MUSIC AND STREAMING MARKET STUDY

UNIVERSAL MUSIC GROUP'S RESPONSE TO THE CMA'S UPDATE PAPER DATED 26 JULY 2022

19 AUGUST 2022

1. Introduction

1.1 Universal Music Group (***UMG***) welcomes the provisional decision of the CMA in its Update Paper not to make a Market Investigation Reference (***MIR***). It recognises the thorough and evidence-based review conducted by the CMA, as well as the constructive engagement throughout the first half of the market study.

1.2 Many of the findings in the Update Paper are consistent both with the facts and the evidence already presented by UMG to the CMA in the first half of the market study, and with UMG's experience of the industry – in particular, the provisional findings and conclusions that:

(a) the music industry's health and revenues have only recently started to recover from the damage inflicted by years of piracy;

(b) the music streaming market is delivering good outcomes for consumers (with universal access to music either at no cost or at a subscription cost that has been declining in real terms for several years);

(c) labels face intense competition from multiple parties to attract, sign and retain artists; and

(d) the "*major*" record labels are not making sustained and substantial excess profits.

1.3 This submission is made to support and provide additional evidence to assist the CMA's provisional decision not to make an MIR. It is organised as follows:

(a) Section 2 contains further evidence on key findings that support the CMA's provisional decision not to make an MIR – in particular, where the CMA has indicated that it has limited data and/or has only felt able at this stage to express a more tentative view.

(b) Section 3 contains further evidence in response to potential competition concerns that the CMA has provisionally identified – concerns that UMG believes may be dismissed as either purely hypothetical or misconceived when the additional evidence is taken into account.

1.4 UMG looks forward to further engagement with the CMA in the remainder of the market study to help support the CMA in cementing its provisional conclusions (including on the main open issue identified in the Update Paper, UUC services).

2. Further evidence in support of the CMA's provisional findings

2.1 UMG welcomes and agrees with two of the CMA's central findings– namely, that:

(a) the majors are not excessively profitable; and

(b) the majors do not favour their recording businesses over their publishing businesses.

2.2 UMG notes that the first of these findings is expressed at paragraph 3.31 of the Update Paper as being made on the basis of evidence that has "*limitations*" due to data availability[1] and because accounting treatment makes definitive findings difficult. The second of these findings builds on a provisional conclusion that the majors do not have undue influence within the collective management organisations (***CMOs***), a point rejected by the CMA (and with which UMG agrees) – but in part because the CMA has "*not received any evidence that clearly support these assertions*"[2].

2.3 Accordingly, UMG provides additional evidence in this response that should enable the CMA to be more definitive about these two important points, which is set out under parts (a) and (b) below.

(a) **The majors are not excessively profitable**

2.4 UMG welcomes the CMA's provisional conclusion that its analysis of the profitability of the recording businesses of the majors "*does not indicate that profits are substantially and persistently in excess of the cost of capital*" (paragraph 3.32 of the Update Paper). As the CMA recognises in the Update Paper, UMG's profitability levels (and, as the Update Paper suggests, the profitability of the other major companies) have remained stable, at moderate levels, for a long period of time. This is a strong indicator of a well-functioning competitive market, and consistent with UMG's own experience that the competitive pressure it faces in the market today is stronger than ever.

2.5 UMG nevertheless takes note that the CMA has at this stage noted that there are "*limitations*" to its assessment due to data availability and treatment (e.g., due to differences in accounting practices across the majors). Financial analysis of profitability is inherently complex and such limitations are, to some extent, inevitable. However, UMG considers that the extensive evidence already provided to the CMA should, taken in the round, enable it to conclude with a high degree of confidence that the provisional profitability analysis is a strong indicator of a well-functioning and competitive market for signing artists in the UK, irrespective of any potential data limitations – and UMG would urge the CMA to make this clear in its final report.

2.6 In particular, the CMA can have a high degree of confidence in its conclusions on profitability, because the limitations to the analysis tend to *overestimate* economic profitability. Specifically, UMG notes the following elements in this response:

(a) UK margins have remained broadly flat at moderate levels – supporting the CMA's provisional conclusion on excess profits;

(b) the Update Paper's simple accounting approach overstates UMG's economic profitability; and

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1 Update Paper, para. 3.31

2 Update Paper, para. 5.117

(c) certain cost savings, which may appear to increase profitability, are time limited.

2.7 Further details are provided in the remainder of this sub-section.

(i) *UK margins have remained broadly flat at moderate levels – supporting the CMA's provisional conclusion on excess profits*

2.8 As the CMA has observed, the music industry was heavily affected by piracy from the mid-2000s until the mid-2010s. The industry has since entered a recovery phase and recently returned to growth, with revenues recovering significantly since 2015[3] in nominal terms, largely driven by digitisation and the rise of streaming (although adjusting for inflation, industry revenues still remain below peak levels).

2.9 However, despite this revenue growth, the level of profitability has remained broadly flat, [***Confidential***].

2.10 Margins have remained stable as a result of the highly competitive environment in which UMG operates: on the one hand, UMG faces the strong negotiating power of digital music streaming services, [***Confidential***]; on the other, UMG faces an artist community with a growing range of options to release their music and who are increasingly able to negotiate a higher share of the revenues earned from streaming. If (as certain undertakings making representations have suggested to the CMA) the majors had market power, then this would inevitably have been reflected in increasing and/or high levels of profitability. The fact that this has not happened reinforces the CMA's provisional finding.

2.11 Some undertakings making representations on this point, as apparent "*evidence*" that the market is not working (and/or that the majors must be earning high levels of profit), have suggested (without evidence) that, with the advent of streaming, costs have decreased. In fact, the move to digital has not been the unambiguous cost saving that those making representations have suggested, not least because a number of historic operating costs effectively remain as part of the majors' overheads and other, new costs relating to streaming have emerged – see point (iii) below for further details.

(ii) *The Update Paper's simple accounting approach overstates UMG's economic profitability*

2.12 UMG appreciates that a full economic analysis of profitability would be unrealistic within the scope of a market study. UMG recognises that in place of this the CMA had made a robust assessment based on management accounting information and that the CMA has presented a simple accounting calculation of return on capital employed (***ROCE***) based on readily available management accounting information. There are important factors outside of this simple accounting-based approach to measuring profitability, however, that mean the CMA can be confident (and can in its final report make clear its confidence) in its conclusion that there can be no excess profits and that, if anything, record companies' true economic profitability is lower than estimated.

(A) ROCE overstates economic profitability

[3] See BPI's analysis of UK recorded music revenues, which indicated that 2020 marked the fifth year of growth: [UK recorded music revenues grew 3.8% in 2020 - BPI]

2.13 The CMA relies on ROCE, a profitability measure which calculates the value of profits as a proportion of the asset base. Such a calculation, if it is to provide a true assessment of profitability, would need to be based on the true economic value of those assets.

2.14 The most important assets of a record company are the recorded music rights it controls. A record company invests in these assets both when it signs a new artist (through offering advances and funding the recording of new music) and when it incurs marketing and promotion costs in order to build a following for that artist's music. The true economic value of these assets is related to their ability to generate revenue from music sales in the future. Any assessment of economic profitability should take into account the true economic value of these assets in a competitive market – not simply their book value according to standard music industry accounting practices. This is particularly important in the current market context, where:

(a) [***Confidential***]; and

(b) market conditions have changed very rapidly over the last five years – with revenues recovering significantly with the success of commercial streaming services.

2.15 The impact of this is clear and one-directional: the current balance sheet account valuation of UMG's assets will be too low to properly represent their true economic value in a competitive market. This is because, in competitive market conditions (which are precisely those faced by UMG):

(a) investment decisions are inherently forward-looking – artist contracts are signed based on a (highly imperfect) assessment of the artist's future revenue potential; and

(b) competition between record companies drives labels to offer artists terms that balance the offer to the artist against their expected earnings – any expected revenue 'left on the table' would leave space for rival labels to offer the artist better terms; but

(c) where substantial risk and uncertainty always remains – both because the artist's individual potential is unknown (even for proven artists who are making new music) and because future market conditions are uncertain.

2.16 This means that when business conditions improve significantly (as they have over the last five years) the value of rights obtained on competitive terms in the past will inevitably increase for those artists who have been successful and may be likely to continue to be streamed in future. That increase in the value of the assets is driven by the change in market conditions, not by a reduction in competitive pressure. Indeed, in improving market conditions, competitive pressure should be expected to increase. This is demonstrably the case in the UK music market, where (as the CMA observes in its Update Paper) there has been substantial new entry and growth of new business models, alongside significant improved terms offered to artists.

2.17 Looking at historical asset values therefore risks understating current conditions of competition. Asset values would be artificially low relative to their competitive market value, and this would tend to mean that the measure of ROCE using those asset values would produce profitability figures that are artificially inflated.

2.18 Moreover, the extent of this bias in the simple accounting approach to ROCE will have increased over time as the recovery in revenues has gathered pace over the last five years. In turn, this means that there is a significant risk that a simple accounting approach could produce an artificial (and misleading) trend of increasing profitability (even though, in fact, in this market profitability has increased only by a very small percentage).

2.19 As UMG recognises (at paragraph 2.12) above, a full assessment of economic profitability would be unrealistic. However, even without such an exercise:

(a) there is clear evidence in this case that the value of recorded music assets in a competitive market has risen, in particular:

(i) the rapid growth of streaming revenues after a protracted downturn and period of negative or low growth in industry revenues;

(ii) the increased popularity of older music on all-you-can-eat streaming services, which raises the value of rights acquired prior to the streaming-led recovery in revenues;

(iii) the improving terms to artists over time, reflecting improved expectations of their future earning potential from streaming; and

(iv) the increased competition for the acquisition of existing catalogue rights by third party investors (who are not themselves active as frontline record companies),

and consequently;

(b) that the CMA can be confident in concluding that a ROCE accounting approach is biased towards overstating profitability – both in terms of its absolute level and in terms of any trend of increasing profitability over time. If UMG were to re-evaluate the value of its recorded music assets, the ROCE calculated on the current market value of UMG's assets would in fact be considerably lower, reflecting the fact that it faces intense and increasing competitive pressure.

(B) The growing share of international repertoire has affected UK profitability on signing current UK artists

2.20 [***Confidential***].

2.21 In some cases, [***Confidential***].

2.22 [***Confidential***]. This may overstate the economic profitability that the CMA wants to measure – namely, of the activity of signing and developing UK artists.

(C) The increasing popularity of artist catalogue distorts the true picture of profitability of the UK business

2.23 The streaming-led recovery of the industry has meant existing music is now more widely available and accessible than ever before. The *"all you can eat"* model of streaming has allowed customers to listen to a much wider range of music and has increased the share of catalogue in the total number of streams. As the CMA notes at paragraph 2.10 of the Update Paper, catalogue music accounted for 86% of streams in the UK in 2021.

2.24 Cohorts of artists signed at a given time would in the pre-digital era typically earn most of their revenue in the years that follow while their repertoire is current[4], then usually experience a subsequent decline. This was especially noticeable during the downturn in the industry. However, as a result of streaming, earlier cohorts of artists have seen sales of their music recover or continue to be monetised on an incremental basis in a way that was impossible in the pre-streaming era, as their music has become available on streaming services, generating revenue whenever a consumer listens to it.

2.25 As with international repertoire, catalogue music typically receives a higher-than-average margin. There are usually fewer costs associated with catalogue music, although some distribution and marketing costs might remain, and album re-releases can incur additional initiation and marketing costs. While catalogue has made a positive contribution to UMG's profitability in the UK, increased sales of older music is a consequence of the risk taken on old investments (risks that were often taken during the period where the industry was in a protracted recession) and so is not a relevant indicator of the extent of competitive pressure today, or of the profitability of today's investments. Indeed, it is the increased value of catalogue – in addition to a more competitive environment for signing artists – that has helped improve contract terms for both new and catalogue artists. The longer lifetime over which revenues can be earned is a factor in how new contracts are now negotiated and signed. As UMG has noted previously[5], and as the CMA notes at paragraph 5.96 of the Update Paper, the evidence shows that these terms have been moving in artists' favour consistently throughout the industry's recent period of recovery.

(iii) *Certain cost savings, which may appear to increase profitability, are time-limited*

2.26 The Update Paper states at paragraph 3.29 that "*due to the lower associated costs of streaming compared with traditional channels, the majors' recorded music operating margins have improved*". UMG considers that this statement is misleading - in particular, it fails to consider (for example) the temporary costs savings during the Covid-19 pandemic and changes to UMG's marketing strategy.

(A) Impact of Covid-19

2.27 During the pandemic, music companies were not able to make investments in artists' tours and music video production due to international travel and event restrictions. However, whilst this has contributed to temporary cost savings in recent years, any reduction in touring and promotional video investments is ultimately likely to have negative effects on revenues for subsequent years, as UMG and artists have missed out on key promotional and merchandising opportunities as a result of external factors.

(B) Changes to marketing strategy

2.28 The change in marketing channels (i.e., the switch from TV and billboard advertising to social media and targeted advertising) – which has occurred as a result of the

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4 [***Confidential***].

5 See, for example, UMG's response to the CMA's s.174 notice dated 16 February 2022, Q.24

digitalisation of all industries, and not just the shift to music streaming – has changed the composition of marketing costs and, consequently, profitability[6]. These cost savings are the result of external market developments, and not a conscious reduction in UMG's promotional and marketing activities and related costs.

2.29 At the same time, UMG notes that while certain costs have decreased, UMG's overall spend in the streaming era has not, and UMG's accounts, as they relate to direct marketing, may not provide a complete picture. For example, while UMG's costs in using agencies to coordinate its advertising strategy have fallen, it now performs those functions in-house, even if it could also have chosen to outsource. As a consequence, the same costs that were previously listed as marketing costs now appear as overheads.

(C) Preliminary data for 2022 suggest that costs are returning to pre-pandemic levels

2.30 Preliminary data for 2022 suggest that temporary cost reductions are returning to pre-pandemic levels, contradicting any suggestion that cost reductions were wholly a consequence of music streaming. Figure 1 below illustrates UMG's total promotional, tour and advertising costs for 2017-2022[7]. Some costs, such as tour support, have actually experienced a significant increase above pre-pandemic levels in 2022 due to pent-up demand. Similarly, promotional costs – which include TV and radio show appearances or interviews, album launch events, and travel and accommodation costs associated with these – and video costs have recovered towards pre-pandemic levels. However, other costs, such as TV and billboard advertising have continued their pre-pandemic downward trend.

Figure 1: **[*Confidential*]**

2.31 The CMA's emphasis on "*lower associated costs of streaming compared with traditional channels*" as an impact on margin levels is therefore not accurate.

(b) **The majors do not have any ability or incentive to favour their recording business over publishing, and do not have the ability to unduly influence CMOs**

2.32 UMG agrees with the CMA's provisional conclusions at paragraph 5.114 of the Update Paper that there is "*limited interaction between the majors' record label and music publishing businesses*" and that "*deals with music streaming services are also largely negotiated separately and by different teams*".

2.33 UMG runs its music publishing and recorded music businesses separately with no operational integration or coordination on commercial strategy. The two businesses are incentivised to conclude deals on their own merits, "*being ultimately accountable for securing the best licence terms possible for their respective artists and songwriters*"[8]. In this context, licensing agreements with music streaming services are negotiated and concluded separately.

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6 For example, targeted advertising methods today are typically cheaper than traditional advertisements.

7 [***Confidential***]

8 Update Paper, para. 5.114

2.34 UMG presents further evidence in support of these provisional conclusions in this response. The evidence shows that:

(a) music publishing rates are agreed in conjunction with and approved by CMOs and any attempt to artificially depress them in negotiations with music streaming services would be transparent to these CMOs, and would be frustrated by them in compliance with their fiduciary duties, and because it would clearly be against CMO members' financial interests;

(b) UMPG continues to advocate for higher music publishing rates;

(c) tacit coordination between the majors is not possible in relation to music publishing rates;

(d) checks and balances in CMOs' respective governance and regulation of CMOs ensures that the majors do not have the ability to unduly influence the behaviour of collection societies;

(e) the structure of the CMOs is such that it is not possible to unduly influence its licensing decisions;

(f) the CMOs operate strict procedures for conflicts of interest; and

(g) a clear and important rationale explains the presence of the majors on CMO boards, subject to the parameters set by applicable governance rules referenced above.

2.35 Further details are provided in the remainder of this sub-section.

(i) *Music publishing rates are agreed in conjunction with and approved by CMOs and any attempt to artificially depress them in negotiations with music streaming services would be transparent to these CMOs and frustrated by them in compliance with their fiduciary duties, and because it would clearly be against CMO members' financial interests*

2.36 UMG notes the assertion expressed at paragraph 5.117 of the Update Paper that the oversight of CMOs has been eroded, due in part to the fact that "*Option 3 publishers who have opted to license [...] music streaming services directly (which includes the major publishers) are now negotiating performing rights on behalf of CMOs alongside reproduction rights*". Unsurprisingly, the CMA "*has not received any evidence that clearly supports these assertions*": not only is this a misrepresentation of the way in which the negotiations with CMOs work, but it is the very involvement of the CMOs that would make any attempt to depress publishing revenues impossible.

2.37 [***Confidential***].

2.38 [***Confidential***]. SACEM's extremely broad represented repertoire spans over 153 million works[9], in respect of which it grants key multi-territorial licences which are invaluable for music streaming services. SACEM therefore has significant bargaining power [***Confidential***].

9 See: SACEM's Annual Report, 2020

2.39 [***Confidential***]. Both SACEM and PRS are regulated as CMOs and so cannot discriminate between services. It is accordingly impossible for UMPG to negotiate anything other than a fair rate. A deal which disadvantaged writers would be rejected by SACEM and PRS. Additionally, a designated "clean team" at PRS reviews the deals made by all the licensing hubs that incorporate PRS rights in their licensing negotiations, including deals negotiated by IMPEL[10]. PRS would object to a deal that was delivering significantly lower rates or returns to songwriters compared to deals for the same service made by other licensing hubs. [***Confidential***].

(ii) *UMPG continues to advocate for higher music publishing rates*

2.40 UMG agrees with the CMA's provisional conclusions at paragraphs 5.130-5.131 that "*competition is helping drive improved outcomes for songwriters*" and that "*the fact that streaming revenue growth for the majors' publishing arms has outpaced growth for their recording arms (more so than for the industry as a whole) suggests that the majors are competing up their publishing shares, rather than not competing and instead seeking to favour their recording businesses*".

2.41 UMPG consistently advocates for higher rates for its writers – notably through its membership on the boards and committees of CMOs, including the PRS Licensing Committee – and has in fact been securing higher rates over time[11]. UMPG constantly pushes for the best rates possible, including challenging outdated published schemes: [***Confidential***][12].

(iii) *Tacit coordination between the majors is not possible in relation to music publishing rates*

2.42 The Update Paper preliminarily concludes at paragraph 5.131 that "*concerns over tacit coordination among the majors that would enable them to act without fear of competitive pressure do not appear supported in light of a lack of evidence of the major publishers seeking to discourage the publishing share increases since 2007 and the lack of an obvious and credible 'punishment' mechanism to secure such coordination*".

2.43 UMG agrees that tacit coordination between the majors is not possible. Crucially, the majors do not have any visibility over rates in each other's deals and so it would not be possible to monitor competitor behaviour.

2.44 The inability effectively to monitor any hypothetical tacit collusion would equally render any punishment mechanism ineffective as deviation would be difficult to detect. Any attempt at retaliation would be ineffective relative to the strong incentive to deviate from any (hypothetical) collusion. In practice:

(a) Publishing is a highly competitive market, and so any attempt at coordination would quickly be disrupted by the incentive to secure new writers on more competitive terms.

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10 IMPEL is an international collective of independent music publishers who, together, license their mechanical rights to a wide range of digital service providers. It is publisher owned and publisher led.

11 See UMG's response to Q.3 of the CMA's s.174 notice issued on 2 August 2022

12 [***Confidential***]

(b) Entry and expansion in publishing is easier than ever in the digital era, and so there would also be a large number of independent publishers readily able to act in the capacity of a 'maverick' to exploit the opportunity presented by a worsening of rates. For example, Sentric Music – which describes itself as the "*industry challenging music publisher*" – offers its writers a 28-day rolling contract for maximum flexibility[13]; and Kobalt Music, which is described as "*the leading alternative to incumbent music publishers*"[14], has a publishing offering that is based around an advanced technology platform promising greater transparency and faster royalty payments for writers[15].

(c) Any credible suggestion that UMPG was pushing down publishing rates would lead its writers to switch publisher, outweighing any potential benefit of coordination. Many publishers' agreements with songwriters provide frequent opportunities for re-negotiation or change of representation making UMPG's reputational excellence of key importance.

2.45 As a result, there is also no credible 'punishment' mechanism to secure tacit coordination.

(iv) *Checks and balances in CMOs' respective governance and regulation of CMOs ensures that the majors do not have the ability to unduly influence the behaviour of collection societies*

2.46 UMG strongly refutes the unfounded assertion outlined at paragraph 5.117 that the majors have undue influence over CMOs and that this influence "*may undermine any steps that it might want to take to improve songwriter rights*".

2.47 As recognised by the CMA, there is simply no evidence to support such an allegation: as far as UMG is aware, there has never been a specific allegation that UMPG executives have acted in the sole interest of UMG to the detriment of writers or other publishers, or that UMPG has not declared a conflict of interest.

2.48 Not only has such a situation never arisen, but it is difficult to see how one could arise: the interests of UMPG and the other major publishers are generally aligned with the interests of writers and other publishers. All parties benefit from obtaining the best revenues possible from the use of musical works.

2.49 Given that any accusations of this nature are baseless, to the extent that the CMA has received complaints about specific circumstances, UMG would request that it is given the opportunity to comment on and definitively rebut the specific scenario alleged.

(v) *The structure of the CMOs is such that it is not possible to unduly influence its licensing decisions*

2.50 The Update Paper notes at paragraph 5.119 that "*PRS for Music's governance also appears to have checks and balances in place to prevent undue influence from the*

13 See: https://sentricmusic.com/

14 See: https://techcrunch.com/2019/08/09/how-a-swedish-saxophonist-built-kobalt-the-worlds-next-music-unicorn/

15 See: https://www.kobaltmusic.com/

majors". Building on this, UMG wishes to specifically highlight the following factors which render any undue influence impossible:

(a) First, in relation to decision making at the Members' Council and Board of PRS, all members (including those representing music publishers) are entitled to one vote per director, regardless of the revenue that flows through the society via the publisher that the director is employed by. Moreover, following recent changes to the PRS governance arrangements, the three top earning publishers now have guaranteed seats on the Members' Council (from which two publishers are appointed to the Board by the Members Council (the ***designated directors***)) and so no longer participate in elections for the Members' Council; and collegiate voting has been introduced for elections to the Members' Council. This means that the publishers as a college do not participate in and have no influence whatsoever over the outcome of the director elections for writers and the three top earning publishers (including UMPG) do not participate in the elections for the remaining publisher directors, and so have no way of influencing votes. The Members Council comprises up to 25 members of which only 3 are designated publishers. The Board is appointed from the Members' Council and comprises 13 directors of whom only two (the designated directors) are major publishers[16].

(b) Second, PRS has a 50/50 balance of publishers and writers represented on its Members Council and Board, with the publishers' constituency further balanced between majors and independents. When combined with the fact that the publisher representatives of the Members Council cannot participate in elections for the writer directors, and the designated directors cannot participate in elections for the remaining publisher directors. This means that no publisher – or group of publishers – is able to unduly influence the outcome of votes. In addition, the composition of both the Council and the Board includes voting independent non-executive directors, as well as the PRS CEO who also has a vote. Accordingly, the major publishers can always be easily outvoted on every topic. It follows that the employees of the major publishers are in a position of responsibility as directors without decision-making authority. This is despite the substantial contribution to the PRS' overheads derived from the repertoire represented by (and invested in by) the major publishers.

(c) Third, for MCPS specifically, a UMPG executive is currently the non-voting, statutory chair, and so UMPG doesn't currently have a vote at the MCPS Board. In addition, UMPG's mandate for the use of its repertoire in multi-territorial digital licensing is with SDRM/SACEM, so MCPS plays no role in UMPG's licensing to the major digital music services.

(d) Fourth and finally, UK national blanket licensing of musical works is managed by the PRS Licensing Committee, where decisions are made by consensus. Any member of the Committee including the majors can raise objections, which must be in the best interests of PRS in line with each PRS director's fiduciary duties. Any objections meeting this criterion can be

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16 See: https://www.prsformusic.com/about-us/governance/members-council

escalated to the Board, where the majors can be outvoted. Decisions impacting the MCPS are referred to the MCPS Board, where UMPG doesn't have a vote.

2.51 Consistent with the above, there have been no specific complaints about the behaviour of UMG (or, as far as UMG is aware, the other majors) in relation to CMOs.

2.52 Consequently, it is not credible to suggest that any major could exercise undue influence over the CMOs, even if they wanted to do so.

(vi) *The CMOs operate strict procedures for conflicts of interest*

2.53 Any conflict of interest is carefully managed by CMOs. PRS operates a strict Conflicts Policy[17] and there is a procedure for the declaration of conflicts on both: (a) an annual basis, which is compiled into a centrally maintained conflicts register; and (b) a per-meeting basis, where each meeting begins with a request for conflicts to be declared.

2.54 The conflicts that must be declared include not only other directorships and board seats, but also particular client relationships that might exist between the majors and PRS customers. For example, [***Confidential***].

2.55 Quite apart from the lack of incentive for UMPG to attempt to sway PRS negotiations in its favour, CMO board members have the same fiduciary duties under the Companies Act as the director of any company and can be subject to legal action if they are in breach of those duties. Board and Council members receive a detailed document which specifically outlines their duties, obligations, and liabilities under the Companies Act[18], as well as a conflicts of interest policy; an anti-bribery and corruption policy; guidance on competition law compliance; and rules on related party transactions. This is accompanied by specific directors training on their responsibilities. It is thus abundantly clear to all PRS board members that in their capacity as board members, they must strictly represent the interests of the CMO.

2.56 Finally, the presence of the other PRS members in meetings and negotiations guards against any party acting in their own interest: it would be immediately obvious to the other board or council member if one of the majors was to have an ulterior motive, and the resulting reputational damage to that major in the publishing community would far outweigh any incremental benefit derived.

(vii) *A clear and important rationale explains the presence of the majors on CMO boards, subject to the parameters set by applicable governance rules referenced above*

2.57 While the CMA is right to focus on the checks and balances in the governance structure of CMOs that prevent undue influence by any party, it is important to note the vital positive contribution that the majors make to the publishing community via their participation in CMOs. The majors are at the forefront of licensing and operational developments in the music industry and have a wealth of experience and expertise across the sector. CMOs benefit extensively from the involvement, knowledge and

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17 As stipulated in PRS' "*Conflicts Committee - Terms of Reference*"

18 "*Members' Council (PRS) and the Board (PRS for Music): Directors' Duties, Obligations and Liabilities*"

insight of the major publishers, particularly in relation to publishers' knowledge of non-confidential information on best practices of CMOs in other jurisdictions, as gleaned from the majors' international offices, in an effort to improve outcomes for all. The majors contribute their views to the CMOs on important industry issues, alongside and in conjunction with representatives from the independents, creators, and other publishers.

2.58 As a wider point of principle, CMOs are member organisations and UMPG and the other major publishers are important members of the publishing community: it is to be expected that they are present on the boards of societies that represent the interests of that community. The presence of the major publishers in the room gives a CMO credibility that it is representative of its membership, even though the reality is that, for PRS, decisions (including in relation to material funding decisions) can be taken by a combination of non-executive directors (who have no financial ties to PRS other than their fees as directors) from outside the industry and writers/publishers who only make de minimis contributions to the administrative costs of PRS. By participating in PRS, the major publishers have to contend with the fact that their independent competitors and writer directors who may be relatively low earning can decide to make funding choices, in the knowledge that the majors will be the parties most impacted by those choices.

3. Further evidence in response to potential competition concerns identified in the Update Paper

3.1 The Update Paper tests certain hypothetical competition concerns and raises some potential competition concerns. The evidence shows that a number of these potential competition concerns are either not substantiated or are relevant only to a *de minimis* extent such that there can be no distortion of competition in the market. UMG provides further evidence (and analysis) in this response in respect of the following main topics:

(a) the relationships between the majors and music streaming services;

(b) the perceived distinction between the majors and independent labels; and

(c) the negotiating power of artists.

3.2 Further details are provided in the remainder of this section.

(a) Relationships between the majors and music streaming services

3.3 The Update Paper provisionally concludes that there is weak competition in the supply of music to streaming services, and that "*the lack of good alternatives, particularly for the majors' content, is therefore likely to weaken music streaming services' bargaining position in their licensing negotiations*"[19].

3.4 To say there is "*weak competition*" in the supply of music to streaming services misunderstands the key market dynamics in play: the very nature of the industry is that each record label has a unique roster of artists, and as such is licensing different repertoire than every other record label. The uniqueness of quality music is not something which arises by chance or through a lack of competition. Quite the opposite:

[19] Update Paper, para. 5.10

it is the result of extensive investment by record companies in their artists – to make their music as distinctive and appealing as possible. Those investments are themselves the product of a highly competitive market. While music companies' products are not perfectly substitutable for one another, and thus they cannot easily be replaced by a streaming service, this does not imply weak competition. This does not only apply to the majors: any label or artist who creates unique and valuable music will not be directly substitutable and will enjoy control over their music. None of this means that competition is weak, that negotiations with streaming services are one sided, or that music companies are not significantly constrained by the rates offered by their competitors via constant negotiation and re-negotiation with streaming services.

3.5 On the contrary, the fact that music companies and streaming services are mutually interdependent - with music companies taking measures to protect the rights of their artists – is not merely no sign of weak competition, it is in fact *vital* to a well-functioning competitive market. It is artists and their labels who invest in creating music, not streaming services. As such they must be in a position to earn a fair return on their investments, in order to have the incentive to create high quality music (which cannot easily be substituted) in the first place. A world in which streaming services held all the bargaining power would be one in which streaming services would be in a position to take all the benefits from the investments and hard work of artists and their labels – to the ultimate detriment of music consumers. The bargaining position of record companies is a vital counterbalance to this: ensuring that investing in artists and in quality music is sustainable.

3.6 Moreover, as the CMA observes in paragraph 2.29 of the Update Paper, music companies compete hard to gain exposure for their artists on streaming services. It is hard to reconcile this section of the Update Paper with any finding of *"weak competition"*.

3.7 Further evidence on two specific aspects of the CMA's concerns about the streaming service/label relationship is set out under each of the following headings below.

(i) *"Complex" licence negotiations do not stall innovation*

3.8 In paragraph 5.67 of the Update Paper, the CMA notes that complex licence negotiations appear to be a main barrier to greater innovation. While licence negotiations can indeed be a complex process, UMG considers that this had limited or no impact on the extraordinary pace of innovation the industry.

3.9 In fact, the complexity in the negotiations process is largely a function of constant innovation. Innovation, in any industry, always involves some complexity, which is vital in delivering new functionalities and features on streaming services. These functionalities and features invariably have to be fleshed out contractually so as to ensure that music companies are providing appropriate licences. While negotiations may take some time on occasion, UMG is eager to embrace and agree to innovative changes to streaming services for the benefit of consumers and their listening experience (and to ensure that consumers are attracted to and are retained on streaming services). The extent of innovation within a short time period demonstrates that such length of time is neither excessive nor disproportionate to delivering the benefits of innovation in a researched and robust way.

(A) Licensing music rights to streaming services inherently has certain complexities, as it must (to ensure availability of all music) necessarily involve a large number of parties, who need to be able to protect their artists' and songwriters' rights

3.10 For music streaming services to offer consumers access to all available music content, licences are needed from a large number of counterparties on a global basis. The sheer number of music companies with whom music streaming services need to negotiate is an indicator of a healthy, competitive market. And those music companies' support of a multiplicity of streaming services ensures continued competition and helps to achieve, insofar as possible, a level playing field between pure play streaming services and large technology companies, which is highly beneficial to consumers.

3.11 Access to all music, and the large number of suppliers involved, speak to a competitive market working in consumers' interests. A corollary of this is that music streaming services will need to deal with many licensors, and changes to licences will necessarily take some time to implement. The question the CMA rightly focuses on is whether the time taken to deal with all licensors is such as to cause detriment, in particular by slowing innovation.

3.12 The evidence shows clearly that this is not the case. Inevitably, there are discussions between music companies and music streaming services, as well as further research, in order to better understand new or proposed functionalities and features to be introduced to a service. However, these are a necessary part of innovation in the industry. UMG always strives to enable streaming services to explore and introduce innovative features and products on their services [***Confidential***]. This remains the case even where such innovation has [***Confidential***].

3.13 UMG notes that the CMA states in paragraph 5.67 of the Update Paper that it has identified very few specific examples of blocked innovation in music streaming. To the extent that the CMA has received specific examples of blocked innovation, UMG would welcome the opportunity for further engagement with the CMA on these examples in order to fully comment on this preliminary finding. In the meantime, UMG considers that any such examples should rightly be treated as distinct as they do not reflect the extent to which innovation has transformed the music industry in the last decade. The pace of change has been extraordinary – comparable to innovation in the wider information technologies sector and far in excess of the evolution of the music industry historically i.e., prior to digitalisation. [***Confidential***].

(B) The complexity of UMG's agreements with music streaming services is a direct result of the constant evolution of agreements and introduction of new and innovative features by music streaming services

3.14 [***Confidential***]. This constant evolution is reflective of the highly dynamic and competitive nature of the market.

3.15 Far from being a barrier to innovation, the ease and speed with which such agreements can be negotiated is facilitating the quick introduction of new features. [***Confidential***].

3.16 As rightly recognised by the CMA in paragraph 5.39 of the Update Paper, there would be no incentive for consumers to upgrade to premium tiers from the ad-funded tiers if the functionality and features on the latter tiers were equivalent to those on premium tiers. Discussions on the functionalities for different tiers are therefore necessary and critical for music companies to protect their artists' rights. Such discussions do not evince lack of or delays to innovation, but rather indicates a necessary part of negotiations.

3.17 While the structure of the agreements can become complicated for an outsider to understand, these are not complex for the music companies and music streaming services involved in agreeing and operating the licences. Negotiations involve experts who are accustomed to reviewing and negotiating such agreements and have done so for years. Nonetheless, UMG has sought, in any event, to simplify the various agreements and amendments relating to licences with music streaming services and continues to do so. By way of example, [***Confidential***].

3.18 UMG would be happy to discuss further the complexity of its agreements with music streaming services as the CMA progresses the second half of the market study.

(C) Far from there being barriers to innovation, the music industry has been in a period of constant and ongoing innovation since the advent of music streaming

3.19 As recognised by the CMA in its Update Paper, the music industry is continuing to go through a period of unprecedented change and evolution. UMG has always been supportive of new innovations from music streaming services, provided it is legally able, and has not sought to inhibit innovation or block a new feature [***Confidential***]. By way of example:

(a) [***Confidential***]. As the market has continued to evolve and innovations continue to increase, ad-funded tiers can now be used on all devices and there have been significant improvements in what consumers can now do on free tiers.

(b) [***Confidential***].

(c) [***Confidential***].

(d) UMG has supported various changes to music streaming services' functionality which proved not to be successful and have since been discontinued from the service or, in some cases, were never launched, [***Confidential***].

(e) [***Confidential***].

(f) [***Confidential***].

(g) [***Confidential***].

(h) [***Confidential***].

3.20 Since the advent of music streaming, [***Confidential***].

(ii) *Streaming services do not have weak bargaining power in negotiations*

3.21 The Update Paper provisionally finds at paragraph 5.12 that the "*increasing mutual dependence does not necessarily result in equal bargaining power of the music* *streaming services and record companies. Even larger music streaming services could remain in a weak bargaining position with the majors due to the lack of good alternatives to the majors' content*".

3.22 UMG considers it misplaced to say that there is a "*lack of good alternatives*" for the majors' content – it is not a question of available alternatives. Music streaming services must offer all music content from all labels in order to be competitive for consumers, while labels must licence all content to all music streaming services in order to make their artists' content universally available. The relationship between the majors and music streaming services is not one where streaming services are in a weaker position, but one of mutual dependency – a dynamic which the CMA recognises is intensifying[20].

(A) Music streaming services are indispensable trading partners for record labels

3.23 Contrary to the provisional findings in paragraphs 5.10 to 5.14 of the Update Paper, music streaming services are not in a weak bargaining position in their licensing negotiations with majors. As discussed in detail in paragraphs 4.11 to 4.16 of UMG's response to the CMA's Statement of Scope, music streaming services are indispensable trading partners for record labels and both parties are strongly incentivised to agree terms with each other so as to ensure an optimal and affordable service to consumers while making artists' content widely available.

3.24 Subscription and streaming revenues accounted for approximately 66% of global revenue earned by UMG in its financial year ended 31 December 2021[21]. As such, it is unrealistic that UMG might not agree a licence with a music streaming service – to do so would cut UMG off from a vital source of revenue from that music streaming service. It would also mean failing to reach the subscribers of that music streaming service. Similarly, as recognised by the CMA[22], music streaming services need to license content from a wide range of record labels so as to provide a similar range of content as was freely available via piracy.

3.25 The key aspect of competition is therefore the increasing scale of mutual dependence between record companies and music streaming services, which the CMA recognises in paragraph 5.12 of the Update Paper. Both streaming services and record labels would be negatively impacted by a failure to agree a licence agreement as labels need to license to music streaming services in order to generate revenues; and music streaming services need to license from all music companies in order to provide consumers with access to all music. There is therefore limited, or no difference, in the bargaining position of majors vis-à-vis music streaming companies and of independents vis-à-vis music streaming services as the contents of independents are equally critical as those of the majors to these services.

3.26 Contrary to the suggestion at paragraph 5.13 of the Update Paper, revenues lost from failure to negotiate a licensing agreement with one music streaming service could not be offset by growth in revenues from licences to other music streaming services. These services have licences for the full catalogue of content and would not increase the

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20 Update Paper, para. 5.12

21 See: [UMG's Annual Report 2021](), page 13

22 Update Paper, para 3.64

agreed licence fees to compensate labels for lost revenues for failing to agree a licence with another music streaming service and streams of a particular artist's songs lost on one streaming service would scarcely be compensated by availability on other streaming services (see further (B) below).

3.27 Moreover, if a label were to refuse to license music to a music streaming service, this would have serious ramifications not just on the label's own revenues but on consumer confidence in the streaming model as a whole. Piracy remains a strong threat in the music industry, and it is important to continue to build trust in the streaming model, and to encourage the view that music has value and should be paid for. The CMA has acknowledged the difficulty of consumers switching between streaming services. Accordingly, if a label were to suddenly remove its music from a streaming service, this would seriously impact the relationship with the consumer, risk subscribers on other music streaming services losing confidence in the model and risk pushing consumers towards piracy (as well as reducing some artists' revenues – as mentioned above and described in more detail at (B) below).

3.28 UMG actively encourages new digital streaming services, [***Confidential***]. This is evidenced for example by its funding of Deezer's recent recapitalisation[23], [***Confidential***] and through its agreement to licence new entrants [***Confidential***]. It would not be in UMG's interests to discourage new entrants, or to make it difficult for new entrants to negotiate mutually beneficial terms.

(B) Artists universally want their content to be available on all streaming services

3.29 UMG faces significant pressure from artists to achieve licensing agreements with all music streaming services. As discussed in detail in paragraphs 4.13 to 4.14 of UMG's response to the CMA's Statement of Scope, artists want their content accessible worldwide, to as many consumers as possible, including on UUC platforms.

3.30 Failure to agree a licence with a music streaming service would almost certainly lead to relationship issues and make it harder for UMG to extend contracts with those existing artists. In the future, artists' representatives would seek to sign new artists to a label that would ensure their music was available on all streaming services.

3.31 The position of a record company is therefore symmetric to that of the streaming service in a negotiation: a streaming service would risk losing subscribers if it failed to secure access to all content, and a record company would risk losing artists if it failed to secure access to all distribution channels

(C) Contrary to the CMA's provisional finding, there are several alternatives that streaming services can promote either alongside or in preference to the majors' content

3.32 The bargaining position of streaming services in their licensing negotiations has been strengthened by the increasing number of alternatives that streaming services can

23 See: Deezer, a leading global music streaming platform, debuts today its listing on the Euronext Paris Stock Exchange (prnewswire.com)

promote, either alongside or in preference to, the majors' content, contrary to the CMA's views in paragraph 5.12 of the Update Paper.

3.33 First, UMG's music faces increasing competition for consumer attention, as more artists and labels release more music than ever before. It is therefore increasingly difficult to break through the sheer volume of music content uploaded to music streaming services. [***Confidential***].

3.34 Second, music streaming services have been increasingly exploring opportunities for and promoting non-music content (e.g., podcasts[24], audiobooks[25], and gaming[26]). Recent research conducted internally by UMG shows that [***Confidential***]. The increased importance of podcasts to Spotify, and the steps it has taken to reduce its dependence on music content, is evident from the clash between Joe Rogan and Joni Mitchell and Neil Young in early 2022[27], in which Spotify effectively favoured Joe Rogan's podcast over those recording artists' music content by refusing to remove the podcast from its service.

3.35 Third and finally, many streaming services (e.g., Apple, Google and Amazon) – unlike music companies – have a broad range of alternative revenue-generating activities and therefore have diversified revenue streams. [***Confidential***].

(D) In UMG's experience, [***Confidential***]

3.36 As explained above, UMG is in constant negotiation with music streaming services, and almost every negotiation involves [***Confidential***]. For example, UMG has consistently agreed to [***Confidential***].

3.37 As a result of these [***Confidential***], music streaming services' share of UK streaming revenues have increased each year since 2017, with a corresponding decrease in [***Confidential***] the total label share (which the CMA equally acknowledges at Figure 5.1 of the Update Paper) and [***Confidential***]. The CMA's finding is consistent with UMG's experience, where it has seen [***Confidential***]. UMG is concerned that, [***Confidential***].

(E) UMG's [***Confidential***]

3.38 As noted above, [***Confidential***]. As explained at paragraph 3.3 and 3.37 above, UMG is at the mercy of the editorial decisions made by music streaming services concerning how music content is presented and promoted on the service. UMG is not able to control, or even influence to a material extent, how its music content performs once it has been delivered to a streaming service.

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24 Apple, Spotify, Amazon and YouTube all push on their respective platforms. See: Music Ally Quarterly Report Q1 2022, page 5

25 For example, '*Spotify is already expanding into audiobooks, which may in turn spark more collaboration between Amazon Music and Audible, and Apple Music and Apple Books. Guided meditations, audio dramas and other formats may have a role to play too*'. See: Music Ally Quarterly Report Q1 2022, page 6

26 See for example: Spotify's proposal to fully integrate game Heardle more fully into its app. Spotify acquires music trivia game Heardle - The Verge

27 See for example: Joni Mitchell joins Neil Young in protest over Joe Rogan Spotify podcast - The Washington Post

3.39 [***Confidential***], coupled with the fact that [***Confidential***] with its streaming partners, clearly indicates the limitations of UMG's bargaining power in negotiations with streaming services.

(b) **The perceived distinction between the majors and independent labels**

3.40 The Update Paper finds "*evidence of significant barriers to expansion faced by independent record companies compared to the majors*"[28] and that "*[t]he majors have significant advantages linked to their scale that are difficult for independent record companies to replicate. Most notably the majors' ownership and earnings of large back catalogues of music for which they have long-term rights gives the majors significant financial advantages*"[29]. UMG believes that the evidence in fact points strongly in the opposite direction. In particular:

(a) the strength of the majors is not inhibiting the growth of independents;

(b) the Top 1000 UK singles is not an appropriate measure of market share on which to base any analysis of barriers to expansion;

(c) independents compete effectively to sign artists;

(d) the majors do not benefit from increased promotional placement on streaming services; and

(e) the clauses identified by the CMA in the Update Paper are not indicative of a distortion of competition in the market or increased bargaining power of the majors.

3.41 Further details are provided in the remainder of this sub-section.

(i) *The strength of the majors is not inhibiting the growth of independents*

(A) The evidence shows that independents are growing and competing effectively to sign artists

3.42 The CMA's provisional finding in paragraph 5.90 of the Update Paper is inconsistent with evidence which indicates the growth of and intense competition from independent record companies in the battle to sign artists:

(a) First, BPI evidence indicates that independents' share of the UK music market continues to increase. In particular:

(i) Independents' share of the UK music market (measured by share of album equivalent sales) grew to 26.9% in 2021, up from 25.9% in 2020[30] and 22.1% in 2017[31].

(ii) When looking at artist album sales in 2021, independents' share is even higher at c.34.2%, up from 30.4% in 2019[32].

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28 Update Paper, para 5.87
29 Update Paper, para 5.88
30 BPI: "*All About the Music 2022*"
31 See: Indie music surge continues with fourth consecutive year of growth - bpi
32 See: Indie music surge continues with fourth consecutive year of growth - bpi

(iii) As the CMA found in paragraph 3.28 of the Update Paper, the majors' combined share of recorded music revenues from UK music streaming in 2021 dropped to 73%, compared to 78% in 2017. As a consequence, the combined share of independents increased from 22% in 2017 to 27% in 2021[33], an increase of c. 8% in the reference period.

(b) Second, recent research conducted by MIDiA in 2021[34] showed that independents have grown globally, with the revenue generated in 2020 from the rights owned by independents increasing by 12%, compared to a total recorded music market growth of 12%. Given some independent record labels distribute their music through major labels, the revenue generated from their rights ownership goes via the majors' accounts, and so the major labels' reported revenues (which are often used to calculate market shares) are boosted by independent revenue (and therefore the majors' actual revenues are less than the reported figures), thus inflating the market share of the majors. With the data MIDiA tracked in its independent label survey, measuring global market shares on a right 'ownership' basis, independent global market share (which includes artists direct) goes from 33.9% (the 'distribution' basis) to 43.1%, i.e., an additional 9.2% of share.

3.43 The fact that independents are consistently growing and improving their offerings is widely acknowledged within the industry, including by artists, performers and music streaming services (as the CMA acknowledges in paragraph 3.64 of the Update Paper, music streaming services need to offer the full catalogue of available music, including from independent labels). For example:

(a) Last year's winner of the Mercury Prize has recently stated that "*Independent music is as important as ever, and it's growing and growing every year*"[35].

(b) Jeremy Sirota, Merlin CEO, recently indicated that Merlin has grown significantly, having signed deals with 15 new platforms or major new features since 2020. Merlin remains focused on continued growth as well as preserving the value of the copyright of its members so that they can be competitive. Mr Sirota commented that independent music "*fits particularly well*" with the wider increase in technology and social media "*because there's so much diversity within [independent music] and it's so wide reaching"* independent music *"plays so well within a world where the user is making intentional choices*" [36].

3.44 Independents are well-positioned to adapt their structure and offerings quickly to the continued evolution in the music industry in order to remain attractive and competitive in the signing and retention of artists.

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33 Update Paper, para. 3.28

34 Music market shares: independent labels and artists are even bigger than you thought | Music Industry Blog (wordpress.com)

35 See: More and more musicians are releasing their own music: Here's why - BBC News

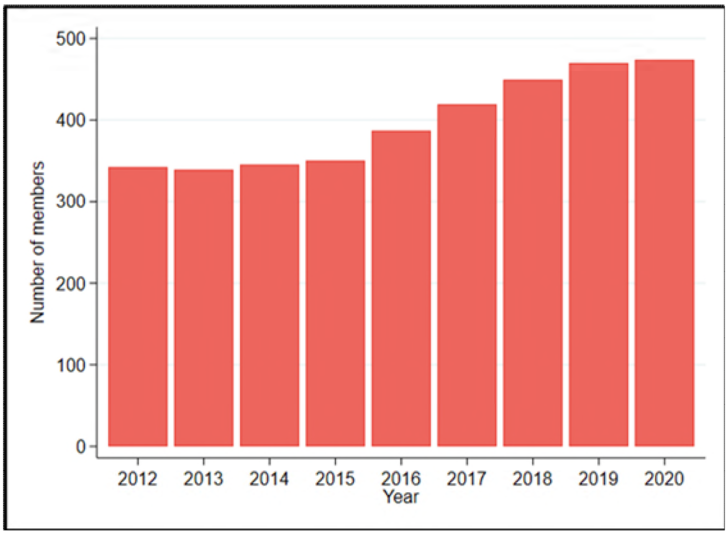
36 See: Jeremy Sirota on demystifying Merlin, explosive growth and the Web3 potential for indies - The Independent Music Insider

(B) Barriers to entry and expansion for independents have reduced significantly

3.45 As discussed in UMG's responses to RFI 1[37] and the CMA's Statement of Scope, a plethora of options are available for independents and artists to enter the market and new options are emerging all the time. These routes to market have been made possible by the significant reduction in barriers to entry and expansion for independents.

3.46 First, the significant upfront costs involved in manufacturing and distributing physical products are no longer as relevant for new music companies entering the market in the era of digital streaming. Consequently, it has become easier to operate a label efficiently at a much smaller scale and with lower set-up costs than was historically the case. Since the advent of digital streaming, the entry of independents has increased steadily. As illustrated in Figure 2 below, in 2020, there were 474 independent labels registered with the BPI, up from around 350 in 2015.

Figure 2: Number of independent labels signed with BPI, 2012-2020



Source: BPI membership data. Frontier analysis.
Note: Associates are excluded.

3.47 Second, the scale and global reach of a major label is no longer as important in the digital streaming era. The importance of a physical presence in different countries has reduced as streaming, licensing, and distribution has become global. Where independent labels do not have a physical presence in a market, they have access to a large network of international labels with whom they can partner. For example, when Adele signed to XL Recordings, her music was licenced to Columbia Records (Sony) for exploitation in the US at the time. The head of Beggars Group (the parent of XL Recordings) has subsequently indicated that, if given the chance now, he would not have agreed to license to a major label and would have instead handled international exploitation without licensing to third parties[38].

3.48 Third and finally, signing with a major – or even a record label – is no longer a pre-requisite for success (if that ever were the case). This is highlighted by the recent

[37] See in particular, UMG's response to Q.4(a), 4(b), 9(a), 9(b), 20, 23 and 24

[38] See: Daily Variety, *Indie music biz blows its own trumpet*, 13 June 2012

success achieved by artists on independent labels as well as self-releasing artists: earlier this year, Lauren-Spencer Smith reached the top five of the UK singles chart with self-released music distributed by TuneCore; Kylie Minogue's latest album, Disco, was released on her own label, Darenote; and other successful UK artists such as Dave and Little Simz have retained full ownership of their music, as a result of the continued reduction in barriers to entry[39].

(ii) *The Top 1000 UK singles is not an appropriate measure of market share*

3.49 The Top 1000 *"hits"* is not an accurate proxy for market power and not a relevant indicator of the importance of the majors' repertoire as suggested by the CMA in paragraph 5.23 of the Update Paper. For the reasons set out below, this metric is not a reliable measure and should not be used in this market study.

3.50 First, the Top 1000 UK singles is an arbitrary and artificial threshold in today's world given there is no finite *"shelf space"* on music streaming services. It makes no sense to limit the huge volume of music available to consumers to such a small sub-set of tracks.

3.51 Second, the Top 1000 UK singles reflects only a small proportion of majors' revenue in 2021, and a very limited proportion of independents' revenue in the same period. Moreover, the share of overall listening of the Top 1000 tracks is declining[40]. To be a reliable metric for measuring market concentration, the revenue accrued from the songs in this list would need to represent the vast majority of UK market revenue. This is, however, not the case – the songs featured in the Top 1000 *"hits"* account for (at most) an estimated [***Confidential***] of UMG UK repertoire revenue in 2021[41].

3.52 Third, the Top 1000 UK singles tends not to be the strategic focus of independents for two reasons:

(a) independents often like to market their competitive advantage in genres like jazz, urban or "*indie*" music which are less commonly found in the top 1000 singles but often have strong penetration regardless.

(b) independents – as a function in part of that focus – have often placed greater emphasis on album performance rather than individual tracks in assessing success.

3.53 Fourth, the Top 1000 UK singles includes a material share of songs not recorded through UK-based music companies. Of the [***Confidential***] tracks featured in the Top 1000 "*hits*" in 2021 in which UMG owns full or partial recording rights[42], only [***Confidential***] are recorded through UK-based music companies. Accordingly, the results do not necessarily reflect the UK competitive landscape since the large proportion of tracks that appear in the list are international repertoire.

(iii) *Independents compete effectively to sign artists*

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39 See: More and more musicians are releasing their own music: Here's why - BBC News
40 UMG internal analysis of the number of streams of the Top 1000 tracks
41 Analysis of UMG's UK revenues by Frontier Economics
42 See UMG's response to Q.30 of RFI 1

3.54 Independents compete effectively with majors to sign artists in all genres across the music industry:

(a) First, there is no genre where UMG does not routinely encounter competition to sign artists from independents. In many instances, UMG has lost out on an artist who ultimately decided to sign to an independent label; who opted to self-release their work; or who opted to sign a distribution-only deal. For example:

[***Confidential***]

(b) Second, independents are very effective at identifying new talent, and have the grassroots ability to scout and sign new artists.

(c) Third and finally, the smaller size of independents can be used as an advantage over the majors. In UMG's experience, artists can sometimes be apprehensive about signing to a major label, for fear of being 'lost' in a large roster of other artists. The independents' pitch is that they are able to offer a deeper focus on individual artists, which can be attractive to artists particularly at the early stage of a career.

3.55 In addition, there are certain genres which are traditionally dominated by independents, e.g., electronic dance music (EDM), urban, "*indie*" etc., with many artists in these genres favouring independent labels for the reasons set out above.

(iv) *The majors do not benefit from increased promotional placement on streaming services*

3.56 UMG strongly refutes the provisional finding that the majors "*appear [...]to be able to use the importance of their repertoire and its lack of substitutability with rivals' content to negotiate significant marketing support from music streaming services*"[43]. UMG is not able to achieve the high level of placement and prominence of its repertoire on music streaming services that it would like. All labels compete to be promoted and need to make their case to be featured on a streaming service: labels typically pitch tracks using online tools, and most streaming services have individual representatives for specific labels so that all have access to the promotional teams.

3.57 Taking Spotify as an example, all labels must use Spotify's pitching tool via "*Spotify for Artists*" to upload and democratically present new music to be featured on the service[44]. Labels are limited to pitching a single track per artist at any given time. This allows for a broad range of repertoire to be featured on the service and means that an artist signed to a major has the same access to the Spotify pitching team as an unsigned artist or an artist signed to a smaller label. Spotify is also not bound by the manner in which labels may choose to pitch tracks: for example, the editorial team may select alternative tracks from the artist for inclusion in particular playlists.

3.58 Even where UMG has tried to [***Confidential***].

3.59 In any event, playlist features (the most direct way in which streaming services can shape consumer listening) are increasingly important to all labels, and majors are not

43 Update Paper, para. 5.8

44 See: Help - Pitching music to our playlist editors – Spotify for Artists

given preferential treatment as a result of the size of their catalogue. [***Confidential***]. Commercial negotiations and playlisting functions also tend to be handled by separate teams at streaming services, with unknown interaction between the two, such that a major's catalogue has no bearing on the promotions it is able to negotiate for particular tracks or artists.

3.60 Relatedly, contrary to the CMA's statement at paragraph 5.89 of the Update Paper that artists are incentivised to sign to a major label in order to access the majors' licensing agreements with streaming services, it is widely known among artists and labels that no label has preferential access to the design or operation of streaming services' algorithms, or greater ability to influence promotions on streaming services. As explained above, all labels are on equal footing with access to the same promotional tools, and artist negotiations are highly personalised to each individual artist. In this context, independent labels with a smaller roster are well positioned to focus on individual tracks to prioritise.

(v) *The clauses identified by the CMA in the Update Paper are not indicative of a distortion of competition in the market or increased bargaining power of the majors*

3.61 The CMA indicates at paragraphs 5.15-5.22 of the Update Paper that several of the contractual clauses typically included in licensing agreements between streaming services and record companies offer some limited competitive advantages to the majors. UMG fundamentally disagrees with this provisional conclusion.

3.62 The clauses identified by the CMA as being to some extent present in the majors' agreements, but not the independents', can be understood as falling into two categories:

(a) **Clauses that benefit all labels**. For example, the so-called 'functionality clauses' described at paragraph 4.6 *et seq*. do no more than clearly identify the service that is being licensed in return for the rates negotiated. [***Confidential***]. The clauses at issue can therefore have no or minimal competitive significance, and do not, as suggested by the CMA at footnote 106 of the Update Paper, reflect any superior bargaining power of the majors.

(b) **Clauses that do not confer any practical benefit**. Several of the clauses identified by the CMA are included as part of a 'belt and braces' approach but in reality do not have any practical competitive effect:

(i) *Must-carry clauses*: a streaming service is required to offer all music content [***Confidential***]. Therefore, it almost goes without saying that a streaming service will carry all content that it has licenced. The assertion in the Update Paper that these clauses "*prevent a music streaming service from removing certain content from their service where the associated royalty rate was uncompetitive or the content itself was considered to be low quality*" misunderstands the purpose of 'must carry' clauses. [***Confidential***]. Given it is so well established that streaming services provide consumers with access to all content, [***Confidential***]. In any event, any artist can distribute content on streaming services via self-distribution services such as TuneCore (see e.g., Lauren-Spencer Smith who reached the top five of the UK singles chart)[45].

(ii) *Price MFNs:* [***Confidential***] as the CMA rightly acknowledges, price MFNs do not restrict record companies from competing on price, as "*if a record company had incentives to lower its prices relative to its competitors in return for, say, more marketing support as noted above, the record company could simply remove the price MFN or waive the right to higher prices under such an MFN*"[46].

(iii) *Marketing and promotion/playlisting clauses*: [***Confidential***].

(iv) *Change of business model clauses*: [***Confidential***].

3.63 In line with the above, any competition concerns about these clauses are wholly unfounded, and UMG disagrees that there would be even a marginal strengthening of competition resulting from their removal either individually or in combination.

(c) **The negotiating power of artists**

3.64 UMG agrees with the finding in the Update Paper that "*the lack of substantial and sustained excess profits of the majors [...] suggests that there is little prospect for greater competition to improve significantly outcomes for artists overall*"[47].

3.65 However, the Update Paper also finds that "*without a significant number of attractive options, many artists may experience weak competition to sign them and find themselves in a weak negotiating position, particularly at the early stages of their career when they do not have a track record to build on*"[48]. UMG disagrees and makes three points in relation to this provisional finding.

(i) *Less concentration in the market would not substantially improve outcomes for artists*

3.66 It is an inherent and long-standing feature of the market that only a small proportion of all artists that are signed will be commercially successful. This means that when an artist is "*at the early stages of their career when they do not have a track record to build on*" any record label looking to sign them faces a high chance of making losses. Those losses do not arise by coincidence: they arise precisely because of intense competition. If competition for those artists was weak, those artists would be offered less when signing, and it would easier for the label to break even. The reality is very different – competition for new emerging talent means that a label must speculate on making its artists a commercial success and offer new artists attractive terms, in the knowledge that this will in most cases be a loss-making investment.

3.67 As the CMA recognises, consumers have a finite amount of time they can spend listening to music, and there is increasing competition for consumer attention. Given

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45 See: More and more musicians are releasing their own music: Here's why - BBC News
46 Update Paper, para. 5.7 and 5.19
47 Update Paper, para. 5.107
48 Update Paper, para. 5.94

the huge volume of artists releasing new music every day[49], it is inevitable that some artists will struggle to break through or to come to the attention of a record label. But at the same time, competition for consumer attention has ensured that those new artists who are generating the most buzz and seen as having most potential to break now have greater leverage than ever, as demonstrated by the examples in section (ii) below

3.68 That is not an indication of a lack of competition to sign artists; rather, it is simply the reality of how virtually all intellectual-property rights-based markets work. This was true before music streaming – if anything, it is even more the case today.

(ii) *Artists do not have weak bargaining power to re-negotiate contracts*

3.69 Artists are negotiating shorter deals that enable them to re-negotiate terms much earlier than in the past. Ten to twenty years ago, a typical artist agreement might include options for six albums. Now, it is more typical to agree a [***Confidential***] deal (see further UMG's response to Q.57 of RFI 1).

3.70 Artists are able to negotiate good terms even in the context of their initial agreement at an early career stage. Having achieved success, the initial agreement will typically be renegotiated to secure e.g., increased royalty rates for catalogue, increased royalty rates for future commitments and further advances. In fact, artists are also sometimes able to renegotiate their contracts even if they have not released much music by leveraging, for example, the viral success of one or two singles to receive a considerably improved deal. By way of recent examples:

(a) **Artist A**: [***Confidential***].

(b) **Artist B**: [***Confidential***].

(c) **Artist C**: [***Confidential***].

(d) **Artist D**: [***Confidential***].

3.71 Record labels take significant risk in investing in new artists. Artists provide contractual commitments in return for this investment and the promotional support of the label. For record labels, the risk of investment is not declining – if anything, it is increasing as the number of artists competing for public attention increases every day, whilst the public's listening time remains broadly static. For artists, the length and extent of their commitment, however, is reducing (as the data above confirms). And the number and frequency of renegotiation of contracts is increasing. This would not be happening if artists were losing out through reduced bargaining power or competitive position.

(iii) *Artist terms are constantly improving*

3.72 When looking directly at outcomes for artists, there have been improvements in the terms offered to artists (as acknowledged by the CMA at paragraph 5.96), e.g.: increased royalty rates, fewer commitments, fewer deals where UMG owns the

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[49] See, for example: [Over 60,000 tracks are now uploaded to Spotify every day. That's nearly one per second. - Music Business Worldwide]

copyright, increased focus on delivering singles instead of albums and shorter contractual terms.

4. Conclusion

4.1 As stated above, UMG welcomes the provisional decision of the CMA in its Update Paper not to make a MIR. It appreciates the thorough and evidence-based review conducted by the CMA, as well as the constructive engagement throughout the first half of the market study.

4.2 UMG looks forward to continued engagement with the CMA in the second half of the study. UMG notes that the CMA is "*at an early stage of assessing*" the issued raised in relation to UUC platforms, and that it intends to undertake further analysis to understand these issues[50]. UMG recognises that such services are important to consumers and to artists, and that UUC services give rise to new opportunities as well as certain complexities. UMG will consider this topic further and welcomes engagement with the CMA during the second half of the market study.

4.3 To the extent that the CMA identifies further issues that it wishes to investigate beyond those already identified, UMG would welcome the opportunity to engage with the CMA on those issues and to provide evidence where possible.

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50 Update Paper, paras. 5.134 and 5.135