AEPO ARTIS

ASSOCIATION OF EUROPEAN PERFORMERS ORGANISATIONS

CMA MARKET STUDY INTO MUSIC AND STREAMING SERVICES: SUBMISSION BY AEPO-ARTIS

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INTRODUCTION

AEPO-ARTIS is a non-profit organisation that represents 37 European performers' collective management organisations from 27 European countries, including the UK. The number of performers represented by our member organisations can be estimated at 650,000.

Much of the scope of the market study is outside our field of expertise, however we believe we are well positioned to provide information on the following elements you have identified:

(i) **How performers (musicians and singers) fit into the music streaming value chain**, both in the UK and in the EU[1];
(ii) The **copyright framework[2];**
(iii) **User-uploaded** content platforms[3].

In doing so, we wish to comment on some elements identified in the DCMS report and then provide a "*View from the EU*". We hope that by highlighting some **practices and legislation existing in the EU**, you will be able to form a view on which elements work well and which do not. Additionally, we will demonstrate how the legal protection currently granted to performers is insufficient to achieve a **"fair and competitive marketplace for copyright"**.

We understand that following the conclusion of the market study, one option available to the CMA is to make recommendations to the UK Government. We will conclude our submission by expressing what in our view are suitable recommendations that could be made to improve the situation of performers and do so in in a manner which benefits not just performers, but also consumers, culture and – consequently - the music industry as a whole.

Due to their lack of financial resources and lobbying power, performers have historically been the stakeholder with the smallest voice in the streaming market, a voice which is frequently drowned out by the immensely powerful recorded music companies and streaming platforms. The tide is turning with the likes of the **#BrokenRecord** and **#Fixstreaming** campaigns in the UK, and the **#Payperformers**[4] campaign active throughout Europe. **Nevertheless, institutional and political intervention is needed.**

For that reason, we are very grateful for the opportunity to contribute to your market study and for the fact that the CMA is willing to prioritise this issue within its existing workload.

[1] Statement of Scope paragraph 86(a)
[2] Statement of Scope paragraph 105
[3] Statement of Scope paragraph 8
[4] https://www.payperformers.eu

Finally, and we appreciate it is outside the scope of your study, we would like to point out that many of the problems that performers face with music streaming are equally applicable in film and TV streaming. This urgently merits the attention of the DCMS.

CONTEXT

The DCMS report concluded[5] that streaming needs a "complete reset". Is this really needed for performers?

A recent study[6] conducted on behalf of the #payperformers campaign found that most **performers earn less than €1000 per year** from streaming. It also found that **44% of performers earn €0.00.**
By contrast, it was reported that in 2021 the three major record labels earned approximately **€2.2 million per hour** in global revenues.[7]

At the EU level, the EU legislature recognised in "Directive 2019/790 on Copyright in the Digital Single Market"[8] that **"a well-functioning and fair marketplace for copyright"** did not exist, and for that to be achieved, new rules were needed.

When confronted with these figures, and the evidence from the EU, there can be no doubt that for performers, streaming needs a **"complete reset**".

1. THE DCMS SELECT COMMITTEE REPORT ON THE "ECONOMICS OF MUSIC STREAMING"

While focussing on UK performers, this report accurately depicts the realities of streaming for performers throughout the rest of Europe. Countless elements of the report could be quoted to demonstrate the plight of performers, but this one in particular stands out:

"*Streaming has undoubtedly helped save the music industry following two decades of digital piracy but* ***it is clear that what has been saved does not work for everyone.*** *The issues ostensibly created by streaming simply* ***reflect more fundamental, structural problems within the recorded music industry****. Streaming needs a complete reset*."[9]

For performers, ***streaming does not work***. The ***structure of streaming*** is the most fundamental and crucial "problem" they face today. Of course, it is far more than a "problem". With the stated aim of certain streaming platforms being to replace radio (which is a reliable income stream for performers, where **unwaivable** remuneration is collected on their behalf by their CMOs), the possibility for performers to continue to make music is wholly dependent on their being a change to the **structure of streaming**, or at least to the law that applies to the structure of streaming.

[5] DCMS report, pages 25 and 103
[6] https://www.payperformers.eu/performer-survey-results
[7] https://www.musicbusinessworldwide.com/major-music-companies-now-turn-over-2-5m-every-hour-and-will-generate-more-than-20bn-between-them-this-year/
[8] https://eur-lex.europa.eu/eli/dir/2019/790/oj (at recital 3)
[9] DCMS report, page 25.

THE LEGAL STRUCTURE OF STREAMING

For performers, streaming is based primarily on one crucial legal right – the **exclusive right of making available**.[10]

The Statement of Scope contains an accurate summary of the main relevant legal instruments that apply to this right,[11] but also contains a **crucial inaccuracy** that highlights the importance of the "*fundamental, structural problems within the recorded music industry*".

The Statement of Scope states: "*One of the central objectives of the copyright system is to incentivise and reward creativity.* ***Music rights enable creators to control how their works are used and to benefit financially from that use****. …*"[12]

Regrettably, for performers that is not true.

In the context of streaming, **music rights <u>DO NOT</u> enable performers to control how their works are used nor to benefit financially from that use.**

Because of the overwhelming financial, contractual, and negotiating power that record companies have, performers[13] have no real choice but to transfer their exclusive rights with little or no financial benefit[14]. For performers, that is (the main) "fundamental, structural problem" with streaming.

EXCLUSIVE RIGHTS VERSUS REMUNERATION RIGHTS

When the WPPT introduced the exclusive making available right in 1996[15], it was designed with the intention of enabling performers to benefit financially from the developing technology of making available. Historically, exclusive rights were seen as being more beneficial than remuneration rights. Confronted with the internet as a place where piracy thrived, performers and producers were given "strong" exclusive rights, theoretically enabling them to forbid, rather than permit. At the time, there was a belief that the music industry could control the internet in this way.

However, throughout Europe we have seen that that a business model with an exclusive right at its core, **is not working for performers** and has mainly been a tool for a handful of powerful record companies to bring about unprecedented market concentration.

Remuneration rights, on the other hand, **are of actual practical benefit to all performers**. Remuneration rights focus - as their name suggests - on the right to be compensated and ensure that this right can be separated from the right to allow or forbid certain uses. For them to be effective, it is crucial that they are **unwaivable** (and thus performers cannot be pressurised into transferring them to record labels or any other entity).

[10] https://www.legislation.gov.uk/ukpga/1988/48/section/182CA The equivalent provision for EU member states is found in Directive 2001/29 article 3(2)(a) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029
[11] At paragraphs 37 – 39
[12] At para 39
[13] Excluding a very few exceptionally successful artists
[14] See again https://www.payperformers.eu/performer-survey-results "most performers earn less than €1000 per year from streaming… 44% of performers earn €0.00."
[15] See WPPT 1996 article 10 https://wipolex.wipo.int/en/text/295578

This was recognised by Lord Justice Arnold, author of the most authoritative book on performers' rights in the UK:

"*It must be conceded, however, that the advantage to performers of conferring on them an unwaivable right to equitable remuneration rather than a full proprietary exclusive right is that they cannot be pressurised by producers into assigning the right away. In the present state of the film and music industries, this is an important factor*."[16]

A system of collectively managed **remuneration rights** operates incredibly successfully throughout the EU and the UK in the context of broadcasting and public performance, with CMOs (including PPL in the UK) administering these rights in a very effective way.

For performers, the only way in which the fundamental structural problem inherent in streaming can be resolved is by the introduction of a **remuneration right**: an unwaivable right to equitable remuneration subject to collective management which would apply when the making available right is transferred. **This would go a long way in helping to achieve a *well-functioning and fair marketplace for copyright***.

It was exceptionally welcome to see that the DCMS understood this and made the following recommendation in their report:[17]

"*The right to equitable remuneration is a simple yet effective solution to the problems caused by poor remuneration from music streaming.* *It is a right that is already established within UK law and has been applied to streaming elsewhere in the world. A clear solution would therefore be to apply the right to equitable remuneration to the making available right in a similar way to the rental right.* ***As such, an additive 'digital music remuneration' payment would be made to performers through their collecting societies when their music is streamed or downloaded...*"**

At the EU level, and particularly in the context of the recent Directive on copyright and related rights in the Digital Single Market ("CDSM Directive"), AEPO-ARTIS has been proposing a similar solution, specifically the introduction of the following wording into EU law:

"*Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance. The right of the performer to obtain an equitable remuneration for the making available to the public of his performance should be unwaivable and collected and administered by a performers' collective management organisation."*

Can performers' exclusive rights achieve a "*a well-functioning and fair marketplace for copyright*"?

Exclusive rights are the building blocks upon which record contracts are constructed. Theoretically, these exclusive rights ought to allow performers to thrive in a **well-functioning and fair marketplace for copyright**. They ought to enable a performer to **negotiate with a record label,** with at least some prospect of achieving a fair deal. They ought to create a **competitive environment** where these rights have a real value. They ought to provide the performer with a **real** choice of whether to exercise the right herself, or to collaborate with a record label.

That myth was **shattered by the DCMS report.**

[16] Arnold, Performers' Rights, Sixth Edition, page 52
[17] DCMS report, page 103

The report includes a comprehensive and damning analysis[18] of unfair record contracts and goes on to say that:

"*The issue of **unfair contracts** is exacerbated when considered against the **relatively meagre returns from streaming,** even as streaming itself is displacing other forms of music consumption and has emerged as the dominant modality*."[19]

To conclude, they stated:

"*The pitiful returns from music streaming impact the entire creative ecosystem. **Successful, critically acclaimed professional performers are seeing meagre returns from the dominant mode of music consumption. Non-featured performers are frozen out altogether,** impacting what should be a viable career in its own right, as well as a critical pipeline for new talent..."* [20]

In respect of existing recordings, performers are in fact totally excluded from the marketplace for copyright, which is developing in an unforeseen and unforeseeable manner. In general, the contracts performers sign with record labels transfer ownership of their performances permanently. Thereafter, the performer is out of the equation, while the record label is free to negotiate lucrative deals with new partners, embracing new technologies and exploring new opportunities that no performer could have imagined when they signed the record contract (e.g., Twitch, TikTok etc.). The marketplace is rapidly evolving but performers are excluded from the new opportunities created.

From this we can see that for performers, exclusive rights alone will never achieve *a well-functioning and fair marketplace for copyright.* And not a competitive market either. **An aspect that the CMA should investigate further is the extent to which the exclusive right on which the streaming market is built contributes to the concentration of revenues among a limited number of players, compared to the possibilities of concentrating revenues from radio play.**

THE PRACTICAL STRUCTURE OF STREAMING

The DCMS report identifies several practical issues relevant to performers that affect their standing in the music streaming value chain. In particular, it addresses transparency, contract adjustment (and the weak negotiating position of performers), right of revocation and UGC platforms. Since these items are all covered in the CDSM Directive we shall address them in the following section.

[18] DCMS report pages 27 - 33
[19] DCMS report, page 29
[20] DCMS report, page 34

2. THE VIEW FROM THE EU

The **Copyright in the Digital Single Market Directive** 2019/790 is currently in the process of implementation throughout the EU member states. At present, 10 of the 27 member states have implemented the Directive.[21] Following the UK's withdrawal from the EU (and hence the non-application of the CDSM Directive) there is now a disparity in the way performers are treated on each side of the Channel. Failing legislative intervention on the part of the UK government, that will remain the case. UK performers are therefore already disadvantaged.

The DCMS report states:

"*We accept that the Directive is not a silver bullet to the music industry's problems, but it is a step in the right direction in terms of protections and rights for rightsholders*." [22]

We agree with this assessment but would urge caution. It is a step in the right direction, but only a small step. The UK has the opportunity to introduce superior **effective** legislation, that would grant performers rights that would actually benefit them **in practice**.

The three elements identified in the CMA Statement of Scope upon which AEPO-ARTIS wishes to comment (performers' position in the music streaming value chain, copyright framework and user-uploaded content) are all affected by articles 17-21 of the Directive. We wish to refer to the most relevant parts of these articles for performers and comment on their success or otherwise.

ARTICLE 18: PRINCIPLE OF APPROPRIATE AND PROPORTIONATE REMUNERATION

Article 18
Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

This article is linked to recital 3:

Recital (3)
Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. **New business models** and new actors continue to emerge. **Relevant legislation needs to be future-proof** so as not to restrict technological development. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment.

[21] The 17 that have failed to do so are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Greece, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden
[22] DCMS report page 106

As stated in the Commission Communication of 9 December 2015 entitled 'Towards a modern, more European copyright framework', **in some areas it is necessary to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights.** … **In order to achieve a well-functioning and fair marketplace for copyright,** there should also be rules on rights in publications, on the use of works or other subject matter by **online service providers storing and giving access to user-uploaded content, on the transparency of authors' and performers' contracts, on authors' and performers' remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.**

Thus, we see that in the view of the EU legislature, a well-functioning and fair marketplace for copyright does not exist and that "**supplementary rules" on performers' contracts and remuneration are needed** to achieve this.

They elaborate on this in recital 72:

Recital (72)
Authors and **performers tend to be in the weaker contractual position when they grant a licence or transfer their rights**, including through their own companies, for the purposes of exploitation in return for remuneration, and **those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law…"**

There is a fatal flaw in article 18. Unlike the recommendation of the DCMS report, it stops short of obliging member states to introduce **an unwaivable right to remuneration** for making available. Instead, there is a statement that member states shall be free to use different "mechanisms" to achieve the goal of appropriate and proportionate remuneration.

As a consequence, what we have seen is that **no member state has introduced a right to remuneration for streaming.** The majority of member states that have implemented the Directive have done so merely on a copy/paste basis. No member state has introduced a "mechanism" that would ensure performers receive "appropriate and proportionate remuneration". In reality, there has been no change to the status quo.

Regrettably, article 18 must be viewed as a failure and a missed opportunity. The lesson to be learned is that if performers are to achieve a fair position in the music streaming value chain, the only way to do so is to grant them **an unwaivable right to remuneration subject to collective management** as advocated by the DCMS report.[23]

The introduction of such a right has also been proposed in a recent study published by the **World Intellectual Property Organisation** (WIPO). It found that:

"*What remains is that performers transfer value to streaming services beyond that which is compensated by market centric royalty payments. It seems that the policy goals and principles of equitable remuneration are best fulfilled by a streaming remuneration in the nature of a communication to the public royalty that is* ***outside of any recording agreement****, is not waivable by the performer and it is collected and distributed by performers' CMOs."* [24]

[23] DCMS report at page 103. Note that an unwaivable remuneration right was also proposed in the recent Private Members' Bill sponsored by Kevin Brennan MP https://bills.parliament.uk/bills/2901 In addition, its provisions on transparency, contract adjustment and rights recapture are to be commended.
[24] "Study On The Artists In The Digital Music Marketplace: Economic And Legal Considerations prepared y Christian L. Castle, Esq. And Prof. Claudio Feij" at page 49 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_3.pdf

It is also supported in prominent academic studies including one by the leading academic Raquel Xalabarder. She states:

*"Statutory residual **remuneration rights, granted by law as unwaivable (and inalienable) rights to receive remuneration subject to collective management** (mandatorily, if necessary) and paid by users/licensees remain the best mechanism to secure effective fair remuneration for Authors and Performers, especially in the audiovisual and music sectors."* [25]

ARTICLE 17: USER-UPLOADED CONTENT

Article 17
Use of protected content by online content-sharing service providers
1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.
An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. **Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement,** that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues…

Article 17 is a wide-ranging complex article however one element is of particular importance in illustrating the **position of performers in the value chain** and (again) the "*fundamental, structural problems within the recorded music industry*".

Summarising article 17 very roughly, the intention is that platforms such as YouTube should conclude licenses with rightholders to ensure that they are remunerated when their music or audiovisual works are used.

Like article 18, this article also has a fatal flaw: it does not take into account the fact that because of the performer's weak negotiating and contractual position[26], he/she will have been forced to transfer the relevant legal right to the record label. Accordingly, when a platform such as YouTube concludes a license, it needs to obtain the rights (permission) from **the record label, not the performer** and the record label will retain 100% of the license fee.

Accordingly, the performer is in practice totally excluded from the benefits this article should provide, because of the "*fundamental, structural problems within the recorded music industry*".

[25] Xalabarder, Raquel, The Principle of Appropriate and Proportionate Remuneration of ART.18 Digital Single Market Directive: Some Thoughts for Its National Implementation https://ssrn.com/abstract=3684375
[26] See again recital 72 "Authors and **performers tend to be in the weaker contractual position…"**

Should the UK implement a similar obligation on user-uploaded content platforms, it would only be perpetuating the position whereby **in practice** certain rights benefit only the record labels and not the individuals they were designed to protect**. This problem would be solved by the introduction of an unwaivable right to equitable remuneration subject to compulsory collective management, payable by such platforms.**

In this regard, the CMA could investigate to what extent the lack of such a right to remuneration hinders the freedom of competition given that the current model does not allow the individual musician to obtain any remuneration directly from these user generated content platforms.

ARTICLE 19: TRANSPARENCY OBLIGATION

Article 19
Transparency obligation
1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due...

The content of this article is self-explanatory. While it is welcome (and is indicative of the problems faced by performers), the proposal in the DCMS report[27] is considerably better.

"*16. … As a minimum, the Government should introduce a right for performers (or their representatives) to have sight of the terms of deals where their works are licensed, on request and subject to non-disclosure. There should also be notification requirements, requiring relevant parties to provide clear information and guidance to creators about the terms and structures of every deal where creators' works are licensed, sold or otherwise made available, and the means and methods by which monies that are being distributed to them are calculated, reported and transferred.*"

Transparency is of course to be welcomed, but it does not in itself get to the root of the problem. If current practice continues whereby a performer has no real choice but to sign a contract whereby she transfers all her rights for little financial benefit, transparent information on the "lack of financial benefit accruing" will be of no help.

To take a practical example, we have seen that major record labels have concluded licensing deals with platforms such as TikTok,[28] Facebook[29] and others. The terms of these deals remain totally opaque for performers, even for highly successful performers with well negotiated contracts.

However, the fundamental problem remains. Even if these licensing deals were transparent, performers (having been obliged to transfer all their relevant rights to the record company) would not share in the profits made by the record company.

However, if a **transparency obligation was combined with an unwaivable remuneration right** then it would be highly beneficial.

[27] At page 106
[28] https://www.musicbusinessworldwide.com/tiktok-and-universal-music-group-sign-global-licensing-deal/
[29] https://www.musicbusinessworldwide.com/facebook-secures-major-label-rights-for-its-twitch-rivalling-gaming-app/

ARTICLE 20: CONTRACT ADJUSTMENT MECHANISM

Article 20
Contract adjustment mechanism
1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors **and performers or their representatives are entitled to claim additional, appropriate and fair remuneration** from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, **when the remuneration originally agreed turns out to be disproportionately low** compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

This provision is also one of the recommendations in the DCMS report.[30] It is too early to tell whether this article will be of benefit to performers in the EU, but we are very sceptical. It **looks** beneficial, but in practice few performers are willing to confront the (far more powerful) record companies. In support of this contention, we refer to correspondence released during the DCMS enquiry. DCMS Committee Chair Julian Knight MP issued a statement saying:

"*We have been told by many different sources that some of the people interested in speaking to us have become reluctant to do so because they fear action may be taken against them if they speak in public*."[31]

Accompanying dispute resolution provisions exist in the CDSM Directive, but these are weak and it is not obligatory to use them. In practice, few performers could afford (either financially or professionally) to litigate on this issue.

[30] DCMS report, page 105
[31] https://committees.parliament.uk/work/646/economics-of-music-streaming/news/136824/statement-from-chair-julian-knight-economics-of-music-streaming-inquiry/

3. CONCLUSION AND RECOMMENDATIONS

CONCLUSIONS

(i) Theoretically, exclusive rights ought to allow performers to thrive in a **well-functioning and fair marketplace for copyright**. They ought to create a **competitive environment** where these rights have a real value. They ought to enable a performer to **negotiate with a record label,** with at least some prospect of achieving a fair deal. The reality is that exclusive rights have failed to achieve this.

(ii) Performers are at the bottom of the music streaming value chain and this will not change by way of soft law. In the context of streaming, **the existing UK copyright framework is of little meaningful benefit to performers**. The CDSM Directive identifies the key problems affecting performers, but does not provide sufficient legislative change to be of significant benefit.

(iii) **Legislative intervention is urgently required.** A well-functioning and fair marketplace for copyright can be achieved by the introduction of an unwaivable right to equitable remuneration, together with effective provisions dealing with transparency, contract adjustment and rights revocation[32].

RECOMMENDATIONS

The UK should draw inspiration from the **principles of the CDSM Directive,** but implement them in the manner set out in the **recommendations of the DCMS report**. Specifically, it should:

(i) Introduce an unwaivable right to remuneration, subject to compulsory collective management.[33]

(ii) Grant performers a right to receive transparent, comprehensive and comprehensible information concerning all exploitation of their performances.[34]

(iii) Grant performers a right to contract adjustment and recapture.[35]

[32] A template for this already exists, namely the Private Member's Bill proposed by Kevin Brennan "Copyright (Rights and Remuneration of Musicians, Etc.) Bill
[33] DCMS report, page 103, recommendation 5
[34] DCMS report, page 106, recommendation 16
[35] DCMS report, page 105, recommendation 12