



**CMA Music and streaming market study – IMPALA’s comments on the CMA’s report  
update  
30 August 2022**

**Introduction**

We welcome the CMA’s market study update and the summary of the detailed findings that it has made to date concerning the music streaming market. We are surprised that the CMA has stated its intention not to make an MIR as, having considered the findings to date, we believe that there are a number of areas where we feel greater knowledge is necessary, which may not be possible without a market investigation. Our comments on the market study update below, inter alia, include those areas and will concentrate on the following issues:

- UUC platforms - the value gap and safe harbour rules, where we argue for further investigation.
- All you can eat model and Most Favoured Nation clauses. We believe there should be further investigation in particular as regards functionality and non-discrimination clauses.
- Competition between integrated and non-integrated services. We consider that further investigation, including prospective, is necessary to consider how the current competitive advantages of integrated services could develop in the short- and medium-term, and make it increasingly difficult for non-integrated services to compete on a level playing field in this market.
- Consolidation. Again, we consider that further investigation is required into the lack of a level playing field between the majors and smaller players, and how that affects consumers ultimately, including in areas beyond price.
- Situation of artists and distribution. IMPALA agrees with the CMA’s assessment that any significant shift in the way artists and songwriters are remunerated should be carefully researched as such a shift could result in lowering their revenues. (IMPALA opposes calls for so called equitable remuneration for this reason, and we also oppose calls to pay more for publishing rights for example)

**I. UUC platforms – value gap & safe harbour**

***Value gap***

- We note that the CMA has said that it is at an early stage of assessing these issues and that the initial evidence on the value gap therefore focusses on YouTube specifically. Given this, we would urge the CMA to widen its focus to other UUC platforms, for example TikTok (ByteDance), already a significant player with over 1 billion monthly active users (expected to rise to 2 billion by the end of 2022), and whose payment system is opaque, and where there may be a greater value gap relative to other streaming services. Given that, IMPALA considers that the CMA should gather evidence on how TikTok calculates its current payments, and what

percentage of its revenues they represent, as well as how its market position relative to other UUC platforms like YouTube, and music streaming services, is likely to develop in the next 2-3 years.

- As set out in our previous submissions, our members enjoy a fruitful day to day relationship with YouTube and other services in the UUC space and these services play a vital role in our ecosystem.
- We view the CMA's analysis of the UUC platform model as a confirmation that there is a value gap in terms of the percentage rate of ad revenues paid out to music rightsholders on UUC services relative to other music streaming services (5.138). In common with the CMA, we believe a deeper analysis of the value-gap between what UUC services and what music streaming services pay rightsholders, and its impact on consumers, should be undertaken.
- The report recognises that YouTube/Google share less of their advertising revenues with rightholders but goes on to make two counter arguments. First, that while Google may pay out a lower percentage of ad revenues than commercial content ad-funded music streaming services, Google generated more ad revenues per stream in 2021, and so broadly pays the same as other services. This seems to suggest that Google is entitled to keep a larger percentage of ad revenues itself because it is the market leader, and to the detriment of rightsholders, as long as in absolute terms it pays the same as less successful ad generators. The report also states that because YouTube's market share is relatively low (estimated at 10% -20%) as a percentage of total streaming revenues the impact is likely to be small.
- We disagree with that analysis. When looking at this type of issue, we consider that the CMA should be taking into account a service's market share of streaming revenues not only relative to the overall market (and we note that Figure 2.4 of the report does that) but also the sub-market for UUC platforms (where it is the main platform) as well by comparison with other ad-funded services (there appear to be no pie charts, similar to Figures 2.4, 2.5 and 3.8, for these markets). And, in order to appreciate the full impact of a service sharing a lower share of its advertising revenues with rightsholders, it is not sufficient to consider only its market share for streaming revenues but also for usage.

Finally, as already mentioned above, we consider that the CMA should widen its focus when carrying out its further analysis of the value gap to other UUC platforms, for example, TikTok. Not only is it a question of underpayment for music, but of holding back the growth of music streaming services which obtain licences before making music available.

### ***Safe harbour***

- Safe harbour rules create a disadvantage for smaller rightholders who have to agree to "take it or leave" deals if they want to get their music licensed, and therefore monetised. As the CMA study acknowledges, safe-harbour rules limit the liability of UUC platforms for hosting illegal content uploaded by users in some circumstances and enable UUC platforms to avoid liability for copyright infringement by removing content at the request (so-called "takedown requests") of the rightholder.
- We are not surprised that the CMA found that a minority of stakeholders were sanguine about the safe harbour rules. The major labels, for example, have a far stronger negotiating position because, in default of agreement, they have far greater resources to monitor use of their copyrights and to issue takedown notices than

independent labels such as IMPALA's members, placing the latter at a disadvantage in relation to the safe harbour rules. The advantage of the majors is then reflected in commercial terms and even favourable application of the Content Management System in respect of major label channels.

- This matters to consumers and consumer choice, both its breadth and quality, for the very reasons that the CMA has highlighted in its report. As the CMA notes, more creators than ever before are releasing music and have more choice over how to distribute it, but this also means that there are more artists competing for the attention of consumers than ever before. As the CMA notes, UUC platforms are key to helping to promote and break new artists and allowing consumers to discover artists. The safe harbour rules, by placing smaller rightsholders and independent labels at a disadvantage, hinder that process, and hence, ultimately, the breadth, quality, and diversity of consumer choice.
- Non-integrated music services (such as Spotify) are at a disadvantage both compared to integrated music services such as Apple, (which benefit from better leverage due to their control of both the music service and the playing device and having other significant businesses which can be used to subsidise their music service), and to UUC platforms which benefit from safe harbour protection. We therefore disagree with the CMA in its view that commercial content music streaming services generally do not appear to currently be at any substantial competitive disadvantage compared to UUC platforms (5.136).
- The CMA considers that a change to safe harbour provisions should be carefully assessed for the reason that it could result in increased music streaming revenues and earnings for artists, which could come at a cost to consumers as higher music streaming royalties to rightsholders would involve consumers in aggregate paying more for music streaming services (5.144). IMPALA cannot agree with this assessment for the simple reason that this model relies on making available unlicensed music available to the public for free. While the advantages to the consumer of lower prices are clear, this cannot be at the expense of artists and rightsholders who are given no say in the matter. This was addressed in Europe with the EU copyright directive of 2019 which the UK government has chosen not to implement following its departure from the European Union. Moreover, and as the CMA has noted in its report, price is not the only criteria to consider in relation to consumer benefit. An increase in music streaming revenues could improve the breadth, quality and diversity of music available to consumers (5.145) as well as driving further innovation by music streaming services to the benefit of consumers. Changing the safe harbour rules to ensure (1) that the playing field between UUC providers and music streaming services, who compete directly in this market, is more level and (2) more equal access to UUC services by smaller rightsholders and labels, would support this.
- To this end, we also recommend that any analysis looking into the safe harbour issue is not limited to the amount of revenues that Google/YouTube is redistributing to the sector as a whole but looks at other services as well as which rightsholders benefit the most. Indeed, the CMA demonstrates that majors are in a better competitive position in comparison to independents and streaming platforms in general and use their enormous bargaining power to obtain most favoured nations (MFN) protections to ensure they always get the best deal offered to any other party. The independent

labels are effectively penalised twice: as they are in a weaker position when negotiating with the platform due to safe harbour protections, but also their largest competitors (the majors) benefit from substantial advances or minimum guarantees and other contractually negotiated advantages. We recommend the CMA to look not only at the question of the amount of revenue that UUC platforms are paying to rightholders in order to decide whether to investigate this specific question, but also the divergent impact of safe harbour platforms on different sizes of rightholders.

- In our opinion, changes to safe-harbour rules would be very significant for the music industry as a whole. It may not have the effect of creating more streaming revenues – at least directly – by leading to an increase in premium subscription as the CMA notes (5.141), but it would create the conditions for a fairer redistribution of revenues by supporting smaller labels and artists in strengthening their negotiating position with UUC platforms, and, as mentioned above, ultimately reward consumers with a larger and more diverse catalogue offering (5.145). Safe harbour rules distort the market by forcing streaming services that pay for content to compete with those who view payment as an option, rather than an obligation. Allowing traditional streaming services to compete on the same grounds would also open the door to more innovation (5.145). IMPALA members believe that putting an end to safe harbour provisions is the priority before any other streaming reform can take place (see IMPALA [ten-point plan to reform streaming](#) here).

## II. All you can eat model & Most Favoured Nation (MFN) clauses

- IMPALA agrees with the CMA’s assessment that the cost to consumers of streaming platforms’ subscription tiers has remained unchanged for several years, and therefore reduced in real terms (5.36). Streaming services find it difficult to increase their subscription prices and remain competitive, not least as they compete against UUC platforms that benefit from safe harbour provisions as described above.
- The CMA comes to the view that competition would not be more vigorous in the absence of MFN clauses (6.18). Although IMPALA agrees with this assessment from the perspective of supply of music, we believe that competition for the access to a wider audience is primarily linked to a label’s visibility on a platform, not simply the presence of its music there (this also ties in with the comments we made above about visibility of smaller rightholders and labels on UUC platforms). The type of issues covered by the clauses referred to in 4.6 as being included in the majors’ recording licences directly affect the functionality of the services and how tracks are accessed by consumers. As stated previously, we believe that some streaming services choose to prioritise their deals with the majors, as well as visibility of their repertoire once on the service. This is confirmed by the CMA’s own research which demonstrates that “some agreements contain obligations on the music streaming service to ensure that a major’s share of tracks within global playlists broadly corresponds to its overall share of streams” (4.13 and again in 5.89). This is also confirmed in [a recent report](#) showing that majors overperformed on Spotify’s editorial playlists worldwide over the past four years, despite independent music overperforming on third-party or user-created playlists over the same period. We are also aware of incidences of major labels demanding that non-music content on

streaming services (such as podcasts) be disregarded for the purpose of calculating pro-rata royalty shares.

- In the CMA's assessment the majors do not have the possibility to impact a music streaming platform's algorithm (4.13), but this seems to disregard the point that many playlists on streaming platforms are curated by the platform's staff and not generated by an algorithm. In practice, the actual process of compiling playlists and the inclusion of repertoire on them is however extremely opaque. IMPALA believes that the overwhelming presence of content belonging to major labels is linked to their negotiating position when licences are entered into, and the presence of MFNs to ensure that their market share is preserved, with scant regard to the essence or theme of a playlist. This is not to the benefit of consumers but to the benefit of the majors and the tracks that they license.
- This is compounded by initiatives such as Spotify's Discovery Mode which represent yet another opportunity for the biggest companies to drive user discovery, by providing for the payment of lower levels of royalties in return for enhanced playlisting presence or prominence. These types of "pay to play" arrangements are similar to the system of paid plays (or "payola") once common but now largely outlawed in the radio broadcast industry. If the reasons for enhanced playlisting or prominence of specific tracks are not signposted to consumers, this type of "pay to play" arrangement could, in addition, constitute a form of hidden advertising. This also further reduces the price of music and ultimately labels' and artists' incomes.

### **III. Competition between music services (non-integrated / integrated / new entrants)**

- We fully agree with the CMA's conclusion that integrated services' control over hardware devices, engines and systems through which consumers use and discover music gives them a competitive advantage over non-integrated services (5.42). This, in our view, opens the door to unfair competitive strategies such as preferential treatments and other activities listed by the CMA in 5.43.
- Integrated services are able to subsidise their streaming services from their other market activities and ultimately to use music as a loss leader to drive custom to their more profitable products and services. For example, Amazon Music bundles free access to music streaming (albeit with a more limited catalogue) as part of its Amazon Prime subscription.
- We also agree with the CMA's assessment that some strategies by integrated businesses could ultimately drive non-integrated services from the market, as well as preventing smaller, non-integrated music streaming services entering and expanding in the market, thus creating more consolidation while hampering innovation (5.47). IMPALA notes the CMA findings about certain terms imposed by Apple and Google through their app stores, for example Apple's terms for the distribution of music through its App Store (5.43). Control of the App Store is probably of greater concern as regards competition between Apple and Spotify than control of devices. While Spotify is able to outcompete Apple on subscriptions, App Store terms, which are akin to an "app tax", still have a braking impact (and incidentally drive up prices for consumers).
- We believe that any analysis of the streaming market should look more deeply into these issues and that a prospective analysis of how the market might develop in the

short and medium-term should be made, especially given the CMA's comments in 5.51 and 5.70, about the recent growth of integrated services and the competition that they represent to the largest non-integrated service, Spotify.

#### IV. Consolidation

- We welcome the CMA's clarification of the place of majors and independent labels in the streaming market (2.25, 2.26, 5.25 & 3.28). This confirms IMPALA's view that the music market is extremely concentrated, with three recording companies (the majors) accounting for a combined market share of more than 60%, climbing to a massive 95% for Top 100 on radio and streaming in Europe. The finding, in particular, that in 2021 they collectively had some form of rights in 98% of the top one thousand singles in the UK is telling (5.23) and should be investigated further. This indicates more than simply the importance of the majors' repertoire to music streaming services – they are unavoidable trading partners.
- We agree with the CMA's assessment that the majors are in a far stronger position than independent labels due to their scale when it comes to negotiating deals with platforms and promoting artists globally. However, we believe that this is compounded by the general trend of majors increasing their market share by 'attrition', which has not been considered by the CMA. As mentioned in IMPALA's comments on the issues raised in the statement of scope from February 2022 (p.7), the majors have preserved and enhanced their market share by acquiring aggregator and distribution businesses such as the Orchard, Finetunes and Phonofile as well as important independent companies in key markets globally, such as SOM Livre in Brazil and the music catalogue of the Mexican regional label and management company, Remex Music. Sony's recent acquisition of AWAL in the UK continues this trend of acquisitions. These acquisitions of smaller companies by the majors serve to strengthen the position of companies such as Sony in these markets, while at the same time eliminating the biggest independent competitors, an approach which appears to mirror that of large companies like Google and Facebook in other markets when competition from new companies offering different models or innovative solutions arises.
- This enhances these companies' negotiating strength even further in online markets, by increasing their catalogue offering – a crucial element for streaming platforms as it generates the vast majority of streams, as the CMA also identifies (5.88). This is in addition to the repertoire that majors distribute on behalf of other labels: even if this is a minority part of the majors' streaming revenues (3.24), it again enhances their negotiating strength, as it increases the volume of catalogue with which they enter negotiations with services as well as overall share of streams, with knock-on effects in other areas.
- In particular, this has a knock-on impact on playlists, which are a vital route to discovering new music. While AWAL's market share was less than 1% in the overall recorded market, the same company accounted for 5% of tracks on one of Spotify's main playlists (see the [report](#) by Music Tomorrow [here](#)). Sony's acquisition of the independent contributed to the consolidation of its dominance over editorial playlists, where the company already overperformed.

- The CMA notes that all major companies have holdings in music streaming services (3.14 & 3.16) but states that “they affirm that these interests have not resulted in any undue influence or operational involvement with these firms”. This reassurance does not seem to have been questioned or probed. Although a shareholding may not provide a major with the ability to influence decision making over content, there is an obvious additional incentive to offer preferential terms if by doing so they ultimately benefit their own investment. We believe this is a subject requiring deeper examination.
- All of the elements described above feed into each other, to the detriment of independent labels, as the CMA also identifies (5.90). This shows how important it is for the CMA to support relevant measures to create a more level playing field in the music market as a whole. More equal access to services for all players in the market could also benefit consumers, beyond simply price benefits, as this would allow consumers to access a greater breadth, quality, and diversity of music on the services.

## **V. Situation of artists and distribution**

- IMPALA welcomes the CMA’s clarification of the situation of artists (numbers streamed almost doubling between 2014 and 2020 from around 200,000 to 400,000) (paragraph 5.98) and songwriters in the streaming market, and notably the fact that the surge in artist participation has had an impact on remuneration (2.29) but that the deal conditions available to artists are improving nonetheless (3.52).
- It is also very interesting to note that in parallel, music streaming services have retained more revenues, while the labels’ share has fallen (3.88).
- The IPO’s analysis shows that both artists’ and publishers (including their songwriters) have all seen their share of revenues from streaming increased at the expense of labels; and the share allocated to publishing rights has increased significantly at the expense of label’s recording rights. This appears to be a continuing trend. As mentioned in previous submissions, IMPALA sees no valid reason for increasing the value that songwriter and publishers are able to extract from the digital cake. This is because we do not agree that revenues between different parts of the sector should be reviewed (including for example publishing and recording) without a concomitant discussion of relative risk taking and investment.
- IMPALA also agrees with the CMA’s assessment that any significant shift in the way artists and songwriters are remunerated should be carefully researched as they could result in lowering their revenues. In particular, and as mentioned in our comments from February 2022 (p.9), IMPALA rejects the so-called “Equitable Remuneration” model which would diminish value in the commercial market, would reduce capital for investment in new artists and projects but which would almost certainly not result in greater remuneration for artists. IMPALA advocates that all record labels and, in particular, the majors pay artists a fair contemporary digital royalty rate. Proper royalty deals are the answer, plus differentiation by streaming services to reallocate revenues meaningfully. Streaming is core business, not radio!
- We also recommend other measures such as services facilitating label search and track titles in multiple languages as a way for services to become more dynamic.

- IMPALA’s 10-point plan to reform streaming and to boost local markets in Europe can be found [here](#). More information about our position on Equitable Remuneration is set out [here](#).

## Conclusion

In conclusion, while we are surprised that the CMA does not intend to make an MIR given that the CMA itself considers that further investigation is required in some of the areas outlined above, we would urge that, before the CMA makes a definitive decision, it further investigates a number of key areas. In particular:

- UUC platforms- We consider that further investigation is required as regards the value gap and safe harbour rules and that the detailed investigation should be widened to look at UUC platforms other than YouTube such as TikTok.
- All you can eat model and Most Favoured Nation clauses. We consider that the emphasis cannot be on price alone and should extend to the breadth, quality, and diversity of consumer choice. Thus, IMPALA considers that there should be further consideration of how clauses relating to functionality and terms of access make it more difficult for consumers to discover music beyond that which is presented to them.
- Competition between integrated and non-integrated services. We consider that any analysis of the streaming market should look more deeply into this issue and that a prospective analysis of how the market might develop in the short and medium-term should be made, especially given the CMA’s comments in 5.51 and 5.70, about the recent growth of integrated services and the competition that they represent to the largest non-integrated service, Spotify. IMPALA is particularly concerned not only about control of devices by integrated services but also about control of app stores, for example, in the case of Apple which lead to higher pricing and costs for Apple’s competitors in the music streaming business.
- Consolidation. This leads to a lack of a level playing field between the majors and smaller players. While a large catalogue of music is available, the visibility of certain catalogues means that the music that consumers are presented with does not truly represent the full breadth, quality, and diversity of the full catalogue of music available.
- Situation of artists and distribution. IMPALA agrees with the CMA’s assessment that any significant shift in the way artists and songwriters are remunerated should be carefully researched as they could result in lowering their revenues. In particular, IMPALA rejects the so-called “Equitable Remuneration” model which would diminish value in the commercial market, would reduce capital for investment in new artists and projects but which would almost certainly not result in greater remuneration for artists. Instead, IMPALA believes all labels should pay a fair contemporary digital royalty rate, plus differentiation by streaming services to reallocate revenues meaningfully. Streaming is core business, it is not ancillary business like radio. We also do not support claims by some sectors in the music sector that revenues between different parts of the sector should be reviewed (including for example publishing and recording) unless the relative risk taking and investment by the different participants in the business is also taken into account.