IMPALA - comments on the CMA's Issues statement of 11 October 2021 in the Sony Music Entertainment/AWAL and Kobalt Neighbouring Rights investigation
25 October 2021

IMPALA welcomes the CMA's issues statement generally and would like to submit the following comments:

General comments

Before commenting on the CMA's issues statement, IMPALA would like to make the general comment that the real price of music has been decreasing overall for the past two decades. The claims that the recorded music industry returned to its peak in revenues (from 2001) has to be counterbalanced. Research by IMPALA shows that, as regards trade revenues for the sector, the European market today is at only 35% of its 2001 value when adjusted for inflation - *results obtained using figures for Europe from IFPI's Global Music Reports (2001-2019), excluding performance and synchronisation rights. See IMPALA's ten-point plan to make streaming work.*

In this context, streaming, which is responsible for much of the sector's growth over recent years, also brings its share of challenges. Indeed, digital music services have offered consumers an all-you-can-eat model as the main way to consume music since their creation (i.e. for around 10 years). During that time, the amount of music released has exploded, and today there are more than 60,000 tracks uploaded on Spotify every day.

However, apart from very recent and small tweaks to multiple users packages, there have been little to no changes to subscription prices. Other sectors have managed to increase prices without difficulties (see, for example, the case of Netflix, which has been steadily increasing rates since 2014). In addition, some music services like Spotify are launching initiatives to reduce royalties for plays or privileged treatment in algorithms or other features, which are similar to Payola and have no legitimate place in improving viability and opportunity for creators.

As a consequence, the real price of music has decreased, and to date, attempts to promote real change in how services charge for music and then allocate it have not been taken on board. In this context, we are referring, for example, to the Artist Growth Model and other proposals in IMPALA's streaming plan, rather than equitable remuneration which we believe would damage emerging artists. This is why we believe that digital service providers should also be investigated as regards the issues touched on in the UK DCMS report about artist revenues.

We believe this needs to be looked into by the CMA alongside investigations into deals like SME/AWAL and KNR, and the market study into streaming recently announced, which we of course welcome.

1. The CMA has decided, considering developments in the music industry, to concentrate on the wholesale digital distribution of recorded music ('digital music distribution'), particularly streaming (para 14 Issues Statement) in the UK. In paras 43-45 Issues Statement, the CMA develops further these points concerning the market. It will concentrate on streaming rather than downloads/radio, given its high and growing importance, and will not look at physical unless it receives evidence to the contrary.

IMPALA would like to comment that although it is true that digital has gradually overtaken physical in all markets as the dominant segment of the market, and that streaming does represent the lion's share of recorded music revenues, other types of revenues remain significant today.

Recorded music in physical formats remains important, and a recorded music company generally still needs to be active in both the physical and the digital recorded music markets in order to be a viable and successful competitor in the market. There remains a segment of customers who can only be reached through the physical market, and there has also been a renewed interest and growth of vinyl in recent years. In addition, the overall decrease in physical revenues over the past years is counterbalanced by a continuous increase of vinyl sales - which increased by 19.3% between 2020 and 2021 (year-on-year).

Therefore, we believe it would also be important for the CMA to look at the physical market as well as digital music distribution.

2. The CMA notes that in differentiated markets, it is more appropriate to assess the strength of the level of constraint that the parties place on each other rather than precisely to define market boundaries. The CMA will consider whether there is segmentation between A&R, A&L and other services, if services to artists and labels and distribution are separate markets, and the appropriate geographic market.

IMPALA would like to reiterate that these markets are indeed separate. This type of assessment as proposed by the CMA is important since, for example, one key element of the merger is that the acquisition of Kobalt Neighbouring Rights, as the CMA has noted in the Phase 1 decision, allows Sony to add a neighbouring rights offering inhouse to its artists and thus provide more of a one-stop-shop service across different segments of the music industry. This is even more significant as Kobalt was the largest independent neighbouring rights collection services company and was also highly data focussed.

On top of that, AWAL is a significant competitor when it comes to A&R, competing with the major record companies, Sony, Universal and Warner, as well as other independent music companies. AWAL's unique offering consists of artist ownership and retention of copyrights with high royalty rates. The artists that AWAL signs could equally be signed to Sony or another major, or to a large independent label, and vice versa. This includes competing for the more established artists that have traditionally and typically signed to majors like Sony.

As regards the wholesale of physical and digital recorded music, AWAL had reached a certain level of scale not attained by most new market entrants, as the CMA has noted in its Phase 1 decision.

In addition, AWAL has also been active in the market for distribution services as an independent distributor, including providing distribution services to other smaller independent record companies without a distribution capability.

In short, by taking options out of the market, such as the innovative option offered by AWAL (i.e. options open to artists who wish to keep their own copyright), competition will be reduced and Sony will be able to use its power to leverage more influence and disadvantage other competitors. As flagged in our initial comments, we believe it is also possible that artists are gradually pushed back towards more traditional options offered by the majors which are less innovative and disruptive. In many ways, this is inevitable because there is a concern that AWAL's models were supported by VC funds, and not necessarily conducive to fair competition.

We believe that the fact that the impact of this merger will be compounded by the decrease in competition it creates in all the markets mentioned above, in addition to significantly increasing Sony's market power, demonstrates the importance of looking at the impact of this deal in the different segments and markets that make up the music industry.

An overall concern however is that this move follows the general trend of gaining market share by 'attrition', i.e. the majors, seeing that they are in danger of losing market share, identify market share in the shape of DIY and aggregator or distribution solutions (such as the Orchard, Finetunes and Phonofile). For example, it appears that Sony's reaction to this situation is to add market share by acquiring smaller and more innovative companies. It appears to be similar to the classic response of large companies like Google and Facebook in other markets when competition from new companies offering different models or innovative solutions arises.

3. In paras 15-24 Issues Statement, the CMA provides an overview of the industry and in para 16 notes that the sector is characterised by (i) competition between service providers to acquire and retain artist clients, label clients and music catalogues; and (ii) providers negotiating with digital service providers ("DSPs") to obtain favourable deal terms for the distribution of digital recorded music. The CMA notes that these two are likely to be linked: acquiring a portfolio of successful artists, and/or label clients and/or music catalogue may provide greater negotiating power vis-à-vis DSPs.

We would like to confirm categorically that the ability of a company to acquire a portfolio of successful artists, and/or label clients and/or music catalogue is directly linked to its possession of greater negotiating power vis-à-vis DSPs.

A major music company with a large and important catalogue will be seen as an indispensable trading partner, which will increase its leverage when negotiating deals with DSPs. Today, 80% of streaming revenues go to the top 1% artists, most of them being signed with the three majors. In this respect, it is difficult to imagine how a DSP could choose not to make deals with the majors - especially if their repertoire is available on other competing platforms - which demonstrates the negotiating power of the majors. Indeed, a DSP is likely to prioritise its deals with the majors.

This position as indispensable trading partner, and the ability of a major to automatically add their repertoire to all platforms will in turn increase the market power of that major and to make it more appealing to artists, therefore increasing its chances of signing more acts. This is even more relevant in this case, as Sony's market power is already significantly increased in any case as a one-stop-shop for artists through this merger.

4. Comments on the CMA's "Summary of key aspects of the assessment of loss of potential competition"

In this context, whilst Sony's market share gain may seem small in recorded music, it constitutes a significant loss in the independent music sector's scale and ability to negotiate digital licensing deals through Merlin. In addition, Sony will be able to leverage its market share gain and make it worth more because it has such a high market share to start with, which it will already be leveraging. Simultaneously, the merger will also reduce independent labels' options in terms of access to third party distribution services and potentially depress innovation in recorded music services.

In other words, the addition of AWAL will clearly strengthen Sony in terms of market share, and, as Sony already has a high market share, it will be able to leverage the additional market share in a way that a smaller record company would not be able to do.

When the independent sector loses that type of market share, the negative impact on its market power is also compounded as proportionately the lost catalogue is much bigger.

As mentioned above, the pattern of gaining market share by ‘attrition’ is also relevant. As noted in earlier submissions, Sony has in recent years acquired the Orchard, Essential, Finetunes, Phonofile and now AWAL is added to that list. Looked at as a whole, this can be seen as buying competition out of the market, and while each individual company’s market share is not large, together these acquisitions add up to a significant strengthening of Sony’s market share and of its power. This is on top of the effect of narrowing of choices available to artists and labels to get to market.

IMPALA would like to add that the deal should be seen in the global context. This is even more relevant when looking at the general trend of majors gaining market share by ‘attrition’, by acquiring smaller and more innovative companies.

For example, Sony is currently acquiring other key independent companies in key markets globally, such as SOM Livre in Brazil, or the music catalogue of the Mexican regional label and management company, Remex Music. This strengthens Sony’s position in these markets and also eliminates the biggest independent competitor. This is seen by IMPALA as part of an overall international strategy, which will reinforce Sony’s position and also undermine the independent sector as key competitor.