RESPONSE TO EUROPEAN COMMISSION CONSULTATION ON THE EVALUATION OF PROCEDURAL AND JURISDICTIONAL ASPECTS OF EU MERGER CONTROL

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A. SIMPLIFIED PROCEDURE

1. **Changes from joint to sole control.** We note that a change from joint to sole control would generally be covered by paragraph 5(d) of the Commission's notice on simplified procedure. Such changes should however be assessed very carefully where the market is concentrated, or where the change to sole control involves the market leader on the market, or where the initial assessment of the acquisition of joint control was subject to conditions and obligations. In such cases, a detailed analysis of the impact on competition should be routine, especially where the former joint venture company is integrated into the group or network of the single controlling shareholding (see, as regards these points, Cases *COMP/M.6459 – Sony/Mubadala/EMI* and *COMP/M.8018 – Sony/Sony-ATV*).

B. JURISDICTIONAL TURNOVER THRESHOLDS

2. **Jurisdictional turnover thresholds.** IMPALA has followed the recent debate about the effectiveness of the current turnover-based jurisdictional thresholds under the ECMR, given its relevance to the digital music market, both on the recorded music and the publishing side of the market. The debate is of particular relevance to the digital music distribution market and to the different digital music providers in that market, as well as in relation to the video distribution market.

3. For example, at the end of last year, there was much discussion in the media about a possible merger between key player, Spotify, in digital music distribution and rising player, Soundcloud. Given the relatively low turnover of Soundcloud, it is unlikely that such a merger would have been have been notified under the ECMR, and yet, it would have been a significant merger for the EU digital music market. Soundcloud was already reported as having 175 million monthly unique users in 2014. And, clearly, it is viewed as a highly valued target, given that Twitter had already shown interest in acquiring it in 2014.

C. TECHNICAL ASPECTS

4. **Time limits.** IMPALA would welcome the Commission's proposal to introduce greater flexibility as regards the time limits in Phase II cases and the proposal to increase the maximum number of working days by which Phase II may be extended under Article 10(3)(2) from 20 to 30 days. As the Commission notes, even with an extension, there may be barely enough time to carry out a thorough quantitative analysis, largely due to the need to collect data from the parties and possibly, third parties. IMPALA has been involved in a number of mergers in the music market where it has made third party comments and where there has been very little time for the Commission to collect comprehensive data from third parties, which is key to informing the Commission's testing of the data provided by the parties. Moreover, third parties often have very little time to comment on detailed proposed commitments. In the case of

associations, such as IMPALA, where individual members must be consulted in order to provide the Commission with meaningful information, this is particularly challenging.

5. IMPALA would also suggest that this could even be an issue in Phase I cases where commitments are provided and that greater flexibility in these cases should also be considered.

6. **Creeping dominance.** The phenomenon of creeping dominance also needs to be investigated, and this is an issue that has been raised by IMPALA in the past. For example, we previously raised concerns about a series of separate acquisitions of key national companies which upset local competition and which taken together amounted to a significant cross-border market strengthening yet which escaped scrutiny at European level because individually the mergers are local. Such cross-border effects also escape effective scrutiny at national level as regards the potential cross-border effects because each national authority is only concerned with what goes on within its own territory.

7. Another example of such creeping dominance would be where a company with significant market power on a concentrated market has acquired a competitor, and in order to obtain merger clearance, is obliged to make very significant divestments across multiple territories and yet, subsequently acquires a vital local asset in the EEA but in a national territory that was not covered by the original merger decision, or the commitments set out in that decision, to create a dominant position in that local market. In that case, it is difficult for the EC to look at the case again and it is vital that merger control prevents companies in this situation from making such further acquisitions, or that at least when they do, such acquisitions are subject to merger control or that the company is obliged, under the commitments to which the approval decision is subject, to notify the Commission of such acquisition to allow the Commission to consider whether the acquisition complies with the commitments, if they take place within a certain time frame.

8. IMPALA considers that this enforcement gap is particularly relevant in highly concentrated, oligopolistic markets such as the music market in which its members operate.

9. **Other forms of control or influence over competitors or companies with vertical links.** These can arise through business agreements, financing arrangements and other relationships, which create effective control or some form of influence over the target. There should be greater clarity as regards the assessment of such arrangements.

D. GENERAL ISSUES

10. **Incorporating a wider review of competition policy and how it applies to merger control.** This needs to be carried out as part of effective merger control as this is a vital part of ensuring competition rules do their job and take into account the specific characteristics of different markets. In terms of market access and ensuring a level playing field more

generally, the European Commission needs to make concrete progress on its recommendations in the green paper on unlocking the potential of cultural and creative industries (the "Green Paper"). As underlined in the Green Paper, *"creating and maintaining the level playing field which ensures that there are no unjustified barriers to entry will require combined efforts in different policy fields, especially competition policy".* In this context, the area of competition policy still needs to catch up with political and economic recognition of the vital role of SMEs and of diversity in the economy.

11. As part of the mainstreaming exercise carried out within the Commission, there is a need for a review of competition policy with new competition guidelines adapted to SMEs and taking into account the cultural diversity dimension. The EC should also conduct an investigation into the economics of cultural markets and the competitiveness of SMEs to see whether or not there is a level playing field.

12. The need for a level playing field, and the role of competition policy, was also recognised by the study commissioned by the EC on the "entrepreneurial dimension of Cultural and Creative Industries": "Accessing *the market remains difficult for CCI (Cultural and Creative Industries) SMEs, especially where a few large companies dominate the market. The EU should consider adapting competition policy to CCI's characteristics to avoid excessive market concentration. This could ensure that all cultural players have a minimum access to all distribution channels, including on the online market to offer real cultural diversity and choice for consumers."* Another study commissioned by the European Commission on "the impact of culture on creativity" already highlighted "the *importance of competition rules as a tool to promote a diverse cultural offering* (...) *as diversity is a catalyst of creativity".* And the European Parliament's resolution on cultural and creative industries also asked the European Commission to, amongst other things, consider the "best *way to adapt the regulatory framework – and in particular the rules on competition policy – to the specific situation of the cultural sector to ensure cultural diversity and consumer access to a range of high-quality cultural content and services"* (point 55).

13. Finally, in its strategy on intellectual property, the EC also pointed out the need to accompany "*strong protection and enforcement of IPR"* by "rigorous *application of competition rules in order to prevent the abuse of IPR which can hamper innovation or exclude new entrants, and especially SMEs, from markets".* The digital market in particular should provide opportunities, with a real level playing field, for all actors regardless of their size. It will be essential to ensure that horizontal and vertical control issues are effectively addressed.

14. The market, if left to its own devices, should deliver diversity but it is clear in this case that a real level playing field needs to be created in order to ensure that this happens. It is also important for the EC to be in line with the UNESCO Convention on cultural diversity, which is part of EU law, to

ensure the principle of fair and equitable access to the means of creation, promotion, production and distribution for all cultural operators.

15. The Treaty (Article 167 TFEU) also states that cultural aspects shall be taken into account when implementing European law. There is no inherent diversity and big companies have no economic interest in providing it. The EC needs to ensure that SMEs have fair and equal access to the market as they are essential to the development of an economy of diversity, and more generally to jobs and growth, and competition policy and in particular merger control plays a vital role in ensuring this fair and equal access.

16. All of the above should therefore be considered as part of any strategy to implement more effective EU Merger Control.

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