

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

12 August 2022

INTRODUCTION

AEPO-ARTIS is a non-profit organisation that represents 37 European performers' collective management organisations from 27 European countries, including the UK. Our member organisations represent more than 650,000 performers.

We are grateful for the opportunity to make a submission to the market study update. We note that you are aware that your findings will inform third parties (such as the UK IPO). They will also not go unnoticed by EU member states, particularly in the context of the implementation of the Copyright in the Digital Single Market directive which is of great significance to the economic well-being of performers.

It is therefore extremely important for EU performers that the final study is accurate and leaves no room for misinterpretation with regard to the position of creators and performers in particular.

We will divide our submission into two parts. The first is a general comment on the update in its entirety. The second deals with specific issues found therein.

1. General comments on the Music and Streaming Market Study Update

1.1. Be clear about the scope.

The initial Statement of Scope indicated that the CMA aimed at a study that would consider the streaming market, from the creators of music to the consumer.

*"106. ...the CMA intends to assess revenue outcomes for creators at a high level and in this way **the CMA anticipates its work can assist to inform the wider debate on music creators' earnings.** However, the CMA proposes to focus its contribution on **how this breakdown is affected by competition. The CMA does not plan to focus on other factors that may affect overall revenue outcomes (such as piracy issues within copyright), or social issues including how appropriate such allocations may be, in particular in respect of the relative contributions of different creators or in furtherance of cultural aims.** These are important matters of wider policy that **the CMA considers the Government and the IPO are best placed to examine** via their ongoing programme of research."*

The study update limits the scope to the products and services offered by music companies and the provisions of music streaming services to consumers (1.13) hereby referring to its statutory remit and clarifying that it *"is not intended to downplay the critical role of creators"* and that nevertheless the CMA has *"considered and set out some general views on outcomes for creators (in particular, artists*

given our focus on recorded music) as these outcomes are relevant to the sustainability of the market and the consumer” (1.14 b).

Contrary to what the words might suggest, this is not a mere *formalistic* confirmation of the limitation of the scope. This is indeed a profound limitation of the scope. And the importance of this should not be underestimated, especially when the study update further illustrates this limitation by referring to the fact that *“initiatives are already underway to improve outcomes for artists and songwriters, in particular by the IPO”*.

When initiatives to improve the situation of creators in the music industry are on the way, they can only be welcomed. However, it is important for those same creators to know whether those initiatives can also be motivated by competition-based arguments.

The scope of the study is focussed on an analysis of the **“value chain”**. Contrary to the value chain illustrated in the study update, the start of the value chain that needs to be analysed is not *“creators providing their rights to intermediaries”* (3.85). The start of that chain is the creation of a song or recording, in respect of which a human being is entitled to certain legal rights. The **second** link in the value chain is when those rights are transferred to intermediaries.

Taking the creation of the song or recording as the correct starting point, we see that there is no analysis of whether the recorded music that has been *supplied upstream* and that forms the foundation of this market, has been *“ethically sourced”*. There is no analysis of whether the use of *“resources”* (i.e. creators) is sustainable. There is no analysis of whether the labour engaged to create the *“product”* is being exploited or not.

It is submitted that if, in the 21st century, a market is based upon unethical practices this must surely be detrimental to society as a whole and cannot be deemed to be *“good for consumers”*, no matter how cheap the *“product”* is and how wide the choice of *“product”* offered is.

Perhaps more than any other market, the music market is fundamentally **human** in nature. It is based upon a *“product”* (music) that is unique and ethereal. No two performers play in an identical manner and every song written is a unique and original composition of a human being. It contributes to the fact that *among artists* there is no general sentiment of 'competition'. However, it is necessary to take into account the reality that musicians are economic actors who are also confronted with structures that limit competition. It is precisely the task of the CMA to investigate these matters.

With a view to finalising the study, the scope needs to be clear and the question must be asked (and answered) whether the CMA intends to do an analysis of competition in the music and streaming sector, or an analysis of the music and streaming sector as a whole?

We believe that the current music industry does suffer from competition problems that directly affect the position of authors and performers as economic actors and that *initiatives that aim to improve the situation of authors and performers in the music industry* can also be introduced as a competition-based intervention.

1.2 Stick to competition

Inevitably, in any study of this market there will be a crossover between competition (the CMA’s area of expertise) issues and *“non-competition”* issues¹. Where that is the case, **we urge the utmost**

¹ By *“non-competition issues”* we refer to issues affecting creators caused by factors other than purely competition.

caution when commenting on non-competition issues, particularly since you intend to share your findings with the IPO to inform its work.

Regrettably, we have found a number of inaccuracies in non-competition issues and it is important that these do not lead to the IPO and other relevant parties being misinformed.

This is all the more important given a number of non-competition issue findings contained in the study update appear to lack a clear evidential basis or are in contradiction to other evidence which the CMA has consulted (e.g. the 2021 DCMS select committee report on the “*Economics of Music Streaming*” and the 2021 “*Music Creators’ Earnings the Digital Era*” study).

It is therefore crucial to the wider music sector (the IPO, creators in general and even consumers) that any inaccuracies and misleading statements are remedied, prior to publication of the final study.

It is vital that any findings are accurate and fully founded in fact. With regard to non-competition issues in particular, any evidence that has not been independently verified should be excluded so as not to misinform third parties that may refer to or rely upon the contents of the market study.

1.3 Note the terminology used

We refer to paragraph 106 of the initial Statement of Scope in which it is stated that “... **the CMA anticipates its work can assist to inform the wider debate on music creators’ earnings**”.

As an association of European Performers Organisations, we must point out the importance of correct and consistent terminology used for the creative participants in the music streaming market. The study update describes - in determining the scope - “creators” as a term covering all songwriters and artists.

Our comment mainly relates to the term ‘artist’, which has a much broader meaning in the minds of many readers not familiar with the specific roles active within the music industry. It seems to us the purpose of the CMA is to cover with the term “creators” the group of artists who are protected by laws on copyright and related rights. Rights necessary to enter into a contractual relationship with producers, publishers, distributors and even CMOs.

Therefore, we advise to use the terminology used by the said legislation: music authors and performers, who as a group can be addressed as recording artists. The term music author covers both composers and lyricists and the term performer covers both the featured *and* non-featured performer. After all, the latter is a crucial pillar of the music industry and is (wrongly) explicitly excluded within the current scope.

In addition, we would like to point out that the study will have wide repercussions throughout the music industry and cultural sectors and will be read by policy makers and “**stakeholders**” that have **neither the experience of competition investigations**, nor the financial resources to obtain expert advice thereon. Given that the findings of the study are explicitly designed to inform other (“non-competition”) investigations it is vital to achieve transparency and fairness for all readers of the study. **Because of the nature of this specific study, the authors have a responsibility to ensure that terms that could be misleading or cause confusion are either explained or excluded from the study.**

For example, the term “*excess profits*” is frequently used in the study update and we understand it to be a term commonly used in competition investigations, with a specific meaning.

The profits referred to may or may not be “*excess profits*” in the narrow context of an investigation into **competition**. However, they may be excessive (i) in the context of a healthy music industry; and (ii) in a general societal sense. That should be clearly indicated and explained, in a neutral manner, in the final study.

If a term is used which has a meaning in a competition market analysis that is different to the everyday meaning of the word (or is misleading or capable of causing confusion) this should be clearly and explicitly indicated and explained.

1.4 Distinguish verified data from non-verified data

There is widespread distrust of some streaming services and record companies, as demonstrated by oral evidence given during the DCMS select committee hearings. Its report noted at paragraphs 138-139:

*“138. a lack of transparency has **undermined research into inequities of creator remuneration**. Of the streaming services, only YouTube, Deezer and SoundCloud agreed to be interviewed and none provided relevant data that was not already in the public domain, whilst **all major record companies and all but one major publishing company declined the researchers’ requests for further discussions.**”*

*139. Artists and their representatives face a systemic lack of transparency from both music companies and the streaming services that license their works. This exacerbates the inequities of creator remuneration by creating information asymmetries and preventing them from undertaking their right to audit. Creators and their representatives have a right to know about the terms on which their works are exploited and verify the outcome of these agreements. **It is also deeply concerning that this norm is challenging academic research efforts, including and in particular taxpayer-funded projects, despite efforts to positively engage music companies and streaming services in this endeavour.**”*

It is vital for the integrity of the study that meaningful information is provided regarding data sources that the CMA relies upon. We are concerned that some of the data provided to the CMA is unverified, but nevertheless relied upon to reach some of the most important conclusions in the study.

For example: “3.31 We note that profitability is only an indicator and does not on its own provide conclusive evidence around the level of competition in the market. Furthermore, **our analysis has limitations due to issues such as data availability and treatment.**”

If no further explanation is provided by the CMA, and it does not state that this (indisputably one-sided) data has been verified, it is entirely reasonable to give very little credibility to any findings based upon this analysis.

If the CMA has had access to the “root” of this data and been able to test its veracity, then it is reliable and rightly ought to be used by the CMA as part of the basis of its findings. If it has not had access to the root of this data, then this should be explicitly stated and explained and should be given limited credibility.

Founding vital conclusions on unverified data, will inevitably result in the study suffering from a lack of integrity and credibility and will **misinform** the wider debate on music. We realise that in some cases it is inevitable that some important data cannot be verified. However, where this is the case, the data should be given only limited credibility and its untested nature should be indicated in the study.

The study should clearly indicate which evidence the CMA has tested and found to be reliable, and which evidence remains unverified and is merely the contention of the party supplying that evidence. Unverified evidence should be given only limited credibility.

2 Specific substantive issues

2.1 No substantial music streaming revenues left?

At 5.107 it is stated that: “... in addition to what has already been paid out to artists, **there are no substantial music streaming revenues left to pay artists substantially more, as a group, once record companies’ costs have been accounted for, including the cost of raising funds to invest in artists.**”

It cannot be stressed enough how misleading that statement is. This is in stark contrast to the many numbers that reflect the exponential growth of the music streaming market. It is even more in stark contrast to the reality that label executives themselves do have room for more.

The remuneration of major record label executives is in the public domain². This is the position of Warner Music Group:

Name and Principal Position	Year	Salary	Bonus ⁽¹⁾	Stock Awards ⁽²⁾	Non-Equity Incentive Plan Compensation ⁽³⁾	Change in Pension Value and Nonqualified Deferred Compensation Earnings	All Other Compensation ⁽⁴⁾	Total
Stephen Cooper CEO	2021	\$3,000,000	—	\$6,627,873	—	—	\$1,116,854	\$10,744,727
	2020	\$1,000,000	—	—	\$8,225,000	—	\$6,749,945	\$15,974,945
	2019	\$1,000,000	—	—	\$7,075,000	—	\$2,013,264	\$10,088,264
Eric Levin Executive Vice President and Chief Financial Officer	2021	\$1,000,000	\$1,219,300	\$ 999,988	—	—	\$ 18,270	\$ 3,237,558
	2020	\$ 850,000	\$8,892,840	—	—	—	\$ 8,550	\$ 9,751,390
	2019	\$ 850,000	\$1,034,340	—	—	—	\$ 8,400	\$ 1,892,740
Max Lousada ⁽⁵⁾ CEO, Warner Recorded Music	2021	\$5,476,000	—	—	\$2,400,000	—	\$2,358,487	\$10,234,487
	2020	\$5,100,000	—	—	\$1,538,219	—	\$2,072,353	\$ 8,710,572
	2019	\$5,108,000	—	—	—	—	\$ 510,330	\$ 5,618,330
Carianne Marshall ⁽⁶⁾ Co-Chair and COO, Warner Chappell Music	2021	\$1,250,000	\$1,950,200	\$ 499,994	—	—	\$ 13,989	\$ 3,714,183
	2020	\$1,250,000	\$1,870,400	—	—	—	\$ 8,550	\$ 3,128,950
	2019	\$1,132,692	\$1,319,487	—	—	—	\$ 721	\$ 2,452,900
Guy Moot Co-Chair and CEO, Warner Chappell Music	2021	\$1,750,000	\$1,950,200	\$ 499,994	—	—	\$ 27,446	\$ 4,227,640
	2020	\$1,750,000	\$1,870,400	—	—	—	\$ 390,571	\$ 4,010,971
	2019	\$ 829,994	\$ 913,985	—	—	—	\$ 322,754	\$ 2,066,733

Two of the top five executives each received more than **\$10 million** in 2021. They all received more than **\$3 million**. These figures pale into insignificance with the widely reported³ 2021 payment to the head of Universal Music Group in the region of **£150 million**, a figure which is reportedly more than all UK songwriters received from streams and sales of their music in the UK in 2019.

Record labels make choices. They choose to pay their executives exorbitant amounts. As a consequence, the revenue left to share among artists is vastly reduced.

² https://www.sec.gov/Archives/edgar/data/1319161/000114036122001910/ny20001327x2_def14a.htm#TEC

³ <https://www.theguardian.com/music/2021/nov/10/mps-and-music-industry-bodies-criticise-pay-of-universal-head-lucian-grainge>

We firmly believe that no market study can be complete or balanced without including this publicly available data.

The reality is, of course, much more complicated than this and it is not our intention to contribute to a debate based on populist statements. Any study that sincerely seeks an explanation of how the music market works and which improvements are possible should steer clear of unfounded statements and wholly subjective terms such as “substantial”. What may be deemed insubstantial by some, could be very substantial to a musician trying desperately to sustain a livelihood.

The statement that “*there are no substantial music streaming revenues left to pay artists substantially more, as a group, once record companies' costs have been accounted for, including the cost of raising funds to invest in artists*” therefore has no place in this study.

Such a statement is a slap in the face for the thousands of musicians who are obliged to participate in an all you can eat buffet where the point of return on their investment lies further away than ever before and they are faced with the reality that their investment is not even part of the costs being taken into account.

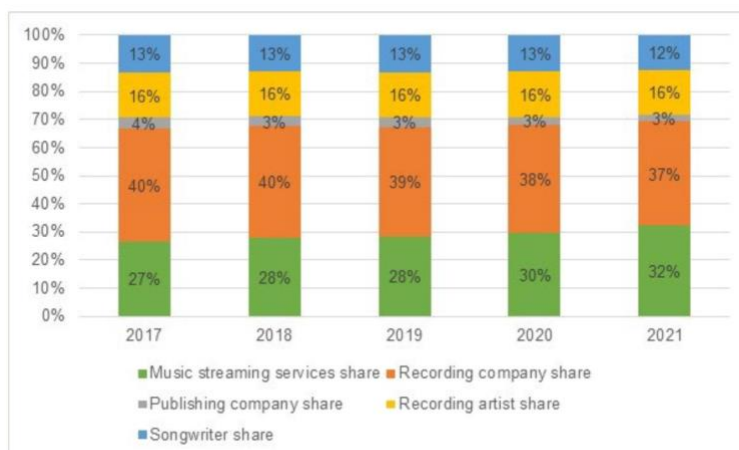
Misleading statements must be avoided. Major record label executives’ salaries are highly relevant to the context of claims such as this and should be referred to in the final study.

2.2 What is the recording artist’s share of streaming revenues?

The CMA states (see figure 3.8 and paragraph 3.87) that “*The share of revenue paid to artists and to songwriters have both remained fairly constant...*”.

Figure 3.8 (copied below) asserts that a recording artist’s share of streaming revenues across the value chain has been **16%** (during the period 2017 – 2021). The source stated in the study is merely “*CMA analysis of data from music streaming services and music companies.*”

Figure 3.8: Share of streaming revenues across the value chain



Source: CMA analysis of data from music streaming services and music companies.
Note: in some cases artists may also be songwriters and earn in both capacities.

It is in fact strange that the CMA makes this statement and reaches this conclusion when it **has access to evidence and data which contradicts the contention that “the share of revenue paid to artists” is 16%.**

The CMA had access to, and ought to have taken into account, the following:

(i) Recoupment and the share of revenue paid to artists

The CMA has studied the DCMS select committee report and therefore will be aware of the issues caused by “recoupment”.

For example, we refer to the DCMS report at paragraph 45:

*“Colin Young described the challenges facing performers to recoup on their deals: The challenge is to recoup that within the cycle, because you have a two year period, in essence, you have to recoup it by, before the next advance is given and the next recording costs. The costs are immediate on to the ledger; the income is delayed. .. **That is the challenge: 20 percent of the income, 100 percent of the costs and you only have a limited window to recoup it in. That is difficult.***

*...the costs are recouped against a minority of the income, a recording’s total revenue might have in actuality exceeded the total costs of production and the performer’s advance **well before the label ... begins paying royalties to the performer.**”*

To paraphrase this evidence, the structure of record deals is such that the **share of revenue paid to performers** is not 16%. It is **0%**, unless the artist can recoup within a limited window. In the words of Colin Young “*That is difficult*”.

To say without any context, explanation or reference to evidence such as the above that the artist is paid a 16% share is therefore extremely misleading.

(ii) The accuracy (or otherwise) of the figure of 16%

There is no evidence (verified or unverified) contained in the study update that explains where the 16% figure comes from.

It is clear from the evidence produced by Sony, and referred to below, that the amount actually **paid to the artist** is in fact 0% not 16%, until such time as the recording has been streamed (in the particular example below) 458 million times.

If the contention of the CMA is that 16% is **not actually the amount paid to the artist, but is the amount set against the advance and recording costs** that the artist has incurred, the CMA has data which shows that even that is not true.

The CMA will have seen the evidence submitted by Sony in the study “Music Creators Earnings in the Digital Era” which provides the following information (at page 220)⁴:

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020133/music-creators-earnings-report.pdf

Sony Featured Artist Royalty Deal: Profit and Loss (2020)

			Label break- even point	Label 10% Margin	Label £300k profit	Artist recoups		% of Revenue: calculated in relation to 'Label 10% Margin'
Streams (millions)	10	100	244	314	378	458	1,000	
Gross Revenue (£000s)	£50	£500	£1,222	£1,571	£1,889	£2,292	£5,000	
Artist Advance (£000s)	£300	£300	£300	£300	£300	£300	£300	19.1%
Recording Costs (£000s)	£250	£250	£250	£250	£250	£250	£250	15.9%
Artist Royalty (£000s)	£0	£0	£0	£0	£0	£0	£650	0%
Marketing (30%/£300k minimum) (£000s)	£300	£300	£367	£471	£567	£688	£150	30%
Overhead (25%) (£000s)	£13	£125	£306	£393	£472	£573	£125	25%
Label profit/loss (£000s)	(£813)	(£475)	(£1)	£157	£300	£481	£1,050	10%
Artist Total	£300	£300	£300	£300	£300	£300	£950	

In this example, after 1000 million streams, the gross revenue is stated to be £5,000,000. From this revenue, the artist's royalty is stated to be £650,000. This amounts to a **13% share of revenue not a 16% share as stated in the study.**

However, what makes the 16% of streaming revenue figure **even more inaccurate and misleading** is that the amount actually **paid to the artist** is not calculated on the basis of a percentage of **the gross revenue** (i.e. in this example £5,000,000). It is calculated on that amount after e.g. marketing and overhead costs have been deducted⁵. These costs are continuing and very substantial. In the example above, **Sony's marketing costs are 30% of gross revenue and their "overheads" amount to 25% of gross revenue.** It follows that whatever percentage a recording artist receives; it is of a far smaller pie than the CMA states⁶.

(iii) Calculation of "operating margins"

It is stated at paragraph 3.29, footnote 57 that "*Operating margins are calculated after deducting cost of sales and operating expenses such as **marketing expenses, admin, and overheads.***"

Here we refer the CMA again to the evidence from Sony set out above. Read together, the Sony evidence and footnote 57 indicate that operating margins are calculated after the deduction of marketing expenses (30% of gross revenues) and overheads (i.e. 25% of gross revenues). It is stated in the Music Creators' Earnings study that while a label's overheads are fixed, the contribution that each release makes to those overheads will be based on 25% of that release's gross revenue and will therefore rise as its revenue rises."⁷

We would ask the CMA to reconsider whether their method of calculating operating margins is satisfactory.

Given the evidence and data that appears to have been disregarded (and pointed out in (i) to (iii) above) we invite the CMA to confirm in the final study if they were able to independently verify the veracity of the 16% figure and if so how.

⁵ Much can be said about how these costs can be "recycled" through the record label and therefore ought not to be categorised as a "loss".

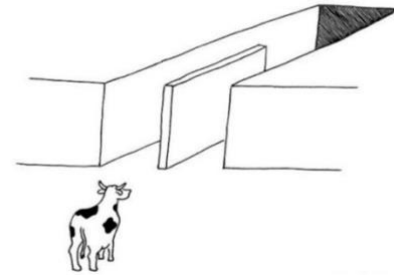
⁶ It is noted that figure 3.8 refers to "streaming revenues" and does not specify whether these are gross or net. Our assumption is that the reference is to gross streaming revenues, since if the reference was to "net streaming revenues" further explanation would have been needed to clarify what would be meant by "net streaming revenues".

⁷ Music Creators Earnings, page 220

This is all the more important because a failure to do so will misinform other studies or investigations which rely on the findings of this study.

2.3 The illusion of choice

Respectfully, we suggest that the CME has been taken in by the *illusion of choice*. In the graphic on the right, the cow represents the 98% of professional musicians who now have an unprecedented choice of ways to access the streaming market... but all of them take them to the same place: a financially unsustainable career in music.



At paragraph 2.26 the CMA explains that “...there are **hundreds of smaller ‘independent’ or ‘indie’ labels. New types of providers helping artists self-release their music have also emerged in the wake of digital distribution.**” It also refers to the “DIY distributors that focus on putting music onto streaming services at low cost, helping artists to by-pass the involvement of a traditional music company if they wish.”

However, it goes on to explain at 2.25 that **the three major labels “collectively had some form of rights in 98% of the top one thousand singles.”**

When confronted with this reality, the CMA should investigate to what extent the market concentration around a very limited amount of major record labels and publishers on the one hand and a similar limited amount of global distributing platforms on the other limits the options available to music artists. How many of the DIY distributors are (in)directly owned by major labels? Do independent performers and independent record labels have access to the same terms as major record labels? What role does catalogue-ownership play in obtaining a share of the streaming revenues? What choice do artists actually have?

By the CMA’s own facts, it is surely undeniable that there is in reality not much CHOICE for those creators that want not just to make and release music, but to have a FINANCIALLY VIABLE career in music.

CONCLUSION

It is acknowledged that the primary focus of this study is on **competition**. Nevertheless, there is an inevitable overlap with the overall well-being or otherwise of creators.

It is explicitly stated by the CMA that its findings will inform the work of third parties (such as the UK IPO) whose focus **is on the situation of creators**. The CMA should be aware that their study will not go unnoticed by EU member states and therefore its findings will have consequences not only in the UK, but also in the EU.

This submission highlights a number of instances where statements or claims are made that are misleading, inaccurate, based on unreliable evidence or lack context.

To ensure the integrity of the final study we trust that the CMA will rectify these.

This will ensure the final study reliably informs and does not **misinform** all third parties that may read it.