony Music Publishing (SMP).

3.10 In the following section, we provide brief further background on the services provided by both SME and The Orchard as well as key financial data for both businesses.

Sony Music Entertainment

3.11 As described above, SME is one of three major labels in the music industry. Through its frontline labels, SME scouts, signs, develops and supports recording artists, [✂]. According to its website, there are around 400 artists signed to SME’s frontline labels.[89]

3.12 SME’s 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.

3.13 SME’s revenues are generated primarily from contracts with digital streaming services and sales of physical products such as CDs.[90] SME’s total turnover and operating income in the three financial years preceding the Merger are set out in Table 3. In FY21, SME generated total turnover of approximately $[✂] billion, of which $[✂] billion was generated in the UK.[91]

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[87] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 23. See Sony Music website for further details.
[88] Sony Music website, accessed 1 October 2021.
[89] Sony music website: Artists, accessed on 1 October 2021. We note however that this figure includes catalogue artists as well as those currently signed to SME’s frontline labels.
[90] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page F-24.
[91] We note that these figures do not align with those presented in paragraph 3.5. Total revenue from recorded music as cited in paragraph 3.5 includes revenue from Sony Music Entertainment Japan in addition to Sony Music Entertainment.

Table 3: Sony Music Entertainment revenue and operating income (FY18-FY20; $ million)

	2018	*2019*	*2020*
Revenue	[✂]	[✂]	[✂]
Operating income	[✂]	[✂]	[✂]
% margin	[✂]	[✂]	[✂]

Source: Sony.

The Orchard

3.14 The Orchard provides distribution and other services (including marketing, promotion, sync licensing, data analytics and video services) to independent artists and independent third-party labels. The services provided by The Orchard are typically narrower in scope and smaller in scale than those provided by SME to its artists.

3.15 The significant majority of The Orchard's current customers are independent labels. As of March 2021, The Orchard provided distribution and other services to around [✂] labels and [✂] independent artists. In 2020, it generated $[✂] million in UK revenue from distribution-only agreements with labels and $[✂] million from agreements with independent artists. The Orchard's revenues from label services grew by [✂]% between 2018 and 2020, and revenues from artist services grew, from [✂] (of $[✂] million), by [✂]% over the same period (with artist services increasing its share of The Orchard's revenues from [✂]% to [✂]% in that period).[92]

3.16 The Orchard's total turnover in FY21 was approximately $[✂] million, of which approximately $[✂] million was generated in the UK. Total revenues increased by [✂]% year-on-year (FY20: $[✂] million), with UK revenues increasing by [✂]% (FY20: $[✂] million).

AWAL

3.17 AWAL is a music platform providing marketing, distribution and other services to independent artists and independent labels.

3.18 AWAL has 12 office around the world, including in London, New York, Los Angeles, Toronto and other markets.[93] It was owned prior to the Merger by Kobalt.

[92] CMA analysis of Sony data.
[93] See AWAL website: company profile.

3.19 AWAL provides a tiered service offering to support independent artists at different stages of their careers. It focusses on the mid-range artists segment but is active across all segments of the market, providing artist services to new artists as well as more established global artists.

3.20 AWAL's service offering is structured into three separate tiers, designed to serve mid-range artists at scale. An artist typically retains ownership of the copyrights to the recorded music within all tiers. AWAL's offer comprises:[94]

(a) **AWAL Core**: aimed at 'artists with a trajectory, building fans and their story';

(b) **AWAL+**: designed for 'artists [AWAL] think[s] are on the verge'; and

(c) **AWAL Recordings**: which AWAL describes as 'our global record label, built to break artists on their own terms'.

3.21 Artists join AWAL Core via two routes: either by direct referral or, more commonly, following submission of music to AWAL's online DIY platform. [✂]. Internal AWAL documents estimate that it receives over [✂] new online applications each month and that the 'pass rate' for online submissions is [✂]. Around [✂] artists are included in the AWAL Core tier.

3.22 Select AWAL Core members are 'upstreamed' to AWAL+ based on factors such as [✂] and the judgement of AWAL's expert team.[95] Some artists may also join AWAL at the AWAL+ tier. AWAL+ artists receive more extensive support than AWAL Core artists. This may include a customised campaign strategy, a dedicated AWAL representative, funding for specific projects (ie a package of songs) and additional sync and DSP support (ie placing music in film and TV and in key playlists). There are around [✂] artists currently included in the AWAL+ tier.

3.23 AWAL Recordings is designed to support a select group of established and developing artists and provides a customised label service and high-touch support for artists. Artists in this tier may be 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.[96] There are around [✂] artists currently supported by AWAL Recordings.

[94] See AWAL website: How it works.
[95] See AWAL website: How it works.
[96] See AWAL website: How it works.

3.24 AWAL provides a business-to-business offering for independent labels (referred to as its 'B2B' services). AWAL told us that its label clients are offered bespoke deals and that there is no typical label contract structure. AWAL also provides distribution services for artists' back catalogues, including those owned by Kobalt Capital Limited.[97]

3.25 AWAL's total turnover in FY20 was $[✂] million, of which $[✂] million was generated in the UK. Table 4 shows how AWAL's total FY20 revenues can be broken down by each of its service offerings.

Table 4: AWAL revenue (FY20; $ million and percentage)

	$m	*%*
AWAL Core	[✂]	[✂]
AWAL+	[✂]	[✂]
AWAL Recordings	[✂]	[✂]
Label services	[✂]	[✂]
Catalogue Distribution	[✂]	[✂]
Other	[✂]	[✂]
Total	**[✂]**	**[✂]**

Source: Kobalt
Note: 'Other' revenue includes ancillary merchandising, timing accruals and other adjustments, net of intercompany eliminations.

3.26 Total AWAL revenues increased to $[✂] million in 2020 from $[✂] million in 2019 and $[✂] million in 2018, representing a compound annual growth rate of [50–60%]. The growth of each part of AWAL's service offering over the previous three financial years is shown in Table 5.

Table 5: AWAL revenue by service offering (FY18-20; $ million)

	2018	*2019*	*2020*
AWAL Core	[✂]	[✂]	[✂]
AWAL+ and AWAL Recordings	[✂]	[✂]	[✂]
Label services	[✂]	[✂]	[✂]
Catalogue Distribution	[✂]	[✂]	[✂]
Other	[✂]	[✂]	[✂]
Total	**[✂]**	**[✂]**	**[✂]**

Source: Kobalt.

3.27 At the operating profit level, AWAL has historically [✂]. The financial data provided to the CMA showed AWAL's earnings before interest, tax, depreciation and amortisation (EBITDA) before the attribution of any centralised costs (as Kobalt's financial reporting does not allocate centralised,

[97] Kobalt Capital Limited is a subsidiary of Kobalt Music Group Limited. Kobalt Capital Limited acquires catalogues both from Kobalt Music Group's own clients (where artists may be looking to monetise their assets) and from the marketplace more broadly.

corporate costs to each of its individual business units).[98] AWAL's EBITDA on this basis for the financial years 2018 to 2020 is shown in Table 6. AWAL [✂] in 2020 and [✂] in each of the two preceding financial years. The CMA has also calculated total EBITDA estimates for AWAL in each year by allocating corporate costs across Kobalt on the basis of revenues. The CMA's estimates of EBITDA on this basis are set out in Table 6.

Table 6: AWAL gross profit and EBITDA (FY18-20; $ million)

	2018	*2019*	*2020*
EBITDA before corp. costs	[✂]	[✂]	[✂]
% margin	[✂]	[✂]	[✂]
EBITDA (CMA estimate)	[✂]	[✂]	[✂]
% margin	[✂]	[✂]	[✂]

Source: CMA analysis.

Kobalt Neighbouring Rights (KNR)

3.28 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 £[✂] million,[99] of which approximately £[✂][100] was generated in the UK.

The Merger

3.29 On 18 May 2021, Sony, through its wholly-owned subsidiary SME, acquired AWAL and KNR for approximately $430 million (approximately £314 million) in cash.

Events leading up to the Merger

3.30 Kobalt submitted that 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.

3.31 In late 2018 Kobalt engaged [✂], an investment bank, in connection with a proposed fundraising but no deal was agreed as part of that process. Internal documents prepared for the Kobalt board show that prospective investors [✂]. [✂].

[98] Total corporate costs (ie across Kobalt's entire business) were $[✂] million in 2018, $[✂] million in 2019 and $[✂] million in 2020.
[99] Revenue converted from US dollars to GBP at a rate of US$1.38 to £1.
[100] Revenue converted from US dollars to GBP at a rate of US$1.38 to £1.

3.32 In mid-2020, Kobalt instructed Goldman Sachs to assist with a further sales process and to market the business to potential bidders. The sales process covered the whole of the Kobalt business, which was comprised of four parts:

(a) Kobalt Music Publishing: described as a 'leading platform administering music publishing rights';

(b) AWAL: described as an 'independent record label focused on the rapidly growing emerging artist market';

(c) AMRA: described as a 'digital rights/royalty collection society'; and

(d) KNR: described as a 'collect [or] [of] performance rights royalties globally' and 'the number one neighbouring rights administrator in the world'.

3.33 Goldman Sachs conducted targeted outreach with an agreed set of technology-oriented buyers to educate them on the Kobalt business and the strategic rationale for a potential transaction. It also received interest from other possible buyers after the possibility of a sale became public.[101]

3.34 In total, Goldman Sachs engaged with [✂] parties: [✂] as part of its targeted outreach programme and [✂] additional parties following inbound interest.

3.35 After sending out a confidential information memorandum to [✂] parties in September 2020, [✂] formal indications of interest were received:

(a) [✂] for the entire Kobalt business (valuation range: $[✂] million to $[✂] billion);[102]

(b) One bid for AWAL and KNR from SME (valuation: $[✂] million to $[✂] million);

(c) [✂] for AWAL from [✂][103] (valuation: $[✂] million to $[✂] million); and

(d) [✂] in AMRA and KNR from [✂][104] but with no valuation range.

3.36 In November 2020, a further proposal was received from [✂], to create a special purchase acquisition company and raise funding through an initial public offering (IPO). [✂] proposal implied a valuation for Kobalt of $[✂] billion.

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[101] See also Bloomberg (2020), *Music publisher Kobalt is said to explore a potential sale*, September 2020.
[102] [✂]
[103] [✂]
[104] [✂]

3.37 Following the provision of further diligence reports and extensive data room access for bidders, [✂]. In its summary of bidder feedback, Goldman Sachs noted that some potential bidders were [✂].

3.38 In December 2020, SME submitted a revised proposal for AWAL and KNR of $[✂] million, reflecting the upper end of the valuation range included in its preliminary proposal. The offer was subsequently revised upwards to $430 million based on updated synergy assumptions and tax implications of the transaction.

3.39 In its December 2020 update for the Kobalt board, Goldman Sachs noted options to revisit select parties' interest in a transaction for the whole of the Kobalt business and/or for Kobalt Music Publishing, in parallel to continuing engagement with SME.

3.40 We understand that, after evaluating the various expressions of interest received, Kobalt decided that SME's offer for AWAL and KNR was its favoured option and did not pursue interest from other parties.

Transaction rationale

Kobalt's rationale for the Merger

3.41 Kobalt told us that its reasons for pursuing a sale of the company (or parts of it) in 2020 were twofold: a sale would allow the company to reduce its debt and to return capital to long-term shareholders. Kobalt told us that, [✂], it considered SME's offer to be the best means of achieving both of these aims.

3.42 At its main party hearing, AWAL told us that [✂]. AWAL told us that [✂], had motivated Kobalt to initiate a further sales process in mid-2020. AWAL told us that it understood a sale of AWAL and KNR would allow Kobalt to reduce its debts [✂].

3.43 We note that the submissions we received from Kobalt and AWAL are supported by some of the contemporaneous documents that we have reviewed. For example, Kobalt's recent filings with Companies House show that, following the Merger, it executed share buybacks from investors in August 2021 amounting to approximately $89 million.

3.44 As regards its decision to sell to SME in particular, Kobalt told us that AWAL and KNR would benefit from the Merger for a number of reasons. Specifically, it told us that:

(a) Being part of Sony's global network will enable AWAL and KNR to grow internationally, supporting the global aspirations of its artists.

(b) AWAL artists will gain access to The Orchard's expertise, including tools to manage digital advertising campaigns, optimise YouTube channels, and pay out royalties to collaborators.

(c) AWAL will benefit from exposure to Sony's frontline labels and AWAL artists will have easier access to Sony's resources, including the potential to achieve increased exposure and investment.

(d) Being part of Sony will open-up more opportunities for AWAL and KNR in the form of financial support.

Sony's rationale for the Merger

3.45 Sony's documents show that [✄].

3.46 While it concluded that it would not pursue an acquisition of Kobalt Music Publishing and AMRA, regarding its assessment of AWAL, SME noted that:

(a) [✄];

(b) [✄];

(c) [✄];

(d) [✄]; and

(e) [✄].

3.47 Based on the above, [✄]. It also [✄].

3.48 Subsequent internal documents which were prepared during the Merger process and which commented on the strategic rationale for an acquisition of AWAL were broadly consistent with the rationale identified in paragraph 3.46.[105]

3.49 In its submissions to the CMA, Sony stated that it had [✄]. It told us that [✄].

Valuation

Sony's offer for AWAL and KNR

3.50 Sony's purchase price of $430 million for AWAL and KNR was based [✄].[106]

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[105] For example, [✄].
[106] [✄]

3.51 Table 7 shows the valuation range calculated for each business. It shows that [✄].

Table 7: Sony valuation of AWAL and KNR ($ million)

	Low	*Mid*	*High*
AWAL	[✄]	[✄]	[✄]
KNR	[✄]	[✄]	[✄]
Total	**[✄]**	**[✄]**	**[✄]**

Source: Sony.

3.52 As our assessment of the Merger has focussed on SME's purchase of AWAL rather than KNR (see paragraphs 6.61 to 6.65), our analysis of Sony's financial model considers its valuation of AWAL only.

3.53 Sony's valuation model was [✄]. Sony [✄].

3.54 The financial forecasts produced by Sony and Kobalt included revenue projections for each component of the AWAL business as follows:[107]

(a) **Artist services revenue**: services offered to AWAL+ and AWAL Recordings clients.

(b) **DIY Platform revenue**: services offered to AWAL Core clients (also referred to as 'AWAL Managed' and 'AWAL Basic' clients[108]).

(c) **Label services revenue**: services to independent labels.

(d) **Catalogue revenue**: distribution services to back catalogue clients, including those owned by Kobalt Capital's funds.

(e) **Other revenue**: ancillary merchandising and accounting adjustments.

3.55 Table 8 compares the revenue projections and anticipated growth of AWAL to FY25 in the Sony model and the Kobalt management case.

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107 [✄].

108 'AWAL Managed' refers to artists in the gated DIY tier who have a dedicated client manager but no additional services or specific project funding. 'AWAL Basic' refers to those artists in the gated DIY tier with no additional services or client manager.

Table 8: Kobalt and Sony forecasts of AWAL revenue (2020 and 2030) ($ million)

		Sony model		*Kobalt management case*	
AWAL Revenue	*2020*	*2025*	*CAGR%*	*2025*	*CAGR%*
Artist Services Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
DIY Platform Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Label Services Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Catalogue Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Other Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Total	**[✂]**	**[✂]**	**[20-30%]**	**[✂]**	**[30-40%]**

Source: CMA analysis of the Parties' data.

3.56 Table 8 shows that differences in the Parties' forecasts were in large part due to [✂]. In particular, the Parties' respective financial models show that, while Sony projected around [✂] AWAL Core clients by 2025, Kobalt estimated that its DIY platform clients would increase to nearly [✂] over the same period.

4. Relevant merger situation

4.1 This chapter addresses the first of the two statutory questions which we are required to answer under section 35 of the Act and pursuant to our Terms of Reference, namely: whether a relevant merger situation (RMS) has been created.

4.2 The concept of an RMS has two principal elements: two or more enterprises have ceased to be distinct enterprises within the statutory period for reference;[109] and the turnover test and/or the share of supply test is or are satisfied.[110]

Enterprises ceasing to be distinct

Enterprises

4.3 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'.[111] A 'business' is defined as including 'a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.[112]

4.4 AWAL, KNR and Sony (including SME) are active in various business activities. In the UK, AWAL generated turnover of approximately £[✂]

[109] The Act, sections 23 and 24.
[110] The Act, section 23.
[111] The Act, section 129(1).
[112] The Act, sections 129(1) and (3).

million[113] (in the financial year 2019/20), KNR generated turnover of approximately £[✂] million[114] (in the financial year 2019/20), and SME generated turnover of approximately £[✂] million[115] (in the financial year 2020/21). Sony's total global turnover in the financial year 2020/21 was approximately £63.5 billion.[116]

4.5 We are therefore satisfied that each of AWAL, KNR and Sony (including SME) is a 'business' within the meaning of the Act and that, accordingly, the activities of each of AWAL, KNR and Sony (including SME) are an 'enterprise' for the purposes of the Act.

Ceasing to be distinct

4.6 The Act provides that two enterprises cease to be distinct if they are brought under common ownership or common control.[117]

4.7 The Merger concerns the acquisition by Sony, through SME, of the entire issued share capital of AWAL and KNR and therefore full legal control of it. Accordingly, we are satisfied that 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

4.8 The Merger completed on 18 May 2021. The CMA's mergers intelligence function identified the Merger as warranting an investigation before the transaction had completed. The CMA issued an Initial Enforcement Order to Sony, SME, The Orchard, AWAL and KNR on 17 May 2021. The transaction completed the following day and this was generally known. The CMA therefore considers that material facts about the Merger were made public on 18 May 2021, on which date the four-month clock commenced. The four-month deadline for a reference decision, under section 24 of the Act, was 30 September 2021, following extension under section 25(2) of the Act.

4.9 On 7 September 2021,[118] the CMA decided that the Merger gave rise to a realistic prospect of an SLC. It extended the four-month period for making a reference and gave Sony until 14 September 2021 to offer undertakings in

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[113] US dollar figures converted to sterling using the average exchange rate for the year to 30 December 2020 (ie AWAL's financial year end): see HMRC website.
[114] US dollar figures converted to sterling using the average exchange rate for the year to 30 December 2020: see HMRC website.
[115] US dollar figures converted to sterling using the average exchange rate for the year to 31 March 2021 (ie Sony's financial year end): see HMRC website.
[116] US dollar figures converted to sterling using the average exchange rate for the year to 31 March 2021: see HMRC website.
[117] The Act, section 26.
[118] Following an extension under section 34ZB(1) of the Act.

lieu of a reference (UILs).[119] On 10 September 2021, SME informed the CMA that it would not offer UILs to the CMA. The CMA made the reference for a Phase 2 investigation on 16 September 2021.[120]

4.10 We are therefore satisfied that the enterprises of Sony (including SME), AWAL and KNR ceased to be distinct within the applicable statutory period for reference.

The turnover and share of supply test

4.11 The second element of the RMS test seeks to establish sufficient connection with the UK on a turnover and/or share of supply basis.

The turnover test

4.12 The turnover test is met where the value of the turnover in the UK of the enterprise being taken over exceeds £70 million. As the turnover of AWAL in the UK in its last financial year prior to the merger agreement was approximately £[✄] million, and that of KNR was approximately £[✄] million, the turnover test is therefore not met.

The share of supply test

4.13 The share of supply test is met where, as a result of enterprises ceasing to be distinct, the following condition prevails or prevails to a greater extent: at least one quarter of goods or services of any description which are supplied in the UK, or in a substantial part of the UK, are supplied either by or to one and the same person.[121] The requirement that the condition prevails or prevails to a greater extent means that the merger must result in the creation or increase in a share of supply of goods or services of a particular description and the resulting share must be 25% or more.

4.14 The concept of goods or services of 'any description' is very broad. The CMA is required by the Act to measure shares of supply by reference to such criterion (whether value, cost, price, quantity, capacity, number of workers

[119] The Act, sections 25(4) and 73A(1). The CMA stated that the extension to the four-month period would end on (among other matters) the expiry of the period of ten working days beginning with the first day after the receipt by the CMA of a notice from Sony stating that it did not intend to give UILs.
[120] The Act, sections 22(1) and 34ZA(2).
[121] The Act, section 23(2), (3) and (4). The reference to supply 'by' or 'to' one and the same person catches aggregations with regard to the supply or purchase of goods or services. The test is also met where at least one quarter of the goods or services is supplied by the persons by whom the enterprises concerned are carried on, or are supplied to or for those persons.

employed or some other criterion, of whatever nature), or such combination of criteria, as the CMA considers appropriate.[122]

4.15 The share of supply test is a flexible test that gives the CMA discretion to consider forms of supply separately or in combination (whether as a whole or taken in groups) and to consider whether transactions differ materially as to their nature, their parties, their terms or the surrounding circumstances.[123] In each case the criteria are to be such as the CMA considers appropriate in the circumstances of the case.[124]

4.16 The description of goods or services identified for the purposes of the jurisdictional test does not have to correspond with the economic market definition adopted for the purposes of determining the SLC question.[125] The CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met.[126] Importantly however, the parties must together supply or acquire the same category of goods or services (of any description).[127]

4.17 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).

4.18 In view of the above, we have concluded that the share of supply test in section 23 of the Act is met, and therefore the second limb of the RMS test is also met.

Conclusion on jurisdiction

4.19 In view of the above, we have decided that the Merger has resulted in the creation of an RMS.

[122] The Act, section 23(5).
[123] The Act, section 23(6) and (7).
[124] The Act, section 23(8).
[125] Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020, (CMA2 Revised), paragraph 4.63(a). CMA2 Revised was further updated on 4 January 2022, however the December 2020 version remains the applicable guidance for the purposes of the present investigation.
[126] Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020, (CMA2 Revised), paragraph 4.63(b).
[127] Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020, (CMA2 Revised), paragraph 4.63(e).

5. Counterfactual

Introduction

5.1 In this chapter, we set out:

(e) the CMA's framework for assessing the counterfactual;

(f) the Parties' submissions on the counterfactual; and

(g) our assessment of, and conclusion in relation to, the appropriate counterfactual.

The CMA's framework for the assessment of the counterfactual

5.2 The counterfactual is an analytical tool used in answering the question of whether a merger gives rise to an SLC.[128] Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger.[129] The latter is called the counterfactual.[130]

5.3 The counterfactual is not, however, intended to be a detailed description of the conditions of competition that would have prevailed absent the merger.[131] Those conditions are better considered in the competitive assessment.[132] The CMA also seeks to avoid predicting the precise details or circumstances that would have arisen absent the merger.[133]

5.4 The CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger.[134] In some instances, the CMA may need to consider multiple possible scenarios, before identifying the relevant counterfactual.[135] As part of this assessment, the CMA will take into account whether any of the possible scenarios make a significant difference to the conditions of competition, and if they do, the CMA will ultimately select the most likely conditions of competition absent the merger as the counterfactual.[136]

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[128] CMA's Merger Assessment Guidelines (CMA129), March 2021 (MAGs), paragraph 3.1.
[129] MAGs, paragraph 3.1.
[130] MAGs, paragraph 3.1.
[131] MAGs, paragraph 3.7.
[132] MAGs, paragraph 3.7.
[133] MAGs, paragraph 3.11.
[134] MAGs, paragraph 3.13.
[135] MAGs, paragraph 3.13.
[136] MAGs, paragraph 3.13.

5.5 The CMA recognises that evidence relating to future developments absent the merger may be difficult to obtain.[137] Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment of the counterfactual, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merging parties to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.[138]

5.6 Further, the time horizon considered by the CMA in its assessment of the counterfactual will depend on the context and will be consistent with the time horizon used in the competitive assessment.[139]

The Parties' submissions on the counterfactual

5.7 We set out the submissions made by and on behalf of Sony and AWAL on the counterfactual below.

Sony

5.8 Sony submitted that the relevant counterfactual was Kobalt's continued ownership of AWAL and that AWAL faced an uncertain future in this scenario.[140]

5.9 Sony told us that [✂].[141]

5.10 Sony told us that, [✂] 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'.[142]

5.11 SME's independent financial advisors, [✂], submitted an analysis of 'AWAL's standalone financial profile, its historic funding, viability for an IPO and attractiveness to other potential buyers'.

5.12 [✂] considered that [✂]. It stated that:

(a) [✂]; and

[137] MAGs, paragraph 3.14.
[138] MAGs, paragraph 3.14.
[139] MAGs, paragraph 3.15.
[140] Sony's response to the Issues Statement, page 5.
[141] Sony's response to the Issues Statement, page 5.
[142] Sony's response to the Issues Statement, page 5.

(b) [✂].

5.13 [✂] noted that, [✂]. [✂].

5.14 [✂] also considered that [✂]. [✂].

5.15 Finally, [✂]. It submitted that [✂].

5.16 As a result of the above, Sony submitted that, in the counterfactual, AWAL would have struggled to maintain its position and had no realistic prospect of becoming a more significant competitor in the foreseeable future.[143]

5.17 As regards The Orchard, Sony told us that it had faced difficulties in building The Orchard's artist services business organically. It told us that The Orchard did not have the human resources, brand or capabilities to build a [✂] artist services offering, and it was [✂] from its core label services business.

5.18 Nonetheless, Sony told us that it 'want[ed] to be in the artist services business' [✂]. Therefore, Sony told us, [✂].

5.19 Sony told us that it had considered whether to 'buy' or 'build' further artist and DIY services capabilities internally at various times in the past [✂]. [✂].

AWAL

5.20 AWAL submitted that the relevant counterfactual was the continued ownership of AWAL by Kobalt.

5.21 Although other expressions of interest were received during the 2020 sales process, AWAL told us that these alternative proposals were not sufficiently attractive to Kobalt. It considered that Kobalt would likely retain ownership of the AWAL business rather than accept investment at valuations it did not consider reflected true value. AWAL therefore told us that, in the counterfactual, a sale of the business to a third party was not as likely as continued ownership by Kobalt.

5.22 AWAL told us that it [✂] and that, [✂]. It told us this was the case because:

(a) Kobalt [✂]; and

(b) to the extent that additional financing was available, [✂].

5.23 AWAL told us that, without additional funding:

[143] Sony's response to the Issues Statement, paragraph 98.

(a) it was unlikely to have been able to [✂] as it would under SME's ownership; and

(b) it would not have expanded its services and would likely have focussed on [✂].

5.24 AWAL submitted that it faced [✂] and was [✂]. It told us this was because artists and label clients demanded support in different areas and that AWAL did not [✂]. As a result, AWAL told us that, prior to the Merger, it had taken an [✂] to [✂] and that it [✂] absent the Merger. AWAL told us that it did not have the expertise or capability to do so, especially given its [✂], and that it [✂].[144]

5.25 Based on the above, AWAL told us that it considered the appropriate counterfactual to be the pre-existing conditions of competition in which it remained part of Kobalt and continued to focus on 'the 'middle class' of new and emerging artists'. It stated that it would likely have continued to operate in largely the same way as prior to the Merger but that, without significant additional investment, its [✂].

Our assessment of the appropriate counterfactual

AWAL in the counterfactual

5.26 In our assessment of the appropriate counterfactual in this case, we considered the following possible counterfactual scenarios as regards AWAL:

(a) continued ownership of AWAL by Kobalt; and

(b) a sale of AWAL to an alternative purchaser (ie a purchaser other than Sony/SME).

5.27 We then considered whether any of the possible counterfactual scenarios make a significant difference to the conditions of competition absent the Merger.[145]

5.28 For the reasons set out below, we have concluded that the appropriate counterfactual in this case is that AWAL would have continued to supply services to both artists and labels and to compete in the same way as prior to

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[144] AWAL also told us that a significant amount of the revenue from its [✂], but that the deal had expired in November 2021. AWAL told us that the [✂] deal was continuing on a rolling basis and accounted for c. [✂]% of its labels business in 2020. AWAL submitted that, were [✂] to move 'even some of its business' elsewhere, this would result in a significant loss for [✂]. AWAL also told us that during the week beginning 7 February 2022 [✂] had served notice of its intention to leave AWAL.

[145] MAGs, paragraph 3.13.

the Merger, with a focus on improving the profitability of the business. We have concluded that this counterfactual would 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.

5.29 Our assessment is set out below.

Scenario 1: Continued ownership of AWAL by Kobalt

5.30 As set out above, the Parties have submitted that [✂] (see paragraph 5.22). The Parties considered this to be the case primarily because [✂].

5.31 To inform our view of how AWAL would have been most likely to develop under Kobalt's ownership, we have reviewed internal Kobalt documents including Board papers which discussed the strategic direction of the Kobalt group, its plans for the AWAL business and, as required, the options available to finance those plans.

5.32 Our assessment of Kobalt's internal documents is structured as follows:

(a) First, we considered internal documents prepared prior to Kobalt's 2019 fundraising round.

(b) Second, we considered internal documents which comment on the outcome of the 2019 fundraising round.

(c) Third, we considered internal documents which relate to Kobalt's plans and the future outlook for the business following the 2019 fundraising round.

Documents prepared prior to 2019 fundraising

- *Overview*

5.33 In this section, we consider the evidence from Kobalt's internal documents dated between February 2018 and February 2019. Documents produced during this period inform our understanding of the intentions of Kobalt's management and Board following the re-branding of its recorded music division under the 'AWAL' brand.

5.34 Prior to February 2018, Kobalt's recorded music business consisted of AWAL Platform, AWAL+ and Kobalt Music Recordings (KMR).[146] KMR subsequently

[146] See Appendix E, paragraph 3, item 1.

became 'AWAL Recordings' as Kobalt intended to 'create a single powerful music company, positioned as the industry leader in building independent artists' careers'.[147]

5.35 Kobalt's internal documents from this period demonstrate that it had a clear intention to invest in and grow the AWAL business significantly and that it planned to initiate a capital raise to accelerate that growth. Kobalt's documents indicate it anticipated that investors would be willing to provide the capital that it sought and that this capital would enable it to capitalise on what it considered to be a 'massive market opportunity for AWAL'.[148]

- *Evidence from Kobalt's internal documents*

5.36 Kobalt's internal documents from early 2018 show that it had ambitions to expand AWAL's services for both artists and labels following the re-branding. It stated in its February 2018 Board pack that:[149]

(a) It was starting to close label deals and actively expanding its services to include services for labels.

(b) It was continuing to focus on scaling the AWAL business, expanding its client base and breaking new artists.

5.37 Minutes of a subsequent Kobalt Board meeting, held in April 2018, stated that it aimed to raise between $[✄] million and $[✄] million to 'dramatically accelerate growth of [the] huge AWAL opportunity which is becoming even more exciting in [the] market'.[150]

5.38 An internal presentation prepared by Kobalt's management team in June 2018 confirmed its intention to use the proceeds of its planned fundraising to invest in AWAL. The presentation showed that Kobalt planned to use $[✄] million of new capital as follows:[151]

(a) $[✄] million would be used [✄];

(b) $[✄] million would be used to [✄]; and

(c) $[✄] million would be used to [✄].

[147] See Appendix E, paragraph 3, item 3.
[148] See Appendix E, paragraph 6, item 2.
[149] See Appendix E, paragraph 3, item 1.
[150] See Appendix E, paragraph 15.
[151] See Appendix E, paragraph 16.

5.39 While Kobalt was considering possible fundraising options for the business, its internal documents show that AWAL continued to grow considerably throughout 2018. For example, in a presentation to its Board in July 2018, Kobalt stated that AWAL was 'gaining momentum across all categories [artist services, label services and its platform business]'[152] and noted in particular that:

(a) It had signed [✂] deals with artists in the previous year and that 'artists with [the] biggest potential [were] now seeking out AWAL'.

(b) It had rapidly expanded its label services business and made a number of key signings.

(c) It had seen strong growth in its platform business and had a 'structure in place to secure clients at scale'.

5.40 As AWAL continued to grow, Kobalt's management team recommended in September 2018 that the Board initiate its capital raising plans to accelerate its growth.[153] It considered that its current budget left 'massive untapped upside' in its recordings business[154] and that obtaining additional capital would enable AWAL to scale in line with its long-term vision and, more specifically, to invest in its platform and pay out advances to attract more label clients.[155]

5.41 As a result, management recommended that the Board raise $[✂] and $[✂].[156] Minutes of the September 2018 Kobalt Board meeting show that it agreed to [✂] and to engage [✂], a global investment bank, ahead of formal fundraising. Subsequent documentation prepared for the Kobalt Board stated that it expected this to be Kobalt's '[✂]'.

5.42 Board documents from February 2019 show that Kobalt management recommended that the Board target a capital raise of $[✂] million rather than $[✂] million to 'maximise the value of Kobalt' and to 'allow the company to pursue a more aggressive growth plan'. It advised that its recommendation to raise $[✂] million of incremental capital would be used to '[✂]'.

[152] See Appendix E, paragraph 5, item 1.
[153] See Appendix E, paragraph 6, item 1.
[154] See Appending E, paragraph 6, item 3.
[155] Kobalt's Board pack noted that 'B2B indie clients… expect an advance to fund their client advances as the market standard'.
[156] Management recommended [✂].

Outcome of 2019 fundraising

- *Overview*

5.43 In this section, we consider the evidence from Kobalt's internal documents dated between July 2019 and December 2019. Documents produced during this period inform our understanding of the outcome of Kobalt's 2019 fundraising round and the response of its management and Board.

5.44 Kobalt's internal documents from this period show that [✄], primarily as a result of [✄] and uncertainty concerning [✄]. Its internal documents show that, in response, Kobalt adopted a new business plan, with a focus on [✄].

- *Evidence from Kobalt's internal documents*

5.45 Internal Kobalt documents from July 2019 show that AWAL (and the entire Kobalt group) continued to grow revenues and gross profits considerably:

(a) AWAL revenue grew to $[✄] million, up [✄]% year-on-year. Kobalt group revenue grew to $[✄] million, representing an increase of [✄]% from the previous year.

(b) AWAL gross profit grew to $[✄] million, up [✄]% year-on year. Kobalt group gross profit grew to $[✄] million, representing an increase of [✄]% from the previous year.

5.46 In a fundraising update presented to the Board in July 2019, Kobalt identified [✄] interested parties from which it was awaiting responses following outreach by [✄]. It noted that one potential investor was 'deep in due diligence'.

5.47 However, Kobalt also presented a 'Plan B' for the Board's consideration. It considered this to be [✄]. Kobalt's 'Plan B' consisted of:

(a) [✄];

(b) [✄]; and

(c) [✄].

5.48 Under [✄], Kobalt set out a range of [✄]. As regards AWAL, possible actions included:

(a) [✄].

(b) [✄].

(c) [✂].

5.49 Kobalt noted that [✂] would [✂]. Management also noted that it would be [✂]. It recommended assessing which plan to prioritise at a subsequent meeting.

5.50 Minutes of the discussion with the Kobalt Board show it agreed, depending on how fundraising progressed, that an updated long-range plan should be produced.

5.51 At the next meeting of the Kobalt Board, in October 2019, the CEO, Willard Ahdritz, provided an update describing the current state of the business. Mr Ahdritz stated that the Kobalt and AWAL brands were 'very strong' and that demand for the company's services remained 'very high' (noting also the continued growth in the AWAL business as described in paragraph 5.45).

5.52 Mr Ahdritz stated that, to date, the business had focussed on [✂] and had not focussed on [✂]. He explained that:

(a) [✂].

(b) [✂].

5.53 As a result of the above, Kobalt's Board pack stated that the capital raise process initiated in 2019 was '[✂]'[157] and that '[✂]'.

5.54 Management therefore recommended that Kobalt '[✂]', with a focus on '[✂]' (ie [✂]). As part of [✂], Kobalt stated that it would focus on [✂] and put in place a strategy to [✂].

5.55 As regards AWAL, Kobalt planned to [✂] AWAL Recordings and AWAL+ and to '[✂]'. More specifically, it considered that:

(a) AWAL Recordings and AWAL+ were [✂].

(b) AWAL Platform [✂].

(c) The market opportunity in label services [✂].

5.56 Kobalt therefore planned to [✂] AWAL Recordings and AWAL+ [✂] but also planned to '[✂]'.

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157 The capital raise process resulted in [✂].

5.57 Kobalt’s short-term and long-term plans for each part of the AWAL business, as set out in its October 2019 Board pack, are summarised in Table 9.

Table 9: Kobalt plan for AWAL under [✂]

AWAL Service Offering	*Short Term Plan*	*Long Term Plan*
AWAL Recordings and AWAL+	[✂]	[✂]
AWAL Platform	[✂]	[✂]
Label Services	[✂]	[✂]

Source: Kobalt.

5.58 Kobalt management also presented a new long-range plan based on [✂]. Under its base case, management projected that the company would become profitable in [✂] and would generate EBITDA of $[✂] million in [✂] on total revenues of $[✂] billion.[158] It also recommended that the company explore another equity raise or an alternative strategic option within 18 to 24 months.

5.59 The revised revenue projections for AWAL presented by management to the Kobalt Board, which show how management expected AWAL to perform under [✂], are shown in Table 10.

Table 10: Kobalt forecast growth in AWAL revenue under [✂] ($ million)

AWAL Revenue	*2019*	*2025*	*CAGR (%)*
Artist Services Revenue	[✂]	[✂]	[✂]
DIY Platform Revenue	[✂]	[✂]	[✂]
Label Services Revenue	[✂]	[✂]	[✂]
Catalogue Revenue	[✂]	[✂]	[✂]
Other Revenue	[✂]	[✂]	[✂]
Total	**[✂]**	**[✂]**	**[✂]**

Source: Kobalt.

5.60 Table 10 shows that management [✂]. In total, management [✂]. Consistent with the planned [✂].

5.61 [✂], Table 10 shows that management continued to project significant revenue growth for AWAL, with total revenues increasing by an average of [✂]% per annum and growing [✂] over the six years to 2025.

[158] The base case assumed that Kobalt [✂]. Nonetheless, Kobalt management prepared a [✂].

Plans and performance of the business post-2019 fundraising

- *Overview*

5.62 In this section, we consider the evidence from Kobalt's internal documents dated between December 2019, when it terminated the equity raise with [✂] and introduced [✂], and March 2021, shortly before the Merger closed. Documents produced during this period inform our understanding of how the AWAL business performed in the period leading up to the Merger (under its new business plan) and the future outlook for AWAL under Kobalt's ownership.

5.63 Kobalt's internal documents from this period show that Kobalt continued to plan to expand each element of AWAL's tiered service offering and that AWAL continued to experience considerable year-on-year revenue and gross profit growth.

- *Evidence from Kobalt's internal documents*

5.64 Internal Kobalt documents show that AWAL continued to grow considerably through 2019 and that it continued to develop its capabilities and client roster in the months following the introduction of [✂]. For example:

(a) In December 2019, Kobalt reported that AWAL continued its 'strong growth', with total revenue up [✂]% year-on-year. Kobalt reported that AWAL 'continued to grow significantly with higher value clients' and had 'increased the number of $1 million revenue clients from [✂] in 2018 to [✂] in 2019'.

(b) Kobalt's February 2020 Board reporting pack stated that AWAL had recently made some key staffing hires, including [✂]. Kobalt considered that the 'calibre of hires illustrates the continued growth in AWAL's market position'.

(c) The same Board paper demonstrated that AWAL's deal 'pipeline' remained strong with [✂] deals under active negotiation, including [✂] potential deals with '$1 million+' clients.

5.65 In the following months of 2020, Kobalt was required to assess the potential impact of the Coronavirus (COVID-19) pandemic on its business. Following the submission of a new budget for 2021 to the Board, Kobalt also produced a new version of its long-range plan to 2025.

5.66 Kobalt's new budget showed that, despite the negative impact of the Coronavirus (COVID-19) pandemic, it retained its expectation that the Group would [✄]. As regards AWAL, it projected that revenue would grow to $[✄] million in 2021, up from $[✄] million in 2020 (representing a year-on-year increase of [✄]%), and that gross profits would grow by [✄]% to $[✄] million (2020: $[✄] million). Growth was expected to be driven primarily by [✄], with the corresponding shift in AWAL's revenue mix leading to an increase in its gross profit margin from [✄]% in 2020 to [✄]% in 2021.

5.67 In addition, Kobalt's 2021 budget maintained its plan to increase funding for [✄] compared to previous years (increasing from $[✄] million in 2019 and 2020 to $[✄] million in 2021).

5.68 In its updated long-range plan, Kobalt presented different scenarios to its Board as follows:

(a) First, an updated 'equity case', which appeared to be prepared for potential investors,[159] but which also stated that it assumed '[✄]'. The purpose of these projections is not clear from the documents that we have received, although we note that the projections in the updated 'equity case' were almost identical to those included in the subsequent confidential information memorandum provided to investors.

(b) Second, what Kobalt referred to as the 'credit case' and which appeared to be an updated version of [✄]. Kobalt commented that the 'credit case' was 'more conservative vs the equity case', assumed '[✄]' and was more consistent with [✄] (ie those projections set out in Table 10).

(c) Third, what Kobalt referred to as the 'liquidity case', which was '[✄]'.

5.69 Given the specific purpose of the 'liquidity case' described above, we have focused on Kobalt's projections in the 'equity case' and the 'credit case' in the following paragraphs. Kobalt's forecasts for growth in AWAL's revenues under both scenarios are set out in Table 11.

[159] We note that the Parties told us that Kobalt received inbound interest for the purchase of the business, following its attempted fundraising in 2019 and instructed a formal sales process as a result.

Table 11: Kobalt forecast growth in AWAL revenue under different scenarios in June 2020 'long range plan' ($ million)

		'Equity case'		*'Credit case'*	
AWAL Revenue	*2020*	*2025*	*CAGR (%)*	*2025*	*CAGR (%)*
Artist Services Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
DIY Platform Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Label Services Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Catalogue Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Other Revenue	[✂]	[✂]	[✂]	[✂]	[✂]
Total	**[✂]**	**[✂]**	**[✂]**	**[✂]**	**[✂]**

Source: Kobalt.

5.70 Table 11 shows that the difference between Kobalt's forecast scenarios was in large part a result of different projections for AWAL's [✂] business. Projected spend on [✂] was also higher under the 'equity case' ($[✂] million over 2021-25 vs $[✂] million over the same period in the 'credit case'), leading to greater artist services revenue. Revenue generated from label services was projected to reach $[✂] million by 2025 in both cases.

5.71 Revenue projections under the 'credit case' were [✂] than in Kobalt's [✂] base case (as set out in Table 10). In its new 'credit case', Kobalt [✂]its 2025 projections for AWAL as follows:

(a) **Artist services**: revenue projection [✂] by $[✂] million.

(b) **DIY platform**: revenue projection [✂] by $[✂] million.

(c) **Label services**: revenue projection [✂] by $[✂] million.

5.72 [✂], we note that Kobalt continued to project considerable revenue growth for AWAL (representing a compound annual growth rate of [✂]%).

5.73 In terms of profitability, AWAL was forecast to reach gross profit of $[✂] million in 2025 under the 'credit case' and $[✂] million in the 'equity case'. In both cases, [✂] were forecast to be the biggest contributors to gross profits, thereby improving margins across the AWAL business as a whole.[160]

5.74 Kobalt's Board presentations in the second half of 2020 and into 2021 show that the AWAL business continued to develop in line with the trajectory set out

[160] AWAL Recordings was forecast to achieve a gross margin of [✂]%, with AWAL+ earning a gross margin of [✂]%. By contrast, AWAL platform services were forecast to generate a gross margin of [✂]%, while label services gross profit margin was expected to be [✂]%.

in [✂]. That is, AWAL's revenues and gross profit margin continued to grow during 2020, driven by an increased focus on [✂].[161]

Our assessment of AWAL's prospects under Kobalt's ownership

5.75 Kobalt had introduced a new business plan shortly before the Merger, [✂]. Kobalt's board documents show that the intention of [✂].

5.76 Kobalt's documents show that it planned to [✂] on the AWAL Recordings and AWAL+ parts of the business, [✂].

5.77 Its documents show that it was putting this plan into effect immediately prior to the Merger and that Kobalt had continued to grow AWAL, improve its profitability and attract new clients. Kobalt's business planning documents show that it continued to be incentivised to grow the AWAL business and planned to do so, absent the Merger. We note, however, that Kobalt had [✂].

5.78 While there is naturally a degree of uncertainty and execution risk associated with Kobalt's [✂] 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).

5.79 In our view, the evidence provided to us supports the view that, under Kobalt's ownership, AWAL would most likely have continued to compete at the higher tiers of its service offering in a similar way as it had done prior to the Merger, offering a credible option, and for some artists an alternative to a major label deal, through AWAL Recordings and AWAL+.

5.80 While [✂] can reasonably be expected to have resulted in a slowing down of the considerable rate of growth that AWAL had experienced in the years 2018 to 2020, Kobalt's board documents show that [✂], but that these parts of the business were nonetheless expected to continue to grow. Its documents show that [✂], as Kobalt had identified this part of the business as a route to [✂].

[161] See for example Kobalt document titled '[✂]': AWAL growth 'driven by steady growth in [✂]'. Kobalt, document titled '[✂]: 'Maintaining our deal discipline… has allowed us to continue increasing rates, getting options and increasing term of deals… Narrative around power of owning rights… has also opened many new deal opportunities to AWAL'. Also, [✂]: 'We have delivered some high-quality signings over last 12 months and see this as a large opportunity with the new resourcing in place'. Kobalt document titled '[✂]': '[AWAL] growth story is now evident… business has continued to sign deals (renewals and new deals) and pipeline remains strong'.

For this reason, we consider that AWAL Recordings was likely to have at least maintained its competitive position in the counterfactual. We have not, however, been provided with any evidence that AWAL Recordings would most likely have exerted a materially different future competitive constraint to that at the time of the Merger.

5.81 As regards label services more specifically, we note that AWAL told us [✂] absent the Merger and had [✂] (see paragraph 5.24). We also note that there is evidence of a decision by Kobalt to [✂] (see paragraph 5.55).

5.82 [✂], Kobalt's board papers state an intention to [✂] and, as of June 2020, Kobalt projected that it would continue to compete and grow AWAL's revenues [✂] (see Chapter 6, Table 12).

5.83 We have therefore concluded that, under Kobalt's ownership, AWAL would be most likely to have continued to compete in label services in a similar way as prior to the Merger. AWAL would not have been likely to materially expand its label business within the next two to three years, given that it intended to [✂].

Scenario 2: The potential sale of AWAL to an alternative purchaser

5.84 As an alternative to continued ownership by Kobalt, we considered whether it was likely that AWAL would have been sold to an alternative purchaser and whether this would have made a significant difference to the conditions of competition absent the Merger.

5.85 We first note that Kobalt told us that the 2020 sales process was initiated as a result of receiving inbound interest for the purchase of the business. As part of the sales process, we understand that Kobalt received [✂] formal indications of interest from potential acquirers, excluding the bid from SME. [✂] of these bids were for the entire Kobalt business (ie including AWAL), with [✂] to purchase AWAL only and [✂] relating to a purchase of AMRA and KNR.[162]

5.86 AWAL's view was that these alternative proposals were not sufficiently attractive to Kobalt and that Kobalt would have retained ownership of AWAL rather than accepting investment on unattractive terms.

5.87 We contacted those alternative bidders which had initially expressed an interest in acquiring AWAL, either on a standalone basis or as part of a transaction for the entire Kobalt business. We received responses from [✂], which each expressed an interest in acquiring Kobalt. We also received a

[162] See paragraph 3.35 for details of the offers received during Kobalt's 2020 sales process.

response from [✂], which had submitted interest in a transaction for AWAL only.

5.88 [✂] each expressed concerns with the valuation sought by Kobalt. [✂] told us that it did not consider AWAL a suitable investment 'in light of the likely cost and in consideration of some key risk areas identified in our assessment'. Documents provided by [✂] to the CMA show that it considered:

(a) [✂];

(b) [✂]; and

(c) [✂].

5.89 As a result of the above, [✂] told us that it elected not to submit a second round bid as part of the sale process.

5.90 [✂] told us that it did not pursue an investment in Kobalt 'due to the company's recent performance and the risk/reward merits of the potential investment… There was considered to be too much risk relative to the perceived value'. It added that '[✂] [of Kobalt] didn't make the opportunity attractive for [✂]'.

5.91 [✂] told us that it decided not to pursue an acquisition of or investment in Kobalt [✂] after receiving preliminary information about the business '[✂]' and '[✂]'.

5.92 Although potential investors [✂], we note that the financial projections provided to investors were based on Kobalt's '[✂]' forecasts, which are set out in Table 11 above, and which [✂].

5.93 [✂] submitted initial interest in a transaction to carve out and purchase AWAL only, rather than pursuing a purchase of the entire Kobalt business. [✂] told us that its offer for AWAL required AWAL shareholders to receive equity in a merged [✂] entity but that the bid was not accepted because 'Kobalt (and thereby AWAL) shareholders were looking for an acquisition structure comprising [✂], which was neither feasible nor attractive for [✂] at the time'.

5.94 Noting that we did not receive responses from all alternative bidders to SME, the evidence that we have received shows that the bids of many of the other interested parties [✂].

5.95 However, it would have remained open to Kobalt to pursue the initial interest expressed by these parties absent the bid from SME. In particular, we infer from [✂] submissions that it remained interested in a transaction to purchase AWAL but that the structure of its offer was not attractive to Kobalt. As [✂]

noted in a presentation to the Kobalt Board, Kobalt could have revisited the interest of some of those parties identified above, had it wished to do so.

5.96 We consider that it is possible that AWAL could have been acquired by one of these other parties as part of Kobalt's 2020 sales process (albeit potentially on different terms than Kobalt originally sought). Kobalt may also have pursued another sales process in the near future, after demonstrating [✄]. In this context, we also note the Parties' submissions that several rival artist and label services providers and other DIY distribution providers have recently won 'substantial investment to boost further growth and expansion'.[163] As a leading provider of these types of services, we consider that raising additional external finance or a sale to an alternative purchaser remained realistic possibilities for AWAL in the absence of the Merger.[164]

5.97 In these circumstances, we have concluded that AWAL would most likely have continued to compete as a provider of artist and label services and to focus on improving the profitability of the business, as it was doing prior to the Merger and in the same way as under Kobalt's ownership. We have not been provided with evidence that the competitive constraint from AWAL would most likely have been materially different, had it been acquired by an alternative purchaser.

Conclusion on AWAL in the counterfactual

5.98 In each of the possible counterfactual scenarios identified above, we have concluded that the same conditions of competition absent the Merger would most likely have prevailed. We do not therefore find it necessary to identify a particular scenario that leads to the counterfactual.[165]

5.99 We have concluded 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. We found this counterfactual would 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 in 2020, or in the near future as part of a further Kobalt fundraising round.

[163] Sony's response to the Issues Statement, paragraph 68.
[164] We note that IMPALA also told us that 'it is likely that Kobalt would have been able either to pay down its existing debt or introduce new investment at Kobalt company level' and that 'the market for acquisition of music businesses is currently buoyant… it is quite possible that other buyers may have emerged for AWAL had [it] not sold to Sony'. IMPALA response to the Provisional Findings, dated 4 March 2022, page 3.
[165] MAGs, paragraph 3.9.

Sony in the counterfactual

5.100 In assessing the appropriate counterfactual as regards Sony, first we considered the conditions of competition that would likely have prevailed in the supply of high-touch services to artists in the absence of the Merger.

5.101 Second, we considered whether it was likely that Sony would have developed its offering to mid-range and low-range artists absent the Merger. In doing so, we have considered evidence on Sony's intention, incentive and ability to develop artist services capabilities.

5.102 Finally, we considered Sony's most likely competitive position in the provision of label services absent the Merger.

A&R Services

5.103 As noted in Chapter 2, Sony is one of three major labels, providing a full range of high-touch A&R services to artists through its frontline record labels. Sony has submitted that its major frontline record labels focus on providing services to potential superstar artists[166] and that the business model required to attract these artists involves significant upfront investment. Sony told us that [✂].

5.104 Sony submitted that it had no plans to '[✂]'.

5.105 Sony's submissions show that it intends to continue to provide high-touch services to artists via its major frontline record labels as it did prior to the Merger, and we have not received any evidence or other submissions to support an alternative counterfactual.

5.106 Therefore, we have concluded that the appropriate counterfactual as regards Sony's supply of A&R services should be the pre-Merger conditions of competition.

Artist services

5.107 In its submissions, set out in paragraph 5.18, Sony expressed a clear intention and incentive to be more active in artist services absent the Merger. It told us that it wanted to be in the artist services business for two primary commercial reasons:

(a) [✂]; and

[166] Sony's response to the Issues Statement, paragraph 19.

(b) [✂].

5.108 Sony's submissions are consistent with its internal documents, which show that [✂]. For example:

(a) [✂]:

(i) [✂]; and

(ii) [✂].

(b) [✂].

(c) Another document from early 2019 compared numerous competitors in artist services and artist technology based on a number of parameters. [✂].

5.109 Internal documents provided by The Orchard also show [✂].

5.110 We note that Sony told us at its Main Party Hearing that 'we really started looking at building the artist services pieces of the business back in late 2017 at The Orchard'. Sony told us that it had 'struggled' to grow The Orchard in this way but that 'back in 2019 we were continuing on an organic path to build'. Sony told us that it had struggled because The Orchard specialised in label services and the provision of artist services required different capabilities and a different skillset, in particular in managing relationships with artists.

5.111 As a result of these difficulties, Sony told us that, absent the Merger, it [✂] and [✂].

5.112 Further internal documents provided by Sony and The Orchard show that [✂]. On the basis of these documents and Sony's submissions during our inquiry, we understand that Sony:

(a) [✂];

(b) [✂]; and

(c) [✂].[167]

5.113 Based on the evidence set out above, we consider it to be unclear whether Sony would ultimately have pursued a 'buy' or 'build' strategy (or a combination of the two) as a means of expanding its presence in artist services in the counterfactual. We have not however, been provided with

[167] Sony's response to the Issues Statement, paragraph 80.

evidence that Sony had made progress towards an alternative acquisition in the absence of its bid for AWAL. We therefore consider a scenario in which Sony acquires an alternative A&L provider to be too speculative to represent the appropriate counterfactual.

5.114 In addition, we consider that Sony's clear incentive and intention (as demonstrated by its internal documents and submissions during its Main Party Hearing), its financial resources, market position and existing A&R expertise mean that, absent the Merger, Sony would most likely have had the ability to continue to build its artist services capabilities organically.

5.115 Therefore, we have concluded that, absent the Merger, Sony would most likely have continued to further develop its artist services offering, as it was doing prior to the Merger, and continue to build out its capabilities organically via The Orchard.

5.116 We assess Sony's likely competitive position relative to other suppliers in this counterfactual in the competitive assessment below.

Label services

5.117 In its submissions on the appropriate counterfactual, Sony did not explicitly comment on its likely competitive position in the provision of label services absent the Merger. It did, however, tell us more generally that it considered the appropriate counterfactual in this case to be the pre-Merger conditions of competition, that [✂]. The Orchard also told us that '[✂]'.

5.118 We have found no evidence that, in the counterfactual, Sony/The Orchard would most likely have done anything other than continue to compete in label services in the same way as prior to the Merger. Indeed, [✂].

5.119 Based on the above, we have concluded that, in the counterfactual, Sony would be most likely to have continued to compete in label services through The Orchard, as it had done prior to the Merger.

Our conclusion on Sony in the counterfactual

5.120 Based on the above, we have concluded 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:

(a) Provide high-touch services to artists as it did prior to the Merger;

(b) make ongoing efforts to expand its artist services offering; and

(c) continue to compete in label services via The Orchard as it had done prior to the Merger.

6. Background to the assessment of competition

Introduction

6.1 In this chapter, we provide a background to our assessment of competition:

(a) We first discuss dimensions of competition among Providers to sign artists and labels, and to supply DSPs.

(b) We then provide a description of market shares as measured by music streaming in the UK and a brief description of recent trends in market share for key Providers.

(c) We then set out our approach to defining the market and to the competitive assessment in this case.

(d) We then set out an introduction to the theories of harm we explore in subsequent chapters.

Competition among Providers to sign artists

6.2 The features of the competitive process to sign or provide services to artists vary between the offerings available to artists. At one extreme the majors engage in negotiations with artists on a case-by-case basis. At the other extreme DIY platforms offer standardised, non-negotiable contracts and use these to compete to attract artists to their platform.

6.3 These differences are driven by the value proposition of different types of Providers: the majors offer expertise and people-based services while DIY platforms offer automated, technology-driven services to large numbers of artists.[168]

6.4 For artists who already have a service Provider, other Providers typically compete to win their business either if they are not signed on a long-term contract or are reaching the end of a contract. Where artists are unsigned or do not have a service Provider, Providers compete to identify and win new artists with the potential to be successful.

[168] Believe IPO and document on tech driven.

Competition to identify new artists

6.5 Major labels, independent labels and A&L services providers compete to identify new artists. The means by which a new artist is identified can vary. For example, some artists approach Providers directly, while others are identified through the scouting process. For some Providers scouting for new artists is an important aspect of the competitive process.[169]

6.6 Although streaming data and social media following can give indications of an artist's trajectory, even for industry experts it can be difficult to identify which artists will become successful. Identifying (and investing in) potentially successful artists early in their career (and before other Providers) is advantageous.

6.7 Artists with potential are sometimes identified through a process referred to as 'upstreaming'. This is where Providers identify lower-service tier artists from within their own business and elevate them to higher-service tiers. This can be advantageous as Providers can use proprietary data to identify and approach artists ahead of when they might be identified more widely in the industry.[170] In addition, the presence of an existing relationship with an artist can be an important factor in an artist's choice of Provider.[171] Major labels and A&L services providers engage in upstreaming. The major labels upstream from their A&L service divisions and A&L services providers upstream from their lower tiers of service (such as their DIY platforms).

Agreements and negotiations

6.8 Typically, major and independent labels negotiate with (and compete for) artists on a case-by-case basis. A&L services providers typically negotiate on a case-by-case basis for their higher-tier artists and offer standardised contracts to their lower-service tier artists.[172]

[169] For instance, Believe's IPO document notes that its growth depends on its 'ability to discover and attract new artists and labels', noting further that the 'competitive talent scouting strategy' of the major labels is a factor affecting their ability to attract artists. In addition, the document notes that if Believe had 'insufficient access' to various external databases it 'could miss opportunities to sign artists with strong development potential'.
[170]See also [✂] explains that '[✂]'.
[171] For example, an A&L services provider's internal documents indicate that it lost a client due to them having an existing relationship with the A&R team of another provider.
[172] For example AWAL's contracts with its higher tier artists (AWAL Recordings and AWAL+) are bespoke while its DIY platform offers non-negotiable, standardised contracts. In addition, Believe's IPO documents notes that it lower-tier offerings 'artists agree to the general terms and conditions of sale' when they subscribe online to the service (this related to TuneCore).

6.9 In their agreements with artists, Providers (namely major and independent labels and the higher-service tier offerings of A&L services providers) compete over a wide range of contract terms:

(a) Financial terms, including: the size of any capital advance, recording costs, marketing and promotion budgets, the label's share of royalties (or the artists' share of royalties).

(b) Commitments from the artist such as: the output to be provided by the artist (such as number of tracks and albums), commitments to future projects such as a series of albums, or commitments to deal exclusively with the Provider.

(c) The structure of rights ownership: whether the artist will own the copyright and, if so, whether the music will be exclusively licensed to the Provider or part of a distribution agreement.

(d) Contract duration: where the agreement is based on a distribution or licensing arrangement, the duration of the contract.[173]

6.10 For Providers (namely major and independent labels and the higher-service tier offerings of A&L services providers) each of these contract terms can vary on a case-by-case basis. A traditional record deal (typically offered by a major or independent label) often involves the label acquiring copyright or a long-term licence over the content, a multiple year or album commitment by the artist and a relatively high royalty share for the label in return for the artist benefiting from a sizeable advance and marketing spend. In contrast, A&L providers generally do not acquire copyright and would typically provide a smaller advance and marketing budget in return for a shorter commitment by the artist and higher royalty share going to the artist. However, these models are not fixed and, as will be discussed in Chapter 8, the distinction between them may be getting smaller.

6.11 The average timeline of negotiations varies from two weeks to several months depending on the complexity of the deal.

6.12 DIY platforms do not compete for artists on a case-by-case basis, rather they offer non-negotiable standardised terms and conditions, although artists may be able to purchase some additional support options (see paragraph 2.49). DIY providers therefore will not in most (if not all) cases negotiate with a

[173] A licensing agreement is typically longer terms and gives the recorded music company more rights over the music for the duration of the contract.

particular artist. Where negotiation does occur, it will be limited as DIY providers typically do not offer marketing and promotion budgets.

Factors affecting an artist's choice of Provider

6.13 Major and independent labels and the higher-service tier offerings of A&L services providers compete on the range, scale, and flexibility of their services. For instance, in the ordinary course of negotiations, an A&L service provider would typically provide a list of services that can be offered (and the standard terms upon which they are offered). If the client has significant growth potential or many providers are engaging in a bidding process, then A&L services providers might provide a pitching document setting out its marketing and other plans for the artist.

6.14 Artists are attracted by the scale, quality, range of services and/or extent of independence offered by the Provider, for instance artists consider:

(a) the creative vision of the Provider;

(b) their (or their representatives') relationship with the Provider;

(c) the quality of marketing/promotion;

(d) the extent to which the Provider offers creative control over marketing and A&R budgets;

(e) the Provider's track record 'breaking' artists: the provider's track record of growing artists' music such that they reach commercial success and similar aspects of the Provider's reputation;[174]

(f) whether the provider can supply certain services, for example radio promotion is important for pop artists; and

(g) the global reach of the Provider: the Provider's ability to market music globally and in key geographic areas.[175]

6.15 We sent questionnaires to artist clients of The Orchard and AWAL (see Appendix C), and the answers provide evidence on the key factors which are important to them when choosing a Provider. Artists were asked to rank factors affecting their choice of current Provider from one (not important) to

[174] For example, an AWAL internal document indicates that its track record of breaking artists is attracting new artists to its platform.
[175] For example, [✂].

five (very important). In order of the highest average score, the following factors had an average score of three or higher:[176]

(a) retention of copyright of recorded music;

(b) flexibility of deals;

(c) size of advance;

(d) analytics, data, and technology platform;

(e) quality of marketing/promotion;

(f) contract length;

(g) royalty rate; and

(h) geographic/global reach.

Competition for label clients

6.16 A&L services providers compete to represent label clients. As with artist clients, some label clients will approach A&L services providers and sometimes Providers will approach potential label clients, for example if they become aware that the label is leaving a competitor.

6.17 The competitive process for label clients varies along the continuum of offerings available to labels. Some Providers offer tailored services to different types of labels, while others focus on offering distribution to larger, more established labels.[177]

6.18 The needs of labels are likely to vary according to their size; many large labels will be able to effectively offer services in house, whereas smaller labels may need additional services and levels of support from their Provider. Competing for larger labels is likely to require greater investment in digital infrastructure as opposed to expertise-based marketing and A&R services.

6.19 We consider the distinction between 'label' and 'artist' services in paragraphs 7.9 to 7.27.

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[176] CMA questionnaire Q5: Please indicate instead of another provider. [Rank (scale of 1-5, with 1 =how important the following factors were in your decision to use [Party] not important, 5 = very important) + Reason for importance if ranked 5 or 4]. Respondents = 18.

[177] For example, an AWAL internal document notes that it 'provide[s] a version of AWAL, AWAL+ and AWAL Recordings for labels'. Further, Believe's internal documents indicate that it offers a tailored service to different types of labels. In addition, [✂] noted that '[s]ome distributors only deal with labels who are well-structured independent record labels.

Competition to supply DSPs

6.20 Providers, in addition to competing to supply services to artists and labels, also compete in the provision of music to DSPs.

6.21 Some Providers negotiate directly with DSPs to distribute their catalogue. These negotiations are wide-ranging, and negotiations focus on the key financial terms of the agreements, access to data, and a variety of other clauses that cover the extent to which DSPs can engage with the repertoire of a Provider, eg whether they can market the music of particular artists or work with the artist directly.

6.22 In addition to these contractual arrangements, Providers have ongoing relationships with DSPs, for example to promote their music in key playlists. With respect to playlist promotion, one Provider noted that this is a granular activity that falls outside the scope of negotiations with DSPs.

6.23 Many Providers including the major labels (and their A&L services arms), A&L services providers, and DIY platforms distribute to DSPs directly. As noted in paragraph 2.12, some independent labels do not distribute their music directly to DSPs but do so through use of A&L services providers. Therefore, not all those active in signing and servicing artists are active on the DSP-facing side of the market.

6.24 Instead of contracting directly with DSPs, Providers can instead join Merlin, an organisation which negotiates licence agreements with DSPs under which it licences on certain of its members' content.[178] Merlin makes a margin of [✂]% on such licensing activities. Merlin does not undertake the uploading of content to DSPs and members are required to do this themselves either in-house or via another Provider.

Market shares

6.25 The Parties provided the CMA with data on streaming shares. This data, from the Official Chart Company (OCC), was for UK streaming shares for all Providers supplying music recordings to the major DSPs.[179] This reflects our focus on the digital distribution of recorded music. Table 12 sets out the share of distribution for the Providers that are relevant to our theories of harm.

[178] See Member Led. Music Focused. | Merlin (merlinnetwork.org).
[179] OCC data includes streaming data from Amazon Music, Apple Music, Deezer, Napster Qobuz Strm, SoundCloud, Spotify, Tidal, Vevo, and YouTube.

Table 12: UK music streaming shares by distributor (2016-2021)

%

Entity	*2016*	*2017*	*2018*	*2019*	*2020*	*2021*	*Share growth 2016-2021*
Absolute	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
ADA	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Amuse	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
AWAL	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Beggars Group	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Believe Digital	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
CD Baby	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Distrokid	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
DITTO	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Domino Recordings	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
EMPIRE	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
FUGA	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
IDOL	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Ingrooves	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Label Worx	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Ninja Tune	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
ONErpm	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
PIAS	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Platoon	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Secretly	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
SSME	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[✂]
Stem	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
The Orchard	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
TuneCore	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
United Masters	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[✂]
Universal Music	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]	[30-40]	[✂]
Warner Music	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]	[✂]

Source: OCC official chart data
*In relation to this column the Parties submitted that the music industry is dynamic and going through a period of 'fundamental transformation'. Given these circumstances, the Parties submitted that a company's performance since 2016 may give a misleading impression of their trajectory for the future if not considering more recent developments. As an example, the Parties submitted that AWAL's share has grown [✂]% since 2016 but has declined [✂]% since 2019. We note that growth rates for some competitors have varied over time, but consider that a longer period is less likely to be subject to short term volatility and we have considered changes in growth rates in our assessment where appropriate.
Note: This sets out the share of distribution for the Providers that are relevant to our theories of harm. A Table for the top 25 distributors by UK streaming share in 2021 is included at Appendix F, Table F1. This table includes those that distribute directly to DSPs. The information submitted by the Parties also includes streaming figures for some (but not all) providers that distribute to DSPs through a third party. For consistency, these providers are not included here, and their streaming presence has been considered, where relevant, in the competitive assessment. For example, BMG is not shown as a separate entry as it distributes through ADA. In addition, we note that OCC official chart data does not break out the share of Virgin from Universal. To understand its streaming presence, we have used information from its internal documents (see Appendix C, paragraph 64).

6.26 Care must be taken in interpreting this data for the following reasons. Some Providers also distribute recorded music on behalf of labels, meaning their share of streams is not representative of their share on the artist-facing side of the market and therefore will be overstated.[180] Streaming data is based on streams of a mixture of new and older recordings, meaning that it is unlikely to accurately reflect current competition for artists and may understate the importance of competition from Providers without a large historical catalogue. There is also a lack of consistency across Providers as to whether different elements of their business are accounted for separately or combined. For example, AWAL's figures include its DIY platform, whereas other Providers do not (for example, Believe reports separately from TuneCore).

[180] This data, however, does reflect the strength of Providers on the DSP-side.

6.27 Notwithstanding these concerns, we note that the majors have had a very large and stable market share over time, though it has diminished slightly over the five years from 2016 to 2021. As shown in Table 12, the majors' share of streaming has fallen from [70–80%] in 2016 to [70–80%] in 2021. The next largest players are the major-owned A&L services providers, ADA and The Orchard, whose combined growth (from [0–5%] to [5–10%]) more than offsets the reduction in the market share of the majors' frontline labels.[181]

6.28 Following the majors and the major-owned A&L services providers, there are a small number of slightly smaller players, including AWAL, that have been winning market share. AWAL's share has increased from [0–5%] to [0–5%] in the same period although there was a small reduction in the most recent year. One independent label (Beggars) features in Table 12, and its share has fallen by around [✂]% over the same period. Finally, there are some DIY players that have exhibited high rates of growth, but this is mainly due to their very low starting shares.

6.29 For those Providers with a market share of at least 1% in 2021, only AWAL and the major-owned A&L services providers have experienced positive growth rates over the period 2016-2021. The aggregate share of the next largest seven Providers (primarily A&L services providers) who had at least a 0.5% market share in 2021 has fallen from [5–10%] in 2016 to [5–10%] in 2021, although some of these individually have experienced positive growth since 2016.

6.30 Many of these third parties are described in Appendix C. It is not possible to delineate precisely between the categories of A&L and DIY providers because several third parties (and AWAL) offer a combination of DIY and A&L options.

Our approach to defining the market and assessing competition

6.31 This section sets out our approach to the market definitions relevant for the competitive assessment of the Merger.

The CMA's approach to market definition

6.32 The assessment of whether a merger gives rise to an SLC must be in terms of an SLC 'within any market or markets in the UK for goods or services'.[182] An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market(s) is an analytical tool that forms part

[181] OCC official chart data does not break out the share of Virgin from Universal, see note to Table 12.
[182] The Act, section 35(1)(b) in relation to a completed merger; see also MAGs, paragraph 9.1.

of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.[183]

6.33 While market definition can sometimes be a useful tool, it is not an end in itself. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. In many cases, especially those involving differentiated products, there is often no 'bright line' that can or should be drawn. Rather, it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum between 'strong' and 'weak'. The CMA will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market.[184] In this way, evidence on concentration and on closeness of competition can be interpreted and taken into account without the need for a precise definition of the relevant markets.[185]

6.34 Rather than setting out a highly specific description of any particular market definition, the CMA may take a simple approach to defining the market – for example, by describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects.[186]

Our approach to market definition in this case

6.35 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 acquire repertoire, for example by providing services to artists, which they then compete to distribute to streaming services, ie DSPs.

6.36 In our view, it is appropriate to take a simple approach to market definition in this case[187] and to focus, within this frame of reference, on assessing the strength of the current and likely future constraints from different competitors or categories of competitors as part of the competitive assessment. This is for several reasons, as set out below.

6.37 The relevant services of the Parties and their rivals in the digital distribution of recorded music are complex and differentiated. As described in

[183] MAGs, paragraph 9.1.
[184] MAGs, paragraph 9.4.
[185] MAGs, paragraph 9.3.
[186] MAGs, paragraph 9.5.
[187] MAGs, paragraph 9.5.

paragraphs 2.53 to 2.60, both the needs and preferences of artists and the services provided to them exist on a spectrum.

6.38 Artists at different stages of their career are likely to have different needs and therefore have different sets of options available to them; however, there are not clear lines of demarcation between these stages or service offerings. Furthermore, even artists at the same stage of their career may have different needs and preferences depending, for example, on whether they have the support of a strong management team, feel strongly about keeping their copyright or creative control or prioritise the best upfront financial offer.

6.39 Suppliers (including the Parties) often have a multi-tiered offering, aimed at providing services to a range of artists and labels. The focus and strengths of these different offerings also sit on a spectrum from high-touch services and substantial levels of investment down to low-cost digital distribution with no or limited added services.

6.40 These dynamics make it difficult to draw bright lines around particular customer groups or types of Provider for the purposes of understanding competition.

6.41 Furthermore, the issues under analysis concern how competition between the Parties and their rivals will dynamically evolve over time. As set out in Chapter 8, the positioning of Providers in terms of their offering and types of clients they seek to serve has changed over time. For example, some independent labels have started to offer artist services in addition to traditional label deals, the major labels have entered into the A&L space and some DIY providers have added a degree of more high-touch services to their offering.[188]

6.42 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. This is used to inform the assessment of competitive effects of the Merger, as set out in Chapter 7 and Chapter 8. We have taken account of the Parties' submissions on market definition in the sections of this report which assess the closeness of competition between different types of service and between different suppliers.

6.43 From a geographic perspective, we understand that on the artist side, Providers are often active in multiple countries although the extent of their presence and perceived strength as an alternative for artists may vary from

[188] See for example DITTO and Amuse (see Appendix C, paragraphs 83-94).

country to country. On the distribution side, the distribution of music through DSPs is global, however, the popularity of artists in terms of stream share will often vary substantially on a regional or country by country basis. We have considered the impact of the merger primarily on competition for UK-based artists but have considered the constraint from non-UK-based Providers to the extent that they provide an alternative for UK artists.

Our approach to the competitive assessment

6.44 In this section, we set out some key elements of our approach to the competitive assessment including how we have taken account of the two-sided nature of the market, which segments of the market we have focused on and how we have assessed the constraint from different types of Provider.

Approach to the two sides of the market

6.45 The wholesale distribution of digital recorded music is a two-sided market. One side is artist-facing where Providers compete to acquire repertoire and provide services to artists (eg music distribution, supporting A&R, marketing and promotion). The other is DSP-facing where Providers compete to distribute their content to streaming services.

6.46 As discussed in Chapter 2, the competitor set is slightly different on the two sides of this market since some independent labels only operate on the artist-facing side of the market and use other Providers to distribute their content to DSPs. However, most Providers are present on both sides of the market, albeit some are stronger in the provision of services to artists and others are more focused on distribution. Both AWAL and The Orchard operate on both sides of this market and both also distribute music on behalf of label clients.

6.47 Competition between Providers is primarily to attract artists[189] but that is closely linked to competition on the DSP side as it in turn allows Providers to offer an attractive repertoire to DSPs and negotiate favourable terms.[190] These terms feed back into the quality of a Provider's offering to artists both directly (in terms of aspects such as marketing and playlist promotion) and indirectly (through financial terms).

[189] We note that Providers can increase the repertoire they distribute to DSPs through the acquisition of back catalogues and through distributing for other providers of services to artists. Neither of these are material considerations in our assessment of the Merger as (a) AWAL has a relatively limited back catalogue due to its typically short contract length and (b) it offers limited label services.
[190] For example: Merlin is able to achieve 'best in class' deals with [✂] DSPs, [✂]; [✂] said [✂], [✂] said Sony's streams share and content increase Sony's bargaining power.

6.48 In line with our approach to market definition and given the substantial overlap in the competitor set on the two sides of the market, we have assessed the effects of the Merger on the artist-facing side and DSP-facing side together. However, since we have found that competition is primarily focused on the artist side, we have focused more on competition on the artist-facing side in the competitive assessment.

Approach to the assessment of competitive constraints

6.49 As noted above, we have analysed the effect of the Merger by assessing the strength of the current and likely future constraints between the Parties and their rivals in the digital distribution of recorded music in the UK. Within this broad frame of reference, however, we have focused in particular on two areas.

(a) First, we have considered the overlap between the Parties in the mid-service tier to emerging and established artists and independent labels. In this space, A&L providers like AWAL and The Orchard are prominent competitors.

(b) Second, we have considered the extent of competition between AWAL Recordings and SME's frontline labels. AWAL Recordings provides a high-service tier offering which may be considered an alternative to a frontline label deal for some artists. We have considered current and prospective competition for these artists.

6.50 At the lower end of the spectrum, AWAL has a DIY platform but SME does not so this is not a main focus of the competitive assessment. However, we have considered the extent of the constraint from DIY providers on the Parties currently and in future where relevant to our theories of harm.

Role of digital distribution

6.51 As discussed in paragraphs 2.3 to 2.16, digital media, and in particular streaming has become the most frequently used format for consumers to receive music. The share of physical media, such as CDs, continues to decline, whereas streaming is rapidly growing. 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.

6.52 In response to our Issues Statement,[191] The Independent Music Companies Association (IMPALA)[192] submitted that physical formats remained important, there remained a segment of customers who could only be reached through the physical market, and there had also been renewed interest and growth in vinyl in recent years.[193] However, no evidence was presented by IMPALA or any party that taking into account physical distribution would have any impact on the assessment of the competitive effects of the Merger.

Theories of harm

6.53 The CMA assesses the potential competitive effects of mergers by reference to 'theories of harm'. A theory of harm is a hypothesis about how the process of rivalry could be harmed as a result of a merger. Theories of harm provide a framework for assessing the effects of a merger and whether or not it could lead to an SLC relative to the counterfactual.[194]

6.54 We set out in the following sections our consideration of two theories of harm developed during the course of our investigation.

6.55 In Chapter 7, we consider the impact of the Merger between AWAL and The Orchard on 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 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.

6.56 In Chapter 8, we consider the impact of the loss of current and potential (future and dynamic) competition between AWAL Recordings and SME on competition in the supply of high-touch services to artists. We consider the current impact on SME's 'traditional' frontline label offers of the high-service tier offering of AWAL Recordings, which combines non-traditional contracts and high-touch services to artists. We also consider 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. Our assessment considers the extent to which this offering has been, and was likely to continue to be, an important competitive constraint on SME,

[191] Issues Statement, paragraph 14.
[192] IMPALA is a pan-European body which represents independent labels and distributors.
[193] IMPALA response to issues statement, section 1.
[194] MAGs, paragraph 2.11.

as well as the extent of the remaining current and ongoing constraint from other A&L providers, independent labels and other types of Providers.

DSPs

6.57 Some third parties expressed concern that the provision of music to DSPs is already concentrated with the majors each holding a substantial share, such that any increment in market share to one of the majors could lessen competition.

6.58 We have not adopted a standalone theory of harm in relation to DSPs. As discussed in paragraph 6.47, competition on the DSP side takes place primarily through competition for repertoire and artists as a Provider's strength in competing to supply DSPs is dependent upon the size of its repertoire, which can be increased by, for example, recruiting artists who produce music to add to its repertoire (Providers can also purchase back catalogues or distribute for other providers of services to artists, but these are not material issues with respect to our assessment of the Merger[195]). Therefore, for there to be any Merger-specific effect in relation to the supply to DSPs, it would need to arise from a reduction in competition in the provision of services to artists. We have therefore concentrated on the two theories of harm identified above.

6.59 In Chapter 8, we have considered whether any possible impact of the Merger on relationships of Providers with DSPs could affect competition in the supply of services to artists (for example, whether the loss of AWAL's repertoire could negatively impact the terms that Merlin is able to obtain from DSPs and therefore whether other independents may find it more difficult to compete for artists).

6.60 A number of other concerns were expressed to us in relation to the pre-Merger terms of contracts between the majors and DSPs. However, these concerns were not related to the effect of the Merger and so we have not investigated them.

Neighbouring rights

6.61 As noted at paragraph 3.28, the Parties overlap in the provision of neighbouring rights administration services. KNR provides these services in the UK while Sony also provides them through SMP.

[195] This is because (a) AWAL has relative limited back catalogue due to its typically short contract length and (b) it offers limited label services.

6.62 As noted in the CMA's Phase 1 Decision,[196] the Parties submitted that SMP has no material market presence in supplying neighbouring rights administration services. The Parties further submitted that SMP and KNR have limited overlap in their customers, noting that SMP only has around [✂] performers globally, which are generally high-earning U.S. based artists signed to SMP's music publishing business.

6.63 The CMA's Phase 1 Decision also noted that there were a number of other close competitors to KNR operating in the UK. For these two reasons the CMA found at Phase 1 that it believed that the Merger did not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of neighbouring rights administration services in the UK.[197]

6.64 In our Issues Statement, we stated that we did not propose to investigate neighbouring rights administration services unless significant new evidence was presented to us.[198] We did not receive any significant submissions or new evidence on this subject during the course of the Phase 2 investigation including in response to the Provisional Findings consultation.

6.65 We also considered whether the addition of further neighbouring rights administration capabilities would impact on the ability of the Parties post-Merger to compete in the provision of A&L services. However, we did not receive evidence that this was a material consideration for customers.

7. Competitive effects of the merger - assessment of the impact of the loss of current and potential (future) competition in the supply of A&L services

7.1 In this chapter, we assess whether the loss of current and potential (future) competition between AWAL and The Orchard has resulted, or may be expected to result, in an SLC 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. In this regard, we note that the evidence provided in the Phase 1 investigation

[196] Phase 1 Decision, paragraph 229.
[197] Phase 1 Decision, paragraph 229.
[198] Issues Statement, paragraph 49.

shows that, absent the Merger, Sony was planning to grow The Orchard business.[199]

7.2 The remainder of this section is structured as follows:

(a) We set out the framework for the analysis of a loss of future competition.[200]

(b) We set out the evidence on the distinction between artist and label services. We then assess the current[201] closeness of competition between the Parties and assess whether in future, absent the Merger, the Parties might be expected to become closer competitors in their A&L services offerings.

(c) We consider whether other A&L services providers, independent labels and other types of Providers currently constrain the Parties and/or whether these suppliers have the combination of the intention, incentives and ability to expand in a timely, likely and sufficient manner so as to constrain the A&L offering of the Parties (specifically, SME and AWAL) post-Merger.

Framework for assessing a loss of future competition

7.3 Horizontal mergers combine firms that are currently active, or absent the merger would be active in the future, at the same level of the supply chain and that compete to supply products that are substitutable for each other.[202] Unilateral effects relate to the merged entity being able to profitably and unilaterally[203] raise its prices, worsen its quality or service and non-price factors of competition, or reduce innovation efforts at one or more of the pre-merger businesses.[204]

7.4 The assessment of horizontal unilateral effects arising from a merger essentially relates to the potential weakening or elimination of a competitive constraint. The competitive constraint eliminated by a merger may be an existing constraint, or a potential or future constraint.[205] The Merger Assessment Guidelines note that the CMA's main consideration is whether

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[199] Phase 1 Decision, paragraph 152.
[200] In the remainder of this chapter, we refer to 'future competition' for brevity to denote potential (future) competition.
[201] In this report we use the term 'current' in relation to competition to refer both to competition pre-Merger and to the continuing competition between AWAL and Sony entities further to the Initial Enforcement Order made in relation to the Merger.
[202] MAGs, paragraph 2.15.
[203] As distinct from acting in coordination with other firms in the market.
[204] MAGs, paragraph 2.17(a).
[205] MAGs, paragraph 4.2.

there are sufficient remaining good alternatives to constrain the merged entity post-merger. Where there are few existing suppliers, the merger firms enjoy a strong position or exert a strong constraint on each other, or the remaining constraints on the merger firms are weak, competition concerns are likely. Furthermore, in markets with a limited likelihood of entry or expansion, any given lessening of competition will give rise to greater competition concerns.[206]

7.5 Mergers involving potential expansion can lessen competition in different ways.[207] For example, a merger involving potential expansion may imply a loss of the future competition between the merger firms after the expansion would have occurred.[208] This will be the case if, absent the Merger, expansion by either or both merger firms may have resulted in new or increased competition between them.[209]

Current competition and future competition between The Orchard and AWAL

7.6 In this section, we set out the evidence on the distinction between artist and label services, the current competition between the Parties, and future competition between the Parties given the Parties' plans to grow their A&L services offerings absent the Merger. We draw upon the Parties' views, the stream shares of the Parties and their competitors, the Parties' internal documents, evidence from customers and evidence from competitors.

The Parties' views

7.7 The Parties have made a number of submissions on the competitive dynamics of the Merger. At a high level, the Parties submitted that they do not presently compete at all because The Orchard serves label clients and AWAL serves artist clients.

7.8 The Parties also submitted that they would not have competed closely in the future because The Orchard and AWAL would have continued to serve

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[206] MAGs, paragraph 4.3.
[207] It is a well-established principle that competition law protects not only actual competition, but also potential competition between undertakings. (See MAGs, Chapter 5; see also by analogy T-519/09, Toshiba v Commission EU:T:2014:263, paragraph 230.) This is because there is competitive interaction between a firm that has the potential to enter or expand in competition with other firms (MAGs, paragraph 5.1). A potential competitor may exert competitive pressure on the firms in the market 'by reason merely that it exists' (C-307/18 Generics (UK) Ltd and Others v CMA, EU:C:2020:28, paragraph 42).
[208] MAGs, paragraph 5.2.
[209] MAGs, paragraph 5.1.

different types of clients going forward. In particular, [✂]. Similarly, The Orchard's small artist services business expects to [✂].

Distinction between artist and label services and implications for current closeness

7.9 The differences between artist and label services are discussed in paragraphs 2.43 to 2.48. Based on this, artists and labels appear to have different but overlapping/related service requirements. The Orchard's core offering is label services and AWAL's core offering is artist services. However, The Orchard also provides artist services for some customers and AWAL also provides label services for some customers.

The Parties' views

7.10 The Parties submitted that of The Orchard's '[✂] clients,[210] only [✂] are artists signed in the UK.[211] By contrast, AWAL focuses on providing services to artists: [✂]% of its [✂] clients are artists'.[212]

7.11 The Parties have also submitted that artist services and label distribution [✂]. In particular, an artist will need marketing, A&R, sync and distribution. A label will also need these same services (eg A&R, creative, relationships with DSPs, sync team) but will provide many of them in-house itself and will then partner with another provider for very specific services such as international footprint, physical distribution and technology.

Sony and AWAL internal documents

7.12 Both Parties make some distinction between label and artist services in their documents, however we infer from these documents that there is not always a clear distinction between these services:

(a) Within Sony's internal documents artist services and label distribution are regularly split out into separate categories.[213] However, several

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[210] The Parties submitted that approximately [✂] of these artists are inactive clients that joined in the 1990s and 2000s.
[211] The Parties submitted that The Orchard provides Artist Services to around [✂] artists, of which [✂] are UK artists.
[212] Sony's response to the Issues Statement, paragraph 4.
[213] See, for example, Appendix D, paragraphs 1 and 2.

competitors provide both services, at least to some extent, and there is fluidity with which competitors appear in each category.[214]

(b) Another of Sony's documents notes '[✂]'.[215]

(c) One of AWAL's documents states: 'B2B [business to business, ie label services] have a similar suite of services to B2C [business to consumer, ie artist services], as relevant to specific clients'. In the speaking notes it goes further to say '[✂]'.[216]

Third party evidence - customers

7.13 As detailed in Appendix C,[217] evidence from the Parties' customers supports the view that artists and labels have different but overlapping/related service requirements. Artists were asked to indicate which services they received from each of the Parties. Artists responded that they receive multiple different services from the Parties with most receiving five or more services. The most common services that are received by artists are: distribution, data and analytics, marketing/advertising and project funding.[218]

7.14 Similarly, labels responded that they receive multiple different services from the Parties with most receiving five or more services. However, the most common services that are received by labels are: distribution, data and analytics and playlist promotion.[219]

7.15 There were some differences in the options listed for artists and labels. For example, sync and licensing and playlist promotion were only presented as options for labels. Artists had several additional options such as recording process assistance. However, we note that distribution and data and analytics were the most commonly received services for both artists and labels.

7.16 This further supports the position that the core offering of A&L services providers to artists and labels are broadly the same. However, some labels will not require A&R services as labels often offer services such as creative

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[214] For example: Amuse is listed as a DIY provider in paragraph 1 of Appendix D but as an artist services provider in paragraph 2 of Appendix D. ONErpm is listed as an artist services provider in paragraph 1 of Appendix D but as a label distributor in paragraph 2 of Appendix D, Empire is listed as a local distributor in paragraph 10 of Appendix D but as an artist services provider in paragraph 9 of Appendix D.
[215] See Appendix D, paragraph 27.
[216] See Appendix E, paragraph 7.
[217] Paragraphs 5-7 of Appendix C set out the low response rate and consequently how we consider this evidence.
[218] All phase 2 artist respondents. N=18. Q4. Please indicate which of these services you receive from [Party].
[219] All phase 2 label respondents. N=16. Q4. Please indicate which of these services you receive from [Party].

support in-house and the exact services required differ depending on the customer.

7.17 Artists were also asked to indicate how important certain factors were in deciding to use one of the Parties instead of another Provider. A wide range of factors were important for artists in their choice of Provider. However, the top three factors based on the highest average importance among those mentioning them were: retention of copyright, the flexibility of deals and the size of advance.[220]

7.18 Labels also indicated that a wide range of factors were important in their choice of Provider. Label management (Other), geographic reach, and low fees were the three factors with the highest average importance among those mentioning them.[221]

7.19 Whilst the core offering of A&L services providers to artists and labels are broadly similar, evidence from third party customers indicates that there are differences in the factors which artists and labels consider when deciding on an A&L services provider.[222]

7.20 Notwithstanding some differences in the requirements of artist and label customers, the Parties' customers considered The Orchard and AWAL to be close competitors. This implies that their respective focus on label services and artist services does not stop them being considered as alternatives to one another. This is further discussed in paragraphs 7.44 to 7.48.

Third party evidence – competitors and other third parties

7.21 Evidence from competitors of the Parties and other third parties supports the view that there is an overlap between artist and label services:

(a) One competitor said that it is 'relatively easy' for a company to supply both artists and labels services as 'the tech. piece is the same'. However, it also noted that the 'focus' may differ slightly, for example, 'Marketing on behalf of a label will involve higher volume of tracks, whereas marketing a specific artist […] involves deeper services and relationships'.

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[220] All phase 2 artist respondents. N=18. Q5 Please indicate how important the following factors were in your decision to use [Party] instead of another provider. [Rank (scale of 1-5, with 1 = not important, 5 = very important) + Reason for importance if ranked 5 or 4].

[221] Other was an available option. Three respondents ranked Other with two respondents specifying 'top notch label management' and 'label manager' respectively. 16 respondents ranked geographic reach and 16 respondents ranked low fees.

[222] A different list of factors were provided to artists and labels. Geographic, quality of marketing/promotion, contract length and analytics, data and technology platform were listed in both questionnaires.

(b) Another competitor said that it is 'easy to switch' between providing artist and label services and that often 'too much of a distinction is made between these services when there is significant overlap'.

(c) Another third party said that the 'nature of the services that AWAL provides to small labels is similar to the services that it provides to artists'. It also said that '[c]ertain established artists that own or control their own recordings and catalogues do not always need all of the functions that a record label provides: they have the capability to find and work with writers and producers based on their own contacts and previous experience; they may already work with experienced managers and promotional and marketing teams. They may have loyal fan followings so need less marketing support than a new artist'.

(d) Another competitor said that 'lines have always been blurred' and gave the one artist labels as an example of this.

Customer data

7.22 As discussed in appendix G: Parties' data, we have analysed data on the Parties' artist and label customers. The Orchard's customer data show that over [✄] of The Orchard's [✄] labels have one 'active artist'. Of these [✄] generated revenues over $[✄] in 2021, giving this portion a similar revenue profile to The Orchard's artist services clients.[223]

7.23 The customer data further shows that that the Orchard generated $[✄] million in revenue in 2021 from supplying artist services to a select number of the artists of its label services customers.[224]

7.24 The Parties have submitted that it is not correct to conflate label services to single artist labels with artist services because artist services comprise a much broader range of activities and are more labour-intensive due to the need to provide a personalised, hands-on service to each artist. The Parties submitted that, in contrast, label services are scalable and technology-based. Moreover, most of The Orchard's [✄] single artist label clients are historical and inactive clients that joined The Orchard in the late 1990s and 2000s prior to SME's acquisition of The Orchard and [✄] of these single artist labels generated revenue below $[✄] in 2021 YTD.

7.25 Our view is that there could be similarities in the services required by some of these single-artist labels to those required by individual artists. This is

[223] Appendix G, paragraph 30.
[224] Appendix G, Table G8.

consistent with The Orchard offering aspects of its artist services offering to the artists of its label clients. This implies that, for the purposes of our assessment, there is no bright line distinction between artist services and label services in some instances.

Our assessment

7.26 We have concluded that the mixed evidence set out above shows that while there may be some differences between artist and label services providers there is not a clear distinction. The closeness of competition between artist and label services providers is primarily driven by the following two factors:

(a) The needs of artist and label customers (which exist on a spectrum). On the demand side, for example, a small label will typically provide a smaller range of services in-house than a large label and therefore is likely to need to acquire some of the additional services required by its artists from other Providers.

(b) The capabilities of the Providers (which exist on a spectrum). On the supply side, a label services provider focused on distribution and lacking significant A&R capabilities will not typically be a good substitute for a high-touch artist services provider and will typically struggle to develop those capabilities due to high barriers to entry and/or expansion in that space (see paragraphs 8.82 to 8.87). However, some label services providers do have A&R capabilities and would be a closer substitute.

7.27 For these reasons, artist services providers and label services providers will be close substitutes in some cases but not in others. Therefore, we consider the closeness of competition between different providers on a case-by-case basis while acknowledging that providers which have a focus on the same type of services are likely to compete more closely.

Current closeness of competition

The Parties' views

7.28 As noted above, the Parties submitted that they do not currently compete in any meaningful way. The Orchard has a marginal presence in artist services: of The Orchard's '[✂] clients, only [✂] are artists signed in the UK. By contrast, AWAL focuses on providing services to artists: [✂]% of its [✂] clients are artists'. Our view is that while this demonstrates The Orchard's focus on label services and AWAL's focus on artist services it also shows that The Orchard provides artist services and AWAL provides label services to at least some customers.

7.29 The Parties have also made a number of submissions regarding switching data that they provided to us. At a high level, the Parties have submitted that the data shows a complete lack of competitive interaction between The Orchard and AWAL. Our view is that very little, if any, weight should be placed on this evidence due to concerns around the accuracy and completeness of the data. This is discussed in more detail in Appendix G.

Streaming shares

7.30 As set out in Table 12 in Chapter 6, the majors' frontline labels account for most digitally distributed recorded music in the UK. However, excluding the major's frontline labels, The Orchard is the largest provider with a share of [0–5%] in 2021, and AWAL is the third largest with a share of [0–5%] in 2021.[225] Both The Orchard and AWAL have grown their shares since 2016.

Customer data

7.31 As discussed in Appendix G: Parties data, we have analysed data on the Parties' artist and label customers. In view of AWAL supplying a wider range of artists than The Orchard, we found that AWAL and The Orchard service artists of a [✂] revenue on contracts with [✂] margins and lengths.[226]

7.32 Although label services make up a large proportion of The Orchard's revenues, we note that it provided artist services to [✂] clients which generated revenues of $[✂] million in 2021. Excluding AWAL's DIY platform, it supplied [✂] artists which generated revenues of $[✂] million in 2021. In view of this, we have concluded that The Orchard is a sizable provider of artist services.

Sony internal documents

7.33 There are several Sony internal documents which either assess AWAL specifically or refer to AWAL in a focused way from which we infer that The Orchard considered the need to distinguish itself from AWAL:

(a) one of The Orchard's documents titled [✂];[227]

(b) one of Sony's documents states: '[✂]';[228] and

[225] AWAL's stream share might be overstated relative to other A&L services providers as AWAL's data includes streams from its DIY platform whereas data for some other providers is reported separately for their A&L brand and their DIY brand.
[226] Appendix G, paragraph 26.
[227] See Appendix D, paragraph 15, items 1 and 2.
[228] See Appendix D, paragraph 16, item 1.

(c) another of The Orchard's documents, in relation to The Orchard states: 'interesting to note that AWAL offer a fraction of the services we offer. A story we need to tell better'.[229]

7.34 There are also several Sony internal documents which present AWAL as one of a small group of competitors to The Orchard:

(a) In a FY20 Review FY21 Strategy document, AWAL is listed on one slide as one of four competitors (along with DITTO, Empire and ONErpm) in Artist Services. On the previous slide, AWAL is not listed as a competitor in label distribution, where Caroline, Ingrooves, ADA, and Believe are listed as competitors.[230]

(b) In a 2020 The Orchard strategy update document, AWAL is listed on one slide as one of four competitors (along with Ingrooves, ADA and Believe).[231]

(c) Another document from 2020 notes AWAL as one of four competitors (along with Believe, Caroline and ADA). Another slide in the same document also notes PIAS as a competitor.[232]

7.35 Some of the competitors listed above are also discussed in several of The Orchard's documents that refer to 'Competition & Disruption' and note that ADA, Believe, Caroline and Ingrooves are The Orchard's 'key competitors'.[233,234] AWAL is not recognised as a 'key competitor' in these documents. Instead, it is mentioned that:

(a) Its 'combined rights offering could be significant competition to Artist Services'.[235]

(b) It could be 'potential significant competition on both Label and Artist Services, building on AWAL's success in the UK' [✂]'.[236]

7.36 There are also a number of Sony internal documents which present a wide range of competitors with AWAL being one of several competitors to The Orchard:

[229] See Appendix D, paragraph 14.
[230] See Appendix D, paragraph 5, item 1 and 2.
[231] See Appendix D, paragraph 6.
[232] See Appendix D, paragraph 7.
[233] See Appendix D, paragraph 10.
[234] See Appendix D, paragraph 11, item 1.
[235] See Appendix D, paragraph 10.
[236] See Appendix D, paragraph 11, item 2.

(a) In a couple of strategy documents, AWAL is listed as a competitor under the heading of 'Artist Services'. [237,238] In one of these, The Orchard is also listed under the heading of 'Artist Services'.[239]

(b) Kobalt/AWAL is listed in the 'major Competitor Update' as one of three competitors that focus on artist services and one of twelve artist and label services competitors overall.[240]

(c) In a 2019 Review & Platform Achievements document, Kobalt is listed as a 'potential' competitor. ADA and Believe are listed as 'primary' competitors. PIAS, Ingrooves, Caroline, ONErpm, Stem and United Masters are also listed as competitors [241]

(d) In a February 2020 Pre-MRP/Budget Meeting document, AWAL is listed as one of five (along with United Masters, Empire, DITTO and Amuse) artist services providers that are potentially disrupting the artist development model.[242]

(e) In a November 2017 Integrated Services Strategy document, Kobalt is listed as a potential competitor while numerous other competitors are described as global and local competitors including Believe, ADA, PIAS, ONErpm, and Empire.[243]

7.37 The Parties have submitted that these documents demonstrate a wide competitive landscape, comprising multiple players, where AWAL is not particularly special compared to the competition. However, the Parties submitted that there were two misconceptions by the CMA regarding any specific monitoring of AWAL in Sony/The Orchard's documents:

(a) the [✄] post-dates the initial contact between The Orchard and Kobalt concerning a possible acquisition of AWAL and it is one of numerous competitor profiles created by The Orchard in the ordinary course of its business.

(b) the [✄] underlines the difference between the focus of The Orchard's and AWAL's offerings even within artist services, and identifies [✄] as 'tough competition' in artist services. The Parties further submitted that this document demonstrates that The Orchard considered AWAL to be a less

[237] See Appendix D, paragraph 1.
[238] See Appendix D, paragraph 2.
[239] See Appendix D, paragraph 1.
[240] See Appendix D, paragraph 3.
[241] See Appendix D, paragraph 4.
[242] See Appendix D, paragraph 9.
[243] See Appendix D, paragraph 12, item 1.

significant competitor as a conclusion in the document states: 'It's clear from this that our closest competitors [are] Co-op, ADA, and Caroline'.

7.38 In our view, the evidence set out above indicates 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 at least some current competition between The Orchard and AWAL pre-Merger.

AWAL internal documents

7.39 Competitors were mentioned infrequently in AWAL's internal documents. However, we have identified a handful of documents that show that AWAL was aware of a range of competitors and The Orchard was included among them:

(a) One 2019 document placed AWAL in the [✂]. The Orchard is also present in the [✂] category but is halfway between the '[✂]'.[244] 16 competitors are noted on the grid.

(b) A board document from 2020 identifies similar competitors and splits them into 'major label system', 'indie label system' and 'digital aggregators (DIY artist-focused). The Orchard is present under the major label system and AWAL is seen as a competitor in all of these segments.[245]

(c) A slide deck relating to AWAL strategy from 2016 sets out a similar set of competitors and shows that AWAL considered competitors based [✂].[246] The Orchard is listed as one of AWAL's 'key competitors' but it is noted that '[✂] and the Orchard are major, professional-grade competitors, but focused on serving labels'.[247]

7.40 AWAL also submitted a small number of emails and newsletters that relate to the monitoring and benchmarking of competition. The limited number of these further support that [✂]. From the small number of emails submitted, AWAL appears to informally monitor a number of DIY providers eg [✂] and [✂]. [✂] and [✂] are also mentioned in a competitive context.

[244] See Appendix E, paragraph 7, item 2.
[245] See Appendix E, paragraph 9.
[246] See Appendix E, paragraph 13, item 1.
[247] See Appendix E, paragraph 13, item 2.

7.41 AWAL's internal documents show that AWAL currently competes with The Orchard for some deals. In particular, The Orchard is mentioned [✂] times out of [✂] competitor mentions in AWAL's emails that relate to ongoing negotiations around deals. Furthermore, AWAL's deal documents from early 2018 to late 2021 (which are for [✂] – see Appendix E for more detail) have [✂] mentions of The Orchard out of [✂] competitor mentions.

7.42 The Parties have submitted that AWAL's internal documents paint a picture of a fierce competitive landscape, in which AWAL faces a wide range of competitors. The Parties have submitted that the fact that emails refer to a wide range of competitors in a broad industry is indicative of the very fact that AWAL sees these companies as competitors and that where The Orchard is referred to this is mostly in relation to AWAL's label business [✂].

7.43 In our view, the evidence set out above provides limited information on the nature of the competitive constraints on AWAL as AWAL monitors competitors to a limited extent in its internal documents. The few documents that mention competitors cover a wide range of competitors. However, AWAL's internal documents do show that there was at least some competition between The Orchard and AWAL pre-Merger.

Third party evidence

7.44 As detailed in Appendix C,[248] evidence from third party customers also supports the view that there is some current competition between AWAL and The Orchard.

7.45 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.[249]

7.46 A wide variety of other A&L services providers were also mentioned by AWAL's customers as alternatives. The majority of these A&L services providers were mentioned by fewer than four customers but were typically considered as a medium or strong alternative to AWAL. However, Believe,

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[248] Appendix C, paragraphs 5-7 set out the low response rate and consequently how we consider this evidence.
[249] Combined phase 1 and phase 2 respondents, n=25, artists=16, labels=9. Q6: 'The CMA is seeking to understand the providers of recorded music services (eg A&L providers, DIY platforms, major labels) who are the closest alternatives to AWAL from an artist/label's perspective. Therefore, please consider a hypothetical scenario where AWAL (and all its current services) was no longer available, and you had to move to a different provider for those services. Which other provider(s) would you be most likely to move to? Please list these provider(s), provide a score in terms of how good an alternative they are to AWAL, and provide reasons for your scores'. [Score out of 5 (1 = materially inferior alternative to AWAL, 5 = equivalent to AWAL).]

ADA and Virgin were seen as strong alternatives and mentioned fairly frequently as seen in Figure C5 in Appendix C.

7.47 We asked The Orchard's customers who they considered were the closest alternatives to The Orchard. As seen in Figure C6 in Appendix C, Believe, AWAL, ADA and Virgin were mentioned with similar frequency and most commonly seen as alternatives to The Orchard.[250]

7.48 A wide variety of other A&L services providers were also mentioned by The Orchard's customers as alternatives. Figure C6 in Appendix C shows that the majority of these A&L services providers were mentioned by fewer than three customers but were typically considered as at least a medium alternative to The Orchard. Only a handful of The Orchard's artists responded but they tended to mention larger rather than niche alternatives.

7.49 IMPALA submitted that 'while AWAL was maybe not significant for its market share, it was an important alternative to traditional models as it offered a more "unique" model allowing artists to retain their copyright. Therefore, the removal of AWAL does not only mean the loss of one of the biggest independents, but the loss of an innovative model which will ultimately benefit Sony'.[251]

Our assessment

7.50 We have concluded that, although the evidence set out above is mixed, The Orchard and AWAL competed in the provision of A&L services pre-Merger but not as close competitors given their different focus on artists and labels and alongside a number of other competitors. The Orchard and AWAL (to the extent that AWAL monitors competitors at all) are frequently mentioned in each other's internal documents, albeit most often alongside several other competitors.

7.51 As noted in the previous section, one of the primary drivers of the closeness of competition between artist and label service providers is the individual needs of the customer and The Orchard and AWAL were both commonly identified as good alternatives for the other by customers.

[250] Combined phase 1 and phase 2 respondents. n=20, artists=5, labels=15. Q6: 'The CMA is seeking to understand the providers of recorded music services (eg A&L providers, DIY platforms, major labels) who are the closest alternatives to The Orchard from an artist/label's perspective. Therefore, please consider a hypothetical scenario where The Orchard (and all its current services) was no longer available, and you had to move to a different provider for those services. Which other provider(s) would you be most likely to move to? Please list these provider(s), provide a score in terms of how good an alternative they are to The Orchard, and provide reasons for your scores'. [Score out of 5 (1 = materially inferior alternative to The Orchard, 5 = equivalent to The Orchard).]
[251] IMPALA response to the Provisional Findings, page 9.

AWAL and The Orchard's plans to expand into label and artist services respectively

Sony and AWAL's expansion plans in artist services

7.52 As set out in Chapter 5, we have concluded 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 make ongoing efforts to expand its artist services offering.

7.53 As set out in paragraph 5.99, we have concluded 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. However, as discussed in paragraph 5.80, AWAL's rate of growth could reasonably be expected to slow relative to its growth in 2018 to 2020.

7.54 Given our view that the Parties currently compete, albeit as part of a wider competitor set and are not among each other's closest competitors (see paragraph 7.50) and that Sony would have most likely made ongoing efforts to expand its artist services offering (see paragraph 5.120(b)), we have concluded that The Orchard would most likely have become a closer competitor to AWAL in the provision of artist services in the foreseeable future.

AWAL and Sony's expansion plans in label services

7.55 As set out in paragraph 5.83, we have concluded that, under Kobalt's ownership, AWAL would be most likely to have continued to compete in label services in a similar way as prior to the Merger. AWAL would not have been likely to materially expand its label business within the next two to three years, given that it intended to [✂].[252]

7.56 As set out in paragraph 5.120(c), we have concluded that Sony would most likely have continued to compete in label services via The Orchard as it had done prior to the Merger.

[252] In its response to the Provisional Findings, IMPALA submitted that the CMA's provisional view on AWAL's most likely position in label services 'ignore[d] the extremely high levels of interest being shown by investors in the recorded music market' (IMPALA response to the Provisional Findings, page 3). As part of our counterfactual assessment, we considered the potential sale of AWAL to an alternative purchaser (see paragraphs 5.84-5.97). We have concluded that the same conditions of competition would most likely have prevailed regardless of AWAL's ownership in the counterfactual.

7.57 Given that our view is that the Parties currently compete, albeit as part of a wider competitor set and not as each other's closest competitor (see paragraph 7.50) and that AWAL would not have been likely to materially expand its label business within the next two to three years, we have concluded that AWAL would not have been likely to have become a closer competitor to The Orchard in the provision of label services in that time frame.

Constraint from third party competitors

The Parties' views

7.58 The Parties have made several submissions on the constraint they face from competitors, specifically, that dozens of rival music companies compete in a wide competitive landscape and this includes A&L services providers, independent labels and DIY service providers.

7.59 The Parties have submitted that at least nine independent labels offer artist services structures and therefore independent labels should be considered as competitors for mid-tier artists who want to retain the copyright to their music.[253]

7.60 The Parties have also submitted that DIY service providers offer marketing and support and compete with both artist and label services and should be considered as part of the assessment of competition for the provision of A&L services. In particular, for artist services, many of the services offered by a DIY service provider are similar to those offered by an artist services provider.

Sony's internal documents

7.61 As set out in paragraph 7.35, the competitors that frequently appear as The Orchard's 'key competitors' in its internal documents are Believe, ADA and Caroline. Paragraph 7.36 sets out further internal documents that refer to a wider competitor set including AWAL, Empire, DITTO, ONErpm, United Masters and Amuse.

7.62 There are several Sony internal documents that specifically compare different A&L services providers and DIY providers, including those mentioned above, across a range of parameters. A handful of competitors are shown to be viewed by Sony as comparably strong to AWAL:

[253] BMG, Chess Club, Cooking Vinyl, Ignition, Nude, Play It Again Sam, Secretly, So Recordings and Warp.

(a) An Orchard FY20 Review FY21 Strategy document shows that United Masters is identical to AWAL based on the parameters listed,[254] and that Empire has one additional offering.[255] DITTO and ONErpm are the only other two competitors to be ranked halfway on the A&R & Artist services parameter.[256]

(b) The same document ranks Believe as slightly better than AWAL, Empire and United Masters in terms of global presence and the same on the other parameters. Believe, ADA and Caroline are all ranked as strong competitors on A&R & Artist Services.[257]

(c) Another document compares 11 competitors across a wider range of features to the previous document.[258] Based on the services that each provides The Orchard states that 'it's clear from this that our closest competitors are PIAS, ADA and Caroline'.[259]

7.63 A February 2021 document includes a slide entitled a 'UK – Competitor update' and refers to Believe, Caroline, ADA and PIAS. [260] In particular it notes that:

(a) Believe has 'entered the market first w/strong local presence' and has 'signed one of Kobalt's biggest labels';

(b) ADA is 'aggressively expanding into new markets with hires and offices'; and

(c) PIAS has 'artist and label services set up', has a 'strong physical setup' and is 'really entrenched with big UK independent based labels'.

7.64 The competitors that The Orchard ranked as the strongest in these documents are a similar set of competitors, namely, [✂], [✂], [✂] to those that were identified in [✂] as being '[✂]'.

AWAL's internal documents

7.65 As mentioned in paragraph 7.39, AWAL's internal documents mention competitors infrequently. However, we have identified several documents from which we infer that AWAL was aware of a range of competitors, saw

[254] [✂].
[255] See Appendix D, paragraph 5, item 3.
[256] See Appendix D, paragraph 5, item 3.
[257] See Appendix D, paragraph 5, item 4.
[258] See Appendix D, paragraph 13.
[259] See Appendix D, paragraph 14.
[260] See Appendix D, paragraph 8.

itself competing at each level, and benchmarked each of its offerings against a different set of competitors:

(a) In one document AWAL recognised that the competitors it faced differed depending on the AWAL offer. At the upper end, AWAL benchmarked against the [✂]. At the lower end, competitors such as [✂] and [✂] were identified. The [✂].[261]

(b) Another document compares AWAL to a selection of competitors (that does not include The Orchard) on five parameters.[262,263] It states that AWAL is the only service model able to serve any professional artist or label:

(i) [✂];

(ii) [✂];

(iii) [✂]; and

(iv) [✂].

(c) A Kobalt board document states that new entrants (eg [✂], [✂]) have not demonstrated ability to break global artists and that the digital aggregators ([✂], [✂] and [✂] are listed) lack brand, scale, marketing, and funding to serve professional artists.[264]

(d) Another document states that [✂] and The Orchard are major, professional-grade competitors, but focused on serving labels. [✂] and [✂] are key competitors in the aggregator space and currently winning with adequate offerings and brand (due to current scale and time in market).[265]

7.66 These documents show that AWAL faced a range of competitors for different parts of its offerings.

Third party evidence – customers

7.67 As discussed in paragraphs 7.46 and 7.47, Believe, ADA and Virgin were seen as strong alternatives and mentioned fairly frequently by AWAL's customers as an alternative to AWAL. Similarly, Believe, ADA and Virgin were

[261] See Appendix E, paragraph 12.
[262] [✂]
[263] See Appendix E, paragraph 4.
[264] See Appendix E, paragraph 9.
[265] See Appendix E, paragraph 13, item 2.

mentioned with similar frequency to AWAL and most commonly seen as strong alternatives to The Orchard.

7.68 One of The Orchard's artist customers stated, in relation to AWAL: '[✂]'.

7.69 Evidence on the impact of the Merger from customers was mixed. We asked artists and labels if they had any views on the Merger. Many (20 out of 47) did not have views and said they did not have the information to comment or did not respond to this question. Of those that did respond:

(a) 12 out of 27 considered it would have a negative impact.

(i) Several customers noted that it would lead to a smaller pool of independent offerings and/or that AWAL should not be owned by a major.

(ii) Several customers were worried that the Merger would lead to worsening deal terms from AWAL.

(iii) One of The Orchard's artist customers stated: '[✂]'.

(b) Five out of 27 thought it would result in a positive impact.

(i) One of The Orchard's label customers noted: 'with so much competition amongst the services out there, more interesting artists going through Orchard helps us get more attention at DSPs'.

(c) Ten out of 27 did not think there would be any impact or had no concerns about the Merger:

(i) One of The Orchard's label customers stated: 'the impact will be relatively low. Although AWAL were a key part of the rise to prominence of label service style deals they have recently been outperformed by some of their competitors'.

(ii) Another of The Orchard's label customers noted: 'I can not see how it changes the competitive landscape at all. There is a ton of money flowing into this space and competition is likely to only increase, not decrease'.

7.70 The evidence from customers on the impact of the Merger is mixed. While some view AWAL as the best A&L services provider, others have stated that whilst AWAL was the best at one stage it has since been caught up by other competitors. As set out in Appendix C, given the low absolute number of responses and the low response rate, we have interpreted this evidence qualitatively and are mindful that this evidence does not carry determinative evidential weight in isolation.[266]

Third party evidence – competitors

7.71 We held calls with competitors and sought their views on the Merger. The majority of respondents were not concerned and/or thought the Merger would have no impact on competition. None of the competitors thought the Merger would have a positive impact:

(a) One competitor stated: 'it made little difference whether AWAL was part of Sony or stands alone. There is nothing unique about AWAL and others can fill the space so it does not have a perceivable impact, as the genie is out of the bottle in terms of technology. Artists and consumers now have the technology, so there is no choice but to work with it'.

(b) Another competitor noted that it '[✂]'.

(c) Empire stated: 'it is not clear that this merger, being in traditional channels, will necessarily have an anti-competitive effect. Due to the evolution of digital music with so many new avenues and channels, it is remarkable what is happening in the marketplace now. There are also new players entering with deep pockets'.

(d) PIAS noted that it 'does not see the merger as having much impact. PIAS is confident that it can offer an attractive proposal to win business for artists progressing up the value chain. Once artists are at a certain level, they are mobile, and want different things, and there is lots of competition for them from the majors, PIAS and others. The Integral side of PIAS's business is also not concerned by the merger as the competitive landscape is familiar to them and it does not change their day to day business. PIAS described the market as really dynamic and interesting in throwing up non-traditional artists and genres'.

7.72 Believe noted that it is concerned about the Merger because it thinks 'competition in the artist and label services space will become much more difficult because Sony is likely to operate a loss-making model to support its funnel strategy to grow. This will mean Believe will be competing against loss-making deals instead of competing on service quality'.

7.73 Overall, the majority of competitors were not concerned by the Merger, albeit some competitors expressed some concerns. However, we have taken a

[266] Appendix C, paragraph 7.

cautious approach and placed limited weight on unevidenced competitors' views given that:

(a) several competitors seemed to consider the impact of a loss of competition on their business, rather than on the market more generally (for example, Believe's concern that the Merger could make it more difficult for individual competitors); and

(b) competitors may have strategic incentives in providing views – for example, competitors with a view to potential acquisitions in future may have an incentive to downplay any concerns around increasing concentration (and, more generally, any reduction in competition may benefit existing competitors) and so unevidenced views would carry limited weight.

Third party evidence – other

7.74 IMPALA submitted that 'AWAL had succeeded in growing at a faster rate and to reach a scale not achieved by other independent competitors'.[267] IMPALA also submitted 'that not only do the other majors' A&L arms have dampened incentives to compete in a way to bridge the gap between A&L service providers and the majors, so are they likely to have dampened incentives to compete in a way that undermines the majors' traditional models in the mid-tier of artists and thus to discipline significantly the commercial behaviour of the Parties.'[268]

Assessment of specific competitors

7.75 This section discusses the current and potential constraint that other providers present on the Parties in the provision of A&L services. More detail about each competitor can be found in Appendix C.

7.76 In order to determine whether the Merger may be expected to result in an SLC in the supply of A&L services, we have considered whether the competitive constraint from other suppliers post-Merger would be sufficient, so as to prevent any SLC arising.[269] We have therefore considered:

(a) the extent of the current competitive constraint from other suppliers; and

[267] IMPALA response to the Provisional Findings, page 8.
[268] IMPALA response to the Provisional Findings, pages 8 and 9.
[269] MAGs, paragraphs 5.7 and 5.15.

(b) how, in each case, this competitive constraint may be expected to change as a result of expansion by existing competitors post-Merger.

7.77 In assessing the constraint exerted 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;[270] and (v) streaming shares over time.

7.78 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, we have considered expansion within the next two to three years.[271]

7.79 As set out in Chapter 6, the relevant services of the Parties and their rivals in the digital distribution of recorded music are complex and differentiated. Given the difficulty in drawing bright lines around particular types of provider we have therefore assessed which competitors exert a constraint on the Parties' A&L services offering.

7.80 Our assessment does not take into account the majors' frontline labels as potential competitors because, on the basis of the evidence provided to us, we consider that mid-range artists either do not need high-touch support and would not be considering a 'traditional' frontline label offer from one of the major labels or that not all mid-range artists will have the option of a frontline label offer – ie they may not fit the profile for the kind of success the majors are interested in.

ADA

7.81 ADA is a global A&L services provider with a focus on label services and is owned by Warner.[272]

7.82 As discussed in paragraph 7.35, ADA is often seen as a 'key competitor' of The Orchard in Sony's internal documents. ADA [✂] appears relatively frequently in AWAL's internal documents, albeit as one of a variety of competitors. Furthermore, paragraphs 7.46 and 7.47 set out that customers

[270] We asked customers who they considered were the closest alternatives to the Parties and to score them in terms of how good an alternative they are to AWAL/The Orchard. We have taken an average of the responses and assigned the descriptors: 'strong' for a score of 4 or 5, 'medium' for a score between 2.5 and 3.5 and 'materially inferior' for a score of 1 or 2.
[271] MAGs, paragraph 5.15.
[272] Appendix C, paragraph 52.

also frequently recognised ADA as a strong alternative to AWAL and as a medium alternative to The Orchard.

7.83 ADA has a material and growing UK music streaming share (see Chapter 6, Table 12) and growing revenues (both globally and in the UK).[273] Going forward, it is targeting organic growth [✄].[274]

7.84 Our view is that ADA exerts a strong constraint on the Parties in both artist and label services and will likely continue to exert a similar level of constraint in the next two to three years.

Virgin Music Label and Artist services

7.85 Virgin Music Label and Artist services (Virgin) is a global A&L services provider and is owned by UMG.[275]

7.86 As discussed in paragraph 7.35, Virgin (previously named Caroline) is often seen as a 'key competitor' of The Orchard in Sony's internal documents. Virgin infrequently appears in AWAL's internal documents. Furthermore, paragraphs 7.46 and 7.47 set out that customers frequently recognised Virgin as a strong alternative to both AWAL and The Orchard.

7.87 We consider Virgin's internal documents to [✄].[276]

7.88 Virgin has a material and growing UK music streaming share (see Chapter 6, Table 12) and growing UK revenues.[277] Going forward, it intends to continue its growth in both artist and label services.[278] We consider Virgin's internal documents [✄].[279] On account of its documented expansion plans as well as its past growth, market presence, and capabilities our view is that Virgin will likely compete more strongly with the Parties over the next two to three years.

7.89 Our view is that Virgin exerts a strong constraint on the Parties in both artist and label services and will likely exert an increased level of constraint in the next two to three years.

[273] Appendix C, paragraph 57.
[274] Appendix C, paragraph 58.
[275] Appendix C, paragraph 59.
[276] Appendix C, paragraph 62.
[277] Appendix C, paragraph 65.
[278] Appendix C, paragraph 66.
[279] Appendix C, paragraph 67.

Ingrooves

7.90 Ingrooves is an A&L services provider that is also owned by UMG. Ingrooves is focused on distribution and offers a [✄] compared to Virgin.[280]

7.91 Ingrooves is often seen as a competitor of The Orchard in Sony's documents. This includes being noted as a 'key competitor' as discussed in paragraph 7.35. Ingrooves is seen less often in AWAL's internal documents but as set out in paragraph [✄], one document recognised Ingrooves as [✄]. Ingrooves was mentioned by five of The Orchard's customers and four of AWAL's customers as a strong alternative.[281]

7.92 We consider Ingrooves' internal documents to indicate that [✄].[282]

7.93 Ingrooves has a material UK music streaming share that is largely unchanged from 2016 (see Chapter 6, Table 12). Ingrooves is planning to expand [✄] and stated its intention to expand its presence [✄]. We consider there to be some evidence in Ingrooves' internal documents that support this intention.[283] On account of its intentions, market presence and capabilities, our view is that Ingrooves will likely compete more strongly with the Parties over the next two to three years.

7.94 Our view is that Ingrooves exerts a strong constraint on the Parties in label services and a more limited constraint on the Parties in artist services and will likely exert a growing constraint in the next two to three years.

Believe

7.95 Believe is a global and established provider of A&L services with a material UK presence. We consider it to operate a multi-tiered service structure comparable to that of AWAL and note that it owns the DIY platform TuneCore (see Chapter 6, Table 12).[284] This structure includes an artist services offering similar to AWAL Recordings and numerous label services options that, according to Believe's internal documents, compete with The Orchard.[285]

7.96 As discussed in paragraph 7.35, Believe is often seen as a 'key competitor' of The Orchard in Sony's internal docs. Believe also appears relatively frequently in AWAL's internal documents albeit as one of various competitors. Furthermore,, paragraphs 7.46 and 7.47 set out that customers also

280 Appendix C, paragraphs 68 and 69.
281 Appendix C, Figures C5 and C6.
282 Appendix C, paragraphs 70 and 71.
283 Appendix C, paragraph 74.
284 See also Appendix C, paragraphs 18 to 20.
285 Appendix C, paragraph 22.

frequently recognised Believe as a strong alternative to both AWAL and The Orchard.

7.97 Believe's internal documents frequently mention AWAL and The Orchard as competitors in both artist and label services.[286]

7.98 Believe has a material and growing UK music streaming share (see Chapter 6, Table 12) and growing UK revenues.[287] Believe's internal documents detail several external and internal growth strategies, forecast substantial revenue growth across both its artist and label services and forecast increases in market share for some of its offerings.[288] Believe stated that that it plans to [✂] its UK market share by 2023 and that its recent IPO has provided capital for further investment in the UK.[289] On account of its documented expansion plans, past growth, market presence, and capabilities, our view is that Believe will likely compete more strongly with the Parties over the next two to three years.

7.99 Our view is that Believe exerts a strong constraint on the Parties in both artist and label services and will likely exert a growing level of constraint in the next two to three years.

Empire

7.100 Empire is a global independent distributor, label, and music publisher. It operates globally and has an A&R presence in the UK. Empire has traditionally had an urban rap and hip-hop genre focus (which has become increasingly more diverse) and offers distribution deals to artists and labels including a higher service offering.[290]

7.101 As discussed in paragraphs 7.34(a) and 7.36(d), Empire is, sometimes, mentioned as one of a handful of competitors (in artist services) of The Orchard in Sony's internal documents. Paragraphs 7.61 and 7.62 also set out that Sony viewed Empire as equivalent to AWAL across a range of parameters. [✂]. Empire was not mentioned by any of The Orchard's customers and was only mentioned by one of AWAL's label customers, albeit, as a strong competitor.[291]

7.102 Empire has a material and growing UK music streaming share (see Chapter 6, Table 12) and growing UK revenues. Empire said that it intends to

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286 Appendix C, paragraph 22(d).
287 Appendix C, paragraph 25.
288 Appendix C, paragraph 27.
289 Appendix C, paragraph 26.
290 Appendix C, paragraphs 28 and 29.
291 Appendix C, Figures C5 and C6.

focus on its deals that [✂], and expand its presence in other music genres (albeit these are genres which are not presently the focus of AWAL's business). However, it said that its international investment is focussing on markets such as the Middle East and Africa, more so than the UK (though it remains committed to the UK).[292]

7.103 Our view is that Empire exerts a moderate constraint on the Parties in both artist and label services in the genres on which it focuses and will likely exert a similar level of constraint in the next two to three years, given its investment is less focused on the UK.

PIAS

7.104 PIAS operates globally and signs UK artists. It operates a label business (PIAS Label Group) and a label services provider (Integral). Integral does not have an explicit artist services offering but does provide label services to some artists (including artists that have their own label).[293]

7.105 As discussed in paragraphs 7.62(c) and 7.63, PIAS is on occasion, seen as one of a handful of competitors of The Orchard in Sony's internal docs. [✂] also shows that PIAS also occasionally appears in AWAL's internal documents as one of a more limited number of competitors. However, PIAS is typically mentioned more infrequently and as one of numerous competitors. PIAS was mentioned as a medium alternative to AWAL a couple of times by customers and as a medium alternative to The Orchard three times.[294]

7.106 PIAS said that its competition with AWAL and The Orchard is limited by its focus on a narrower, more evolved repertoire of acts.[295]

7.107 PIAS had a material UK music streaming share in 2021, however its share has been declining since 2016 (see Chapter 6, Table 12). PIAS stated that its growth in market share is based on continued development of its services and continued expansion into an ever-increasing diversity of rights and genre areas. [296] Despite its intentions, market presence and capabilities, we consider that its historical performance casts some doubt over the level of constraint it will likely exert on the Parties over the next two to three years.

7.108 Our view is that PIAS, through Integral, exerts a strong constraint on the Parties in relation to their label services activities and a more limited

[292] Appendix C, paragraph 36.
[293] Appendix C, paragraphs 37 and 38.
[294] Appendix C, Figures C5 and C6.
[295] Appendix C, paragraph 41.
[296] Appendix C, paragraph 44.

constraint on the Parties' artist services activities and will likely continue to exert a similar or declining level of constraint in the next two to three years.

FUGA

7.109 FUGA is a global business-to-business label services Provider. [✂].[297]

7.110 FUGA is mentioned relatively infrequently in Sony's internal documents [✂], and as one of a number of competitors in Sony's internal docs.[298] FUGA was mentioned by three of AWAL's customers as a strong alternative to AWAL. It was also mentioned by six of The Orchard's customers as a medium alternative to The Orchard.[299]

7.111 [✂].[300]

7.112 Based on OCC data FUGA had a small UK streaming share in 2021 that had fallen from 2016 (see Chapter 6, Table 12). We note that this decline is not seen in other sources of market share information and further note that its UK revenues have grown rapidly.[301] [✂].[302] On account of [✂], past growth, and capabilities we consider that FUGA will likely at least continue to exert the same level of constraint on the Parties in the next two to three years.

7.113 Our view is that FUGA exerts a strong constraint on the Parties in label services and a more limited constraint on the Parties in artist services and will likely continue to exert a similar level of constraint in the next two to three years.

BMG

7.114 BMG is a global record label group. It offers artist services and signs artists onto 'traditional' record label deals.[303] BMG distributes to DSPs through ADA and represents a material and growing share of all music streamed in the UK.[304]

7.115 Taking the available evidence in the round, we believe that BMG is a sizable supplier of artist services in the UK that competes with The Parties. In particular, we note that BMG features prominently as an artist services

[297] Appendix C, paragraphs 45 and 46.
[298] See Appendix D, paragraph 3 and paragraph 11, item 2.
[299] Appendix C, Figures C5 and C6.
[300] Appendix C, paragraphs 47 and 48.
[301] Appendix C, paragraphs 49 and 50.
[302] Appendix C, paragraph 51.
[303] Appendix C, paragraph 75 and 76.
[304] Appendix C, paragraph 79.

competitor (alongside AWAL and the Orchard) in Believe and [✂] internal documents.[305]

7.116 BMG is occasionally mentioned in Sony's internal documents. BMG was mentioned by three of AWAL's customers as a medium alternative to AWAL.[306] It was also mentioned by one of The Orchard's customers as a medium alternative to The Orchard.[307]

7.117 We have not been provided with any evidence of BMG's expansion plans with respect to artist services. On account of its growing stream share and market presence we infer that it likely has the ability and incentive to expand its artist services offering over the next two to three years.

7.118 Our view is that BMG exerts a strong constraint on the Parties in artist services and will likely continue to exert a similar level of constraint in the next two to three years.

Beggars

7.119 Beggars is a global record label group. It is the largest independent label in the UK and represented a material, but declining share of all music streamed in the UK in 2021 (see Chapter 6, Table 12).

7.120 Statements from Beggars indicate that it, on occasion, offers artist services style contracts in order to compete with artist services providers. These further indicate that it operates as a traditional record label.[308]

7.121 Beggars is not mentioned as an artist services competitor in the Parties' internal documents, in third parties' internal documents nor was it mentioned by customers. Taking the available evidence in the round, we consider Beggars is not a sizable supplier of artist services.

7.122 We have not been provided with any evidence of Beggars' expansion plans. In view of its traditional offering and declining UK streaming share, we consider that it is not likely to have the incentive or ability to materially expand its artist services offering.

7.123 Our view is that Beggars exerts a weak constraint on the Parties in artist services and will likely continue to exert a similar or declining level of constraint in the next two to three years.

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[305] Appendix C, paragraph 22(a).
[306] Appendix C, Figures C5 and C6.
[307] Appendix C, Figures C5 and C6.
[308] Appendix C, paragraph 80.

United Masters

7.124 United Masters has a multi-tiered offering and services artists and labels. Its lowest tier offering is DIY distribution.[309]

7.125 It received no mentions from customers and is mentioned as an artist services competitor in Sony's internal documents as seen in paragraphs 7.36(d) and 7.62. It is not mentioned frequently or prominently in the internal documents of other A&L services providers that compete with AWAL and The Orchard.

7.126 We note that United Masters represented an immaterial share of all music streamed in the UK in 2021 (see Chapter 6, Table 12). In addition it has a focus on hip hop and R&B and [✂].[310]

7.127 While it plans to start expanding internationally United Masters [✂].[311] Taking the available evidence in the round, we consider that United Masters is not a sizable provider of A&L services in the UK and, on account of third party evidence and its submissions, we consider it to compete more closely with other DIY platforms.[312]

7.128 Our view is that United Masters exerts a weak constraint on the Parties in A&L services and will likely continue to exert a similar level of constraint in the next two to three years.

DITTO

7.129 DITTO has a multi-tiered offering and services artists and labels. Its lowest tier offering is DIY distribution.[313]

7.130 It received two mentions from AWAL's customers and one mention from a customer of The Orchard[314] and is mentioned as an artist services competitor in Sony's internal documents as seen in paragraphs 7.36(d), and 7.62(a). It is not mentioned frequently or prominently in the internal documents of other A&L services providers that compete with the Parties.

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309 Appendix C, paragraph 87.
310 Appendix C, paragraph 89.
311 Appendix C, paragraph 90.
312 Appendix C, paragraphs 88 and 89.
313 Appendix C, paragraph 83.
314 Appendix C, Figures C5 and C6.

7.131 Giving particular weight to third party evidence, we consider DITTO is not a sizable provider of A&L services and consider it competes more closely with other DIY platforms.[315]

7.132 We have not been provided with any evidence of DITTO's expansion plans although we note that it has a material and growing UK music streaming share (see Chapter 6, Table 12).

7.133 Our view is that DITTO exerts a weak constraint on the Parties in A&L services and will likely continue to exert a similar level of constraint in the next two to three years.

Amuse

7.134 Amuse has a multi-tiered offering and services artists and labels and an explicit artist services offering. Its lowest tier offering is DIY distribution.

7.135 It received no mentions from customers but is sometimes mentioned as an artist services competitor in Sony's internal documents as seen in paragraph 7.36(d). It is not mentioned frequently or prominently in the internal documents of other A&L services providers that compete with the Parties.

7.136 Amuse represented a very low share of all music streamed in the UK in 2021 (see Chapter 6, Table 12). Taking the available evidence in the round, we consider Amuse is not a sizable provider of A&L services in the UK and, on account of third party evidence, we consider it competes more closely with other DIY platforms.[316]

7.137 Our view is that Amuse exerts a weak constraint on the Parties in A&L services and will likely continue to exert a similar level of constraint in the next two to three years.

ONErpm

7.138 ONErpm has a multi-tiered offering with an explicit artist services. Its lowest tier offering is DIY distribution.[317]

7.139 It received one mention from customers[318] and is mentioned as an artist services competitor in Sony's internal documents (see paragraph 7.34(a)) but does not appear in the internal documents of other significant A&L services

[315] Appendix C, paragraph 84.
[316] Appendix C, paragraph 93.
[317] Appendix C, paragraph 95.
[318] Appendix C, Figures C5 and C6.

providers. It is not mentioned frequently in the internal documents of other A&L services providers that compete with the Parties.

7.140 ONErpm represented a very low share of all music streamed in the UK in 2021. We have limited evidence on ONErpm's offering and have not seen any evidence of its expansion plans.

7.141 Our view is that ONErpm exerts a weak constraint on the Parties in A&L services and will likely continue to exert a similar level of constraint in the next two to three years.

Other independent A&L services providers

7.142 There are a number of other independent A&L services providers such as Secretly, Kartel, Platoon, Stem, Absolute, Label Worx, and IDOL. However, they had very low 2021 UK streaming shares (each less than [0–5%]),[319] were infrequently mentioned by customers and rarely appeared, if at all, in The Parties' internal documents or the internal documents of other A&L services providers that compete with The Parties.

7.143 Our view is that, although these A&L providers may be an alternative for some artists, given their current low UK streaming shares and growth trajectory they are unlikely to expand to exert a significant competitive constraint on the Parties in the next two to three years.

Other Independent labels

7.144 There are a large number of independent labels that account for a small share of the distribution of recorded music.[320] By total streams BMG and Beggars are the largest independent labels in the UK.[321] Other than BMG and Beggars, independent labels had low 2021 UK streaming market shares ([0–5%] or less).[322] We have assessed the constraint presented by BMG and Beggars on the Parties at paragraphs 7.114 to 7.123.

7.145 We note that other independent labels were infrequently mentioned by customers and rarely appeared, if at all, in the Parties' internal documents or the internal documents of other A&L services providers that compete with the

[319] See Appendix F, Table 1.
[320] According to Sony there are at least 450 independent labels active in the UK, working with thousands of artists.
[321] BMG does not distribute to DSPs directly.
[322] The streaming share information submitted by the Parties includes a number of independent labels that distribute directly to DSPs (see Appendix F, Table F1). Excluding BMG and Beggars, these had low UK music streaming shares ([0–5%] in 2021). The information submitted by the Parties also includes streaming data for some (but not all) independent labels that distribute to DSPs through a third party. These had very low UK music streaming shares ([0–5%] in 2021).

Parties. Indeed, many independent labels are customers of AWAL and The Orchard's label services. We have not been provided with evidence of the extent to which other independent labels are active in artist services.

7.146 Taking the available evidence in the round, our view is that other independent labels exert a weak constraint on the Parties in A&L services and do not have the incentive or ability to materially expand into A&L services in the next two to three years.

Other Distributors and DIY platforms

7.147 As discussed in paragraph 2.49, there are a number of providers active in the distribution of recorded music that can broadly be categorised as DIY platforms. These providers offer artists and smaller labels distribution to streaming platforms and they typically charge a low fixed fee to digitally distribute music. As set out in paragraph 6.5, AWAL has a DIY platform but Sony does not. Given that there is no overlap between the Parties at this level we have only considered DIY platforms insofar as they exert a constraint on the Parties' A&L services.

7.148 Based on UK music streaming shares (see Table 12, Chapter 6), TuneCore (discussed in relation to Believe at paragraph 7.95), Distrokid and CDBaby are the largest DIY platforms in the UK.[323] We note that United Masters, DITTO, Amuse, and ONErpm operate DIY platforms, the constraint of which has been considered as part of their wider offering at paragraphs 7.124 to 7.141.

7.149 TuneCore, Distrokid and CDBaby were mentioned by customers[324] and are mentioned as DIY competitors in Sony's internal documents.[325] However, TuneCore, Distrokid and CDBaby are not frequently mentioned in the internal documents of other A&L services providers that compete with the Parties.

7.150 As noted in paragraphs 2.49 to 2.52, DIY platforms typically service lower-range artists[326] and typically do not provide for marketing or promotional

[323] We consider that the UK streaming shares presented in Chapter 6, Table 12, may underestimate the scale of these providers (See Appendix F, paragraph 14).
[324] Additionally, other distributors were mentioned (albeit only once) eg Horus Music and Symphonic Distribution. Appendix C, Figures C5 and C6.
[325] For example see Appendix D, paragraph 1.
[326] In response to the Provisional Findings, the Parties submitted that 'DIY services compete for artists across the spectrum' (Sony response to the Provisional Findings, dated 4 March 2022, paragraph 16). We note that, while some successful artists have distributed via DIY services, DIY platforms' business models depend on attracting a large volume of artists and the vast majority of artists using these services are lower-range artists.

services or fund the creation of content.[327] We acknowledge that DIY platforms may be an alternative to the Parties in A&L services in some instances, namely where an artist is able to source additional services and expertise from other third parties.[328] However, we do not consider this an option for most artists.[329]

7.151 Taking the available evidence in the round, our view is that DIY platforms[330] present a weak constraint on the Parties in A&L services (as opposed to on AWAL's DIY platform) and are unlikely to have the incentive or ability to materially expand into A&L services in the next two to three years.

Our conclusion on the constraint from third party competitors

7.152 In view of the above assessment of specific competitors, we have concluded that, with respect to the Parties' label services activities, a number of strong or moderate 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, Empire exerts a moderate constraint, while PIAS exerts a more limited constraint on the Parties. We have concluded that the constraint from AWAL which will be lost is not significant because these third party constraints are collectively sufficient to ensure that rivalry continues to discipline the commercial behaviour of the Parties post-Merger.[331]

Conclusion

7.153 We have examined whether the Parties are close competitors and/or would likely become closer competitors in the foreseeable future, which is where any loss of competition would most likely arise.

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[327] As noted in paragraph 2.49, Sony also told us that DIY services providers offer marketing and promotional services to artists. We understand these offerings are typically more basic than those offered by A&L services providers. For example, some DIY services providers offer automatic marketing tools and tools for artists to develop their own webpages, rather than funding and support for multi-media marketing campaigns and promotions.

[328] In response to the Provisional Findings, the Parties submitted that 'DIY services providers compete with A&L services providers even without third-party support' and that 'DIY services would compete closely with lower-tier A&L services' (Sony response to the Provisional Findings, paragraph 17). AWAL has a DIY platform, which is its primary 'lower-tier' offering but, as noted in paragraph 7.145, Sony does not have a DIY platform, therefore we focused our assessment on the DIY platforms' constraint on A&L services.

[329] In response to the Provisional Findings, the Parties submitted that 'artists can easily source additional services from managers and third parties if necessary' (Sony response to the Provisional Findings, paragraph 18). We consider that, although there are examples of artists who have additional support distributing via DIY platforms, this often depends on prior industry connections which will not be available to all artists, particularly those who are emerging.

[330] Other than those considered as part of their wider offering at paragraphs 7.122 to 7.139.

[331] MAGs, paragraph 2.7.

7.154 The evidence shows that The Orchard and AWAL both currently provide artist and label services. However, the Parties do not currently compete closely in the provision of A&L services with The Orchard focusing on label services and AWAL focusing on artist services.

7.155 We have concluded that AWAL would not have been likely to materially expand its label business within the next two to three years and therefore we have concluded that AWAL would not have been likely to have become a closer competitor to The Orchard in the provision of label services in that time frame.

7.156 We have concluded that AWAL would most likely have continued to supply services to artists in a similar way as prior to the Merger but we recognise that AWAL's rate of growth could reasonably be expected to slow relative to its growth in 2018 to 2020.

7.157 We have concluded that Sony would most likely have made ongoing efforts to expand its artist services offering and therefore we have concluded that The Orchard would most likely have become a closer competitor to AWAL in the provision of artist services in the foreseeable future.

7.158 However, we have concluded that there are a number of strong or moderate constraints with respect to both the Parties' artist and label services that will likely remain following the Merger and that the constraint from AWAL which will be lost is not significant because these third party constraints are collectively sufficient to ensure that rivalry continues to discipline the commercial behaviour of the Parties post-Merger.[332]

7.159 In view of our assessment above, we have decided that the Merger has not resulted, and may not be expected to result, in an SLC within any market or markets in the UK as a result of a loss of current and/or potential (future) competition in the supply of A&L services.

8. Competitive effects of the merger – assessment of the impact of the loss of current and potential (future and dynamic) competition in the supply of high-touch services to artists

8.1 In this chapter, 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

[332] MAGs, paragraph 2.7.

artists. In particular, we assess 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 consider 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. This is a theory of harm arising from horizontal unilateral effects concerning in particular the loss of current competition and the loss of potential (future and dynamic) competition between AWAL and SME. As noted in paragraph 6.27, 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.[333,334]

8.2 The remainder of this section is structured as follows:

(a) We set out the framework for the analysis of a loss of potential competition (future and dynamic).

(b) We consider the changes to SME's frontline model over the last decade and the factors driving these changes, including the extent to which these changes have been driven by AWAL.

(c) We consider whether AWAL Recordings' offering currently constrains SME.

(d) We consider whether AWAL Recordings' offering would likely develop so as to constrain/further constrain SME in future.

(e) We consider whether other A&L providers, independent labels and other types of providers currently constrain SME and/or whether these suppliers have the combination of the intention, incentives and ability to expand in a timely, likely and sufficient manner so as to constrain the Parties (specifically, SME and AWAL) post-Merger.

[333] See, by analogy, the MAGs, paragraph 4.12(a).
[334] IMPALA submitted that 'large market players like the majors with large financial resources and market power may add artists to their roster and catalogue ie back catalogue to their already vast repertoire by acquiring other smaller players in the market.' It also submitted that 'a general trend in the market is the gaining of market share by 'attrition'. The majors see that they are in danger of losing market share and identify market share in the shape of DIY and aggregator or distribution solutions (such as The Orchard, Finetunes and Phonofile) as acquisition targets' (IMPALA response to the Provisional Findings, page 5).

(f) We consider the implications of our findings above on the DSP-side of the market.

Framework for assessing a loss of potential (future and dynamic) competition

8.3 The theory of harm considered in this chapter relates to horizontal unilateral effects (see paragraphs 7.3 and 7.4). Unlike the theory of harm considered in the Chapter 7, which concerned the loss of current and future competition in the supply of A&L services, the theory of harm considered in this chapter concerns both the loss of current competition[335] and the loss of potential (future and dynamic) competition in the supply of high-touch services to artists.

8.4 Mergers involving potential expansion can lessen competition in different ways.[336] First, a merger involving potential expansion may imply a loss of the future competition between the merger firms after the expansion would have occurred.[337] Second, it may be the case that the merger firms can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition. 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. A merger may reduce the incentive of incumbent firms to mitigate the threat of future rival entry or expansion.[338]

8.5 Losses of future competition and losses of dynamic competition are interrelated, as they both involve the constraint from potential entrants, and both depend on the likelihood of entry or expansion by a potential entrant, and the impact of such entry or expansion on competition.[339]

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[335] In the remainder of this chapter, we use the term 'current' in relation to competition to refer to current rivalry and current dynamic competition between AWAL Recordings and SME. In each case, we consider pre-Merger competition as well as the current rivalry and dynamic competition between them further to the Initial Enforcement Order made in relation to the Merger.
[336] It is a well-established principle that competition law protects not only actual competition, but also potential competition between undertakings. (See MAGs, Chapter 5; see also by analogy *Toshiba v Commission*, T-519/09, EU:T:2014:263, paragraph 230). This is because there is competitive interaction between a firm that has the potential to enter or expand in competition with other firms (MAGs, paragraph 5.1). A potential competitor may exert competitive pressure on the firms in the market 'by reason merely that it exists' (*Generics (UK) Ltd and Others v CMA*, C-307/18EU:C:2020:28, paragraph 42).
[337] MAGs, paragraph 5.2.
[338] MAGs, paragraph 5.3.
[339] MAGs, footnote 102.

Changes to SME's frontline model

8.6 The recorded music distribution sector is concentrated. In 2021, the majors together had a UK share of streaming of [70–80%], and SME had a share of [20–30%].[340] Care must be taken in interpreting this share of streams data (see paragraph 6.26), nevertheless, we consider that the majors have had a very large and stable market share over time. In addition, concentration in the sector has increased over the years due to numerous mergers and acquisitions by the major labels (see paragraphs 2.34 and 2.35). In this context we note that where a market is already concentrated, even small increments in market power may give rise to competition concerns.[341]

8.7 Sony submitted that, over recent years, it 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. Sony has submitted that its artist costs have [✂] of gross revenues in 2015 to [✂]% in 2020.[342] Between 2014 and 2020, [✂]. The proportion of traditional royalty deals – where SME keeps the rights to recorded music in perpetuity – has [✂]in 2016 to [✂] in 2020. Deal exploitation periods have [✂] years in 2017 to [✂] years in 2020 (for new deals signed in that year).[343]

8.8 Technological advances such as streaming have significantly reduced the risks and costs of music distribution.[344] For example, data makes it easier to identify artists' potential and streaming requires less upfront investment than physical stock. Sony has submitted that technological advances mean artists have more options to go to market and made it easier for artists to track their own performance. As a result, artists are demanding higher compensation and more control over their music.[345]

8.9 We consider that artists need alternative options in order to negotiate better deals. For example, the emergence of A&L services 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.

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[340] This does not include the share of certain subsidiaries owned by the majors (The Orchard, Virgin and ADA), see paragraph 6.26.
[341] See, by analogy, the MAGs, paragraph 4.12(a).
[342] Sony's response to the Issues Statement, paragraph 41.
[343] Sony's response to the Issues Statement, paragraph 41.
[344] In response to the Provisional Findings, IMPALA submitted that 'Despite the illusion that the digital market is simpler and less costly, the reality is that labels are more in demand than ever. They also have had to invest heavily in digital businesses to remain not only competitive but also in business.' It also submitted that '[i]n order to compete in a world in which far greater quantities of music are available to the consumer at the touch of a button, labels must hire and retain the services of personnel experienced in areas such as digital marketing, licensing, the creation of music videos and artwork, in playlisting creation and optimization, in data analytics and in reporting and accounting to artists' (IMPALA response to the Provisional Findings, page 10).
[345] Sony's response to the Issues Statement, paragraph 45.

Indeed, AWAL's CEO acknowledged that artists considering a major label deal already want the majors to justify their higher rates [✂].[346]

8.10 Sony's internal documents indicate that A&L services providers have disrupted SME's traditional music model. For example:

(a) An SME mid-range plan document from 2018 says that labels, publishers, distributors (including Kobalt) and DSPs are '[n]ew entrants and disruptors' who are 'threatening [the] traditional music model'.[347]

(b) A strategy document by The Orchard from 2017 notes a 'disruption risk' to Sony's 'full-service labels' because 'Artists and labels are seeking solutions that meet their specific needs at optimal cost, leading to talent/client attrition and lost share'.[348]

(c) An SME mid-range plan document from 2020, says that artists are putting pressure on the traditional music rights model in part through 'increased pressure in artist renewals negotiations'.[349, 350]

8.11 Some third parties also noted that changes to the majors' models had been driven by increased options including A&L services providers like AWAL:

(a) [One The Orchard label customer] attributed changes to the majors' models to 'tons of competition', including labels and 'new companies' like AWAL and others.

(b) [An AWAL artist customer] attributed changes to the majors' models to AWAL.

(c) [A competitor] noted that the market has changed due to the emergence of a distribution model. As the market has democratised through other options, major label offerings have had to evolve and soften on issues such as copyright ownership. [✂].

8.12 AWAL describes AWAL Recordings as 'our global record label, built to break artists on their own terms'. It is designed to support a select group of established and developing artists and provides a customised label service (see paragraphs 3.20 and 3.23). Absent the Merger, AWAL planned to grow AWAL Recordings (see paragraph 5.76). Going forward, any growth of AWAL

346 [✂].
347 See Appendix D, paragraph 18.
348 See Appendix D, paragraph 12, item 2.
349 See Appendix D, paragraph 19, item 3.
350 We note that this slide does not explicitly mention A&L services providers, but we consider that increased pressure in negotiations derives from increased options, which is likely to include A&L services providers.

Recordings could provide a credible alternative for a greater number of bigger artists and, if successful, could further bridge the gap between A&L services providers and the majors.

8.13 In view of the above, our view is that changes to SME's frontline model have been driven by both changing technology and the increase in options for artists. Subsequent sections consider the importance of AWAL Recordings as an alternative option specifically for artists requiring high-touch services.

Current competition between AWAL Recordings and SME

8.14 AWAL was, historically at least, a source of disruption and an early proponent of the artist services model. AWAL stands for 'artists without a label', in contrast with traditional major labels and independent labels. This historical position was noted by third parties, for example, Beggars noted that AWAL was the 'innovator' that first came on the scene and offered alternative, service based, deals and then others followed this model. It also noted that AWAL is still perceived as an innovator; although AWAL is not re-innovating a model all the time. Another third party said that 'AWAL is in a different league compared to other independent providers of label services', particularly with respect to its 'artist incubation and promotional efforts'. IMPALA submitted that 'AWAL was active in both A&L and A&R services. In particular, in contrast to other aggregators, AWAL has been able to provide a high-quality offering and competition'.[351] AWAL's internal documents also show it, at least historically, considered itself to have an innovative model. For example, an AWAL board document from 2018 states that it is the '[✂].[352] Also in 2018, a brand guidelines presentation listed [✂].[353]

8.15 As noted in paragraph 8.12, AWAL Recordings is designed to support a select group of established and developing artists and provides a customised label service. This is the part of AWAL's business which currently offers high-touch services.

8.16 SME is the second largest of the three large music distributors (SME had a [20-30]% share of UK streams in 2021 and the majors collectively accounted for a share of [70-80]%, see paragraph 2.34).[354] AWAL's streaming share in 2021 was [0–5%], but this grew between 2016 and 2019, and has declined since 2019-2020.

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[351] IMPALA response to the Provisional Findings, page 8.
[352] See Appendix E, paragraph 3, items 2 and 3.
[353] See Appendix E, paragraph 9.
[354] This does not include the share of certain subsidiaries owned by the majors (The Orchard, Virgin and ADA, see paragraph 6.26).

8.17 In this context, this section considers the importance of AWAL's competitive constraint on SME.

8.18 This section first considers the Parties' views on the current competition between AWAL Recordings and SME. Then it considers the evidence for the current closeness of competition between AWAL Recordings and SME from (a) the Parties' internal documents, (b) customer data and (c) third parties.

The Parties' views

8.19 The Parties have submitted documents that, in their view, show that AWAL is small and lacks presence in top UK tracks. In terms of AWAL's size, the Parties provided data on both revenues and stream shares to illustrate this. For example, AWAL Recordings was estimated to have only generated £[✄] million in the UK in 2020.

8.20 The Parties have also provided data from the Official Chart Company (OCC) on the weekly shares of top 100 hits by providers in the UK in 2021. They have submitted that AWAL's low share, [0–5%], particularly in relation to other A&L services providers, means that it is not a credible alternative to SME for artists requiring high-touch services. We note that the top 100 hits are predominantly from artists represented by the majors' frontline labels and the shares of other providers are typically very small and volatile. As such, we consider that AWAL's current low share in the top 100 hits, is not conclusive on the strength of AWAL as an alternative for SME, indeed its share in 2019 was substantially higher ([0–5%]). In addition, we consider that a large part of the competition between the majors and A&L services providers occurs outside the top 100 or even top 200, both because even high-range artists may not reach the top 200 and because the majors and A&L services providers compete to identify and represent future successful artists.

8.21 The Parties have provided submissions on the difference between SME's/the majors' and AWAL's models.

(a) The Parties submitted that AWAL's business model is characterised by short-term, low commission deals with minimal levels of 'high-touch' support, meaning it is unable to compete with SME. The Parties stated that AWAL would require both a significant increase in financial resources and a change in business model to compete with SME/the majors – and that there is no evidence for either of these.

(b) The Parties submitted that SME and AWAL have different risk appetites. SME provides significant upfront investment at its own risk and requires a higher share of income and a longer exploitation period to assume the

scale of risk that a record company takes in a market where consumers have unpredictable and fickle taste and a vast amount of music to choose from. This model is viable only for frontline artists that generate large sales on a global basis. By contrast, AWAL takes on less risk because its funding advances are smaller and directly recoupable from the artists' portion of revenues. In this way, AWAL can earn a return on its investment with a low commission rate and a shorter exploitation period.

(c) AWAL said that the majors do something 'very, very different' from what AWAL does.

(d) Even for AWAL Recordings, AWAL offered short contracts and rights retention by AWAL. The average duration of AWAL Recordings contracts is [✂] years.[355] These contracts are also [✂].

8.22 Nevertheless, Sony acknowledged that there could be limited circumstances where artists might choose between A&L services providers like AWAL or a major label like SME. AWAL said that there are 'a handful of circumstances' where artists are considering AWAL or a major but also noted that 'most of the time' artists are not choosing between AWAL and a major.

Internal documents showing AWAL competing with SME

SME documents monitoring the threat from AWAL/AWAL Recordings

8.23 This section considers SME documents, as opposed to The Orchard documents as the former are more relevant to SME's frontline labels whereas the latter are more relevant for A&L services and are discussed in Chapter 7.

8.24 There are SME documents which monitor a wide range of competitive threats, including AWAL, for example a 2020 pre-mid-range plan/budget meeting slide, noted 'competitive threats' from major labels, label distribution, artist services, DIY services and financial investors. Even within the artist services category, AWAL was one of five competitors mentioned.[356]

8.25 We have identified only one example of an SME internal document which particularly highlights Kobalt and/or AWAL as a threat to SME. [✂] 'threatening Sony Music's business model'.[357]

[355] This is substantially shorter than 'traditional' record contracts.
[356] See Appendix D, paragraph 9.
[357] See Appendix D, paragraph 20, items 1 and 2.

8.26 We have not identified any other SME documents which refer to a meaningful threat to its frontline labels from AWAL generally or AWAL Recordings specifically.[358]

AWAL documents showing AWAL competing with SME/the majors

8.27 AWAL's internal documents show that AWAL currently competes with SME's frontline labels for some deals. In particular, AWAL's deal documents from early 2018 to late 2021 (which are for [✂] deals – see Appendix E for more detail) have [✂] mentions of Sony or Columbia out of [✂] competitor mentions, more than any other competitor except [✂]. However, other than the deal documents, AWAL's internal documents have very few mentions of AWAL targeting potential SME customers.

8.28 As mentioned in paragraphs 7.39 to 7.43, AWAL's internal documents mention competitors infrequently. Some AWAL documents refer to major labels generally (see paragraph 7.39), nevertheless, we have not been provided with any documents which monitor SME explicitly.

8.29 AWAL's documents do, however, show that although it was serving artists requiring high-touch services to some extent, it was primarily focused on the mid-range artists.

(a) A 2019 document for prospective investors states that AWAL is focused on the 'middle' of the market, not 'stars'.[359]

(b) However, some documents show that AWAL was targeting larger/more potentially successful artists. For example, a 2018 board document stated that [✂]'[360] and a 2019 investor document stated that AWAL had [✂].[361]

Customer data comparison

8.30 The Parties have submitted that the 2021 average revenues per artist are very different for SME ($[✂]) and AWAL Recordings ($[✂]). They submitted that this is evidence that SME and AWAL Recordings operate different models.

8.31 We acknowledge that there is a difference in average customer size, but this is at least in part because SME's largest superstar artists drive up the average

[358] We also note that the internal documents provided to us by [✂] and [✂] did not identify AWAL as a disruptive player.
[359] See Appendix E, paragraph 1, item 1.
[360] See Appendix E, paragraph 5, item 1.
[361] See Appendix E, paragraph 2, item 1.

for SME.[362] As such, there are some SME artists earning similar revenues as artists on AWAL Recordings.

Third party evidence showing AWAL competing with SME

8.32 Evidence from AWAL's customers showed very limited competition between AWAL and SME for artists requiring high-touch services. In particular, when asked about alternatives to AWAL, no AWAL customers mentioned SME or any of SME's frontline labels.[363] We note that a substantial proportion of these respondents were customers of AWAL Recordings and therefore in the segment of AWAL's business where we consider SME's frontline labels are a potential alternative.

8.33 As noted in paragraph 7.68, evidence on the impact of the Merger from customers was mixed. [One artist customer of AWAL] raised concerns about the Merger which appear to relate to the loss of constraint on SME's frontline labels: 'given that one of these entities [ie a major label, Sony] now owns the only real significant independent A&L operation [AWAL], the concern is that this will stifle the changes being made' respecting the 'commercial relationships with artists and their work [which] should be far fairer and more transparent'. [An artist customer of The Orchard], [✂].

8.34 [One third party], however, said that AWAL's top service-tier offering is quite similar to Sony's in terms of creative teams, merchandising, concert tour operations etc but that the value proposition is different as AWAL allows the artist to remain in control of copyright and offers shorter contracts. The third party believed this put the majors under pressure to bid more aggressively for artists through other aspects of their offer such as greater marketing support, greater access to production facilities, greater flexibility regarding contractual terms (eg on number of albums to be produced and/or the timeline for producing albums). It also said that 'the biggest independent artist stories of the last five years (eg Lauv, Rex Orange County, girl in red and several more) have all chosen to be represented by AWAL.'[364]

8.35 IMPALA stated that AWAL is able to compete with the majors, for both mid-sized and higher level artists. It also stated that AWAL is likely to continue to

[362] [%]% of SME's 2021 revenues were generated by [%], each of whom generated revenues of more than $[%] million.
[363] Combined phase 1 and phase 2 responses to the customer questionnaires, n=25, artists=16, labels=9. Q6. 'The CMA is seeking to understand the providers of recorded music services (eg A&L providers, DIY platforms, major labels) who are the closest alternatives to AWAL from an artist/label's perspective. Therefore, please consider a hypothetical scenario where AWAL (and all its current services) was no longer available, and you had to move to a different provider for those services. Which other provider(s) would you be most likely to move to? Please list these provider(s), provide a score in terms of how good an alternative they are to AWAL, and provide reasons for your scores.' Score out of 5 (1 = materially inferior alternative to AWAL, 5 = equivalent to AWAL).
[364] IMPALA submitted that it agreed with this view (IMPALA response to the Provisional Findings, page 11).

provide ‘unique’ deals to artists in terms of retention of copyright and high royalty rates.

Our conclusion on current competition between AWAL Recordings and SME

8.36 We have concluded that the evidence above shows that SME has adapted its model in response to A&L services providers. 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, we consider that the evidence indicates 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. In particular, AWAL Recordings is small, SME’s documents do not refer to a meaningful threat to its frontline labels from AWAL and there is very limited evidence from customers that they considered SME to be an alternative to AWAL.

Potential competition (future and dynamic) between AWAL Recordings and SME

8.37 Absent the Merger, AWAL planned to [✄] on AWAL Recordings (see paragraph 5.76). [✄], this section considers potential competition[365] between AWAL (in particular AWAL Recordings) and SME. We consider that, given SME has already adapted its model in response to A&L services providers increasing the options for artists (paragraph 8.13), if AWAL made 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. 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.

8.38 This section first considers the Parties’ views on potential competition (future and dynamic) between AWAL Recordings and SME. Then it considers the evidence for potential competition (future and dynamic) between AWAL Recordings and SME from (a) the Parties’ internal documents and (b) customer data. Finally, it considers the sustainability of AWAL Recordings’ business model.

[365] Potential competition is relevant to the assessment of the competitive effects of a merger where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them (MAGs, paragraph 5.1).

The Parties' views

8.39 The Parties have submitted that AWAL's market share is declining. They have provided UK streaming data from the OCC showing that AWAL's share fell from [0–5%] in 2019 to [0–5%] in 2021. However, we note that AWAL's market share appears to have plateaued when viewed over the longer time period for which the OCC data is available (2016 to 2021). We also note that AWAL's share is not specific to AWAL Recordings and includes, among other things, stream shares from its DIY platform, so provides limited information about AWAL Recordings' performance.

8.40 The Parties have also submitted OCC data on the share of weekly top 100 and top 200 hits distributed by AWAL. The Parties have submitted that representation in this chart demonstrates how well a provider is able to compete for frontline artists. They note a large fall ([90–100%]) in AWAL's representation in this chart between 2019 and 2021. However, as noted in paragraph 8.20, shares for smaller providers are volatile and a large part of the competition between the majors and A&L services providers occurs outside the top 100.

8.41 AWAL has not disagreed with our view it planned to grow AWAL Recordings alongside other parts of its business.

8.42 At the Main Party Hearing, regarding whether AWAL could take mid-service tier artists and break them into the top tier and keep them, AWAL responded: '[✂] trying to extend up even further and compete in that way just is not practical, […] given the difference in services, the different end deal structure, the difference in capital structure, the difference in kind of team and the difference in the skills that would be needed. Then truly, we would be saying we could do everything for everyone from platform all the way up, [✂]'.

8.43 Sony also submitted that AWAL lacked the resources and risk appetite to make the substantial upfront investments needed to make and break global superstars in competition with global music companies like SME and that there is no suggestion that AWAL was going to fundamentally change its business model.

Internal documents regarding AWAL's growth

8.44 AWAL's internal documents show that it planned to grow AWAL Recordings (see paragraphs 5.66, 5.73 and 5.74).

8.45 AWAL's tiered offering gave it the potential to identify and upstream successful artists. For example, an AWAL investor presentation referred to AWAL's ability to '[✂]' and that [✂]'.[366]

8.46 As noted in paragraphs 8.23 to 8.26, we have seen very few SME documents which refer to a current meaningful threat to its frontline labels from AWAL generally or AWAL Recordings specifically. Nor is there reference to any future threat to SME's frontline labels, although we note that we would not necessarily expect to see evidence of an uncertain future threat in internal documents.

AWAL customer data

8.47 The Parties provided data on AWAL's customers. We have used this to understand the evolution of deal size and terms over time (see Appendix G for more detail).[367]

8.48 From this, we have established that both total and average expected revenues from deals won have increased substantially for AWAL Recordings:

(a) Total expected revenues increased from $[✂] in 2018 to $[✂] in 2020[368] – a [✂]% increase.

(b) Average expected revenues increased from $[✂] in 2018 to $[✂] in 2021[369] – a [✂]% increase.

8.49 The data also shows that the average advance and average marketing fund have increased over time for AWAL Recordings:

(a) Average advances increased from $[✂] in 2018 to $[✂] in 2021[370] – a [✂]% increase.

(b) Average marketing fund increased from $[✂] in 2018 to $[✂] in 2021[371] – an [✂]% increase.[372]

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[366] See Appendix E, paragraph 1, item 2.
[367] We note that there is some volatility in this data which is driven by a few big deals with one artist ([✂]) but excluding this artist from the dataset does not change the trends in the data.
[368] For the year to 1 October 2021 total expected revenues were $[✂].
[369] 2021 data is an incomplete year and covers deals to 1 October 2021.
[370] 2021 data is an incomplete year and covers deals to 1 October 2021.
[371] 2021 data is an incomplete year and covers deals to 1 October 2021.
[372] In the main party hearing AWAL said that the increase in average [✂] were because the 'market was getting more competitive' and that the type of deals AWAL was competing on 'were getting more expensive in the market because there were more people who were competing for these types of deals'. We consider that the simultaneous increase in the size of AWAL Recording deals implies that [✂].

8.50 Our view is that this data shows that, over this period, AWAL Recordings had been pursuing and winning more successful artists.

The sustainability of AWAL Recordings' business model

8.51 In our view, the evidence provided to us and discussed in Chapter 5 supports the view that, under Kobalt's ownership, AWAL would likely have continued to compete at the higher tiers of its service offering in a similar way as it had done prior to the Merger, offering a credible option, and for some artists an alternative to a major label deal, through AWAL Recordings and AWAL+.

8.52 While [✂] can reasonably be expected to have resulted in a slowing down of the considerable rate of growth that AWAL had experienced in the years 2018 to 2020, Kobalt's board documents show that [✂], but that these parts of the business were nonetheless expected to continue to grow. Its documents show that [✂], as Kobalt had identified this part of the business as a route to [✂]. For this reason, we consider that AWAL Recordings was likely to have at least maintained its competitive position in the counterfactual. We have not, however, been provided with any evidence that AWAL Recordings would most likely have exerted a materially different future competitive constraint to that at the time of the Merger.

8.53 There is some evidence that AWAL Recordings' business model, namely its short-term contracts (see paragraph 8.21), would have inherently affected its ability and hence the likelihood of it sustainably bridging the gap to the majors without changing its business model. This is because short-term contracts where AWAL does not retain ownership of copyright beyond this period:

(a) provide a short period over which investments can be recouped. This limits the amount which AWAL could invest and/or increases the risk that AWAL might not recoup its investment.

(b) mean that artists can switch more quickly to competitors.

8.54 Evidence from third parties also indicated that they see some limitations to AWAL's model. One competitor (Believe) said that AWAL's short deals, high advances and low margins made it attractive to artists. It said it felt its own longer duration deals and slightly higher margins were fairer as they allowed investment in supporting team services. It also said that if AWAL had not been acquired then AWAL would have to normalise its business model because it would not have been able to keep running as loss-making. IMPALA, however, submitted that it saw no reason why AWAL would not have grown its market share.[373]

8.55 Regarding AWAL's ability to retain its artists, a 2020 document supporting a The Orchard business plan notes that 'Kobalt seem to be struggling to keep their top artists'.[374] [One competitor] said that it had heard from an AWAL employee that AWAL had some difficulty in retaining artists and that AWAL's model was 'not without its problems'. A third party (Amazon Music) noted AWAL's 'proactive policy to let artists grow to a certain level so they can move onto bigger deals with majors or other independents if they wish – it is an incubator of talent'.

8.56 There is also some evidence that AWAL Recordings' offering, prior to the Merger, was becoming more like that of its competitors in A&L services, for example [✄] deal terms, which implies that AWAL is becoming less disruptive. A 2020 AWAL board document notes that AWAL is continuing '[✄]'.[375]

Our conclusion on the extent of potential competition (future and dynamic) between AWAL Recordings and SME

8.57 Given AWAL's plans to grow AWAL Recordings, we considered the extent of AWAL Recordings' future growth constraint it might be expected to exert on SME in the future.

8.58 Over the period 2018 to 2021, AWAL Recordings' customer data shows that it had been pursuing and winning more successful artists. We have concluded that, under Kobalt's ownership, AWAL would most likely have continued to impose a similar competitive constraint at the higher tiers of its service offering as it had done prior to the Merger, offering a credible option, and for some artists an alternative to a major label deal, through AWAL Recordings and AWAL+. However, AWAL Recordings' business model faced some challenges regarding its sustainability given the relatively short period over which AWAL Recordings was able to earn a return on its investments. As such, we consider that AWAL Recordings would not have offered a materially greater competitive constraint absent the Merger in either static or dynamic

[373] IMPALA submitted that it 'sees no reason however why AWAL would not have continued to build on the market share that it had already accrued, to grow it and to expand its business, and the purchase price paid by Sony suggests that it expected AWAL to grow. AWAL is already one of the strongest players in the market for mid-tier artists and this market is expected to grow further in the near future. It could also be expected that some of these artists would in future become established and boost further AWAL's higher tier service offering if the market were a genuine level playing field' (IMPALA response to the Provisional Findings, page 12).
[374] See Appendix D, paragraph 7.
[375] See Appendix E, paragraph 14.

terms. Indeed, there is some evidence that AWAL Recordings' offering was becoming more like that of its competitors.

Constraint from third party competitors

8.59 As noted in paragraph 8.36, we have concluded that the evidence shows that SME has adapted its model in response to A&L services providers. Despite AWAL's history of disruption, it appears from the evidence that AWAL was exercising a relatively limited competitive constraint on SME's frontline offerings pre-Merger. As noted in paragraphs 8.57 and 8.58, absent the Merger, AWAL had plans to grow AWAL Recordings which is the part of AWAL's business which most closely constrains SME and where a potential (future and dynamic) constraint on SME is most likely to arise. AWAL Recordings would therefore likely continue to impose some competitive constraint on SME absent the Merger now and in the future. However, we consider that this competitive constraint would not likely have materially increased absent the Merger. Therefore, there is some current and potential (future and dynamic) constraint which will be lost following the Merger. In the light of this, this section considers the strength of the constraint provided by third party competitors. We have focused on assessing the strength of their constraint particularly relative to the nature of the constraint on SME currently exerted by AWAL.[376] This section also considers how this constraint is expected to change as a result of expansion by existing competitors post-Merger (see paragraph 8.4). 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.

8.60 This section first considers the Parties' views on the constraint from third party competitors. Then it considers, in order of our assessment of the strength of their current constraint and their ability and incentive to exert a constraint on the Parties going forward: (a) independent artist services providers, (b) the majors' A&L arms, (c) independent labels and (d) distributors and DIY platforms. More detail about each competitor can be found in Appendix C.

[376] In response to the Provisional Findings, Sony submitted that our assessment should also 'account for the significant constraint that other record labels place on SME' (Sony response to the Provisional Findings, section II). We have considered the constraint exerted by competitors on the Parties (including SME and AWAL) post-Merger, but with a particular focus on the constraint for artists requiring high-touch services for whom AWAL and SME are potential alternatives.

The Parties' views

8.61 The Parties have submitted that they face considerable constraints from third parties. They note we identified 'at least 15 competing A&L services providers' in our Market Shares working paper, and that clients of AWAL and The Orchard identified thirty non-merger alternatives to the two Parties. The Parties also note in that submission that all 15 A&L providers identified in the Market Shares working paper, have market shares of a similar order of magnitude to AWAL and many have achieved much higher growth rates.[377] Regarding the deal documents (see Appendix E: AWAL's internal documents for more detail), they have also submitted that these record individuals' subjective views on who else might be competing for the deal and the fact that any particular company is not mentioned does not mean that that company was not in fact competing for the client.

8.62 The Parties have also submitted that a number of A&L services providers have credible expansion plans. As regards these A&L services providers, we have taken their expansion plans into account in our assessment in paragraphs 8.64 to 8.121. However, other A&L services providers that are growing from a very low level are unlikely to exert a timely and sufficient constraint to the Parties post-Merger and are not considered in further detail.

8.63 The Parties also submitted that there were a large number of A&L services providers who had more streams than AWAL in the OCC's weekly top 100 chart in 2021 and who would exert a constraint on AWAL in the future. They noted there were nine A&L services providers with higher stream shares than AWAL in the top 200 chart, and that AWAL's share in the top 100 and 200 charts was significantly below that of many of its rivals. The Parties also noted that independent labels that distribute their music directly (rather than through an A&L services provider) were not captured by this chart, but in their view also represented another source of competition (particularly for the majors). However, as noted in paragraph 8.20 shares for smaller providers are volatile and a large part of the competition between the majors and A&L services providers occurs outside the top 100.

Independent artist services providers

8.64 This section considers the strength of the constraint from other independent artist services providers and their ability and incentive to exert a constraint on the Parties within the next two to three years. Given that this theory of harm

[377] We note that the high growth rates of some of these providers represent the very small base that they started from – a small number of additional deals can lead to very large growth rates when a company is starting out.

relates to artists who require high-touch support, this section focuses on artist services as opposed to label services or distribution.[378]

Believe

8.65 There is evidence that Believe is currently a close competitor to AWAL and offers non-traditional contracts and high-touch services to artists:

(a) Believe is a global and established provider of A&L services with a material UK presence. Believe operates a multi-tier service structure comparable to that of AWAL's. This structure includes an artist services offering similar to AWAL Recordings and it offers advances, with full retention of copyright.[379] However, we note that the terms it offers to upper-mid service tier artists through its in-house record labels are more similar to those of the majors than AWAL's ([✀]).

(b) Believe appears relatively frequently in AWAL's internal documents albeit as one of various competitors. Believe is not explicitly mentioned in AWAL's deal documents,[380] but TuneCore (owned by Believe) is mentioned frequently ([✀] times).[381] Customers frequently recognised Believe as a strong alternative to AWAL (see paragraph 7.46).

(c) Believe's internal documents frequently mention AWAL as a close competitor (see paragraph 7.96).

8.66 In SME's documents, Believe was mentioned among '[n]ew entrants and disruptors' who are 'threatening [the] traditional music model' in SME's mid-range plan document from 2018.[382] Believe was listed under 'label distribution' among 'competitive threats' in an SME 2020 pre-mid-range plan/budget meeting slide pack.[383]

8.67 We note, however, that although Believe has a UK presence and UK staff, it has a stronger presence in France and Germany.

8.68 There is evidence that Believe will continue to grow and exert a constraint on the Parties, particularly AWAL. Believe has a material and growing market share (see paragraphs 6.25 to 6.30). Believe's internal documents detail several external and internal growth strategies and forecast substantial

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[378] In addition, artists may be able to access label services through a manager or by establishing their own small label.
[379] Appendix C, paragraphs 18 to 20.
[380] AWAL's deal documents are created for [✀] deals and as such we consider them to be particularly relevant for this theory of harm. See Appendix E for more detail on AWAL's deal documents.
[381] AWAL told us that it often used the names of Believe and TuneCore interchangeably in its internal documents.
[382] See Appendix D, paragraph 18. See also paragraph 8.10.
[383] See Appendix D, paragraph 9. See also paragraph 8.24.

revenue growth including from [✂]. Believe stated that that it plans to [✂] its UK market share by 2023 and that its recent IPO has provided capital for further investment in the UK.[384]

8.69 Taking the evidence in the round, our view is that Believe currently exerts at least as strong a constraint on SME as AWAL exerts on SME, offering non-traditional contracts and high-touch services to artists. On account of its documented expansion plans, past growth, market presence and capabilities our view is that Believe would likely exert an increased level of constraint on the Parties post-Merger in the next two to three years.

Empire

8.70 There is some evidence that Empire is currently a competitor to AWAL and offers non-traditional contracts and high-touch services to artists:

(a) Empire is a US-based independent distributor, label and music publisher. It operates globally and has an A&R presence in the UK. Empire offers 'record' deals that provide additional services to artists, more akin to a label, but has not taken a copyright interest in the music of its artists.[385]

(b) One of AWAL's documents positioned Empire and AWAL within the same segment, however AWAL's deal documents do not mention Empire. One customer recognised Empire as an alternative to AWAL as a strong competitor (see paragraph 7.101).

8.71 Empire considered that it competes more closely with the major labels than AWAL.[386] Given this, we infer that Empire is currently a close competitor of AWAL as regards the choices available for artists choosing between the majors' frontline label business models and artist services providers.

8.72 In SME's documents, Empire was listed under 'artist services' among 'competitive threats' in an SME 2020 pre-mid-range plan/budget meeting slide pack.[387]

8.73 There is evidence that Empire will continue to grow and exert a constraint on the Parties. Empire has a material and growing market share (see

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[384] Appendix C, paragraphs 26 to 27.
[385] Appendix C, paragraphs 28 to 29.
[386] In response to the Provisional Findings, Sony submitted that this shows that 'Empire competes more closely with SME than AWAL. Yet the [Provisional Findings] conclude that AWAL competes more closely with SME than Empire does, a finding that is inconsistent with Empire's own evidence' (Sony response to the Provisional Findings, paragraph 11). We consider that Empire's comments relate primarily to its label offering, which is more similar to Sony's traditional offering than to AWAL's offering. As noted in paragraph 8.59, we have focused on the strength of competitors' constraint relative to the nature of the constraint on SME currently exerted by AWAL.
[387] See Appendix D, paragraph 9. See also paragraph 8.24.

paragraphs 6.25 to 6.30). Empire stated that it intends to focus on its deals that [✂], and expand its presence in other music genres (albeit these are genres which are not presently the focus of AWAL's business). However, its non-US investment is focussing on markets such as the Middle East and Africa, more so than the UK (though it remains committed to the UK).[388]

8.74 Taking the evidence in the round, our view is that Empire currently exerts almost as strong a constraint on SME as AWAL exerts on SME, offering non-traditional contracts and high-touch services to artists. On account of its intentions, past growth and capabilities our view is that Empire would likely continue to exert a similar level of constraint on the Parties post-Merger in the next two to three years, given its investment is less focused on the UK.

PIAS

8.75 PIAS operates globally and signs UK artists. Neither of PIAS' businesses are particularly similar to AWAL Recordings – PIAS Label Group offers exclusive, long-term contracts, while Integral is a label services provider.[389] Of the two, however, we consider that PIAS Label Group is most like AWAL Recordings but we note that there are substantial differences in rights ownership and term length.

8.76 There is some evidence that PIAS is currently a competitor to AWAL and offers non-traditional contracts and high-touch services to artists. PIAS occasionally appears in AWAL's internal documents (see paragraph 7.105). PIAS was infrequently ([✂]) mentioned in AWAL's deal documents. PIAS was mentioned as a medium alternative to AWAL a couple of times by customers (see paragraph 7.105). PIAS considered that it competes with AWAL.[390]

8.77 PIAS noted that if an artist 'graduated through AWAL' they could join a major or PIAS. We consider this to imply that PIAS is an alternative option for artists requiring high-touch services. PIAS also said that once artists are at a certain level, they are mobile, and want different things, and there is 'lots of competition' for them from the majors, PIAS and others.

8.78 PIAS had a material market share in 2021 however its share has been declining since 2016 (see paragraphs 6.25 to 6.30). We note that PIAS stated that its growth in market share is based on continued development of its

[388] Appendix C, paragraph 36.
[389] Appendix C, paragraph 37.
[390] Appendix C, paragraph 40.

services and continued expansion into an ever-increasing diversity of rights and genre areas.[391]

8.79 Taking the evidence in the round, our view is that PIAS currently exerts a lower constraint on SME than AWAL exerts on SME, offering non-traditional contracts and high-touch services to artists. We consider that its historical performance casts doubt over its ability to continue to provide the same level of constraint on the Parties over the next two to three years and it would likely continue to exert a similar or declining level of constraint on the Parties post-Merger in the next two to three years.

Other independent artist services providers

8.80 As noted in paragraph 7.142, there are a number of other independent A&L services providers. Some of these provide artist services, but we note their small size and that they do not offer the same level of services as AWAL Recordings. For example, [✂] does not offer radio promotion or creative support and [✂] said while that it may offer an advance on a year's streaming royalties, a competitor such as AWAL may offer 3x years' income plus this amount.

8.81 Given the evidence on other independent artist services providers' current capabilities and focus, as well as high barriers to entry in high-touch artist services (see paragraph 8.84), our view is that they are unlikely to have the ability to provide high-touch services to artists within the next two to three years, such that they are a significant constraint, relative to AWAL, on SME post-Merger.

8.82 Therefore, we have placed very limited weight on the current and ongoing constraint on the Parties from these providers.

Our conclusion on the constraint from independent artist services providers

8.83 We acknowledge that Believe, Empire and PIAS typically offer longer term contracts than AWAL and that they may have a slightly different focus to AWAL in terms of genre or presence in the UK, and may not offer services at the level of the majors' frontline offerings. However, taking the evidence in the round, we have concluded that Believe, Empire and PIAS collectively exert at least as strong a constraint on SME as AWAL exerts on SME, by offering non-traditional contracts and high-touch services to artists and would likely constrain the Parties post-Merger in the next two to three years.

[391] Appendix C, paragraph 44.

Majors' A&L arms

8.84 As noted in paragraph 2.36), 'traditional' record label deals include long periods of copyright ownership and pay significantly lower royalties to artists than those paid by A&L services providers. They also include large upfront investment in the artist. As noted in paragraph 2.45, majors typically accept higher levels of risk than A&L services providers. The majors' 'traditional' record label model appears to be very successful, as it drives a large percentage of their revenues, relative to their A&L arms. For example, as noted in Chapter 3, in FY21, SME generated total turnover of approximately $[✂][392] compared to The Orchard's total turnover of approximately $[✂]. In FY21, Sony's revenues grew by $0.6 billion (22%) from recorded music streaming.[393] Warner stated that ADA will potentially be less profitable than the frontline record labels, whereas the frontline model is riskier but margin potential is higher. The majors' 'traditional' record label model's success is also evidenced by the majors' persistently high market shares (see paragraph 2.34). These persistently high market shares also provide evidence of high barriers to entry and expansion and indicate that A&L services providers face considerable challenges in competing with the majors to represent artists requiring high-touch services.

8.85 This is consistent with some of AWAL's internal documents, which show that it considered there to be [✂]. For example, in a document prepared as part of a management presentation for Kobalt (and in preparation for external fundraising), AWAL stated that it had [✂].[394] The speaking notes to the presentation also stated that '[✂]'.[395]

8.86 The same document also discussed AWAL's '[✂]' and stated that '[✂]'. The speaking notes to the presentation added that '[✂]'.[396]

8.87 The views of third parties received during our inquiry also indicate the existence of high barriers to entry and expansion in the supply of high-touch services to artists. Third parties generally told us that new entrants and credible expansion candidates required a strong and trusted brand to attract high-potential artists, the requisite knowhow, capabilities and relationships to market them successfully, economies of scale to negotiate sufficiently

[392] Note that these figures do not align with those presented in paragraph 3.5. Total revenue from recorded music as cited in paragraph 3.5 includes revenue from Sony Music Entertainment Japan in addition to Sony Music Entertainment.
[393] Sony Form 20-F (Annual Report) for the year ended March 31, 2021, submitted to the US Securities and Exchanges Commission, page 35. Revenue converted from Japanese Yen to US dollar figures at a rate of 1 USD = 109.49 Yen.
[394] See Appendix E, paragraph 2, item 3.
[395] See Appendix E, paragraph 2, item 3.
[396] See Appendix E, paragraph 2, item 1.

attractive terms with DSPs and access to large amounts of capital to fund artist advances and other A&R costs.[397]

8.88 In addition to the above, we received some submissions which indicated that the majors benefit from additional, and difficult to replicate, advantages as a result of their scale and historic positions in the music industry. For example, the major labels each own the rights to vast amounts of catalogue music from historically successful acts (and continue to make large-scale catalogue acquisitions[398]) and operate their own well-established music publishing arms. One third party ([✂]) told us that cross-ownership of vast music publishing operations allows the majors to leverage their scale in commercial negotiations in a way that is not open to smaller players in the music industry (eg to A&L services providers). The third party told us that this scale can, for example, be leveraged to exert commercial pressure in negotiations [✂]. Depending on the result of these commercial negotiations, the majors may be able to offer more favourable terms to artists than would non-majors.

8.89 In addition, we understand that the majors are able to utilise the (significant) revenues generated by their music publishing businesses, together with the revenues generated by their catalogue of music assets to continually re-invest in artist advances, A&R costs and music asset acquisitions at a scale that would be unachievable for non-majors.[399] In this way, the financial resources of the majors allow them not only to pay out considerable artist advances, but also to pool the risk of those investments over a larger number of deals, in a manner that is difficult for non-majors to replicate.

8.90 We noted in paragraphs 8.6 to 8.12, however, that over recent years SME has offered better terms to its artists in terms of royalty rates and rights ownership. In our view, this has been driven, at least in part, by the availability of artist and label services deals as alternatives to 'traditional' record label deals.

8.91 We consider that the majors likely have an incentive to protect their profitable 'traditional' record label deals against any further attrition in terms of royalty

[397] For example, [✂] told us that providing 'full-service agreements' required A&R expertise and 'the right contacts and relationships' to successfully market and promote artists. ADA told us that 'the strength of the relationship with the independent label/artist influences choice' and that 'personal relationships sometimes outweigh the perceived benefits of linking with any particular label'. The Independent Music Companies Association, IMPALA (a pan-European body which represents independent labels and distributors) told us that there was a 'chicken and egg' problem in expanding and achieving scale. IMPALA told us that providers needed to build a clientele of successful artists to secure good deals with DSPs, but that an established relationship with DSPs was required to attract artists. It added that successful A&L providers needed significant commitments to resourcing, both financially (to fund upfront advances) and in terms of personnel and knowhow to attract artists.
[398] See for example: Music Business Worldwide, 'Music's first $500m artist catalog deal finally arrives as Bruce Springsteen sells rights to Sony'; December 2021. Music Business Worldwide, 'Warner buys David Bowie song catalog for $250m+'; January 2022.
[399] See for example: Music Business Worldwide: 'Universal Music Group spent nearly $3 billion on catalog acquisitions and artist advances last year'; July 2021.

rates and rights ownership. This is likely to be particularly relevant for artists requiring high-touch services where a major label is likely to prefer to offer the more profitable ‘traditional’ record label deal rather than a shorter, less profitable A&L contract. Indeed, a document from Caroline (now Virgin) shows that one of its strategic aims was [✂].[400]

8.92 Unlike independent artist services providers, when competing for artists requiring high-touch services the majors have an additional consideration in terms of the risk of cannibalising their more profitable business model through further blurring the distinction between A&L contracts and ‘traditional’ record label deals. Blurring this distinction could ultimately have a substantial impact on the majors’ core record label business, affecting both their ability to sign new artists on ‘traditional’ record label deals and potentially enabling their existing artists to renegotiate their contracts on better terms.[401] A Sony document acknowledges this, it states ‘[✂]’.[402] In the main party hearing, regarding this document, Sony said it is ‘[✂]’, therefore there is a ‘[✂]’. It also said that it is ‘[✂].’

8.93 Our view therefore is that the major owned A&L services providers likely have somewhat dampened incentives to compete in a way which could contribute to bridging the gap between A&L services providers and the majors due to the potential impact on the overall profitability of the major (including both the frontline labels and the A&L arms). However, to the extent that there is competition from independent A&L services providers for artists requiring high-touch services, the major’s A&L arms likely have an incentive to serve these artists, if they cannot upstream them to one of their frontline labels, rather than letting them be served by a competitor.

8.94 Therefore, our view is that there is some current constraint on the Parties from the major owned A&L services providers. The remainder of this section discusses the specific constraint (current and ongoing) from each in more detail.

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400 [✂]

401 We understand that the terms of specific contracts between providers and artists are confidential, however the broad types of offer are relatively well known. Moreover, the label to which an artist is signed is common knowledge – so artists and their representatives would quickly identify if the majors’ A&L arms offered deals to high-range artists of the type previously only served by one of its frontline labels.

402 See Appendix D, paragraph 16, item 2.

ADA

8.95 There is evidence that ADA is currently a competitor to AWAL for artist services:

(a) Although most of ADA's revenues were from label services, [✄]% of its FY21 revenues were from artist services. ADA offers short-term agreements where artists retain full ownership of the copyright to their music and offers optional additional services including marketing.[403]

(b) ADA appeared relatively frequently in AWAL's internal documents but was infrequently ([✄]) mentioned in AWAL's deal documents. Customers frequently recognised ADA as a strong alternative to AWAL (see paragraph 7.82).[404]

(c) [✄].[405]

8.96 In SME's documents, ADA was listed under 'label distribution' among 'competitive threats' in an SME 2020 pre-mid-range plan/budget meeting slide pack.[406] [✄].

8.97 We have limited evidence on the extent to which ADA is specifically targeting artists requiring high-touch services.

8.98 There is some evidence that ADA will continue to grow, albeit not rapidly, and exert a constraint on the Parties. ADA has a material and growing market share and growing revenues (both globally and in the UK) (see paragraphs 6.25 to 6.30). Between 2019 and 2021, ADA's UK signed artist services revenue in the UK increased from £[✄] million to £[✄] million.[407] However [✄].[408]

8.99 Taking the evidence in the round, our view is that ADA currently exerts a lower constraint on SME than AWAL exerts on SME, offering non-traditional contracts but it is not clear the extent to which this extends to artists requiring high-touch services. We consider that ADA would likely continue to exert a similar level of constraint on the Parties post-Merger in the next two to three years.

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[403] Appendix C, paragraphs 52 to 53.
[404] Although ADA's artists services offering is primarily label services, some AWAL artists considered it to be an alternative option for them. This may be because these AWAL artists are aware of ADA's artist services offering or because the artists could access ADA's label services by other means, for example, through a manager or by establishing their own small label.
[405] Appendix C, paragraph 54.
[406] See Appendix D, paragraph 9. See also paragraph 8.24.
[407] Appendix C, paragraph 57.
[408] Appendix C, paragraph 58.

Virgin

8.100 There is evidence that Virgin is currently a competitor to AWAL for artist services:

(a) Virgin is active globally and has a direct presence in the UK. [✂] of Virgin's revenues were from artist services. Virgin offers agreements for three to five years where artists [✂] of the copyright to their recorded music.[409]

(b) Virgin infrequently appeared in AWAL's internal documents but frequently appeared in AWAL's deal documents ([✂] times). Customers frequently recognised Virgin as a strong alternative to AWAL (see paragraph 7.86).

(c) Virgin's internal documents identify AWAL as [✂].[410]

(d) A Virgin internal document identifies a 'clear opportunity' for Virgin to be '[✂]' among its competitors. [✂].

8.101 In SME's documents, Caroline (now Virgin) was listed under 'label distribution' among 'competitive threats' in an SME 2020 pre-mid-range plan/budget meeting slide pack.[411] Universal has since relaunched Caroline as Virgin Music Label & Artist Services, serving independent artists and labels.[412]

8.102 There is evidence that Virgin will continue to grow and exert a constraint on the Parties. Virgin has a material and growing market share (see paragraphs 6.25 to 6.30). We consider Virgin's internal documents [✂]. Virgin's expansion plans include focusing on [✂]. Virgin told us that it is '[✂]'.[413]

8.103 Taking the evidence in the round, our view is that Virgin currently exerts at least as strong a constraint on SME as AWAL exerts on SME, offering non-traditional contracts and high-touch services to artists. On account of its documented expansion plans, its past growth, market presence and capabilities our view is that it would likely exert an increased level of constraint on the Parties post-Merger in the next two to three years.

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[409] Appendix C, paragraphs 59 to 61.
[410] Appendix C, paragraph 62.
[411] See Appendix D, paragraph 9. See also paragraph 8.24.
[412] See Music Business Worldwide, 'Universal Launches Virgin Music Label & Artist Services Around the World, Rebranding Caroline and Caroline International', 18 February 2021.
[413] Appendix C, paragraphs 66 to 67.

Our conclusion on the constraint from the majors' A&L arms

8.104 As noted in paragraphs 8.93 and 8.94, our view is that the major owned A&L services providers likely have somewhat dampened incentives to compete in a way which could contribute to bridging the gap between A&L services providers and the majors. However, we consider that there is some current and ongoing constraint on the Parties from the non-traditional contracts and high-touch services offering of major owned A&L services providers. In particular, we consider that if they cannot upstream artists requiring high-touch services to one of their frontline labels and to the extent that there is competition for these artists from independent A&L services providers, the major's A&L arms likely have an incentive to serve them rather than letting them be served by a competitor. We have concluded that ADA currently exerts a lower constraint on SME than AWAL exerts on SME and it is not clear the extent to which ADA serves artists requiring high-touch services. It is likely that ADA would continue to exert a similar level of constraint on the Parties in the next two to three years. We have concluded that Virgin currently exerts at least as strong a constraint on SME as AWAL exerts on SME and would likely exert an increased level of constraint on the Parties in the next two to three years.

Independent labels

8.105 Like the majors, the larger independent labels typically provide high-service tier A&R services and in return offer artists more 'traditional' record deals.[414] 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 considering offering deals with better terms. For example, one independent label (Beggars) told us that although it 'is agreeing to different types of deals, [it] will always attempt to gain the maximum rights period it possibly can.' We note that independent labels offering 'traditional' record deals have been providing music distribution and artist services for many decades, but have not substantially disrupted the majors' offerings.

8.106 The remainder of this section discusses the specific constraint (current and ongoing) from independent labels in more detail, focusing on BMG and Beggars given their importance in the UK.

[414] As noted in paragraph 2.40, independent labels vary significantly in size and a considerable number represent only one or a very few artists.

BMG

8.107 There is some evidence that BMG is currently a competitor to AWAL and offers non-traditional contracts and high-touch services to artists:

(a) BMG is active globally and has a direct UK presence. As well as 'traditional' record deals, BMG offers shorter term artist services deals. One third party label, said that BMG offers services deals as its 'main model', as opposed to 'traditional' record deals.[415]

(b) BMG was frequently mentioned ([✂] times) in AWAL's deal documents. BMG was mentioned by three of AWAL's customers as a medium alternative to AWAL (see paragraph 7.116).

8.108 BMG considered that it competes more closely with the major labels than AWAL.[416] Given this, we infer that BMG is currently a close competitor of AWAL as regards the choices available for artists choosing between the majors' frontline label business models and artist services providers.

8.109 We have not been provided with any evidence of BMG's expansion plans with respect to artist services. On account of its material and growing stream share in 2021,[417] past revenue growth, and established presence we infer that it likely has the ability and incentive to expand its artist services offering at least in line with market growth.

8.110 Our view is that, given the types of contract it offers, BMG is on the boundary between an A&L services provider and an independent label. Taking the evidence in the round, our view is that BMG currently exerts at least as strong a constraint on SME as AWAL exerts on SME, offering non-traditional contracts and high-touch services to artists and would likely continue to exert a similar level of constraint on the Parties post-Merger in the next two to three years.

Beggars

8.111 There is some evidence that Beggars is currently a competitor to AWAL and offers non-traditional contracts and high-touch services to artists:

(a) As well as 'traditional' record deals, Beggars offers shorter term artist services deals, where artists retain their copyright. However, it also said that it seeks the maximum rights period in contracts and its business

[415] Appendix C, paragraphs 75 to 76.
[416] Appendix C, paragraphs 77 to 78.
[417] Appendix C, paragraph 79.

model relies on longer-term contracts in order to cover its overheads and provide risk finance to artists.[418]

(b) Beggars was not mentioned in AWAL's deal documents. Beggars was not mentioned by any of AWAL or The Orchard's customers as an alternative to AWAL or The Orchard respectively (see paragraph 7.121).

(c) Beggars stated that it competes with AWAL for artists and gave an example of competing unsuccessfully with AWAL to sign a high-profile artist.[419]

8.112 Beggars is the largest independent label in the UK and represented a material, but declining share of all music streamed in the UK in 2021 (see paragraphs 6.25 to 6.30).

8.113 We have not been provided with any evidence of Beggars' expansion plans. In view of its traditional offering and declining market share, we consider that it would not have a strong incentive (see paragraph 8.105) to materially expand its artist services offering.

8.114 Taking the evidence in the round, our view is that Beggars currently exerts a much weaker constraint on SME than AWAL exerts on SME, offering high-touch services to artists, but limited non-traditional contracts and would likely continue to exert a similar or declining level of constraint on the Parties post-Merger in the next two to three years.

Other independent labels

8.115 There are a large number of other independent labels that have historically accounted for a small share of the distribution of recorded music. As noted in paragraph 8.105, we understand that the larger independent labels typically offer artists more 'traditional' record deals, and some provide artist services type contracts. However, these independent labels had low 2021 UK streaming market shares ([0–5%] or less). In addition, we have not been provided with evidence of the extent to which they are offering A&L type contracts.

8.116 We also note that other independent labels were infrequently mentioned by customers and rarely appeared in internal documents assessing competition for AWAL and The Orchard, including AWAL's deal documents.

418 Appendix C, paragraph 80.
419 Appendix C, paragraph 80.

8.117 Given the small size of other independent labels, a lack of evidence of their current constraint, particularly on AWAL, and, in the case of the larger of them, their likely preference for 'traditional' record deals (see paragraph 8.105), there is limited evidence of a current and ongoing constraint on the Parties from other independent label providers.

Our conclusion on the constraint from independent labels

8.118 In view of the above, we have concluded as follows. As noted in paragraph 8.105, the larger independent labels likely have an incentive to first offer 'traditional' deals to artists requiring high-touch services before considering offering deals with better terms. The largest independent labels in the UK (BMG and Beggars) exert some current and ongoing constraint on the Parties. 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 the next two to three years. Beggars currently exerts a much weaker constraint on SME than AWAL exerts on SME and would likely continue to exert a similar or declining level of constraint on the Parties in the next two to three years. There is limited evidence of a current and likely ongoing constraint on the Parties from other, smaller, independent label providers.

Distributors and DIY platforms

8.119 As noted in paragraphs 2.49 to 2.52, 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.[420] As such, our view is that they do not currently exert a constraint on the Parties on a standalone basis without additional support from other sources. However, we note that some artists have made it into the top 100 or top 200 using these types of service,[421] but this typically only happens for artists if they have access to expertise from elsewhere and/or a strong team around them. Our view is that DIY platforms are not likely to be a close alternative to AWAL for most artists. Regarding the ability and incentive of distributors and DIY platforms to exert a stronger ongoing constraint on the Parties within the next two to three years, we note the high barriers to entry and expansion discussed in paragraphs 8.84 to 8.88 and therefore have

[420] As noted in paragraph 2.49, Sony also told us that DIY services providers offer marketing and promotional services to artists. We understand these offerings are typically more basic than those offered by A&L services providers. For example, some DIY services providers offer automatic marketing tools and tools for artists to develop their own webpages, rather than support for multi-media marketing campaigns and promotions.
[421] For example, artists using Amuse, Distrokid and DITTO featured in the Top 200 by streaming share in 2021.

doubts about their ability to exert a significant constraint post-Merger in that time frame.

Our conclusion on third party constraints

8.120 As noted in paragraph 8.59, our view is that the evidence shows that SME has adapted its model in response to A&L services providers. Despite AWAL's history of disruption, the evidence shows that AWAL is exercising a relatively limited competitive constraint on SME's frontline offerings. Absent the Merger, AWAL had plans to grow AWAL Recordings which is the part of AWAL's business which most closely constrains SME and where a constraint on SME is most likely to arise in the future. Although we consider that the competitive constraint from AWAL Recordings would not likely have materially increased absent the Merger, there is some current and potential (future and dynamic) constraint which will be lost following the Merger.

8.121 However, we have concluded that, taken in the round, the constraint from AWAL which will be lost is not significant because the current and ongoing constraints from third parties 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.[422] In particular, the evidence shows that the independent artist services providers Believe, Empire and PIAS collectively exert at least as strong a constraint on SME as AWAL exerts, by offering non-traditional contracts and high-touch services to artists and would likely continue to constrain the Parties post-Merger in the next two to three years. Although the major owned A&L services providers likely have somewhat dampened incentives to compete, there is some current and ongoing constraint on the Parties from the non-traditional contracts and high-touch services offering of major owned A&L services providers. In addition, the largest independent labels in the UK (BMG and Beggars) exert some current and ongoing constraint on the Parties.

Impact of consolidation on the DSP-facing side

8.122 As discussed in paragraphs 6.20 to 6.24, music distributors, in addition to competing to acquire repertoire and supply services to artists and labels, also compete in the provision of music to DSPs. Some third parties expressed concerns that the provision of music to DSPs is already concentrated with the majors each holding a substantial share, such that any increment in market share to one of the majors could lessen competition. For the reasons we set out in Chapter 6, we have not investigated a separate theory of harm relating

[422] MAGs, paragraph 2.7.

to DSPs as any Merger-specific harm would arise from a reduction in competition in the provision of services to artists.

8.123 This section, however, considers whether any possible impact of the Merger on the relationships of providers with DSPs could affect competition in the supply of services to artists.

8.124 The main concerns raised in relation to DSPs were:

(a) That the loss of AWAL's repertoire could weaken Merlin's negotiating position and therefore weaken it as an option for independents which in turn could reduce the ability of independent providers to compete for artists.[423]

(b) That the addition of AWAL's repertoire could consolidate Sony's bargaining power vis-à-vis DSPs and increase its ability to insist on restrictive clauses which, we note, may disadvantage independent providers relative to Sony, thereby impacting their ability to compete for artists.[424]

8.125 We note that AWAL [✂]. IMPALA submitted that AWAL was a member of Merlin and its loss was 'likely to affect Merlin's negotiating position in its licensing activities.'[425] Even if the Merger slightly weakened Merlin as an option for independents, this would not have a significant effect on competition as several of the main alternatives to AWAL for artists requiring high-touch services are not Merlin members (specifically Believe, Empire and BMG) and would not be affected by any worsening of Merlin's terms.

8.126 In relation to the increment to Sony's bargaining power, as discussed in Chapter 6, competition between providers is primarily to attract artists in order to be able to offer an attractive repertoire to DSPs. Since we have concluded that in the supply of high-touch services to artists the remaining constraints will be sufficient to ensure that rivalry will continue to discipline the commercial behaviour of the Parties post-Merger, we consider that the Merger will not have a material impact on competition on the DSP side and that there

[423] For example: [✂]; Beggars said that Sony is able to do deals with DSPs based on its scale, hence acquisitions make a difference because even if each increment is small it still adds up. Merlin has been set up to represent independent labels to do deals with DSPs and with AWAL leaving, Merlin's scale is lessening significantly which is an issue for Beggars.
[424] For example; [✂] said AWAL is an important licensor, especially for new content in the UK [✂]; [✂] and Sony's streams share and content increase Sony's bargaining power. [✂] also said that SME's control over catalogue, music repertoires, ownership of publishers and acquisitions of competitors like AWAL gives it outsized negotiating power [✂].
[425] IMPALA response to the Provisional Findings, page 7.

will be no material change in Sony's bargaining position and hence in the ability of competing distributors to attract artists.

8.127 Given this, we have concluded that any loss of competition with respect to artists would not be exacerbated by a loss of competition with respect to DSPs, such that there would be a substantial lessening of competition.

Conclusion

8.128 We have concluded as follows. The evidence shows that SME has adapted its model in response to A&L services providers. Despite AWAL's history of disruption, the evidence shows that AWAL is exercising a relatively limited competitive constraint on SME's frontline offerings.

8.129 Under Kobalt's ownership, AWAL would most likely have continued to compete at the higher tiers of its service offering in a similar way as it had done prior to the Merger, offering a credible option, and for some artists an alternative to a major label deal, through AWAL Recordings and AWAL+. We consider, however, that AWAL Recordings' business model faced some challenges regarding its sustainability given the short period over which AWAL Recordings is able to earn a return on its investments. 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, for example [✂].

8.130 As such, there is some current and potential (future and dynamic) constraint which will be lost following the Merger.

8.131 However, we have concluded that, in the round, the constraint from AWAL which will be lost is not significant because the current and ongoing constraints from third parties 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.

8.132 In view of our assessment above, we have decided that the Merger has not resulted, and may not be expected to result, in an SLC within any market or markets in the UK as a result of a loss of current and/or potential (future and dynamic) competition in the supply of high-touch services to artists.

9. Conclusions

9.1 As a result of our assessment, we have decided 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 UK 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.