

RE: Competition and Markets Authority's music and streaming market study: update paper

Friday 2 September 2022

Thank you for our recent meeting where we discussed the interim report of the Competition and Markets Authority in relation to its music and streaming market study.

Thank you also for agreeing to take your notes of our conversation into account in developing the report to its final stages. I agreed I would write to reiterate some of the points we discussed.

We discussed the fact that some years ago the CMA took a different position when considering the market for groceries and the market power of supermarkets. In that instance, the CMA recommended the creation of a code of conduct enforced by a regulator because of the position of the powerful supermarkets in relation to their small suppliers. This was also a market where the final price to the consumer was kept low, but where the long-term future was threatened by detriment to the small businesses supplying the industry caused by the behaviour towards them of the small number of large retailers dominating the market. This imbalance of power is also a feature of the recorded music industry. I said that I did not think that the CMA had given sufficient consideration to the fact that the market for recorded music should be considered through the same lens.

The report acknowledges the huge market share of the majors, but does not acknowledge that for oligopolistic behaviour to exist in the market it is not necessary for these companies to communicate overtly with each other in order to tacitly collude.

The CMA should recommend a code of conduct be drawn up by the industry in agreement with creators coupled with an independent industry-funded adjudicator in order to mitigate the inequality of market power.

We discussed the CMA's assumption that seems to underline the interim report that each of the three majors are not acting as corporate groups in a way that maximises their profit to shareholders. In other words the CMA seems to assume, without having looked at how decisions are arrived at, that they are not behaving as single economic units, but that the recording and publishing sides compete fairly for a share of streaming revenue within these corporations. The concern expressed by those independents representing publishing copyrights that the Majors have favoured the recording copyright in streaming deals are dismissed because there has been a gradual improvement since streaming began in the share taken by publishing.

There is no examination of the possibility that this has simply happened because of the external reputational pressure that has been brought on these corporations for over a decade. Any progress that has been made has not been through the open operation of market forces. Why was the initial deal with streamers so bad in the first place if it wasn't because it was in the interest of the majors to attribute a higher share of streaming revenue to the recording copyright rather than to the publishing copyright? How can there be a fair exchange without internal walls being erected between recording and publishing interests within the same corporations reporting to an overall single leadership?

The CMA should make recommendations, with the possibility of further action such as divestment if reform is not forthcoming, in relation to separating recording and publishing interests to allow for fair exchange.

The interim report assumes that songwriters can move publishers if they don't like the percentage being obtained by the publishing companies owned by the majors. It seems to be unaware that the information about these percentages that has come into the public domain, has only done so because of the considerable public debate about this issue. In practice this information is usually covered by commercial confidentiality and non-disclosure agreements. Furthermore, song rights are assigned for the life of copyright. The CMA should revise this observation in their final report to reflect the reality of the position of songwriters and composers.

The interim report agrees that some agreements weaken competition. Why is this not investigated in more detail? How do independents benefit from the existence of 'most favoured nation' agreements? If they do not, why are they allowed?

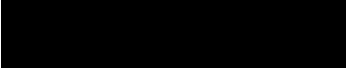
Is the implication that majors can get collective favourable terms not available to indies which could prevent Indies from growing and being more attractive to recording artists? The CMA should dig deeper into this issue.

What is the CMA doing to look more closely at influence on playlists and previous practices such as payola? The CMA should insist on complete transparency in this area.

We also discussed the importance of estimating the value gap and of ease of switching streaming services.

Overall the report seems to adopt, without sufficient in-depth scrutiny, the arguments of the major record companies, despite the implications of concentration and cross-ownership. I recognize that the market study has commenced without the usual period of preparation, but in my view that makes it all the more appropriate that the CMA should proceed to a full investigation. If it remains not minded to do so at the end of the statutory period it should, at the very least, firm up its report recommendations to reflect the real competition issues that are clearly present in this market.

Yours sincerely

A solid black rectangular box redacting the signature of Kevin Brennan.

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