8 April 2024

AlphaTheta Corporation / Serato
Submission by AlphaTheta Corporation on the Statement of Issues

1.   INTRODUCTION AND EXECUTIVE SUMMARY

1.1   This submission is made in response to the Statement of Issues published by the Commerce Commission on 7 February 2024 (**SOI**) in relation to the application by AlphaTheta Corporation (**ATC**) for clearance to acquire Serato Audio Research Limited (**Serato**) (the **Proposed Transaction**).

1.2   The SOI sets out a number of preliminary conclusions on the relevant market definition and the state of competition in the relevant markets which are not supported by the evidence. Also not supported by the evidence are the preliminary conclusions in the SOI that the Proposed Transaction would give ATC both the ability and incentive to foreclose competition in the DJ hardware market.

1.3   As the SOI recognises, the DJ hardware and DJ software industries are both dynamic and market participants compete through innovation. Participants need to stay abreast of competitive offerings and external developments to maintain and grow their market share. The focus when assessing mergers in highly dynamic markets needs to be on future constraints in such markets. In this case, the future of the DJ software industry is clear – DJ software which can be used on mobile/tablet devices (**DJ Apps**) will be a significant feature of the DJ software market and will overtake desktop DJ software (**DJ applications**) within the next 3 – 5 years for both DJ preparation and performance.

1.4   Accordingly, the significant constraint that will be posed by DJ Apps post-Proposed Transaction should not be underestimated. A static view of the market focused on the current state of competition in the DJ software market risks material error and the stifling of a pro-competitive global merger.

1.5   As explained in this submission, the Commission ought to be satisfied that the Proposed Transaction will not have the effect or likely effect of substantially lessening competition in the DJ software market because:

(a)   the relevant market in which to assess unilateral effects arising from the Proposed Transaction is the national DJ software market, which includes DJ applications, DJ Apps, embedded software and music production software. Contrary to the Commission's preliminary view, no meaningful distinction can be drawn between DJ applications, DJ Apps, embedded software and music production software for market definition purposes. Whether a product is substitutable for another is a question of fact and commercial common sense. Defining separate markets for DJ applications, DJ Apps, embedded software and music production software does not reflect the facts or commercial common sense;

(b)   the evidence shows that rekordbox and Serato are not each others' closest competitors. rekordbox and Serato users are different; rekordbox and Serato are preferred by different segments of DJ customers;

(c)   the evidence shows that the merged entity will continue to face vigorous competition from existing DJ software, including Virtual DJ, Traktor, Edjing, djay, Cross DJ, Engine DJ and DJUCED. All are well-placed to continue to innovate and constrain the merged entity post-Proposed Transaction; and

(d)   barriers to expansion in the DJ software market are low and entry is not difficult. While there are sunk costs associated with the development of DJ software, both software incumbents and entrants have similar forward-looking cost positions due to the need to continually invest in iterative improvements. All existing DJ software providers have the ability to invest and innovate to gain market share. Further, all existing DJ hardware providers could easily enter or expand in the DJ software market.

1.6   The Commission should also be satisfied that the Proposed Transaction will not have the effect or likely effect of substantially lessening competition in either the DJ software market or DJ hardware market as a result of vertical effects. The Commission has stated that its "*analysis has focused on whether the merged entity could foreclose rivals through refusing to supply Serato DJ software or raising the price of Serato software*".[1] This is not the correct legal test. "Could" is a term "*used to express possibility, especially slight or uncertain possibility*"[2] but the Commerce Act requires more than a mere possibility. The Commission must be satisfied that there is "*a real and substantial risk*"[3] the merged entity would engage in conduct of this nature. That standard is not met in this case:

(a)   the provisions of the parties' Agreement for Sale and Purchase of Shares (**SPA**) mean there is no real and substantial risk that ATC would engage in any of the foreclosure strategies discussed in the SOI during the Contingent Consideration Period (which is the period ending 31 December 2028). A breach of the SPA provisions could result in ATC being liable to pay significant damages to the Sellers and cause significant damage to ATC's reputation;

(b)   the merged entity has no ability to foreclose hardware competitors in any event. Serato is not a critical component (sometimes described as a "must have") without which DJ hardware manufacturers could not effectively sell their products in New Zealand;

(c)   the merged entity has no incentive to foreclose hardware competitors:

(i)   a foreclosure strategy is not consistent with ATC's rationale for the Proposed Transaction;

(ii)   engaging in a foreclosure strategy would damage ATC's and Serato's reputations and may breach the law;

(iii)   ATC has no history of attempting to foreclose its rivals; and

(iv)   a foreclosure strategy would not be profitable;

(d)   the merged entity has no ability or incentive to foreclose software competitors. ATC is incentivised to allow third-party DJ software providers to integrate their software with its hardware as the more compatible DJ software is with DJ hardware, the better the hardware sells. A refusal by ATC to allow third-party DJ software providers to integrate with its products is likely to result in decreased hardware sales.

1.7   Finally, the Commission should be satisfied that the Proposed Transaction will not have the effect or likely effect of substantially lessening competition in the DJ hardware market as a result of the sharing of commercially sensitive information with Serato post-Proposed Transaction. There is no real risk that confidential information provided to Serato by its hardware partners will be shared with ATC post-acquisition: the parties have taken (and are taking) various steps to put in place measures which will protect the exchange of information between Serato and its hardware partners:

(a)   Serato has prepared a confidentiality protocol for hardware partners' confidential information to be implemented post-acquisition (which is in addition to Serato's existing confidentiality obligations with each individual hardware partner). This protocol includes Serato maintaining an operational board which will be entirely separate from the ATC board, as well as IT, Physical and Operational security obligations and provides that only aggregated hardware revenue may be shared with ATC/NKC group companies' post-transaction (i.e., without breakdown for individual partner, product names, number of units sold and geographic location) to protect partners' confidential information;

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[1] SOI [fn104].

[2] https://dictionary.cambridge.org/dictionary/english/could.

[3] *Commerce Commission v Woolworths Ltd* [2008] NZCA at [97].

(b)   ATC is offering to enter into agreements with hardware partners individually that any confidential information provided by them to Serato would be appropriately safeguarded within the Serato business (and without interference from ATC); and

(c)   in any event, the terms of the SPA comprehensively address any risk of ATC using competing manufacturers' confidential information. Such conduct would result in ATC breaching a number of provisions in the SPA.

1.8   In this submission, unless noted otherwise, capitalised terms have the same meaning as defined in the SOI. References to the Application are references to ATC's application for clearance dated 6 October 2023.

2.   THE FUTURE OF THE DJ INDUSTRY

2.1   The OECD has recognised that innovation merger cases require a counterfactual that predicts whether and to what degree future innovation will impact the future market and a proper counterfactual in such cases should consider both internal and external forces on innovation.[4] Accordingly, the Commission's analysis must take into account likely market developments in its analysis of the competitive constraints that the merged entity will face post-Transaction.

2.2   The DJ industry is characterised by constant innovation and dynamic competition. It has grown and developed at a rapid pace, particularly in response to major external developments from the music and tech industries. For example, over the last 30 years:

(a)   following the development of DJ applications/DJ Apps which automated manual DJ techniques (such as beat-matching) and the corresponding development of the low-cost DJ controller, the bedroom/hobbyist DJ segment has grown exponentially. The use of low-cost (or no) DJ hardware and DJ software options would not have been possible in the early 1990s given set-ups were exclusively hardware-based and specialist DJ hardware and vinyl records were often prohibitively expensive;[5]

(b)   the setup options for performance have become more varied as a result of the various options available for media storage (USBs, laptops, mobiles/tablets, cloud service). DJs can perform with:

(i)   no hardware (laptop/tablet/mobile only);

(ii)   a full-club set-up (two CDJs, a mixer and speakers) and a USB with no laptop or mobile/tablet;

(iii)   an all-in-one device and a USB or laptop/tablet/mobile for media storage to access tracks;

(iv)   a controller, a full-club set-up or all-in-one device connected to a laptop/tablet/mobile phone running DJ software;

(v)   a set of vinyl turntables, mixer, speakers and vinyl records (for users nostalgic for early eras of DJing);

(vi)   a set of turntables, digital vinyl system (**DVS**) control vinyl, mixer, speakers, audio interface and laptop/mobile/tablet running DJ software with DVS capabilities; and

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[4] OECD, The Role of Innovation in Enforcement Cases – Note by BIAC, at [5] and [40].

[5] Present-day turntables and mixers are still considered high-end DJ hardware. For example, the retail price of a Technics SL-1200 turntable (a later iteration of the most popular turntable in 1990s) is NZ$3,599 for a single turntable (see https://www.rapalloav.co.nz/product/technics-sl-1200gr2-direct-drive-turntable-system-ii/?gad_source=1&gclid=CjwKCAiArfauBhApEiwAeoB7qN0nji_fewq0cC83muq3-0MYfrpYfU4tD8wrYQtz-Y2PeavgUAaQ-RoC1ssQAvD_BwE).

(vii)   DJ in virtual reality as a result of Algoriddim's recent collaboration with Apple Vision Pro; and

(c)   there is significant cross-over between the DJ and music production industries, particularly in relation to DJ preparation. It is common for professional DJs to work as music producers,[6] and music production techniques have influenced how music is prepared in DJ software (a topic discussed in further depth in Section 3 **below**).

2.3   We provide further detail of the developments in DJ technology since the 1990s including the impact they had on market participants, together with a diagram illustrating the evolution of the DJ industry in Annex 1.

2.4   The continuing improvements in the processing power of mobile phones/tablets/iPads, the current AI boom,[7] and the popularity of virtual reality (which has only recently started to impact the broader DJ industry) are all continuing to shape the DJ industry and will continue to do so over the next few years (much in the same way the digitisation of music revolutionised DJing in the 1990s).

2.5   While it is difficult to predict with complete accuracy what the future may hold in an industry characterised by innovation, based on the current market trends ATC considers that the following developments are highly likely over the next five years:

(a)   the use of mobile phones and tablets (such as iPads) for media storage, preparing tracks and DJ performance will overtake the use of laptops. With increased functionality and the increasing processing power of mobile devices (such as iPad Pros), DJ Apps are rapidly gaining market share and provide an increasingly strong competitive constraint on DJ applications. ATC expects that DJ Apps will become the preferred software for all types of DJing within the next 3-5 years over DJ applications. In 2023, ATC upgraded its rekordbox App to include DJ performance functionality to ensure it is positioned to compete in the future;

(b)   music production will continue to increase in importance in the DJ industry. There are several developments which evidence this:

(i)   the popularity of audio stem separation to manipulate tracks in DJ software (a feature lifted from music production software);

(ii)   the increasing use by DJs of Digital Audio Workstations (**DAWs**) such as Ableton Live to manipulate tracks during preparation of sets;

(iii)   the launch of Ableton Link-enabled DJ software which can sync and play all electronic equipment in time over a wired connection or via Wi-Fi;[8] and

(iv)   the development of DJ-focused DAWs (such as DJ.Studio[9] and Serato Studio);

(c)   cloud-based music management will become increasingly important and essential for DJ software. DJ software developers will strive to offer seamless cloud-based syncing across a range of devices (mobiles/tablets/laptops/desktop PCs) to enable DJs to DJ "on-the-go" which ties into the rise in popularity of DJ Apps; and

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[6] Application at [5.1(c)], "*Examples of touring DJs include David Guetta, Diplo and Tiesto. It is not uncommon for touring DJs to also work as music producers and produce their own tracks for Djing*".

[7] The current ongoing period of rapid progress in the field of Artificial Intelligence.

[8] Engine DJ offers the ability to use Ableton Link on any OS-compatible device https://djtechtools.com/2021/10/05/engine-dj-2-0-arrives-with-wireless-ableton-link-onboard-lighting-control-new-ui-more/

[9] https://dj.studio/blog/daw-for-djs DJ Studio syncs with rekordbox, virtual DJ and Serato libraries so users can sync libraries and drag and drop tracks into the app. Mixes can also be exported to Ableton Live for further editing and mastering.

(d)   there will be an increase in the use of music streaming services (such as Apple Music) to access music.

2.6   These future developments will have a significant impact on competition in the DJ Software market. The Commission risks making a material error if it does not give proper weight to the impact of these future developments.

3.   THE RELEVANT MARKET INCLUDES APPS AND MUSIC PRODUCTION SOFTWARE

3.1   The Statement of Issues (**SOI**) states that the Commission considers "*the relevant market for DJ software to be limited to laptop applications and excludes apps and music production software*"[10].

3.2   The exclusion of Apps and music production software from the DJ software market does not reflect fact or commercial common sense. It is a static approach to market definition that lacks the value judgment the Commission must make which "*involves, for example, an assessment of pertinent market realities such as technology, distance, cost, and price incentives; […] an appreciation of the fact that a market is dynamic and that potential competition is relevant; and an evaluation of industry viewpoints and public tastes and attitudes*"[11].

3.3   As noted above, the DJ industry is dynamic and rapidly evolving. The Commission has rightly recognised that there are difficulties in applying a traditional market definition approach when assessing mergers in highly dynamic markets and the focus needs to be more on future constraints in such markets.[12]

3.4   The Commission must give proper weight to all of the relevant competitive constraints on the merged entity (including DJ Apps and music production software) and potential future substitutes for DJ software. This will better reflect the competitive realities of the DJ software market. Adopting a static view of the market for this transaction will have significant global impact and stifle a pro-competitive merger.

3.5   The Commission has, by excluding DJ Apps and music production software from the DJ software market, also overlooked the chain of substitution between different types of DJ software products. While these products may differ in terms of characteristics and price, it is appropriate to define the market by the extent to which they exercise competitive constraint on each other.[13]

3.6   Importantly, and as the Commission recognises in the SOI, DJ applications are used for two quite different functions:

(a)   **DJ performance**. All DJ software which has core performance functionality is substitutable. There are a variety of alternative options available including DJ Apps and embedded software with core performance functionality. As noted above, most DJ software (laptop, mobile/tablet and embedded) is built to support live DJing. Some music production software (Ableton Live) also includes core DJ performance functionality and is also, therefore, substitutable for other DJ software for performance.

(b)   **DJ preparation**. This involves organising, preparing libraries and editing/remixing songs prior to a DJ set. All DJ software which offers preparation functionality is substitutable, including music production software. Younger DJs are also increasingly turning to DJ Apps (such as

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[10] SOI at [25].

[11] Re Weddel Crown Corporation Ltd CCOMM Decision No 205, 22 July 1987, at [29].

[12] The Commerce Commission's Ex-post Merger Review Report (29 February 2024) concluded at [37] that "*[e]merging consumer trends and technologies may create new areas of overlap and/or remove previously competing products from a relevant market in rapidly changing markets*" and that the review "*highlighted the difficulty of assessing competitive effects in rapidly changing markets and the need to gather as much information and evidence as possible during the merger assessment to consider the potential effects of changing preferences*" (at [38]) and "*although market definition is a useful analytical tool, it may be appropriate to place more weight on competitive constraints when assessing mergers in dynamic markets*" (at [39]).

[13] See explanation of chains of substitution at [2.1.3] of OECD 'Defining the Relevant Market in Telecommunications" (2014) Defining_Relevant_Market_in_Telecommunications_web.pdf (oecd.org)

djay Pro, Edjing Pro and Mixvibes' remixlive) which have the requisite functionality to edit/remix and save edited tracks for use on DJ hardware.

3.7 We discuss the substitutes for each of these different functions in more detail in the following sections of this submission.

4. APPS AND EMBEDDED SOFTWARE ARE CLOSE SUBSTITUTES FOR LAPTOP APPLICATIONS FOR DJ PERFORMANCE

DJ performance

4.1 DJ performance (live DJing) primarily involves mixing tracks. DJ software is built to support live DJing and has the following core functionality:

(a) the ability to access and organise recorded tracks for a live set (either purchased music or access to music streaming services);[14]

(b) beat-matching features (either a function which automatically beat-matches for users, or BPM analysis/tempo sliders which allow for manual beat-matching to be added in real time); and

(c) a mixing function.

4.2 There is a range of setups that may be used when performing with DJ software. DJs can:

(a) use a laptop/tablet/mobile phone running DJ software without dedicated DJ hardware. DJs can carry out all core DJ performance functions using DJ software alone, either using a keyboard/mouse (for DJ applications) or touchscreen controls (for mobile phones/tablets) to access and mix tracks where the software acts as a replacement for physical DJ hardware;

(b) use dedicated DJ hardware (such as a controller, all-in-one, CDJ, mixer) to "control" DJ software running on a laptop/tablet/mobile phone. Many DJ software options provide MIDI control options where users can connect specific DJ hardware to a device running the software and control software functions using the DJ hardware buttons/controls. The software in this case effectively acts as an extension of the DJ hardware. The primary purpose of the laptop/tablet/mobile phone is to run the DJ software and (if necessary) provide some information regarding the tracks (i.e., the waveforms); however, DJs are not actively using the laptop/tablet/mobile phone to perform (in other words, the DJ does not have to touch the device running the software during the performance); and/or

(c) use DJ hardware which comes with embedded software (such as all-in-ones) and a media storage device or streaming service to access tracks. Embedded software has all the features necessary for DJ performance, including cue selection and management. It is visible on screens or jogs that are part of the hardware and allows users to perform the core functions for performance (accessing tracks, beat-matching and mixing).

4.3 As most DJ software is built for live DJing, the core software functionality for performance is included in all free and paid versions of DJ applications, DJ Apps and embedded software. DJ software developers often offer other features for performing in addition to the core functions listed above (such as added FX); however, these are not essential, and DJs can perform using DJ software without these additional features.

4.4 It follows that all of these DJ software options (e.g., free, paid, basic performance software, software with additional features, embedded software, applications and DJ Apps) are substitutable as a matter of fact and commercial common sense for DJ performance. Further, Ableton Live music production software also has all of the core features required for DJ performance and is therefore substitutable for other DJ software which has performance functionality.

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[14] A music management system is required for both DJ performance and preparation.

4.5   We address the substitutability of DJ Apps and embedded software in further detail below.

Mobile/tablet Apps are close demand-side substitutes for DJ applications for performance

4.6   The SOI states that the evidence "*suggests that apps may not be a sufficient constraint on the merged entity and are likely to be primarily an option for beginner/learner DJs rather than all DJs*"[15].

4.7   The Commission concludes that DJ Apps should be distinguished from DJ applications on the basis that:

(a)   "*Apps tend to have fewer features than laptop applications*"[16];

(b)   "*Apps are designed for smaller screens, which reduces the range of features they can display*"[17]; and

(c)   "*Apps cannot be used with all controllers*"[18].

4.8   These conclusions are unsound. The Commission's exclusion of DJ Apps from its definition of the DJ software market does not reflect the reality and likely future of the DJ industry and defies commercial common sense. The Commission risks making a material error in its analysis if it persists in excluding DJ Apps from the market.

4.9   We address below the deficiencies in the Commission's analysis.

Apps pose a significant competitive threat to DJ applications

4.10   As previously explained at [5.25] of the Application, Apps have gained significant popularity for DJ performance and, as a matter of fact and commercial common sense, DJ Apps are substitutes for DJ applications. ATC also considers that DJ Apps will, over time, become increasingly popular in relation to preparation; in particular, the key competitive threat posed by Algoriddim's djay (generally regarded as the most popular DJ App which initially began as a MacOS DJ application)[19] cannot be underestimated.

4.11   The competitive threat posed by DJ Apps is clear from ATC's investment decisions:

(a)   in order to address the increasing competitive threat posed by DJ Apps over the past few years, ATC released a new version of its rekordbox App (which was initially focused on music management) in 2023 which allowed users to perform with DJ hardware (with an in-App charge); and

(b)   ATC currently has [ ] development staff dedicated solely to its rekordbox App (compared to [ ] staff dedicated to its rekordbox DJ application) and spends [   ] annually on research and development for its rekordbox App (compared to [   ] for its rekordbox DJ application).

4.12   rekordbox App numbers have grown significantly since the app was updated in April 2023 to introduce performance functionality and ATC has seen significant uptake of both the free and paid versions of the mobile app (rekordbox App global revenue for 2023 totalled [   ]). The

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[15] At [76].

[16] SOI at [27.1].

[17] SOI at [27.1].

[18] SOI at [27.2].

[19] ATC understands that djay was released for MacOS in 2008 (see djay Pro » Release Notes (algoriddim.com)) and for iPad in 2010/11.

Commission has not acknowledged ATC's rekordbox App in any part of the SOI, despite being provided with MAU figures showing the increasing users of this product.[20]

4.13 The DJ industry is still actively responding to the increasing use of mobile phones and tablets.[21] Many hardware providers now promote compatibility of their hardware products with DJ Apps, and some are starting to develop DJ hardware specifically for tablet devices (for example, the Reloop Mixon 8 Pro which has an inbuilt docking station to hold a tablet device).

4.14 The criticism levelled at DJ Apps and their use by some commentators in the market simply reflects resistance to technological change, rather than legitimate criticism of the competitive threat DJ Apps pose. The SOI refers to market feedback that "*apps have a place in the consumer segment of the market but are not present in the professional segment*", DJ Apps are not as "*well developed or widely used*", the "*more professional a DJ is, the less likely they would be to DJ using an app*"[22] whilst other submissions have suggested that "*DJing in public with a mobile app […] is needlessly challenging*",[23] and DJ Apps are not "*serious competitors to DJ software*"[24].

4.15 ATC addresses these points further below, but notes that the DJ industry has previously experienced similar resistance to innovation brought about by technological developments. The technological innovations in the DJ hardware and software markets (such as CDs replacing vinyl and the rise in use and popularity of DJ software) all attracted criticism from many industry participants who were resistant to change. This resistance to change did not ultimately affect the impact and uptake of these innovations and ATC submits the critiques of mobile DJ Apps should be considered against this background.

4.16 The mobile phone/tablet integration into everyday life has led to a significant shift in consumer behaviour in a variety of industries – not just the DJ industry. For example, bank statements were historically printed and sent to individual customers every month; however, with online banking and the advent of mobile banking apps most users now manage the majority of their day-to-day banking transactions through their mobile devices (which would not have been technically feasible prior to 2010). In a similar vein, while older DJs may still prefer to use DJ software on a laptop (much like the older generation might prefer to visit physical bank branches and receive printed bank statements) younger DJs are preferring more and more to use their mobile phones and/or tablets to DJ.

DJ Apps are not exclusively focused on beginners

4.17 It is unclear who the Commission regards as a "*beginner*", given DJing is an industry where there is always the potential to improve[25] and there are very few truly "*professional DJs*" – i.e., those who make the majority of their income from DJing. If the Commission's reference to a beginner DJ is to someone who has recently started DJing and has no prior experience, its conclusion that DJ Apps are only focused on beginners is wrong. There are many DJ Apps which are targeted towards experienced DJs which contain a wealth of additional functionality that would be unnecessary (and confusing) for a user who is just starting to learn how to mix. For example:

(a) The Pro version of djay includes all the core DJ performance functionality (streaming service integration and the ability to mix tracks), plus "Neural Mix" (djay's stems function), DVS, Gesture Control (AI-powered hand tracking technology), custom playlists, Automix AI, Pre-

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[20] [⬛⬛⬛⬛⬛⬛⬛⬛].

[21] Whilst smartphone/tablet penetration was low in the early 2010s as the iPhone had only just been released in 2007 and the iPad in 2010, in over a decade it is now accepted that mobile phones and tablets are a regular part of everyday life, with mobile phones replacing landlines in many households, and tablets becoming the tool of choice over laptops and desktop computers, in many areas. As a result, apps are starting to become heavily integrated in everyday life due to the portability of mobiles/tablets compared to laptops and desktop computers.

[22] SOI at 77.

[23] inMusic 8 November submission at pg. 7.

[24] inMusic 8 November submission at pg. 7.

[25] 56% of respondents to the Digital DJ Tips 2024 DJ survey consider their skill level as "*Confident, but still learning*" – despite the fact >60% of respondents started DJing over 6 years ago (8.4% started DJing 6 – 9 years ago, and 53.92% started DJing 10+ years ago).

cueing, recording, many FX options, support for 50+ controllers from Pioneer DJ, Reloop, Numark, Denon DJ and others and an advanced MIDI learn system to map each control on users' hardware.[26]

(b)   The Pro version of edjing mix includes all core DJ performance functionality in addition to hot cues, loops, tempo adjust functions, crossfader, freeze function (freezing a portion of the track while the track continues to play on), FX and EQ.[27]

(c)   Cross DJ's DJ App was created as a "*mobile version of [its] premium DJ software*" which offers core DJ performance functionality (the ability to import any audio file, BPM detection, a mixer function) and advanced "pro-grade features", including the ability to record and play samples, hot cues and loops, manual pitch bend, pre-listening function, an Automix function and is compatibility with MIDI controllers.[28]

(d)   The features and functionality of ATC's rekordbox App appeal to all levels of DJs. It was designed to be used by DJs throughout their DJing journey, from beginner to experienced DJ. rekordbox App also offers 'Cloud Library Sync' allowing users to perform DJ sets on their mobile phone with connected hardware using tracks already prepared on their DJ application (so they can DJ anywhere in the world).

(e)   There is ample evidence of the use of DJ Apps by professional DJs, including in world championship DJ competitions.

4.18   The free versions of the above DJ Apps also have, at a minimum, the core functionality required for DJ performance. This core functionality is all that is required for both beginner and experienced DJs to perform DJ sets. Many of these DJ Apps provide more 'professional' features (such as the ability to save edited tracks and other performance functionality) in paid versions of the DJ Apps, similar to many DJ applications.

4.19   In addition to the key DJ Apps listed at paragraph [4.17] above there are also other DJ Apps in the marketplace which do cater largely to users interested in trying out DJing and who have no or limited prior experience. ATC provided the Commission with a non-exhaustive table of DJ software providers which includes some of these DJ Apps at [5.42] of the Application. Even some of these more limited DJ Apps have paid versions with added functionality. The DJ App marketplace is highly competitive and within any particular genre, there exists a broad range of DJ Apps from those with basic functionality to others that are highly sophisticated.

4.20   The availability of simpler DJ Apps does not mean the role of more advanced DJ Apps in the market or the potential for such DJ Apps to expand to include more sophisticated functionality should be discounted. ATC rejects inMusic's submission that "*most, if not all*" of the DJ software providers included at [5.42] of the Application are "*thinly-featured, gamified and/or intended for beginners and/or casual users looking for distraction*"[29] as this list includes DJ software competitors that offer highly sophisticated software, including sophisticated Apps.[30] The competitive constraint on DJ applications by sophisticated DJ Apps like djay, Edjing Mix and Cross DJ is current and very real.

4.21   While mobile technology in general (as noted above in relation to banking apps) tends to be most attractive to a younger demographic who are experienced and capable in using mobile/tablet devices, and younger DJs tend to be newer to DJing, it does not follow that all DJ Apps are targeted towards beginner DJs. As demonstrated by the examples above there are a variety of DJ Apps which cater to DJs at every stage (from beginners to experienced DJs) in the same way as DJ applications.

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[26] https://help.algoriddim.com/hc/en-us/articles/360022496092-What-is-the-difference-between-the-FREE-version-and-the-PRO-subscription-to-djay-for-iOS

[27] https://macprovideo.com/article/audio-software/review-edjing-5-and-edjing-pro

[28] https://www.mixvibes.com/cross-free-dj-software

[29] inMusic 8 November submission at pg. 6.

[30] This list includes Traktor DJ, Serato, Virtual DJ, Engine DJ, and rekordbox amongst other options.

DJ Apps have the same features as DJ applications in relation to DJ performance

4.22   All free and paid DJ Apps and DJ applications have the core functionality required for performance (as outlined above at [4.3]). While some DJ Apps may not have all of the same features or functionality as DJ applications in relation to 'preparation' functionality, DJ hardware is not used with those functions.

4.23   For example, ATC's rekordbox App has almost all the same features and functionality of the rekordbox DJ application and can therefore be used by all types of DJs. A table comparing the functionality of the rekordbox DJ application and the rekordbox App is set out in the Table below:

Table 1: Rekordbox Functions Comparison

Application name			rekordbox (rb)	rb for iOS/Android	WeDJ for iOS/Android
Common	Support Media	Cloud Storage	✓	✓	
		Streaming Service	✓	✓	✓ (iOS only)
	Music Management	Playlist	✓	✓	✓
		History	✓	✓	✓
		Cloud Library Sync	✓	✓	
	Music Analysis	BPM/BEAT GRID	✓	✓	✓
		Waveform	✓	✓	✓
		Key	✓	✓	✓
		Phrase	✓		
		Vocal	✓		
Export Mode	Export	USB Export	✓		
		LINK Export	✓	✓	
Performance Mode	PLAYER	Number of Deck	4	2	2
		HOTCUE	16	8	8
		LOOP	✓	✓	✓
		BEAT SYNC	✓	✓	✓
		QUANTIZE	✓	✓	✓
		KEY LOCK(MT)	✓	✓	✓
	MIXER	EQ	✓	✓	✓
		FILTER	✓	✓	✓
	FX	BEAT FX	✓	✓	✓
		CFX	✓	✓	✓
		PAD FX	✓	✓	✓
	Others	SAMPLER	✓	✓	✓
		REC	✓		✓

Application name			rekordbox (rb)	rb for iOS/Android	WeDJ for iOS/Android
		STEMS	✓		
		Video	✓		
Edit & Light Mode		Lighting	✓		
		Edit & Save	✓		

Screen size is irrelevant for DJ performance

4.24   During DJ performances (especially for professional DJs) laptops running DJ applications effectively act as a large media storage device and provides some automated beat-matching functions (if necessary – users can also manually beat-match); it is the DJ hardware which does the work and directs the software to perform the various mixing and other performance functions. DJ software does not (and cannot) control DJ hardware. DJs who choose to use a laptop connected to their DJ hardware for performance do not generally interact with their laptop during the performance, rather DJs use the DJ hardware to control the software on the laptop. Accordingly, the size of the screen is irrelevant.

4.25   In any event, there are only minor differences in the size of tablet screens and laptop screens, which are unlikely to affect the user experience. The current iPad Pro comes with either an 11- or 12.9-inch display; whilst the MacBook Pro comes in a 14- or 16-inch display. For example, on Algoriddim's djay the difference in screen size between the laptop and iPad is negligible:

4.26   Whilst there is a more recognisable difference in screen size between mobile phones and laptops, ATC does not consider this is likely to make a difference during DJ performance with compatible hardware. As noted above, during DJ performance with hardware, the role of DJ software if used (whether App or laptop-based) is to allow access to pre-arranged playlists (effectively acting as a media storage device). The size of a standard mobile phone screen is more than sufficient for these purposes, particularly as mobile phone screen sizes have been increasing over the last decade, with the flagship Samsung and Apple standard models both boasting a 6inch touch screen panel – and their "ultra/plus" models with a screen size closer to 7inches (compared to the original iPhone screen size of 3.5 inches in 2007). These screens sizes are similar to the size of in-built touch screen panels on all-in-one devices and CDJs such as the 7-inch touch screens on Denon's Prime GO-2Deck and ATC's XDJ-XZ, where the size of screens has not had any impact on their use by professional DJs.

4.27   As explained earlier, there is a trend towards the use of mobile phones and tablets instead of laptops for performance. Mobile phones and tablets are more portable than heavy laptops, they have sufficient processing power to operate DJ software and have the connectivity required to allow DJs to access their music libraries through cloud storage or via streaming services (depending on the App used). In the same way that laptops replaced the use of CDs (and before that, CDs replaced vinyl

records) as media storage devices in the early 2000s, ATC considers mobile phones/tablets will eventually replace laptops for this same purpose.

4.28   While ATC acknowledges that DJs may still prefer using a laptop to prepare for DJ performances rather than a mobile phone, ATC anticipates that as the use of tablets and mobile phones for audio file preparation activities are already gaining in popularity within the music production industry, the same will be observed within the DJ industry over time. Most DJ Apps already allow users to arrange playlists and tag tracks/set cue points. The touch screen[31] features of mobile phones and tablets are more intuitive than traditional laptops and likely to be preferred by new DJs who have grown up with this technology, despite the smaller screen sizes.

Apps can be used with a large proportion of controllers on the market

4.29   The SOI states that "*Apps cannot be used with all controllers*" and that "*many DJ hardware products have been designed for laptop applications and are not pre-mapped for apps*"[32].

4.30   As a preliminary point, ATC notes that DJ hardware is generally designed independently of the software integration process and that the drivers for innovation in DJ hardware are separate to the drivers for innovation in the software market (discussed in more detail in Section 9 below). Accordingly, it is not correct to suggest that a majority of DJ hardware products are designed for laptop applications. For example, the drivers for developing all-in-one hardware devices are to ensure the product works well as a standalone product with the embedded software rather than compatibility with alternative software; the entire purpose of a standalone, all-in-one device is that it can be used without a laptop or other device.

4.31   Like DJ application developers, DJ App developers can pre-map their products to work with DJ hardware without any involvement or agreement from the hardware manufacturer. This is the primary way that Virtual DJ achieves compatibility with most DJ hardware on the market and uses this compatibility as a selling feature. Pre-mapping or collaboration between DJ hardware manufacturers and software providers is just one way in which software developers can achieve compatibility with DJ hardware devices.

4.32   ATC disagrees that because DJ Apps are not currently compatible with all controllers on the market, DJ Apps are in a separate market to DJ applications. While it is correct that DJ Apps are not compatible with all hardware, neither are all DJ applications.

4.33   In any event, DJ Apps can be used with a wide array of DJ hardware. In particular, the djay Pro iOS app is compatible with an extensive list of DJ hardware,[33] including:

(a)   23 Pioneer DJ products;

(b)   26 Numark products;

(c)   6 Rane products;

(d)   2 Allen & Heath products;

(e)   12 Reloop products;

(f)   11 Denon products;

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[31] Mobile phones and tablets can also be used with a mouse and keyboard depending on a DJs preference. See for example https://support.apple.com/en-gb/guide/ipad/ipad10939edf/ipados#:~:text=You%20can%20connect%20Magic%20Mouse,with%20all%20models%20of%20iPad and https://www.guidingtech.com/how-to-use-a-mouse-with-your-iphone/.

[32] At [27.2].

[33] ATC notes that some of the products listed in (a)-(h) have been discontinued. There is a significant market for second-hand DJ hardware and therefore compatibility with discontinued products is relevant.

      (g)   2 Native Instruments products; and

      (h)   10 Hercules products.

4.34   Djay Pro also (like most other DJ software (apart from locked software such as DJUCED)) has a MIDI-mapping function, and Algoriddim promotes the sharing of MIDI mappings for hardware which is not pre-mapped on its community webpage.[34]
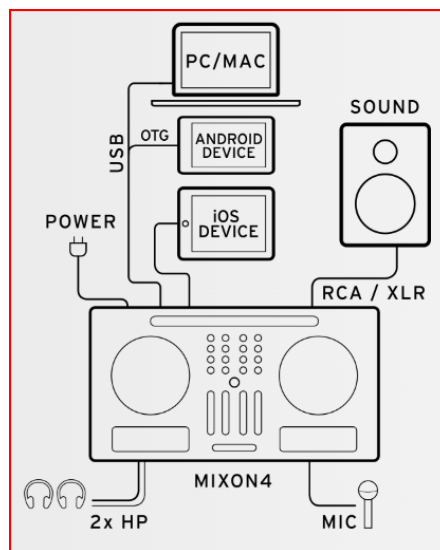
4.35   Further, ATC's rekordbox App can be used with Pioneer DJ players/turntables and DJ controllers.[35] The rekordbox App allows users to start DJing in the palm of their hand with access to "*all functions in the app like easily editing cue and grid information and checking track compatibility*"[36] and offers seamless integration with Tidal and Soundcloud, allowing users to have instant access to millions of tracks.

4.36   Hardware manufacturers would be unlikely to promote compatibility with DJ Apps if DJ Apps were not considered viable substitutes for DJ applications. However, the industry trend is the opposite. DJ hardware manufacturer Reloop's promotion of DJ App compatibility highlights the industry's acknowledgment of DJ Apps as a DJing option. In particular:

      (a)   Reloop states on its website:[37]

> *While DJing with a computer has been an industry standard for many years, DJing using smart devices, such as iOS and Android-based systems, is fast becoming a popular option. There is a great selection of controllers for DJing with smartphones and tablets out there, with solutions for beginners and advanced users.*

      (b)   Reloop showcases how its controllers can be setup with a laptop or a mobile phone / tablet device. For example:[38]

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[34] https://community.algoriddim.com/t/how-to-share-midi-mapping-files-on-the-community/15702

[35] https://rekordbox.com/en/support/link/

[36] https://rekordbox.com/en/feature/mobile/

[37] See, https://www.reloop.com/djing-with-smartphones-and-tablets.

[38] See 'setup examples' at the bottom of the following webpage: https://www.reloop.com/djing-with-smartphones-and-tablets.

(c)   Reloop's flagship DJ controller, the Mixon 8 Pro, has been specifically built with a docking station to hold a tablet device and it is marketed as being compatible with both Serato DJ Pro and djay Pro (a demonstrable illustration of the substitutability between DJ applications and Apps and the competitive threat that Apps pose to DJ applications such as Serato):

4.37   Accordingly, DJ Apps are similar to DJ applications in terms of compatibility (or ability to be compatible) with DJ hardware. There is no basis in fact or commercial common sense to conclude that these products are not in the same market.

DJ Census is not a reliable indicator of the popularity and use of DJ Apps

4.38   The 2024 Digital DJ Tips Global DJ Census results were released in January 2024 and show a relatively small proportion (1.56%) of respondents' main DJ set up is mobile phone/tablet (with/without a controller) compared to the large proportion of respondents (56.51%) indicating their main set up is a controller and laptop.

4.39   ATC considers that there is an inherent bias (due to age/experience) in the selection of respondents to the DJ Census which means that it is not a reliable indicator of the popularity of mobile/tablet applications. In response to the question "*Which of these computing devices do you have and use regularly*" the overwhelming majority of responses indicated desktop/laptop computer, whilst only a small percentage of respondents indicated that they owned and used a smartphone or tablet regularly. However, only 7.5% of respondents to the survey were under 25 years old, while over 70% of respondents were over 35 (including 13.05% respondents indicating they were over 55 years of age). In comparison, in the 2014 Digital DJ Tips survey ~35% of respondents were under 25 years old.[39]

4.40   It is common knowledge that younger generations who have grown up with smart phones and tablets prefer using these devices over laptop computers. DJs who are over the age of 35 did not grow up with mobile phones and tablets of the kind available now; these DJs would have been born in 1989 or earlier, almost 20 years before the first modern smartphone, the iPhone, was released to the market in 2007.

4.41   As most of ATC's customers are [   ] (with the vast majority of ATC's software customers being between [   ]) it is clear that the Digital DJ Tips survey does not represent the majority of DJ software (or hardware) users globally. Customers between [   ] make up the majority of the market and are far more likely to use DJ Apps as they have grown up in an age of increasing mobile processing power.

4.42   In addition, 53.92% of respondents to the DJ Census survey are experienced DJs with more than 10+ years' experience, meaning that they started DJing before 2014. Accordingly, most DJs who participated in the survey started DJing in the early to mid-2010s when the controller and DJ

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[39] https://www.digitaldjtips.com/results-worlds-biggest-digital-dj-survey/

applications were at the height of popularity. It therefore makes sense that the vast majority of respondents prefer a DJ application and controller set up as this is what they learned to DJ with.

4.43 ATC acknowledges the DJ Census assists in tracking the popularity of DJ software for older, more experienced DJs (only 11.44% respondents indicated they were complete beginners/new to DJing). ATC itself has relied on DJ Census data in its board documents to track the popularity of its DJ software with more experienced DJs. However, the number of respondents to the DJ Census have decreased significantly over recent years from 26,560 respondents in 2020 to only 15,162 in 2023, suggesting the overall value of the DJ Census (even for tracking the popularity of DJ software amongst experienced DJs) is decreasing.

DJ Apps are likely to have affected the growth of DJ applications

4.44 The Commission has stated in the SOI that there is limited evidence to suggest that the rise in the sale of DJ Apps has materially affected sales of DJ applications in a way that would suggest DJ Apps impose a strong constraint.[40] Whilst ATC does not have quantitative switching data to demonstrate the number of users of DJ application software diverting to DJ Apps (and vice versa), the DJ industry has grown materially over the past decade. Given the popularity of DJ Apps with younger customers discussed above, it is likely that the growth in DJ applications would have been higher if not for the introduction and widespread adoption of DJ Apps.

4.45 The trend towards more digital and app-based solutions in the DJing and music production industry can be seen from industry references to DJ Apps. Digital DJ Tips, a DJ information resource which produces the DJ Census, states that "*your phone has got all the technology you need* [for DJing]"[41] and DJ Tech Tools has produced a detailed guide on using Algoriddim's djay Pro and Mixvibes' Cross DJ Apps with any MIDI Controller.[42] Crossfader, a prominent DJ school and influencing platform states "*if you can take something as small and portable and as powerful as the iPad into the club and use it in the same way as laptops currently, why would we use laptops at all*"[43]. Similarly, a senior inMusic employee has produced materials demonstrating the use of Rane products with mobile Apps,[44] and Rane has officially partnered with Algoriddim djay Pro on three hardware devices.[45]

4.46 Crossfader also references the computing power of iPad OS and Algoriddim's djay Pro app, as well as the increasing prevalence of hardware which is catering for these DJ Apps, stating "*we will be seeing the* [Pioneer DJ] *DDJ-800 amongst other professional club standard controllers* […] *being supported* [by DJ Apps] *soon*"[46]. This further demonstrates the trend for top end DJ hardware (and DJ hardware in general) to cater for professional DJs using DJ Apps.[47] Likewise, an article by DJ Sara Sims highlights how "*Edjing Pro is a great app which can be used by both professional and beginner DJs*"[48]. The number of professional DJs using DJ Apps will only increase as hardware providers increase the number of models compatible with DJ Apps, and these models become increasingly complex and support a wider range of functions.[49]

4.47 The increasing use of DJ Apps is also evidenced by the release of hardware specifically designed to be used with a tablet (such as the Reloop Mixon 8 Pro discussed above, Reloop Buddy, Reloop

[40] SOI at [28].

[41] https://www.youtube.com/watch?v=UFU–ATiYN5k.

[42] https://djtechtools.com/2018/07/10/how–to–use–any–controller–with–djay–pro–cross–dj–pro–ios–dj–apps/.

[43] https://www.youtube.com/watch?v=HhbVDJkt2sA.

[44] See, https://www.youtube.com/watch?v=UVTcCOBvtPY; and https://www.youtube.com/watch?v=G7jd–ailrZs.

[45] See, https://www.algoriddim.com/press_releases/434–algoriddim–partners–with–rane–djay–pro–ai–with–neural–mix–available–on–the–one–seventy–and– twelve–mkii.

[46] https://www.youtube.com/watch?v=HhbVDJkt2sA.

[47] Pioneer DJ DDJ–200 fully compatible with edjing Mix.
[48] https://macprovideo.com/article/audio–software/review–edjing–5–and–edjing–pro.

[49] A–Trak, DJ Angelo, Laidback Luke, Invisibl Skratch Piklz, DJ Carlo and DJ K–Swizz are all examples of professional DJs using DJ apps, the latter being the 2022 World DMC champion.

Beatpad2, Reloop MixTourPro, Hercules' DJControlMix, Pioneer DJ DDJ-WEGO3 and DDJ-200) by manufacturers.[50]

There is supply-side substitution between DJ Apps and DJ applications

4.48   The SOI states that "*there is unlikely to be strong supply side substitution between apps and laptop applications*", as they are "*written to different operating systems*" which means "*that producing one or the other would require starting afresh*"[51].

4.49   To the contrary, there is significant supply-side substitution between DJ applications and DJ Apps with numerous examples of developers of DJ applications expanding into DJ Apps:

(a)   Algoriddim's djay was originally launched as a MacBook OS DJ software and later expanded to an iOS app;

(b)   similarly, Cross DJ was originally developed as a DJ application, with Mixvibes later developing a (hugely popular) DJ App;

(c)   Traktor launched its Traktor DJ App in 2013; and

(d)   ATC released weDJ and its rekordbox App after first developing its rekordbox DJ application.

4.50   ATC expects this trend to continue as mobile/tablet DJ Apps continue to grow in popularity and developers of DJ applications who do not have mobile alternatives will eventually struggle to compete for new users who prefer to DJ using a tablet or their mobile phone.

Embedded software is a close substitute for DJ applications for DJ performance

4.51   The SOI states that "*the relevant market for DJ software is limited to laptop applications*"[52] but does not directly address embedded software.

4.52   Embedded software (such as Engine DJ OS) allows DJs to carry out core DJ performance functionality (access to recorded tracks, add FX, adjust BPM and mixing functions) and accordingly is a close substitute for DJ applications when used for performance. DJs can connect USBs (or use their mobile phones/laptops as media storage devices) to access their tracks, or use streaming services connected to the embedded software (Engine DJ OS advertises this as "*Standalone Music Streaming*") to access music.[53] Engine DJ Desktop allows users to import their iTunes, rekordbox, Serato, and Traktor libraries directly into the Engine DJ Desktop, including music, playlists, hot cues, and loops.[54] Engine DJ has uploaded a video of how users can import music and playlists from rekordbox into Engine DJ.[55]

4.53   In addition, from ATC's perspective it would be relatively easy to develop standalone DJ software based on embedded DJ software. ATC's embedded software (for CDJs and all-in-ones) and its rekordbox DJ application are written in the same coding language (C++), which demonstrates the ease with which a developer of embedded software could develop standalone DJ software – the same developers can be used for both.

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[50] For example, see the Reloop Beatpad–2 controller and the Reloop Mixon 4 high–performance controller which specifically includes a slot for a tablet.

[51] SOI at [29].

[52] At [25].

[53] https://enginedj.com/streaming

[54] https://enginedj.com/kb/solutions/69000847452/engine-dj-importing-your-serato-library

[55] https://enginedj.com/kb/solutions/69000798942/how-to-import-a-rekordbox-collection-into-engine-dj-playlists-hot-cues-loops-beat-grid

5.   MUSIC PRODUCTION SOFTWARE AND APPS ARE CLOSE SUBSTITUTES FOR DJ SOFTWARE FOR DJ PREPARATION

DJ preparation

5.1   DJ software is a sophisticated system for music management allowing DJs to organise, manage, and prepare their music libraries. This can include setting cue points and tagging tracks which enable quick access to relevant parts of songs during live mixing. Music managed in this way can then be used for performance by using the performance functionality of the DJ software or exporting for use with DJ hardware with embedded software. Notably, the music management function of DJ software is trending towards being cloud based, so users can access their curated music libraries from any device wherever they may be.

5.2   Preparation also involves editing and remixing tracks, which are later used for performance. Editing/remixing functions are generally limited to paid versions of DJ software. For example, the free version of rekordbox allows users to edit tracks (as a teaser) but does not allow users to save those edits, which is only available on the rekordbox Professional and Creative plans. It is also not uncommon for DJs who engage in DJ preparation to use separate music editing software as a complement to their live performance DJ software as this software is specifically designed for editing/manipulating tracks. For example, while inMusic's embedded software Engine DJ OS cannot be used for DJ preparation, its standalone mixing software, MixMeister[56] (recently updated in September 2023) allows users to edit, mix and save edited tracks for export and use on DJ hardware, which it can do for example by exporting tracks to iTunes, which in turn can be exported to Engine DJ Desktop.[57]

5.3   DJ hardware is not used for DJ preparation. Instead, DJs will "prepare" for their DJ performances using only their laptop, tablet or mobile phone. Software which allows DJs to edit tracks and undertake other elements of preparation for performance (including library management) are all substitutable for DJ software which includes this functionality. Users have many options for undertaking preparation functions, as discussed further below.

Music production software and DJ software share preparation functionality

5.4   The Commission concludes in the SOI that there are likely separate markets for DJ software and music production software as "*music production software has different functionality to DJ software*"[58].

5.5   ATC disagrees. Music production software (DAWs) allows users to record, edit and produce audio files. It is therefore a close substitute for the preparation functionality of DJ software which does the same thing, and DJs already use music production software for this purpose. Ableton Live also, contrary to the Commission's conclusions in the SOI, is a close substitute for DJ software used for performance, as it contains all of the functionality required for performance.

5.6   After DJs have developed core DJ performance skills (mixing tracks) the natural next step is editing and producing music to incorporate into their DJ performances. As noted by Phil Morse, "*as with DJing, digital has lowered the barriers of entry into the world of music production considerably, to the point where nowadays you can make a track on your phone, never mind on a tablet or laptop*"[59]. DJs commonly start with live remixing during performances, and then move to editing or re-editing tracks ahead of time to use during DJ performances.

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[56] https://www.mixmeister.com/ Mixmeister offers 15-day trials for its Express, Studio and Fusion products. The Mixmeister Express, which costs $137.99 NZD, the Mixmeister Studio costs $196.99 NZD and the Mixmeister Fusion costs $324.49 NZD.

[57] While the competitive impact of the recent updates to MixMeister are yet to be fully felt, it is clear the IP in the software still retains value as time/resource was taken to update the software in September 2023 to work on new operating systems with the last prior update in May 2015.

[58] SOI at [25].

[59] https://www.digitaldjtips.com/rock-the-dancefloor/becoming-a-dj-producer/#:~:text=DJs%20are%20creative%20by%20nature,fun%20in%20and%20of%20itself.

5.7 The competitive threat posed by DAWs to DJ software is evidenced by the response of DJ software market participants:

    (a) the development of the "stems" feature in DJ software (including DJ Apps such as djay Pro) which effectively combines live-mixing and music production; and

    (b) DJ-friendly/specific DAWs (such as Serato Studio and DJ.Studio) have been specifically developed to target the growing numbers of DJs interested in editing/mixing music.

DJ Census results viewed in context support ATC's submission

5.8 The SOI states that "*while in principle it may be possible to use music production software to perform DJ sets the Commission has received no evidence to suggest that any significant numbers of DJs are doing so*"[60]. The Commission cites the 2023 DJ Census results which show that only a small number of respondents said they use Ableton Live to DJ.

5.9 The Digital DJ Tips 2024 Census results support ATC's submission that experienced DJs are increasingly using music production software to edit/manipulate tracks:

    (a) 17.67% of respondents indicated they wanted to be a "DJ/producer";

    (b) 21.59% of respondents indicated they regularly produce their own music, 29.41% have tried and 36.04% have not yet tried but "want to"; and

    (c) for respondents who produced music, the majority used Ableton Live (by a large margin) followed by FL Studio, Serato Studio and Logic Pro.

5.10 DJs can now use either music production software or some paid versions of DJ applications to edit/manipulate tracks for DJ performances. Music edited on music production software, or DJ applications, can be exported and mixed on standalone DJ hardware (such as CDJs or all-in-ones) or imported into DJ software for live performance.[61]

5.11 It follows that the Commission's exclusion of music production software from its definition of the DJ software market does not reflect reality and defies commercial common sense.

DJ Apps are becoming closer substitutes for DJ software for preparation

5.12 While ATC acknowledges that older DJs may currently prefer to prepare for performances using a laptop instead of a mobile phone, the use of DJ Apps on a mobile phone or tablet for this purpose is becoming increasingly popular.

5.13 As a result, many of the major DJ Apps now offer preparation functionality in addition to DJ performance functionality. For example:

    (a) Edjing Pro automatically saves settings (BPM, cues, loops. https://world.edjing.com/pro see under "*Syncronized cues and loops*"), so when users reload the same music track again, these stored settings can be used again for DJ performance (and re-edited/ modified again); and

    (b) Mixvibes' remixlive App[62] allows users to edit audio files and create their own tracks.

5.14 Accordingly, DJ Apps should not be dismissed by the Commission simply because they are currently less popular with DJs for preparation. As explained in section 2 above, ATC considers that DJ Apps will overtake DJ applications over the next 3 –5 years for both performance and preparation.

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[60] SOI at [33].

[61] https://www.elektronauts.com/t/daw-in-the-studio-dj-software-for-live-anyone-ableton-to-traktor-question/199170

[62] https://www.mixvibes.com/remixlive

6.   NO LESSENING OF COMPETITION

6.1   To assess whether the transaction is likely to substantially lessen competition the Commission must apply the with and without test. This requires a forward-looking assessment that "*[takes] into account factors including* market *growth and technological changes*".[63] While in static markets the best guide as to what would happen in the counterfactual is often the status quo, the Commission acknowledges that where a market is "*likely to undergo changes that will affect competition*" in the counterfactual that it will take these changes into account.[64]

6.2   As discussed above, the DJ industry is dynamic. The pace of innovation has accelerated significantly over time, and there will be significant changes in the market over the next five years which will have a dramatic impact on competition in the market. Current changes– such as the popularity of DJ Apps- already pose a competitive threat to incumbents such as rekordbox, Serato, Traktor and Virtual DJ. In those circumstances the Proposed Transaction cannot be assessed by analysing the market as it is today.

6.3   As a consequence of the earn-out provisions in the SPA discussed in section 7 below, any horizontal effects of the proposed merger will in any event not be realised for almost five years. By that time market conditions will be very different to those that prevail today. As Serato will continue to operate independently of, and as a competitor to rekordbox, until 31 December 2028, market participants have ample time to expand and grow their existing operations in the DJ software market in response to the Proposed Transaction.

6.4   The SOI states that the Commission considers:

(a)   "*Serato's DJ software and ATC's rekordbox compete closely and the loss of competition between them would be significant*" [65];

(b)   the competitive constraint from other software providers is "*unlikely to sufficiently replace the competition lost from the Proposed Acquisition*"[66]; and

(c)   "*the possibility of entry and expansion of rivals would be insufficient to constrain the merged entity*"[67].

6.5   As discussed below, the Commission's considerations are not correct. The Proposed Transaction is unlikely to have an effect of substantially lessening competition in any market.

rekordbox and Serato are not each other's closest competitor

6.6   The SOI states the evidence the Commission has gathered "*shows the merging parties appear to compete closely for customers and impose a significant degree of constraint on one another*"[68] and suggests that rekordbox and Serato are each other's closest competitor in the DJ software market.

6.7   While rekordbox and Serato offer many of the same features and are substitutable, both in relation to their free versions and paid versions, the history of these products and therefore the nature and profile of rekordbox users and Serato users are different:

(a)   **Serato and rekordbox are preferred by different segments of DJ customers**. Serato DJ is well known and used by "scratch" DJs and primarily popular in the US for this reason

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[63] At [2.35] Merger Guidelines.

[64] At [2.36] Merger Guidelines.

[65] At [51].

[66] SOI at [73].

[67] At [51].

[68] At [52].

(Serato's initial DJ software was called 'Serato Scratch Live').[69] rekordbox is primarily used by house/Techno/Trance DJs and has managed to obtain market share by appealing to that DJ genre which is primarily popular in Europe.[70]

(b) **rekordbox started as a library management tool, and performance came later.** In contrast, Serato was originally used for live performance (with Scratch Live). This history continues to influence the use of the two products today. While both rekordbox and Serato now have both preparation and performance functionality, rekordbox has a hardware focus on improving the interchangeability of its DJ application and DJ App. ATC's observation is that Serato has a software focus on enhancing complementarity of DJ performance (Serato DJ Pro / Suite) and music production (Serato Studio) to serve the same artists who use both DJ and music production software.

(c) **the vast majority of rekordbox users use [   ].** Almost [ ]% of rekordbox users (based on MAUs as at December 2023) use the free version, compared to [   ]% of Serato users (based on MAUs as December 2023) that use Serato's free DJ software, Serato DJ Lite. .

Figure 1 below shows rekordbox MAUs over time:

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[69] For example, see https://www.gear4music.com/blog/the-best-dj-software/; https://www.digitaldjtips.com/rock-the-dancefloor/choosing-your-dj-software/

[70] In a pop-up survey in the initial log-in to the rekordbox Application since the launch of version 6.0 (May 2020) users are asked "*What kind of music do you usually play*". As at 29 March 2024, more than [ ] of respondents chose House/Techno/Trance. ATC notes that multiple selection was possible and just under [ ] chose Hip-Hop/R&B. The survey results are provided together with this submission.

Figure 2 below shows Serato MAUs over time:

6.8   The Commission has also relied on the Digital DJ Tips Global Census 2023 results to suggest the parties "*compete closely*"[71]. For the reasons set out above at [4.41], the DJ Census results are not representative of the DJ software or hardware markets. They reflect the preferences of experienced, older DJs who began DJing at a time when DJ applications and controllers were at the height of popularity. In any event, the DJ Census results show that the increased proportion of respondents that use rekordbox has had no appreciable impact on Serato's market position over time.

6.9   Furthermore, as a result of the SPA Protections and Contingent Consideration mechanism, the parties are incentivised to, and therefore will, continue to compete until at least 31 December 2028.

Other software providers will constrain the merged entity post-acquisition

6.10   The DJ software industry is highly competitive. Competition occurs through innovation, which is driven by both internal and external forces: DJ software developers continually update their software to ensure compatibility with new DJ hardware devices, operating systems, and the ways that users like to store and access music, as well as to remain cutting edge to attract new users.

6.11   The Application identified a number of alternative DJ software providers, including providers of DJ Applications, DJ Apps, embedded software, and music production software, which currently compete against ATC and Serato in this market and will continue to compete post-Transaction. All of these software providers continue to innovate and develop at a fast pace.

6.12   The following existing software providers in particular are well-placed to continue to innovate and expand their operations over the next 5 years, and aggressively compete with the merged entity:

(a)   **inMusic** – inMusic is a large, well-resourced and privately-held company which owns a number of music production and DJ brands,[72] including:

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[71] SOI at [60].

[72] Application at [6.18(i)].

(i)   Engine DJ Desktop, which is used to store, and manage a DJ's Music Library. It advertises that it can seamlessly import edited tracks / music libraries from rekordbox, Serato, and Traktor[73];

(ii)   Engine DJ OS, which is software that is embedded in inMusic's standalone controller (equivalent of Pioneer DJ's All-In-One systems);

(iii)   SoundSwitch, which is software used to control lights during performance. Soundswitch is compatible with a wide range of DJ controllers and mixers, including authorised Serato DJ compatible controllers; and

(iv)   MixMeister, a "world class mixing software" which recently offered a free update to all existing users in September 2023 to work with the latest Mac and Windows operating systems.[74] It offers products that analyse BPM (BPM analyser),[75] creates sounding-mixes from music files (Express),[76] and mixes and blends tracks (Studio & Fusion).[77]

inMusic also offers a full range of music production hardware through well-known music production brands including Akai Professional,[78] Alesis,[79] Alto,[80] M-Audio,[81] and SONiVOX.[82] In June 2023, inMusic acquired specialist synthesizer brand Moog. inMusic has partnered with FL Studio and Ableton to produce dedicated music production hardware for these brands. Whilst privately held (and so difficult to estimate revenues), in 2019 inMusic's CEO publicly stated the company's global annual turnover was around US$400m.[83]

inMusic already competes with Serato and rekordbox in relation to both DJ performance and preparation; for performance, DJs can elect to use the embedded version of Engine DJ instead of using standalone software like Serato or rekordbox, and for preparation, DJs can elect to use MixMeister/Engine DJ's desktop library management tool instead. inMusic could easily develop Engine DJ into a standalone DJ application, perhaps by incorporating some features of MixMeister into Engine DJ, to offer a single software product with both preparation and performance functionality to compete more closely with standalone DJ software products like Serato and rekordbox. inMusic already has the knowledge and capability to develop this software, as ATC did by upgrading rekordbox from a mere library management tool to a fully functional DJ performance software. Accordingly, the Commission should reject any suggestion that inMusic could not develop a standalone DJ software product given an incentive to do so, especially given inMusic is nearly twice as large as ATC.

(b)   **Native Instruments** – Native Instruments is a leading manufacturer of software and hardware for computer-based audio production and DJs, based in Germany. Through its Kontrol and Traktor brands, Native Instruments develops, manufactures, and supplies music software and hardware for music production (audio effectors, drum/rhythm machines, samplers, sequencers, synthesizers), sound design, performance, and DJing. Native Instruments produces Traktor, a DJ application.[84] Native Instruments offers a free DJ App

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[73] https://enginedj.com/software/enginedj-desktop, see "*Engine DJ offers the most comprehensive 3rd-party library import in the industry supporting rekordbox, Apple Music/iTunes, Serato DJ and TRAKTOR databases. Instantly import your music, playlists, hot cues and loops ready to use on Engine DJ OS hardware*".

[74] https://www.mixmeister.com/studio.html

[75] https://www.mixmeister.com/bpm-analyzer.html

[76] https://www.mixmeister.com/express.html

[77] https://www.mixmeister.com/studio.html

[78] https://www.akaipro.com/.

[79] https://www.alesis.com/company.

[80] https://www.altomusic.com/.

[81] https://m–audio.com/.

[82] https://www.sonivoxmi.com/.

[83] https://www.stuff.co.nz/business/110962952/million-dollar-investment-points-to-digital-music-potential

[84] Application at [6.18(i)].

version of Traktor (Traktor DJ 2),[85] a stripped back version of Traktor (Traktor LE 3) and the professional flagship software Traktor Pro 3.[86] Native Instruments also offers a leading music production software through its MASCHINE brand.

Traktor was the market leader but is generally regarded as having fallen behind its competitors in terms of features and updates over the last few years, likely because its focus has been on establishing an end-to-end music creation platform.[87] Many Traktor users left Traktor due to delays in regular updates (which meant it took significant time before the software worked on newer operating systems) and it was not as attractive to new users as it did not incorporate newer software features already available on other software. However, as noted by inMusic,[88] Traktor has maintained a core userbase who remain satisfied with the product and how it works. It could invest in updating its existing software to align with the current software offerings in the market, and regain the market share it has lost over the past decade.

(c)   **Algoriddim** – Algoriddim was founded in 2006 and produces djay, a DJ App and application, which is marketed as the number one DJ software for Mac and Windows.[89] Algoriddim offers both a free and paid version of djay. djay Pro on iOS officially supports a wide array of hardware.[90]

Algoriddim is well-resourced and well-placed to capitalise on the popularity of DJ Apps. It already has a significant core user base, and it competes with DJ applications through innovation. Algoriddim's djay Android application has been downloaded over 10 million+ times, whilst the iOS application has ~15,000 reviews on the Mac App Store.

Algoriddim recently announced (on 2 February 2024)[91] that djay now integrates with Apple Music. This has already had a significant impact across the DJ industry with many DJs recognising the competitive threat that djay poses.[92] For Apple Music subscriber DJs who use djay, they now have the ability to access more than 100 million songs in Apple's library. Commentators have suggested this goes some way to filling the void left when Spotify pulled its service from all mixing platforms in 2020, given Apple Music is Spotify's closest rival in terms of market share.[93] In addition to the new streaming capability, djay also now allows DJs to DJ virtually using Apple Vision Pro. This enables DJs to mix on a set of virtual 3D turntables.

Other recent innovations include:

(i)   Algoriddim significantly invested in its stems feature, introducing Neural Mix v2 in its Algoriddim djay Pro 5 through a partnership with AudioShake. Some commentators consider djay Pro as a market leader in stems technology.[94] Other DJ software providers, including Serato and rekordbox, have responded to djay's stems

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[85] https://www.native-instruments.com/en/catalog/software/dj-software/

[86] https://www.native-instruments.com/en/products/traktor/dj-software/traktor-le-3/comparison-chart/

[87] Native Instruments acquired by technology investor, plans "end-to-end" music creation platform - gearnews.com

[88] InMusic 8 November 2023 submission at [II.i].

[89] Application at [6.18(i)].

[90] https://www.algoriddim.com/hardware#ios

[91] https://www.algoriddim.com/news/449-apple-music-integration-is-here-

[92] https://community.enginedj.com/t/algoriddim-djay-pro-now-streams-apple-music/54321/2 Users suggest the integration is "*pushing Djay right up the table of software to use*", that djay is "*easily the most up to date and forward thinking software outside of [Virtual DJ]*", the mobile phone version of the app being "*perfect for vinyl gigs too, if you want to drop the odd track on DVS without carting a laptop and stand etc around*", and in regard to mapping "*if Djay hasn't mapped it already, the process for DIY is reasonably straightforward*".

[93] https://www.musicradar.com/news/apple-vision-pro-algoriddim-djay-apple-music

[94] https://www.digitaldjtips.com/reviews/algoriddim-djay-pro-5/

technology, demonstrating the competitive constraint posed by djay on other DJ software providers;

(ii) Algoriddim launched DVS capability in 2023, and its own timecode DVS that has Neural Mix options – whereby dropping the needle onto a certain part of the DVS vinyl allows a user to play the whole track, the instrumental or the acapella; and

(iii) Algoriddim recently expanded to application and released the Windows edition of its djay Pro software in October 2023.[95] Djay also offers iCloud syncing on iOS and macOS devices (a similar feature to the rekordbox App Cloud Direct Play function). Algoriddim's subscription function enables one payment for use across multiple devices.

(d) **MVM –** MVM (formerly DJit) is a mobile music app publisher which publishes the DJ App edjing Mix. Edjing operates on a "freemium" model, where the free version offers core performance functionality and the premium (paid) features include automix, automatic audio analysis, manual audio adjustment and customisable audio settings.[96] MVM is the world's number one music app publisher and as of 2019, had more than 300 million downloads across 15 products.[97] In addition to its edjing app, MVM also publishes a music source separation app, powered by AI (called "Stemz").[98] MVM is constantly improving, upgrading and developing Edjing,[99] and its efforts have resulted in a large MAU base (estimated 3.89m MAU as at December 2022).[100] ATC considers Edjing Mix is already a competitive threat to incumbent DJ applications (such as rekordbox, Serato, Traktor, Virtual DJ).

(e) **Atomix Productions** – Atomix Productions produces Virtual DJ, a DJ laptop application software. Atomix is a large international corporation with offices all over the world. As noted in [6.18(f)] of the Application, Virtual DJ is marketed as the most downloaded DJ software globally. In addition to its DJ application, Virtual DJ has also released Virtual DJ Remote, an iOS & Android phone and tablet app which allows users to use their tablets as a virtual scratch turntable or control their Virtual DJ application from their phone.[101] Virtual DJ has been increasing in popularity over the years, particularly in light of its key marketing feature – that it is pre-mapped to work with most DJ hardware on the market (500+ devices as of February 2024) [102]. As consumers push for more multi-software compatibility for DJ hardware products, ATC anticipates Virtual DJ will continue to grow in popularity.

Virtual DJ is not "*consumer level*" software.[103] Online forums suggest any perceived "*stigma*" from some DJs regarding the use of Virtual DJ is because early on it was easily pirated for use by non-professionals DJs who were not as skilled at DJing and/or the pirated versions were not as stable as the legally downloaded software.[104] In 2024, Virtual DJ is regarded as professional, stable, high-quality DJ software which is popular amongst mobile DJs in particular.[105]

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[95] https://djtechtools.com/2023/10/16/djay-pro-for-windows-launches-with-neural-mix-tech-for-djs-to-isolate-track-elements/

[96] http://world.edjing.com/pro

[97] https://www.data.ai/en/customers/mwm/

[98] https://www.mwm.ai/apps/stemz

[99] As noted in the Application at [5.13], Edjing has released 7 versions of its app in the last 9 years amounting to one update every 1.3 years.

[100] See Table 3 in Application at [6.8].

[101] https://play.google.com/store/apps/details?id=org.atomixproductions.VirtualDJRemote&hl=en_NZ&gl=US

[102] In 2024, Virtual DJ reached 500+ supported devices, including discontinued devices which remain popular on the second-hand hardware market.

[103] SOI at [71.1.1].

[104] https://www.reddit.com/r/DJs/comments/vwaddb/how_do_you_guys_feel_about_virtual_dj/

[105] https://www.digitaldjtips.com/best-virtualdj-controllers/#:~:text=But%20one%20of%20VirtualDJ's%20strengths,are%20extremely%20good%20at%20it.

(f)   **Ableton AG** – Ableton AG produces Ableton Live, a DAW which is tailored towards electronic music producers and DJs and is described by a leading industry blog as the "*electronic music production flagship to which other DAWs are* compared"[106]. Ableton Live is also designed to be used during live DJ performances as well as for composing, recording and producing music.[107] Ableton poses a competitive constraint on laptop DJ software as it provides music editing functions which can be used for DJ preparation (and it is often used by DJs for this purpose), but also contains the core functionality required for DJ performance.

Ableton is the main DAW used by experienced laptop DJs for DJ preparation, and it has already influenced the DJ software market with more DJ software providers incorporating music editing functions into their software (or, in the case of Serato, building a separate DJ-focussed DAW to capture the growing numbers of DJ producers). As more DJs turn towards music editing and track manipulation, ATC expects the use of Ableton for DJ preparation will continue to grow and impose a significant constraint on other participants in the DJ software market. Ableton has already worked with Serato, Cross DJ (both DJ application and DJ App), Traktor Pro 3 and DJ Player Professional (an App), to enable access to "Ableton Link" a free sync tool which allows users to sync electronic instruments and hardware, and to sync (and therefore use) Ableton Live with the supported DJ software.[108]

(g)   **Mixvibes** – French company Mixvibes produces DJ software in the form of a DJ application (Cross), and an App (Cross DJ). As noted in the Application at [6.18(d)], the Cross DJ App has full features such as high-quality audio effects and support for streaming services, and also offers a remote feature allowing users to control their mixes at a distance from their laptops or PCs through a connection on their Apple device. Mixvibes was originally a DJ application provider which launched its flagship Cross DJ App in 2012 "to the then-nascent market of iOS apps", as it felt "the wind turning".[109] This was fruitful for Mixvibes. The Cross DJ App has been downloaded over 10million times on the Google Play store. As at December 2022, Cross DJ had an estimated [   ] global MAUs.[110] Mixvibes has also been aggressively updating the Cross DJ App in 2023 with 7 updates in 2023, and 2 new updates already in 2024. ATC considers the Cross DJ App poses a significant threat to other DJ software providers and will constrain the merged entity post-acquisition.

(h)   **Guillemot Corporation –** the French-Canadian based Guillemot Corporation is a designer and manufacturer of interactive entertainment hardware and accessories. Guillemot produces the DJ application DJUCED and manufactures the Hercules' brand of DJ hardware, which unlocks the full version of DJUCED software. DJUCED comes with all the key features of professional DJ applications (including real-time stems) and allows users to access its video DJ academy which offers tutorials for users who are new to DJing.[111] Guillemot is a large well-resourced company (it has been listed on the stock market since 1998 with an €188.0 million turnover in 2022)[112] which is well placed to further expand into the DJ software market.

Barriers to entry and expansion in the DJ software market are low

6.13   The SOI states that the Commission is "*of the view that there appear to be significant barriers to entry and expansion, including time, cost and convincing customers to switch software providers.*"

6.14   ATC submits that barriers to expansion are low particularly for existing DJ software developers, including app developers. There is a high profit margin on DJ software and minimum infrastructure/fixed costs required to develop/scale the software. DJ software developers already

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[106] https://www.gear4music.com/blog/best–daws/.

[107] https://www.ableton.com/en/live/what–is–live/.

[108] https://www.ableton.com/en/link/products/

[109] https://www.mixvibes.com/about

[110] See Table 3 in Application at [6.8].

[111] https://www.hercules.com/en-us/dj-academy/

[112] https://www.guillemot.com/en/

possess all of the necessary skills and expertise and, as explained in paragraph [6.12] above, can readily expand.

6.15   The SOI states that "*estimates from market participants on the time it takes to develop DJ software ranged from one to nine years, with some market participants telling us that software develops over time and new iterations of software are built upon previous iterations.*"

6.16   ATC agrees that, for DJ software incumbents, new iterations of software are built upon previous iterations. That is the nature of all software markets; they are dynamic and innovative markets. Market participants are required to continue to invest and innovate to improve their offering in order to maintain and/or improve their market position, which is an "*iterative process*". However, a new entrant is not required to "develop their software over time" prior to entry and entry does not require an "iterative process". In this regard, new entrants have an advantage over incumbents because they do not have legacy systems that need to be adapted to provide new features and functions. It is only once an entrant enters the market with software that it, like all other market participants, will need to invest in iterative improvements of that software.

6.17   The fact that market participants continually develop and improve their software over time is not a barrier to entry or expansion. It is a cost that all market participants incur. Indeed, the innovative nature of software markets provides opportunity for expansion. The introduction of a new feature or improvement on an existing feature can drive significant growth at the expense of incumbents who do not match the innovation.

6.18   The estimate of 1-9 years to develop DJ software also defies commercial commonsense. Open-source software such as Mixxx which has core performance functionality that new entrants can springboard off in the development of their own DJ software product already exists.

6.19   It would take significantly less than 9 years for existing market participants with library management or embedded DJ software to develop DJ applications or a DJ App:

   (a)   it took ATC [   ] to develop and release the performance functionality of the rekordbox application (which was released in October 2015), and less than [   ] from the concept stage. Prior to this, rekordbox was a library management tool; and

   (b)   embedded software allows users to perform using DJ hardware and accordingly has DJ performance functionality which can be adapted to desktop software. As noted earlier, ATC's embedded software and DJ application are both written in the same programming language (C++), although ATC acknowledges that it has different development teams working on its embedded software and its application software due to the additional functionality required for its application software (i.e., a user-friendly interface, additional automated DJ performance functions and editing and lighting functionality).

6.20   The SOI states that "*there can be significant fixed and sunk costs in developing DJ software*"[113].

6.21   All participants in an innovative industry incur sunk costs; that is the nature of software markets including the DJ software market. These sunk costs are incurred in both the development of their original software product and the investment in iterative improvements over time. There is an ongoing need for expenditure (for both entrants and incumbents) to compete for new users. It is not correct to suggest that only new entrants are subject to sunk costs; both software incumbents and entrants have similar forward-looking cost positions due to the need to continually invest in iterative improvements.

6.22   The SOI notes that "*[i]t may be difficult for market participants that do not currently have a DJ software product to* justify *the cost of establishing one, particularly given the potential difficulties with securing sufficient scale*"[114]. To the contrary, the marginal costs associated with DJ software are very low (or close to non-existent) and DJ software is highly scalable. Accordingly, the potential

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[113] SOI at [86].

[114] SOI at [86].

upside for developers who are able to produce a DJ software product which is in demand is significant, and would be a significant factor in the investment decisions of any new entrant. Innovation drives competition for new users and new entrants have the same ability as incumbents to drive innovation in this industry.

6.23   In any event, ATC notes that there are already a large number of DJ software developers that supply their products globally. All of those developers have the ability to invest and innovate to gain market share.

6.24   DJ hardware suppliers are also well placed to enter the DJ software market. Several DJ hardware suppliers have already developed their own DJ software, including inMusic, Native Instruments (Traktor), Hercules (DJUCED), Gemini (V-case) and Allen & Heath (Xone), demonstrating that other hardware manufacturers have the ability to develop their own standalone DJ software. Other DJ hardware manufacturers who do not already have their own DJ software products, such as Reloop, collaborate with DJ software providers including Serato and djay. A business decision to collaborate with third-party software providers instead of developing their own software is a commercial decision, not because of any barriers to entry and expansion. Often DJ hardware manufacturers who have developed proprietary DJ software will market compatibility with third-party software because it is a helpful marketing tool.

6.25   All existing DJ hardware suppliers could easily enter or expand in the DJ software market and are likely to do so in response to an increase in price or decrease in quality; they already have a DJ customer base through their DJ hardware business and are well resourced global players. As explained above at [6.12(a)], inMusic in particular has the existing knowledge and expertise and effectively all of the relevant software IP to develop a DJ software product which more closely competes with laptop/app options such as Traktor, Virtual DJ, djay, DJUCED, Serato and rekordbox and is very well resourced to do so.

6.26   While ATC acknowledges there are some difficulties in getting DJs to switch providers as they tend to continue using the DJ software they are used to unless there is a reason to switch, the same does not apply to the next generation of DJs where the growth opportunity lies. Further, DJs will switch if a new feature that they desire is introduced by another software provider and their existing software does not replicate that feature, if there was an increase in price or if their existing software failed to keep abreast of modern technological changes. For example, while Traktor has still maintained a core user base of users who are satisfied with the level of software provided, some Traktor users have ultimately switched to alternative software in response to a perceived failure by Traktor to keep up with the pace of innovation.

6.27   Further, given the vast majority of DJ software users only use free software to manage unedited music tracks through libraries, it is highly likely that those users would switch DJ software if their preferred software was no longer free, if the quality were to deteriorate or the software was no longer compatible with their chosen hardware.

6.28   For paid software, most DJ software providers have moved to a subscription model which has reduced potential switching costs as users can easily switch for a low monthly fee (compared to a higher yearly/perpetual license cost).

7.   NO CREDIBLE LIKELIHOOD OF VERTICAL FORECLOSURE IN THE DJ HARDWARE MARKET

7.1   The Commission is considering whether the Proposed Transaction will increase the ability and/or incentive for the merged entity to foreclose competition in the DJ hardware market post-Proposed Transaction.

7.2   The Commission's Merger Guidelines state that a "*vertical merger may substantially lessen competition where the merger increases the merged firm's ability and/or incentive to prevent or hinder competition by:*

(a)   *refusing to deal with competitors completely (total foreclosure); or*

(b)   *raising prices it charges these competitors (partial foreclosure).*"

7.3   The test under s 47 of the Act requires a comparison of the likely state of competition if the acquisition proceeds ("*the factual*") against the likely state of competition if it does not ("*the counterfactual*"). A substantial lessening of competition is "*likely*" if there is a "*real and substantial risk*" that it will occur[115]; there must be a "*real chance*" that there will be a substantial lessening of competition.[116]

7.4   The Commission has stated that its "*analysis has focused on whether the merged entity could foreclose rivals through refusing to supply Serato DJ software or raising the price of Serato software*"[117]. This is not the correct legal test. Could is a term "*used to express possibility, especially slight or uncertain possibility*"[118] but the Commerce Act requires more than a mere possibility. The Commission must be satisfied, as noted above, that there is "*a real and substantial risk*"[119] the merged entity would engage in conduct of this nature. That standard is not met in this case.

7.5   To conclude that the Proposed Transaction is likely to have the effect of substantially lessening competition in the DJ hardware market as a result of vertical foreclosure, the Commission would need to conclude:

(a)   there is a real and substantial risk that, during the Contingent Consideration Period (defined further below), ATC would engage in the conduct identified by the Commission at paragraphs 99, 106.1 and 106.2 of the SOI (**Theoretical Conduct**) in breach its obligations under the SPA and bear the economic consequences of damages that flow from that breach;

(b)   that absent the SPA Conditions ATC could engage in the Theoretical Conduct and there is a real and substantial risk that this would result in a partial or total foreclosure of ATC's competitors in the DJ hardware market (i.e. that there is an *ability* to foreclose competitors);

(c)   absent the SPA Conditions, there is a real and substantial risk that ATC would engage in the Theoretical Conduct (i.e. that ATC has an *incentive* to engage in the conduct); and

(d)   there is a real and substantial risk that the Theoretical Conduct would have the effect or likely effect of substantially lessening competition in the DJ hardware market.

7.6   The Commission cannot reach any of these conclusions based on the evidence before it.

The terms of the SPA preclude the Theoretical Conduct during the Contingent Consideration Period

7.7   The purchase price under the SPA has two key components:

(a)   an upfront payment (defined in the SPA as the Initial Purchase Price), which is the aggregate sum of US$65 million plus/minus various agreed adjustments at completion (such as a standard working capital adjustment); and

(b)   [   ] contingent payments (defined in the SPA as the Contingent Consideration), which are payments to be made to the Sellers based on the performance of Serato [:

        (i)   [   ];

        (ii)   [   ].

7.8   The Contingent Consideration is calculated as [   ].

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[115] *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 at 562-563 (CA).

[116] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 (FCA).

[117] SOI at fn 104.

[118] https://dictionary.cambridge.org/dictionary/english/could.

[119] *Commerce Commission v Woolworths Ltd* [2008] NZCA at [97].

7.9   As is normal practice in agreements with Contingent Consideration, provisions were included in the SPA to prevent ATC from interfering in any way with the operation of the Serato business until after the end of the [   ] (the **Contingent Consideration Period**), as any interference could negatively impact on Serato's performance and, therefore, negatively impact the amount of Contingent Consideration payable to the Sellers.

7.10   Contingent Consideration (or earn-outs) are a prevalent feature in sale and purchase agreements for businesses, most often used to bridge valuation gaps between the buyer and seller (as is the case for the Proposed Transaction). They allow for a portion of the purchase price to be contingent on the future performance of the business, thereby aligning the interests of both parties and reducing the risk for the purchaser.

7.11   However, while earn-outs can provide benefits, they also introduce potential material areas of conflict, particularly around the operation of the business post-completion. This is where seller protections become crucial. These provisions are designed to prevent the purchaser from making changes to the business that could adversely affect the earn-out. Such protections are not only common but are also essential to maintaining the integrity of the earn-out arrangement.

7.12   These seller protections can take various forms, including:

        (a)   **Operational Covenants**: These require the purchaser to operate the business in a 'normal' or 'ordinary' manner, thereby preventing changes that could impact the earn-out.

        (b)   **Specific Performance Covenants:** These explicitly outline certain actions that the purchaser must or must not undertake.

        (c)   **Financial Targets:** These set specific financial goals that the business must achieve, thereby limiting the purchaser's ability to make changes that could negatively impact these targets.

        (d)   **Approval Rights**: These give the seller the right to approve certain decisions made by the purchaser post-completion.

7.13   These seller protections are not intended to unduly restrict the purchaser, but rather to ensure that the earn-out, a significant component of the purchase price, is not undermined by post-completion changes to the business. They represent a fair and balanced approach to protecting the interests of both parties to a sale and purchase agreement.

7.14   Given the importance of earn out mechanics and seller protections, enforcement of these provisions via dispute resolution processes is common. While litigation is costly and sellers may or may not have a strong claim, it is very common for purchasers to settle earn out claims with sellers to avoid that cost and to avoid the material distraction to the business that would result from a lengthy dispute process. Accordingly, in practice, purchasers are very cautious of breaching (or being perceived to breach) seller protections.

7.15   The SOI states that the Commission is "*not yet satisfied that the SPA conditions preclude the merged entity from foreclosing rivals*"[120]. Contrary to the assertions in the SOI, as explained below the provisions of the SPA mean there is no real and substantial risk that ATC would engage in any of the Theoretical Conduct during the Contingent Consideration Period.

        The SPA protections prohibit ATC from foreclosing rival hardware providers

7.16   The SOI states that "*there are a number of ways ATC could act against the interests of rival hardware manufacturers, whilst still remaining in compliance with its obligations under the SPA*"[121]. The Commission provides two examples:

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[120] SOI at [108].

[121] SOI at [106].

(a)   allowing rival hardware manufacturers to partner with Serato, but imposing internal resourcing decisions in terms of the time and cost for development and integration, so as to prioritise integration of Pioneer DJ hardware over rival hardware;[122] and

(b)   offering different variations of Serato software to different hardware manufacturers.[123]

7.17   The other Theoretical Conduct mentioned in the SOI is:

(a)   raising the cost of the licensing fee (and other engineering fees);

(b)   refusing to integrate, delaying integration or integrating less effectively (such as only allowing certain features to work with a controller); and

(c)   tying or bundling products.[124]

7.18   The Commission is wrong to suggest that this conduct would not breach ATC's obligations under the SPA.[125] We have set out below how the Sellers' protections in Clause 6, Schedule 11 of the SPA (discussed below) prevent ATC from engaging in any of the Theoretical Conduct for the duration of the Contingent Consideration Period:

"Allowing rival hardware manufacturers to partner with Serato, but imposing internal resourcing decisions in terms of the time and cost for development and integration, so as to prioritise integration of Pioneer DJ hardware over rival hardware."

7.19   Such conduct would result in ATC breaching a number of provisions in the SPA including:

(a)   **Clause 6.1, Schedule 11** which provides that: *"[ATC] undertakes to the Sellers that it will, during the Contingent Consideration Period, act in good faith and, using all reasonable endeavours, support the growth of and operate and manage [Serato] with a view of maximising the [relevant profit metric]."*

If ATC engaged in this conduct, it would not be acting in good faith or using all reasonable endeavours to support the growth of, and operate and manage, Serato with a view of maximising the relevant profit metric in breach of clause 6.1. If ATC were to engage in this conduct, rival hardware manufacturers are likely to end their partnering arrangements with Serato. This would plainly detrimentally affect [   ].

(b)   **Clause 6.2.1, Schedule 11** which provides that: *"[ATC] will ensure that [Serato] is managed in a prudent manner consistent with the 12 months immediately prior to Completion."*

In the 12 months prior to Completion, Serato will be dedicating resources to meet its partnering commitments and partners' commercial expectations to secure future business. If ATC were to engage in this conduct it would therefore not be managing Serato in a *"manner consistent with the 12 months immediately prior to Completion"* in breach of clause 6.2.1.

(c)   **Clause 6.2.9(a), Schedule 11** which provides that: *"[ATC] will ensure that [Serato] does not (without the prior written consent of the Sellers' Representative)…materially change the nature or scope of its Business as presently conducted…."*

Prior to Completion, Serato will be dedicating resources to meet its partnering agreement commitments and partners' commercial expectations to secure future business. If ATC were to engage in this conduct, ATC would be materially changing the nature or scope of Serato's Business as it was conducted prior to Completion (i.e., it would be shifting Serato's focus

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[122] See SOI at [106.1].

[123] See SOI at [106.2].

[124] SOI at [99].

[125] SOI at [106].

from integration across multiple manufacturers equally to a focus on ATC equipment) in breach of clause 6.2.9(a).

Offering different variations of Serato software to different hardware manufacturers

7.20   Such conduct would result in ATC being in breach of a number of provisions in the SPA including:

(a)   **Clause 6.1, Schedule 11.** Requiring Serato to offer different versions of its software to different hardware partners would raise Serato's costs because Serato would need to administer separate (but almost identical) codebases. This will increase technical costs because whenever a bug is fixed in one codebase, it will need to be corrected in the other codebases. These costs escalate with the level of complexity of software variations required over time. Accordingly, if ATC were to engage in this conduct, it would not be acting in good faith or using all reasonable endeavours to support the growth of, and operate and manage, Serato with a view of maximising the relevant profit metric in breach of clause 6.1.

(b)   **Clause 6.2.1, Schedule 11:** Currently Serato does not offer different variations of Serato software to different hardware manufacturers. If ATC were to engage in this conduct it would not be managing Serato in a "*manner consistent with the 12 months immediately prior to Completion*" in breach of clause 6.2.1.

(c)   **Clause 6.2.9(a), Schedule 11:** Serato does not currently offer different variations of Serato software to different hardware manufacturers.[126] If ATC engaged in this conduct it would be materially changing the nature or scope of Serato's Business as it was conducted prior to Completion in breach of clause 6.2.9(a).

7.21   The conduct may also raise issues under clauses 6.2.5 and 6.2.6 as, by requiring Serato to offer different versions of its software to different hardware manufacturers, this may alter the terms of transaction with Serato's hardware partners or force Serato to enter into a new arrangement with its hardware partners. Given the costs of maintaining different versions of Serato's software, this will plainly be onerous for Serato and adversely affect the relevant financial metric.

Raising the cost of the licensing fee (and other engineering fees)

7.22   Such conduct would result in ATC being in breach of a number of provisions in the SPA including Clause 6.2.1, Schedule 11. If ATC decided to direct Serato to raise the cost of the licensing fee (and other engineering fees) from those that applied on Completion, ATC would not be managing Serato in a "*manner consistent with the 12 months immediately prior to Completion*", as Serato currently makes its own independent decisions on the licensing and engineering fees that it charges.

7.23   ATC assumes that Serato's fees are profit maximising, and therefore any attempt to increase license fees would likely result in Serato's hardware partners' reducing the amount of hardware that they sell with Serato or terminating their partnering arrangements with Serato, which would reduce the Contingent Consideration. Accordingly, any attempt to raise the license fees would likely also breach clause 6.1, Schedule 11.

7.24   In any event, even if hardware partners absorbed those additional fees, ATC has no incentive to force Serato to raise its license fees because ATC would need to pay an increased Contingent Consideration [   ].

Refusing to integrate, delaying integration or integrating less effectively (such as only allowing certain features to work with a controller)

7.25   Such conduct would result in ATC being in breach of a number of provisions in the SPA:

(a)   **Clause 6.1, Schedule 11:** ATC considers that, if it were to engage in this conduct, rival hardware manufacturers would end their partnering arrangements with Serato. Given the

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[126] [   ].

potential material impact to Serato [____] as a result, if ATC engaged in this conduct it would not be acting "*in good faith and, using all reasonable endeavours, support the growth of, and operate and manage, [Serato] with a view of maximising the [relevant profit metric]*"

(b) **Clause 6.2.1, Schedule 11:** In the 12 months prior to Completion, Serato will be working with all of its DJ hardware partners to integrate Serato with their hardware, and meeting its commitments (and its partners' commercial expectations) in relation to integration. If ATC engaged in this conduct, ATC would not be managing Serato in a "*manner consistent with the 12 months immediately prior to Completion*", in breach of clause 6.2.1.

(c) **Clause 6.2.9(a), Schedule 11:** Similarly, if ATC engaged in this conduct, it would be materially changing the nature or scope of Serato's Business as it was conducted prior to Completion in breach of clause 6.2.9(a).

Tying or bundling products

7.26 Any tying or bundling of Serato DJ with ATC hardware could only foreclose rival hardware suppliers if those suppliers could not also tie or bundle Serato DJ with their hardware.[127] Accordingly, any such foreclosure could only be achieved if ATC were to refuse to allow rival DJ hardware providers to bundle or tie their hardware with Serato.

7.27 Such conduct would breach clauses 6.2.1 and 6.2.9(a), Schedule 11. Serato currently licenses Serato DJ to its hardware partners and allows those partners to bundle their hardware with Serato, subject to the terms of their arrangements with Serato. Accordingly, any refusal to allow rival DJ hardware supplier partners to bundle their hardware with Serato would not be managing Serato in a "*manner consistent with the 12 months immediately prior to Completion*", in breach of clause 6.2.1, and would be materially changing the nature or scope of Serato's Business as it was conducted prior to Completion in breach of clause 6.2.9(a).

SPA protections guarantee same rate of innovation

7.28 Finally, the SOI states that the Commission is "*still considering whether [...] the provisions would guarantee the same rate of innovation from Serato as the counterfactual, or whether ATC would have the ability and incentive to delay innovation*"[128]. The SPA Conditions would guarantee the same rate of innovation in the factual as in the counterfactual. Serato currently invests significantly in research and development and will continue to do so after completion; as explained in section 2 earlier, market share is tied to innovation and responsiveness to external developments. If ATC did not allow Serato to invest in research and development, this would constitute a breach of the SPA:

(a) clauses 6.2.1 and 6.2.9(a), Schedule 11: If ATC were to prevent Serato from investing in research and development at least at the same level as the 12 months prior to Completion for the duration of Contingent Consideration Period, this conduct would be a breach of clauses 6.2.1 and 6.2.9(a), Schedule 11;

(b) Clause 6.2.3, Schedule 11, which provides that "[*ATC] will not interfere with each Group Company's growth capital in order for the Group to keep investing in headcount, product, sales and marketing at current levels for continued growth and commensurate with forecasts (save for periods of extraordinary events that materially and detrimentally affect the Group (as reasonably determined by the Buyer), such as, an economic crisis)*". If ATC were to prevent Serato from investing in research and development, this would be an "*interference with [Serato's] growth capital*" in breach of clause 6.2.3.

7.29 In any event, clause 6.2.9(d), Schedule 11, provides that ATC will ensure that the Company does not "*undertake or permit any Distributions except for once immediately after [_____]*". Accordingly, all profits will remain in Serato, save for the potential

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[127] At 5.14 Merger Guidelines.

[128] SOI at [43.4].

and limited distribution that may occur after [⬛⬛⬛⬛⬛⬛], for reinvestment by Serato management.

7.30   A number of the Sellers are Serato employees (including in the management team) and will continue to be employees post-Completion. As the amount they will receive under the Contingent Consideration is tied to the success of Serato, these employees will be motivated to ensure that Serato continues to innovate in order to maintain or improve its market position.

7.31   Conversely, ATC has an incentive to continue to innovate in order to maintain or improve rekordbox's market position.

There is no prospect of the parties renegotiating the terms of the SPA to allow ATC to engage in the Theoretical Conduct

7.32   The SOI states that the Commission is considering whether "*the Parties could elect in future to amend these clauses or waive the need for ATC to comply with its contractual obligations*"[129].

7.33   There is no real or substantial prospect that the Sellers would re-negotiate the terms of the SPA to remove or reduce the Contingent Consideration, nor is there any prospect that the Sellers will agree to waive the need for ATC to comply with its contractual obligations.

7.34   First, the Contingent Consideration was subject to extensive negotiation and was the compromise reached between the parties to bridge the gap between their respective valuations of the Serato business. If ATC had not agreed to an earn out mechanism, the Sellers would have sought a higher upfront purchase price aligned with the valuation based on Serato management's projection of [⬛⬛⬛]. ATC was not prepared to pay [⬛⬛] upfront, having valued the Serato business at around US$65million. The Sellers would be unlikely to agree to remove the Contingent Consideration component of the SPA without compensation, which would likely be the net present value of the difference between the ATC's valuation of the business (US$65million) and the Sellers valuation of the business [(⬛⬛)]. There is no rational commercial reason that ATC would agree to this.

7.35   Second, there is no rational commercial reason why the Sellers would agree to waive the SPA Conditions if the Contingent Consideration remains in the SPA. The purpose of the SPA Conditions is to ensure that ATC is not able to interfere in Serato's business in a manner which could detrimentally affect the Contingent Consideration payable to the Sellers. It is therefore not in the Sellers' interests to waive the SPA Conditions.

ATC has no incentive to breach the terms of the SPA

7.36   The Commission is seeking submissions on ATC's incentives to comply with the terms of the SPA.

7.37   As the Commission will be aware, the New Zealand Courts have said that the Commission should not "*start at shadows*"[130]. The Courts in Australia have similarly cautioned that assessments on competitive effects and the counterfactual cannot be based on "*pure speculation[131]*". The key question that the Commission must ask is whether there is a real and substantial prospect[132] that ATC would breach its contractual obligations as outlined above. If there is no evidence that there is a real and substantial prospect of breach, the Commission must conclude that ATC will not breach

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[129] At [43.2].

[130] *Commerce Commission v Woolworths Ltd*, [2008] NZCA 276, at [76].

[131] *Australian Competition and Consumer Commission v Metcash Trading Ltd,* [2011] FCA 967, at [425] affirmed in *Australian Competition and Consumer Commission v Metcash Trading Ltd,* [2011] FCAFC 151, at [233].

[132] *Commerce Commission v Woolworths Ltd & Ors* [2008] NZCA 276 at [135].

the SPA Conditions, which comprehensively address any hypothetical foreclosure concerns until at least 31 December 2028.

7.38   The evidence is consistent that there is no real or substantial prospect that ATC would breach the terms of the SPA by engaging in any of the Theoretical Conduct. There are strong incentives on ATC to comply with the SPA Conditions including:

(a)   ATC will be subject to monitoring by the Sellers for the duration of the Contingent Consideration Period;

(b)   any breach could result in ATC being liable to pay significant damages to the Sellers; and

(c)   any breach of the SPA Conditions will be highly visible and would risk hurting ATC's reputation in the market.

ATC would be subject to monitoring and significant financial consequences if it were to breach the SPA

7.39   The Sellers are motivated to monitor ATC's compliance with the SPA for the duration of the Contingent Consideration Period given the significant potential Contingent Consideration payable. The SOI states that "*Towards the end of the [ ] period, Serato may also be less incentivised to enforce the conditions*".[133] To the contrary, as the Contingent Consideration is calculated over the entire Earn Out Periods, not at a particular point in time, the Sellers have a strong incentive to monitor and enforce the SPA conditions for the entire duration of the Contingent Consideration Period. Any breach by ATC of the SPA Conditions at any time could [   ] and result in a reduction in the Contingent Consideration.

7.40   ATC would be subject to contractual damages for [   ] and consequential reduction in the Contingent Consideration resulting from its actions and face potentially significant legal costs in relation to any claims arising out of any actual or perceived breach of the SPA Conditions.

Breach of the SPA would cause significant damage to ATC's reputation

7.41   ATC is a subsidiary of Noritsu Koki Co., Limited (**NKC**), a Japanese holding company listed on the Tokyo Stock Exchange. As a publicly listed company with global operations, and contracts with many parties including suppliers, distributors and consumers all over the world, ATC's reputation is extremely important.

7.42   Any breach by ATC of its commitments under the SPA would have significant reputational consequences for ATC in all aspects of its business; ATC's trading partners and customers would no longer trust ATC to honour its commitments.

7.43   NKC announced to the market on 11 July 2023 that "*AlphaTheta and Serato will continue to operate as standalone brands*".[134] The announcement also informed shareholders that it had valued Serato between US$54 million and US$77 million using a discounted cash flow analysis, which is a valuation method that values an investment based on future cash flows. Engagement in the Theoretical Conduct would be inconsistent with ATC's publicly disclosed intention and would cause reputational damage.   If there were even a small risk of potential reputational damage, NKC would direct ATC as needed to ensure this risk would not eventuate.

7.44   ATC simply would not risk these potential reputational consequences for itself or Serato. To do so would go against ATC's culture and irreversibly damage Serato's reputation as a hardware-neutral software provider. Further it would not make commercial sense for ATC to risk negative implications for its reputation in circumstances where ATC does not believe that it could successfully foreclose

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[133] At [107].

[134] NKC market announcement 11 July 2023.

rival hardware suppliers from competing in the DJ hardware market as discussed in paragraphs [7.47] – [7.64] below.

No intention to breach the SPA

7.45   The Commission's assessment of whether there is a real and substantial risk that ATC will breach the SPA must take account of ATC's intentions.

7.46   The fact that ATC agreed to the protections in Schedule 11 of the SPA is clear evidence that ATC has no intention of engaging in any of the Theoretical Conduct; it would not make commercial sense for ATC to agree to the SPA Conditions if it had the intention of breaching them (or later seeking to renegotiate them). Further, NKC's reference in its market announcement to using a discounted cash flow analysis for its valuation of Serato also evidences that ATC has no intention of engaging in the Theoretical Conduct: it would not have valued Serato on (and told the market) the basis of its future cash flows if it intended to prevent Serato from selling its products to ATC's competitors or DJs who use competitor hardware.

Absent the SPA Conditions there is no ability to foreclose hardware competitors

7.47   The SOI states that, "*even if it is the case that the SPA is effective preventing foreclosure … it is possible that harm could occur once the [earn out] period ends*"[135].

7.48   Absent the SPA Conditions, engaging in the Theoretical Conduct would not be effective in foreclosing DJ hardware competitors because:

    (a)   Serato is not an essential input and therefore if ATC were to engage in any of the Theoretical Conduct, this will not prevent rival DJ hardware manufacturers from effectively selling their products;

    (b)   the DJ software market is dynamic; it is unlikely that Serato will have become an essential input by the time the Contingent Consideration Period ends in almost 5 years' time; and

    (c)   ATC could not, in any event, prevent non-ATC hardware users from using existing versions of Serato, and refusing to integrate will not prevent users from using Serato with non-ATC hardware.

Serato is not an essential input for DJ hardware suppliers to compete effectively.

7.49   The SOI describes Serato as an "*important input*"[136] and states that the "*evidence suggests that Serato is viewed as an essential trading partner by ATC's main rivals*"[137].

7.50   It is well recognised that vertical foreclosure may be possible where it involves "*a critical component without which the downstream product could not be manufactured or effectively sold on the market*"[138].

7.51   Serato is not a critical component (sometimes described as a must have) without which DJ hardware manufacturers could not effectively sell their products, either in New Zealand or globally. In particular:

    (a)   the evidence shows that, inconsistent with Serato being "essential" or a "must have", the vast majority of DJ software users do not use Serato. According to ATC's market share estimates, Serato accounts for approximately [ ]% of the market by MAUs, which means

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[135] SOI at [107].

[136] SOI at [8].

[137] SOI at [97].

[138] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF

[ ]% of DJ software users use DJ software which is not Serato.[139] Further, only 30.27% of respondents to the 2024 DJ Census stated that they use Serato, meaning that almost 70% of respondents use alternative DJ software.[140] For the reasons explained earlier, the DJ Census is not representative of the DJ industry as a whole and likely to overstate Serato DJ's share of the market given that younger DJs are more likely to use DJ Apps than older DJs.

(b)   rival DJ hardware end-users use many alternative DJ software options in preference to Serato which account for the remaining 69.73% of the respondents to the 2024 DJ Census survey. The evidence shows that DJs often use more than one DJ software solution[141] and most hardware manufacturers already pursue a multi-software strategy. For example, Virtual DJ is compatible with a large range of DJ hardware products, including almost all of inMusic's DJ controllers, as well as a significant range of other non-ATC branded DJ hardware such as Native Instruments' Traktor, Reloop, Hercules, Roland, and others. For a non-exhaustive list of Virtual DJ compatible hardware see https://www.virtualdj.com/products/hardware.html?view=all[142].

inMusic's hardware brand Rane released the high-end controller model "One" in January 2021, bundled, and made compatible exclusively with Serato. However, by September of the same year, Rane "One" was made officially compatible with Virtual DJ and djay Pro, since many of its hardware users are non-Serato users.[143] Similarly, since "One", Rane has released another high-end controller called "Four" in 2023. There have been many comments made by djay Pro users, requesting that it be made compatible with that software.[144] In the meantime, Virtual DJ mapped its software to Rane "Four" to satisfy its Rane users.

(c)   rival DJ hardware suppliers market their hardware products with DJ software partners other than Serato, demonstrating that Serato is not an essential input for hardware suppliers to compete effectively. For example:

(i)   Denon, Rane, Reloop and Hercules advertise compatibility with a range of software brands, including Algoriddim djay (App), not only Serato;[145] and

(ii)   Pioneer DJ also markets and sells DJ hardware which is promoted as compatible with other DJ software, including DDJ-FLX6/GT's compatibility with Traktor Pro 3 and DDJ-1000's compatibility with Virtual DJ.[146] ATC notes that, until recently, its arrangement with Serato [   ].

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[139] See Table 3 of the Application and updated market shares provided to the Commission on 28 November 2023.

[140] DJ Census 2024, page 37.

[141] Anonymous submission in response to SOPI dated 9 November 2023 which notes "*[c]urrently, the artists I work with are using no less than four individual platforms for DJing*"; Anonymous submission in response to SOPI dated 10 November 2023 which notes that "*[a]s a modern DJ you really need to be familiar with many different platforms*", and the submitter adds that they are "*a user of both Serato and AlphaTheta products, alongside some of their competitors flagship products*"; Anonymous submission in response to SOPI dated 8 November 2023 which notes the submitter's personal experience that they have "*DJed from a wide variety of platforms including vinyl records, iOS apps on iPhone and iPad and full embedded devices. Serato DJ is a great platform, but it's one of many choices […]*".

[142] Virtual DJ does not list all hardware with which it is compatible on this page of its website. A search by brand, however, shows that almost all hardware available in the market has already been made compatible with Virtual DJ.

[143] https://www.digitaldjtips.com/rane–one–virtual–dj–djay–pro–ai/.

[144] https://community.algoriddim.com/t/rane–four–djay–pro/19816

[145] For example, Denon advertises its MC4000 controller as compatible with Serato DJ Lite/Pro and Traktor 2, djay Pro and Virtual DJ 8 "*as well as any other DJ application that supports MIDI mapping*" (https://www.denondj.com/mc4000-mc4000xus.html); the Rane One controller is supported by "*Serato DJ Pro, Algoriddim's djay Pro AI, and Virtual DJ*" (https://www.rane.com/one); Hercules' DJ Control Mix is only advertised as compatible with djay (https://www.hercules.com/en-us/product/djcontrol-mix/); Reloop advertises its Reloop Mixon 8 controller as plug and play (and so unlocks the premium version of) Serato DJ Pro and djay Pro (https://www.reloop.com/reloop-mixon-8-pro).

[146] https://www.pioneerdj.com/en/news/2021/ddj-1000-virtualdj-2021-support/

7.52   ATC understands that other market participants have told the Commission that "*none of the other software alternatives have the same quality and adoption rate [as Serato]*"[147]. ATC disagrees with this statement:

(a)   there are many other DJ software products in the market which have comparable features to Serato, including Virtual DJ and djay Pro, both in terms of features/functions and reliability; and

(b)   the data.ai data shows that DJ Apps, namely Edjing and djay, have had much higher adoption rates than Serato in recent years.[148] Market participants could seek to partner with any of these DJ Apps to market their hardware.

7.53   ATC also understands that the Commission has been told that "*products with Serato sell better, and that the strong sales are worth the long and expensive integration process*"[149]. In ATC's experience, DJ hardware which has been made compatible with many software options sells better than DJ hardware which is not. For example, in FY2023 the top three best-selling DJ controllers which sold close to [   ] units in aggregate were compatible with more than three DJ software applications and two were also compatible with two or more DJ Apps, while DJ controllers that are compatible with only rekordbox or Serato DJ sold less than [   ] units each.

7.54   Accordingly, while several hardware manufacturers choose to bundle their products with Serato, this does not mean that hardware bundled with other DJ software would not be as successful.

7.55   Finally, the Commission has referenced various statements made by ATC in an internal document about Serato having a "*near top share*" as evidence that "*Serato is viewed as an essential trading partner*". That document does not evidence that Serato is an essential trading partner for DJ hardware manufacturers. The referenced page of that document is simply comparing Serato's share of the laptop application segment of the DJ software market with its competitors, including rekordbox, using the only available free data, being the DJ Census. It concludes that Serato has a "*Top Share*" of that segment. Merely having a "*Top share*" does not mean that Serato is an 'essential' trading partner; Serato can only be 'essential' if, in the absence of Serato integration and/or branding, hardware manufacturers could not effectively sell their products. As explained at paragraph [7.51] above, Serato is not 'essential' because hardware manufacturers can effectively sell their products without Serato because either they can choose to partner with, or their users can license software from, one of the many other DJ software suppliers in the market, or they can develop their own comparable DJ software.

Serato is unlikely to have become "essential" by the end of or after the Contingent Consideration Period

7.56   As explained in section 2 above, the next 3 – 5 years will see significant change in the DJ industry. ATC anticipates that the use of DJ Apps to both prepare and perform will continue to increase as younger DJs who have grown up with mobile devices become more experienced DJs. ATC also anticipates that DJ software will further evolve to enable greater music production capability as more and more DJs seek to produce their own original music. Recent developments such as the announcement of Algoriddim's deal with Apple Music (see paragraph [6.12(c)] above) are also yet to have their full effect. In this environment, it is highly likely that the competitive landscape in 5 years' time will have changed with the emergence of new competitors and changes in the competitive positions of existing competitors as has occurred over the last 5 years. Traktor, who according to the 2018 DJ Census had a 23% share of experienced DJs in the DJ application segment in 2018, only has around 10% as of 2024 because it failed to keep up with developments in the industry.[150]

7.57   Serato is unlikely to be "essential" by the end of or after the Contingent Consideration Period:

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[147] SOI at [71.2].

[148] See Table 3 of the Application and updated market share provided to the Commission on 28 November 2023.

[149] SOI at [71.2].

[150] https://www.digitaldjtips.com/layoffs-native-instruments-traktor/

(a) Serato does not currently have a mobile App. It is significantly behind other DJ software providers who have already invested in developing their own Apps, including rekordbox. [   ].[151] As the popularity of DJ Apps grows over the next 3 - 5 years, Serato will be working hard to avoid falling behind its competitors;

(b) the popularity of DJ hardware which has embedded software, such as CDJs and all-in-ones, is increasing. This will reduce the demand for standalone DJ software that is compatible with specific hardware. ATC's global sales of all-in-ones (by units) increased by [   ] between 2020 and 2023. Embedded hardware does not need to connect to DJ software on a laptop or mobile device; rather, consumers are able to simply plug a USB containing their playlist or songs into the hardware, or connect via the cloud, and perform a DJ set using the embedded software (the hardware manufacturer's proprietary software). These DJs may use a DJ software application to prepare and edit their songs prior to performing (e.g., by pre-loading song cues and sound effects onto their playlists), but this is not always necessary. The increasing popularity of these devices is driven by the fact that they do not require access to separate DJ software or a laptop for performance, which reduces the equipment that a professional DJ needs to perform; and

(c) the Contingent Consideration Period will provide rival hardware manufacturers with more than sufficient time to develop their own DJ software, invest to improve their own existing DJ software or partner with other DJ software providers to provide a bundled offering (see [6.13] above).

No mechanism to foreclose by refusing to integrate, delaying integration or integrating less effectively

7.58 The Commission considers that there are "*likely to be a range of potential mechanisms which the merged entity could use to foreclose rivals*", including "*refusing to integrate, delaying integration or integrating less effectively (such as only allowing certain features to work with a controller).*"[152]

7.59 At paragraphs [7.6] to [7.7] of the Application, ATC explained that, post-Proposed Transaction, ATC would have no practical technical ability to prevent end-users from using Serato with rival DJ hardware which has a Serato supported sound card because:

(a) any refusal to integrate or similar, could not affect current versions of Serato. The nature of the Serato software means that existing integrations or existing versions of Serato cannot be 'removed' or 'locked' to ATC hardware;[153] and

(b) in any event, refusing to integrate or delaying integration with future versions of Serato will not prevent non-ATC hardware users from using future versions of Serato because Serato can be MIDI-mapped. Serato is MIDI compatible and therefore it is possible to "map" Serato to all DJ hardware devices which either contain a Serato-supported sound card or are connected to another device with a Serato-supported sound card.

7.60 The SOI states that the Commission is "*not satisfied that the ability of hardware providers to MIDI map software would prevent the ability of the merged entity to foreclose rivals.*"[154] This appears to be on the basis that "*[s]ome market participants*" have stated that "*MIDI mapping is not likely to be a substitute for full integration as it does not allow for in depth integration of all of the functions and provides a lower quality outcome for the user*".[155]

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[151] This risk was identified by ATC in [   ].
[152] At [99].

[153] ATC understands that Serato can only remove access to its software for non-payment of subscription fees when a user downloads an update.

[154] SOI at [103].

[155] SOI at [102].

7.61   While MIDI-mapping can be a labour-intensive exercise if a user is doing all of the mapping themselves (instead of using a custom MIDI-map which has been shared online[156]), for most features, it is not a complex or difficult process. It is simply a matter of mapping each button or knob on the controller within the software. Further, where a piece of hardware has already been mapped to a software, custom mapping files are often made available online for others to use. A user of Serato has the ability to upload a pre-set MIDI map file which another user has already created and map their hardware to Serato in a significantly shorter period of time without needing to go through and set each function individually. Serato's setup screen includes an option to load custom MIDI pre-sets. Finally, the MIDI-mapping process is very similar across DJ controllers, therefore once a DJ has experience with MIDI-mapping one type of controller, that experience is relevant to mapping software to other controllers.

7.62   While it is correct that some features of Serato are more challenging to MIDI-map (such as jogwheels, needle search, modifiers/shifts and touchstrips/touch panels to non-compatible DJ hardware), it is still possible to MIDI-map these features. Many DJs have successfully made Serato DJ compatible with controllers (and even more complex CDJs) that were not previously compatible. For example, one user has shared a video showing how to use Serato's MIDI-mapping to map jogwheels, touchstrips and modifiers (see https://youtu.be/YXBRYxb54m0). If ATC were to refuse to integrate future versions of Serato with non-ATC hardware, ATC expects that some users will create and share mapping files which other users can then use to map Serato to non-ATC hardware. Third party manufacturers can also map Serato and make the maps available online.

7.63   Further, it is not correct that customers can only MIDI-map Serato's software to DJ hardware that is already compatible with Serato software or supported by Serato. The use of Serato DJ software is not limited to officially supported hardware. While officially supported hardware guarantees a certain level of integration and user experience, Serato's software is flexible and can work with a broader range of DJ hardware that may not be officially supported provided it is connected to a Serato supported device, such as Reloop's Flux, Denon DJ's DS1, or any other already discontinued interfaces (i.e., Denon DJ's SL series, or Akai AMX). For example, Akai's AMX, which is no longer available in retail stores can now be purchased for less than US$50 from the secondary markets. For information about the mapping process using a Serato-supported external device and mapping file see https://www.youtube.com/watch?v=S-dCIf6cRRw.

7.64   Finally, new DJs or experienced DJs who have not previously subscribed to Serato will have no loyalty to Serato and are more likely to simply choose an alternate software which is compatible with their selected hardware, rather than change their hardware based on its compatibility with Serato. While Serato is a popular DJ software, there are many other popular DJ software products. Online reviews of top DJ software list Serato amongst many other 'top' options, including Traktor, Ableton Live, Virtual DJ and djay.[157]

8.   NO INCENTIVE TO ENGAGE IN THE THEORETICAL CONDUCT

8.1   Contrary to the Commission's preliminary conclusion at [114] of the SOI, the evidence demonstrates that ATC does not have an incentive to engage in the Theoretical Conduct and therefore there is no real or substantial risk that ATC would engage in that conduct post-Proposed Transaction, irrespective of the SPA Conditions:

    (a)   **Engaging in the Theoretical Conduct would reduce the value of the Serato business, and trigger an impairment (negative share price) risk for ATC's parent company, NKC**. ATC has agreed to pay US$65 million plus the Contingent Consideration for the Serato business. The purchase price reflects ATC's valuation of the Serato business, which was based on Serato's projected earnings. As explained at [7.17] of the Application, if post-Transaction ATC were to terminate Serato's partnerships with other hardware manufacturers

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[156] Where a piece of hardware has already been mapped to a software, these custom mapping files are often made available online for others to use. A user of Serato has the ability to upload a pre-set MIDI map file which another user has already created and map their hardware to Serato in a significantly shorter period of time without needing to go through and set each function individually. Serato's setup screen includes an option to load custom MIDI pre-sets.

[157] A search for the "*best dj software*" on the Google search engine on 5 March 2024 returned the following articles near the top of search results: https://musictech.com/guides/buyers-guide/best-dj-software/; https://www.musicradar.com/news/best-dj-software-apps

or engage in conduct which prevented Serato's other partners from licensing Serato, ATC would suffer an immediate loss of revenues which would have an impact on Serato [   ] of, at least, approximately [   ]. This would reduce Serato's value by [   ] at a minimum, to approximately [   ], and as a consequence, NKC will be forced to impair goodwill recognised on its balance sheet, negatively impacting its share price. NKC will, no doubt, hold ATC management responsible for such a reckless strategy. For such a strategy to make sense, ATC would have to be certain that a sufficient number of Serato subscribers who currently use non-ATC hardware would purchase ATC hardware to compensate ATC the amount it would need to compensate the Sellers for the lost [   ], as well as the loss in value of its investment in the Serato business. For the reasons previously explained in the Application and for the reasons discussed further below in this submission, it is highly unlikely that a sufficient number of Serato subscribers would choose to switch hardware rather than switching software, so the strategy would be not profitable.

(b)   **ATC has no history of attempting to foreclose its rivals**. ATC's conduct in the market prior to the Proposed Transaction is relevant to an assessment of the risk that ATC would engage in the Theoretical Conduct post-Proposed Transaction. ATC has no history of using its position in the DJ hardware market or rekordbox in an attempt to foreclose its competitors either by locking its hardware to its own software, locking rekordbox to its hardware or requesting (or requiring) that Serato deal only with ATC exclusively; to the contrary, ATC has actively pursued an open strategy.

inMusic has submitted that ATC has previously refused a request from inMusic to allow rekordbox to be sold with inMusic DJ hardware[158] and states that, because of this, ATC will not allow Serato to be sold with non-ATC controllers either, post-transaction. inMusic's claims are false. Further details about the request made by inMusic and ATC's response are provided in the separate confidential submission.

(c)   **A foreclosure strategy is not consistent with ATC's strategy**. ATC has explained previously that its rationale for the Proposed Transaction is part of a broader strategy to expand its presence in the much larger music production industry. ATC's core growth strategy has always been to grow organically through innovation and responding to evolving customer needs. Pursuing a theoretical foreclosure strategy in relation to DJ hardware is not aligned with ATC's focus on growth in the music production industry. ATC has never modelled the financial impact of a foreclosure strategy, which it would have done if that was its intention. Nor would it have agreed to the SPA Conditions had that been the case. Further, none of ATC's internal documents relating to the Proposed Transaction suggest that ATC considered, let alone planned to implement, a foreclosure strategy. To the contrary, ATC calculated a purchase price based on Serato's projected future earnings which includes revenue from Serato's other hardware partners.

(d)   **Growing DJ software sales is just as important as ATC's hardware business.** Given ATC's current strong position in the DJ hardware market, the DJ software market is equally important to it as its DJ hardware business. While the per-unit price is much higher for DJ hardware, DJ software provides a more constant and consistent revenue stream over time and is easily scalable since the marginal cost of another sale is essentially zero. ATC has no incentive to trade software revenue for new hardware users particularly when, as explained above, ATC is placing increased focus on its music production hardware business.

(e)   **Engaging in the Theoretical Conduct would damage ATC's and Serato's reputations.** As explained in the Application, any refusal to allow Serato to be used with rival DJ hardware post-Proposed Transaction would result in a massive outcry from Serato users, causing significant damage to Serato's and Pioneer DJ's brand reputations and jeopardising ATC's plans in music production. The substantial public interest in the Proposed Transaction means that future conduct will be closely observed by industry participants. It is simply implausible that ATC would put its reputation at risk to engage in the Theoretical Conduct which, for the reasons outlined earlier, would not be commercially rational.

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[158] inMusic 8 November submission at [1(f)].

(f) **The Theoretical Conduct may breach the law:** While ATC considers that engaging in the Theoretical Conduct would not be effective to foreclose its DJ hardware rivals, conduct which had such an effect would likely breach the Commerce Act. ATC is aware of its obligations under the Commerce Act and similar competition laws globally and has a culture of compliance with its legal obligations. In addition, ATC's parent, NKC, is a listed company on the Tokyo Stock Exchange whose value is impacted not only by its financial results as explained above, but also by its reputation (and those of its subsidiaries). There is no real or substantial risk that ATC would knowingly engage in conduct which may breach competition law and risk damaging not only its own reputation but that of NKC.

8.2 The SOI refers to the fact that margins for DJ hardware are high compared to the margins for DJ software as one reason for concluding that the merged entity may have an incentive to foreclose.[159] This would however depend on sufficient customers switching to ATC hardware from non-ATC hardware, to make the strategy profitable in the long term.

8.3 The SOI states that "*there may be many customers of the rival DJ hardware providers that would be willing to switch to ATC's Pioneer DJ products because Serato software is so profitable*"[160]. ATC assumes that the Commission means "popular" not "profitable". However, there is no evidence that non-ATC hardware users would be willing to switch to ATC's hardware to continue to access Serato. To the contrary:

(a) [ ] of Serato subscribers as at December 2023 use Serato Lite. A user who currently does not pay for Serato would not be likely to pay to upgrade their hardware (or pay to acquire more expensive hardware) to continue to access the free Serato Lite (which has significantly more limited features than Serato Pro and Serato Studio); instead, they would be likely to simply substitute their free DJ software with another free DJ software; and

(b) many users are likely to be loyal to the brand of hardware that they use, and therefore are much more likely to switch to one of the many alternative DJ software products rather than switch their DJ hardware.

8.4 Serato's compatibility with a wide range of hardware and its partnerships with DJ hardware manufacturers who agreed to help promote Serato, are one of the main reasons for its success. If non-ATC hardware suppliers were to no longer promote Serato with their products, Serato's popularity is likely to decrease. Business decisions which have a negative impact on reputation are ultimately likely to have a negative impact on sales, and therefore are likely to be counter-productive. A short-term focus on profit margins alone is likely to have a detrimental long-term impact on the Serato business.

8.5 While the Commission has focussed on the relativity of software and hardware margins, it does not appear, in its consideration of the profitability of a foreclosure strategy, to have factored in the financial consequences of such a strategy which would include the costs of a breach of the SPA as well as the loss in value of ATC's investment. Those additional costs would render any foreclosure strategy unprofitable.

8.6 There is therefore no real or substantial prospect that ATC would engage in the Theoretical Conduct.

8.7 Finally, the SOI states that the fact that the parties included the SPA Conditions in the SPA "*suggest that, absent these clauses, ATC would have the ability and incentive to [refuse to allow Serato to deal with other DJ hardware providers]*"[161]. To the contrary, as explained at paragraph [7.9] above, the earn out provisions are normal commercial arrangements for this type of transaction, and suggest neither ability nor incentive to act in the manner postulated by the Commission.

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[159] SOI at [114.1].

[160] At [114.2].

[161] At [106].

9. NO ABILITY OR INCENTIVE TO FORECLOSE COMPETITION IN DJ SOFTWARE MARKET

9.1 The SOI concludes that the Commission has "*limited concerns in relation to vertical effects for DJ software*"[162] but is still considering "*whether the merged entity may have the incentive to foreclose DJ software competitors as part of a broader strategy to foreclose rival DJ hardware providers*".[163]

9.2 ATC agrees with the Commission's observation at [133] of the SOI that it would not have any incentive to foreclose DJ software providers. ATC is incentivised to allow third-party DJ software providers to integrate their software with its hardware. As explained at paragraph [7.53] above, the more DJ software is made compatible with hardware, the better the DJ hardware sells. A refusal by ATC to allow third-party DJ software providers to integrate with its products is likely to result in decreased sales.

9.3 DJ software providers already have the technological capability to make their software compatible with ATC's hardware without any support from ATC, and the same providers will also be able to counter any preventative measures ATC may attempt. Therefore, ATC does not have the ability to foreclose rival DJ software providers.

9.4 Any refusal to allow (or attempts by ATC to prevent) third-party software providers from integrating with ATC hardware would not be effective at foreclosing rival DJ hardware manufacturers, since, as explained above, ATC will not be able to foreclose rival DJ software providers, and ATC has no incentive to do so. Furthermore, any attempts will create an anti-ATC sentiment amongst DJs, therefore it would not be a rational strategy.

9.5 Even if ATC had the ability and/or incentive to prevent third-party software providers from integrating with its hardware temporarily, ATC has no ability to prevent rival DJ hardware manufacturers' accessing third-party DJ software or developing their own (as many have already done).

9.6 Finally, the Commission states at [132] of the SOI that ATC may have market power in the market for the supply of DJ hardware. However, market share is not the sole indicator of market power, and a high market share, particularly in a dynamic market, does not necessarily indicate substantial market power.[164] Even if ATC did have market power, market power is transient in an innovative market like the DJ hardware market. ATC's current market share and respect has been, and continues to be, a hard fought and well-earned position which would be at risk if it does not continue to innovate.

10. ACCESS TO CONFIDENTIAL INFORMATION

10.1 The SOI states the Commission considers that "*the Proposed Acquisition raises concerns that the merged entity's access to sensitive information of rivals could substantially lessen competition for the supply of DJ hardware*"[165] as:

(a) *"rivals may be less incentivised to innovate if there is a risk that a major competitor (ATC) could appropriate those ideas*"; and

(b) *"rivals may react by no longer working with Serato, which would make their hardware products less attractive*".

10.2 ATC considers that there is no real risk that confidential information provided to Serato by its hardware partners will be shared with ATC post-acquisition given the measures taken by both Serato and ATC to protect Serato partner information and the terms of the SPA, discussed further below.

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[162] SOI at [9].

[163] SOI at [9] and [134].

[164] *Southern Cross Medical Care Society v Commerce Commission* (2001) 10 TCLR 25 (HC) at [85]; affirmed in *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA).

[165] SOI at [137].

10.3 Furthermore, ATC does not consider that rivals will be less incentivised to innovate if there is a risk that information will be shared with ATC or that rivals who choose not to work with Serato will have less attractive products.

No real risk that Serato-held confidential information will be shared with ATC

10.4 At [143] of the SOI, the Commission states that it is not currently satisfied "*that there are sufficient safeguards in place to prevent the information being shared between Serato and ATC's DJ hardware operations*"[166].

10.5 Confidentiality protocols are standard features of vertically integrated businesses which compete with customers or suppliers in down-stream or up-stream markets. ATC recognises the importance of commercially sensitive information provided to Serato by hardware manufacturers that it competes with in the hardware market remaining confidential. To ensure that this is the case the parties have taken (and are taking) various steps to put in place measures which will protect the exchange of information between Serato and its hardware partners:

    (a) Serato has prepared a confidentiality protocol for hardware partners' confidential information to be implemented post-acquisition (which is in addition to Serato's existing confidentiality obligations with each individual hardware partner). This protocol includes Serato maintaining an operational board which will be entirely separate from the ATC board, as well as IT, Physical and Operational security obligations and provides that only aggregated hardware revenue may be shared with ATC/NKC group companies' post-transaction (i.e., without breakdown for individual partner, product names, number of units sold and geographic location) to protect partners' confidential information.

    (b) ATC is currently in the process of offering to enter into agreements with hardware partners individually that any confidential information provided by them to Serato would be appropriately safeguarded within the Serato business (and without interference from ATC). [   ].

10.6 In any event, the terms of the SPA comprehensively address any risk of ATC using competing manufacturers' confidential information. Such conduct would result in ATC breaching a number of provisions in the SPA, including:

    (a) **Clause 6.1, Schedule 11**. If ATC engaged in this conduct, it would not be acting in good faith or using all reasonable endeavours to support the growth of, and operate and manage, Serato with a view of maximising the relevant profit metric in breach of clause 6.1. If ATC were to engage in this conduct, rival hardware manufacturers are likely to:

        (i) end their partnering arrangements with Serato; or

        (ii) take legal action against Serato for breaching the relevant partnering agreement(s), hardware protocols and/or NDAs.

    These likely consequences would plainly detrimentally affect [   ].

    (b) **Clause 6.2.1, Schedule 11.** In the 12 months prior to Completion, Serato will be dedicating resources to meet its partnering agreement commitments and partners' commercial expectations to secure future business and will not be sharing hardware partner confidential information with competing manufacturers. If ATC were to begin to leverage Serato by forcing it to provide such information to ATC, it would therefore not be managing Serato in a *"manner consistent with the 12 months immediately prior to Completion"* in breach of clause 6.2.1. In addition, requiring Serato to favour one partner over another (by sharing confidential information with one partner but not with another) would not amount to managing Serato in a prudent manner consistent with the 12 months prior to Completion.

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[166] SOI at [143].

(c) **Clause 6.2.9(a), Schedule 11** which provides that: "*[ATC] will ensure that [Serato] does not (without the prior written consent of the Sellers' Representative)…materially change the nature or scope of its Business as presently conducted….*"

At present, and prior to Completion, Serato conducts its business by partnering with hardware manufacturers and honouring its commitments to them, including protecting any information it receives from its partners which they may perceive to be of a confidential or sensitive nature. If ATC were to attempt to access such information, ATC would be materially changing the nature or scope of Serato's Business as it was conducted prior to Completion (i.e., it would be shifting Serato's focus from integration across multiple manufacturers equally to a focus on ATC equipment by undermining the success of some hardware partners for the benefit of one) in breach of clause 6.2.9(a).

No impact on innovation

10.7 ATC disagrees that any perceived risk by a hardware manufacturer that ATC may obtain access to their confidential information would have a negative impact on innovation. Given the protocols and other measures explained above, the risk is so small that it would be highly unlikely to impact on a rival hardware manufacturer's innovation.

10.8 In any event, in ATC's experience, the important innovations in DJ hardware have been driven by outside influences. For example, cloud libraries, stems and mobile device integrations were influenced by concepts outside of the industry. Hardware providers competed on the quality of these features not the implementation of them in the first place. In addition, a number of hardware features are unrelated to software (such as hardware with built-in rechargeable batteries).

10.9 Innovation will continue post-Transaction and is more likely to be stimulated than reduced as a consequence of the Proposed Transaction.

Rivals who choose not to work with Serato will not have less attractive products

10.10 As explained at paragraphs [7.49] to [7.55], it is not essential for hardware partners to work with Serato. If a hardware partner were to elect not to work with Serato in the future, this is unlikely to make it less attractive or have an effect of substantially lessening competition post-Proposed Transaction.

10.11 In any event, Serato will continue to be incentivised to make its software compatible with as wide a range of hardware as possible, and therefore will be likely to continue to proactively make its software compatible with competitor DJ hardware. This would be consistent with Serato's existing business strategy which will be preserved at least until 31 December 2028 by the SPA protections.

11. CONFIDENTIALITY

11.1 Confidentiality is requested of the information in this submission that is highlighted and contained in square brackets on the basis that disclosure would be likely unreasonably to prejudice the commercial position of the parties providing the information.

11.2 Confidential information in this submission is highlighted to reflect who the information is confidential to:

(a) information that is confidential to ATC is highlighted in yellow (i.e. <mark style="background-color: yellow">CONFIDENTIAL</mark>);

(b) information that is confidential to Serato is highlighted in blue (i.e. <mark style="background-color: cyan">CONFIDENTIAL</mark>); and

(c) information that is confidential to both parties is highlighted in green (i.e. <mark style="background-color: lime">CONFIDENTIAL</mark>).

11.3 ATC requests that it be notified if a request is made to the Commission under the Official Information Act 1982 for release of the information for which confidentiality has been claimed.

1.   **Annex 1 – History of the DJ Industry**

1.1   This Annex sets out further details regarding the developments in DJ technology since the 1990s including the impact they had on market participants. A diagram illustrating the evolution of the DJ industry is at Annex 2.

1990s – vinyl DJing and development of DJ software

1.2   In the 1990s, a typical DJ setup was exclusively hardware-based. In order to mix and play tracks live a DJ would need, at a minimum, two turntables, a mixer, analogue tracks (recorded on vinyl records, which had to be carried around in crates to each event) and a speaker system. It was also not uncommon for DJs to use synthesizers and drum machines to add real-time effects while mixing tracks. There was no ability to edit or manipulate vinyl records pre-performance. The SL-1200 DJ turntable, released by the Panasonic "Technics" brand, was the hardware of choice as vinyl continued to be heavily used by DJs (despite the rising popularity of CDs). ATC (then Pioneer) was primarily a manufacturer of turntables and loudspeakers to play records but not for DJing with a miniscule market share. The barriers to entry for new DJs at this time were extremely high and as a result the DJ population was small. There were very few professional DJs and almost no hobbyists or bedroom DJs. DJs needed to purchase multiple pieces of expensive DJ hardware to start DJing and invest in a substantial collection of vinyl records to have a variety of options available for live sets (it would often take DJs years to build up a sufficient "library"), and both the equipment and crates of records were bulky to store and transport. There was also a significant learning curve in addition to this high upfront cost, as records had to be manually beat-matched – a skill which could take years to master.

1.3   In the broader music industry, digital audio continued to grow in popularity with CD sales overtaking vinyl sales in 1988 and cassette sales in 1991.[167] To capitalise on this shift in the broader industry, ATC released the world's first flat-top professional CDJ (the CDJ-500) in 1994 and followed this up with the first CDJ targeting hobbyists and "bedroom DJs" (the CDJ-100S) in 1998. However, although the CDJ allowed users to play and mix CD tracks, CDJs were not initially hugely successful in the 1990s despite the popularity of CDs. The vast majority of DJs still preferred vinyl because DJs could not play and mix CDs in the same way as vinyl records on turntables. It was not possible to 'scratch' over CDs (which was one of the very few effects DJ could add then), on early iterations of the CDJ and DJing on CDs was somewhat looked down upon due to the perceived lack of skill involved. Accordingly, Technics retained its position as market leader in DJ hardware.

1.4   The digitisation of the audio industry also coincided with huge innovation in digital computing systems combined with lower-cost CPUs which made personal computers more accessible to the everyday consumer. Stanton's Final Scratch (created in the late 1990s and released in 2001) was the first DJ-oriented software which used digital vinyl system (DVS) technology allowing DJs to scratch and control digital music files stored on a laptop using special vinyl records with embedded timecode signals. While it is now obvious that this caused a significant shift in DJing technology, at the time the benefit of DVS technology was only appreciated by some professional DJs.

2000s – CDJs and uptake of DJ software

1.5   In the early 2000s, despite vinyl DJs' continued refusal to use CDJs, ATC continued to focus on the development of its CDJ line and in 2001, it released the CDJ-1000. The CDJ-1000 was highly regarded as the first CDJ which accurately emulated a vinyl turntable due to its "scratch" feel. The other aspect of the CDJ-1000's success was its ability to read any CD. ATC spent time and money collecting badly scratched and unreadable CDs and fine tuning the CDJ-1000 to read them in order to provide the best quality and useful product to the market. For the record, the CDJ-1000 or any other DJ hardware did not allow users to engage in DJ preparation (such as editing of tracks) as users could not save edits to CDs using their computer.

1.6   The popularity of the "scratch" feel CDJ-1000, facilitated by the global uptake of digital audio in the 1990s, caused a seismic shift in the DJ industry in the 2000s. DJs no longer had to haul crates of

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[167] https://www.theguardian.com/music/2015/may/28/how-the-compact-disc-lost-its-shine#:~:text=CD%20sales%20overtook%20vinyl%20in,HMV%20between%201988%20and%202004.

records to events as CDs contained more tracks in a more portable format which was also more affordable (since there was a lower purchase cost per track). ATC also made its CDJs more durable for use in clubs and introduced functionalities, which cost time and money to develop, which the market had requested. ATC began selling the CDJ-1000 to nightclubs and professional DJs and grew rapidly as a result and gained significant market share and respect. The industry vinyl leader, Technics followed and also released CDJs but was unsuccessful; having its history in vinyl DJing, it was unable to reestablish itself in the new era. Denon DJ (acquired by inMusic in 2014) had also begun successfully introducing CDJs at this time. The DJ hardware market had fundamentally shifted from the Technics-dominated 1990s to a new and highly competitive frontier.

1.7   The DJ software market also entered a period of rapid expansion and development as it became more practical for DJs to store digital music files on a laptop computer. Software moved beyond DVS and explored library management tools, and digitisation of analogue DJ skills (such as beat-matching, looping, cueing, cross-fading and FX). Native Instruments launched its Traktor DJ software in 2001, followed closely with an updated version in 2002 which included new features such as scratch macros, expanded looping, MIDI and cue point functionality. Atomix Productions launched the first version of Virtual DJ in 2003, and Serato launched its own DVS software, Scratch Live, in 2004. The automation offered by DJ software was, again, criticised by some vinyl DJs, who considered it "cheating" to use automatic sync functions (this criticism has been regularly repeated since DJ software was introduced).[168]

1.8   The introduction and uptake of DJ software had a knock-on effect on DJ hardware and both beginner and professional DJs. In addition, the software automation of manual DJ skills (such as beat-matching, setting cue points and looping) shortened the learning curve for beginner or hobbyist DJs as the software allowed them to create professional sounding mixes without needing to spend hours learning how to seamlessly beat match or loop tracks. Following the release of the first iPhone in 2006, Algoriddim released the first DJ App "djay" which fully utilised the iPhone's touch interface.

1.9   The advent of DJ software also led to the development of the DJ controller; a device specifically designed to help DJs to mix music on DJ software. During this time hardware manufacturers Denon, Numark, Stanton, Vestax and Behringer all made DJ controllers, and Native Instruments followed suit. Native Instruments made huge headway during this decade and became the dominant controller manufacturer for the detail, quality and affordability of its hardware. Prior to the Traktor S4, the only option for hobbyist DJs was to purchase expensive professional equipment. The S4 revolutionised DJing and democratised the hobby.

1.10   In 2008, ATC attempted to launch its own DJ controllers and released its first ever DJ controller, SEP-C1 bundled with its own DJ software. However, it was not well-received by DJs (ATC also released the DDJ-T1 (with Traktor DJ software) in 2011, and DDJ-S1 with Serato in 2012; however, these products were also unsuccessful and poorly received). Despite its earlier rise in market share off the back of the CDJ, ATC was struggling. Consumers were no longer buying CDJs in the same volumes and Pioneer had become 'uncool' – a death sentence in a market like DJing. In 2008/2009, based on MIST data, ATC estimates that its market share in the controller space was around 20%.

1.11   Around the same time the use and popularity of USBs as storage devices was growing as transfer speeds increased. USBs offered a more portable and convenient way to easily transfer data between devices. Hardware manufacturers including ATC responded to the rise in popularity of USBs by offering USB functionality on CDJs. ATC first started offering USB functionality with DJ hardware on its CDJ-400 in 2007, while Gemini had also added USB functionality to its Cortex HDC-1000 controller in 2007. Now, DJs who preferred to exclusively use CDJs could connect a USB and perform live without using CDs, or a laptop as an external hard drive.

2010s – 2020s

1.12   The pace of innovation in the DJ industry accelerated significantly in the 2010s. DJ hardware continued to be refined, all-in-one/standalone systems started to gain popularity from the late 2000s/early 2010s and ATC released its first all-in-one system, the XDJ-AERO, in 2012, which

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[168] https://www.betterdjing.com/should-djs-use-sync-or-is-it-cheating/

sourced music tracks from mobile devices over Wi-Fi. However, the majority of new developments (spurred by external factors) were in the highly dynamic DJ software market.

1.13 As Wi-Fi connectivity continued to improve, and with the introduction of 4G technology in 2015, music streaming services became one of the most popular ways to listen to, and share music. As a result, DJ software began to offer streaming support in the mid-2010s. DJs no longer had to fill hard drives with downloaded and purchased music. DJ software developers began to compete on ability to obtain support from various streaming services, as some suppliers were able to obtain exclusive deals (i.e., inMusic with Amazon Music).

1.14 The processing power of mobile phones continuously improved and tablet (touch-screen) computers began to grow in popularity. The iPad was launched in 2010 and was recognised as one of the most influential inventions of that year. This led to a huge push by both new software suppliers and incumbents to launch DJ mobile/tablet applications marketed at both beginner/fringe DJs and professionals. Algoriddim released djay for iPad in 2010, edjing mix was released in 2012, Mixvibes released Cross DJ for iPad in early 2012 and Native Instruments launched Traktor DJ for iPad in 2013.

1.15 Experienced DJs became more interested in track manipulation and editing functions on software and started to explore the use of music production software to edit/create their own tracks for later DJing. Ableton Live started to grow in popularity with experienced DJs interested in editing tracks to suit their style or creating their own music to DJ with.[169] In response to this popularity, and to "Bridge the Gap between DJing and Beatmaking" Ableton and Serato launched "The Bridge" software add-on in 2010 as an addition to Ableton Live and Serato Scratch Live (which only worked if both programs were open at the same time with Rane hardware attached).[170] "The Bridge" allowed users to synchronize certain functions of both software to record, edit, enhance and polish mixtapes. Eventually DJ software began to offer these editing functions within their software; however, music production software was still used by experienced DJs for this purpose. ATC added editing functions to its rekordbox software in 2020 with the release of its Core and Creative plans.

1.16 The popularity of touch screen mobile phones/tablets also had an impact on the DJ hardware market. Both Denon and ATC incorporated mobile phone/tablet-sized touch panels into their high-end DJ hardware (particularly all-in-ones and CDJs/players). ATC experimented introducing the touch panel concept using actual iPads and iPhones and connecting them to DJ hardware using Wi-Fi. However, at that time, wifi connectivity was an issue (e.g., unstable and slow), as a result ATC incorporated a mobile phone sized touch panel screen directly onto the hardware (e.g., CDJ-2000NXS and so on),.

1.17 In light of the significant competitive challenges it faced in the market, ATC realised it needed to reinvent itself and come up with a new strategy. ATC decided to broaden its partnerships with other DJ software providers. ATC developed the DDJ-ERGO controller with a completely new philosophy; multi-software compatibility. The DDJ-ERGO was more affordable, compact and worked with Virtual DJ and Serato Lite (and could be MIDI mapped to Traktor). ATC also released a controller specifically designed to work with Algoriddim djay2 in 2012 (the DDJ-WeGO2-K).

1.18 Although ATC's first attempt at developing its own DJ software (in conjunction with its first DJ controller) in 2008 was not successful, after working with other DJ software providers, ATC realised that it could develop its own proprietary software with similar quality to Traktor, Serato, Virtual DJ and djay. It launched the first version of rekordbox in 2009, but as a library management (similar to inMusic's Engine DJ Desktop). Although slow at first, the introduction of its own library management software proved to be successful and was well received by DJs. Therefore, ATC decided to explore the addition of "DJ Performance" functionality in 2013, and after [   ] of development, it introduced "DJ Performance" functionality to the software in 2015.

[169] https://djtechtools.com/2010/10/06/why-dj-with-ableton-live/

[170] https://www.ableton.com/en/products/bridge/

2020s

1.19   With the emergence of 5G technology, more and more music tracks were being stored and carried by mobile devices instead of laptops, therefore, ATC consolidated its belief that mobile device technologies would impact the DJ industry significantly. ATC therefore started to focus on making the rekordbox application and iOS/android App compatible, allowing the software to seamlessly exchange both original and edited music libraries, so that DJs could use both software options, and hence a laptop and mobile device, interchangeably.

1.20   The potential of mobile device technologies has yet to be realised by many due to the similar type of criticism vinyl DJs had in relation to CDJs; however, ATC considers the move to DJing with DJ Apps is already happening, and it is inevitable. Much like the introduction of DJ software and affordable DJ controllers lowered the barriers to entry for new DJs and expanded the overall industry size, ATC is convinced that mobile device technologies will have the similar impact, but at a much faster pace.

Annex 2 - EVOLUTION OF THE DJ INDUSTRY

Timeline markers: CDJ 2000 · 1994 · Serato Live 2004 · Algoriddim djay 2011 · 2023 / STEMS

Music Format
- Analog Tracks
- Digital Tracks
- Digital Tracks / Digital Sounds
- Digital Tracks / Digital Sounds

Media / Storage
- Vinyl
- CD
- CD / USB (notebook)
- USB (notebook)
- USB (notebook) / notebook / mobile
- USB / notebook / streaming / mobile / streaming
- mobile / mobile / streaming
- Vinyl → Vinyl with DVS
- Digital Vinyl (notebook)
- Digital Vinyl (notebook & mobile)

Performance
- Turn Table
- DJ Player (CDJ) + Mixer
- DJ Player (CDJ) + Mixer / Controller
- DJ Player (CDJ) + Mixer (P&M) / Controller / All In One System (AIO) / mobile
- P & M / Controller / AIO / mobile
- Turn Table
- Physical UI
- Touch Panel (TP) UI / Physical UI
- TP UI / Physical UI
- TP UI / Physical UI

Preparation
- Turn Table & vinyl
- CD & DJ Player + Mixer
- notebook
- notebook / mobile
- notebook / mobile
- notebook / mobile
- Turn Table & Vinyl
- Turn Table & Vinyl
- Vinyl Selection
- CD & Track Selection (TS)
- Track Selection (TS) / Playlist Management (PM) / Vinyl Selection
- TS / PM / Track Manipulation (TM)
- TS / PM / TM / Track Creation
- Vinyl Selection

Industry
- Traditional DJ
- Traditional DJ / DJ Music Production
- Traditional DJ / DJ Music Production
- Traditional DJ / DJ Music Production