



IMPALA: Comments on the draft revised Market Definition Notice dated 8 November 2022

1. IMPALA AISBL was formed in 2000 by independent record companies and national trade associations to represent and grow the independent music sector across Europe. It is a non-profit pan-European organization with a scientific and artistic purpose, dedicated to small, micro and medium-sized music companies and self-releasing artists. IMPALA currently has nearly 6000 members across Europe.
2. IMPALA welcomes the publication of the draft revised Market Definition Notice dated 8 November 2022 (the “Draft Notice”) and the proposed updating of the Market Definition Notice published in 1997, especially in relation to digital markets. IMPALA would like to make some specific comments relating to digital content markets, drawn from the position in the digital music market, on the following issues:
 - Market definition in the presence of multi-sided platforms;
 - Market share.

Section 4 Market Definition: 4.4 Market definition in the presence of multi-sided platforms

3. Paragraph 95 notes that, in the presence of multi-sided platforms, the Commission may define a relevant product market for the products offered as a whole, or may define separate product markets for the products offered on each side of the platform. In the digital music market, there exist both digital providers offering a single product, music (e.g. Spotify) and multi-sided platforms (e.g. Alphabet/YouTube). In the case of the latter, YouTube is plainly a separate product to Alphabet’s advertising and search engine activities but YouTube and Alphabet benefit from clear network effects, especially as regards the search engine component, in driving traffic to YouTube. We thus agree with the approach that the Commission sets out in the Draft Notice – defining a separate product market as part of the digital recorded music distribution/retail market for YouTube while taking those network effects into account in relation to the competitive assessment.
4. Similarly, we agree with the comments in paragraph 97 concerning multi-sided platforms that offer a product at a zero monetary price to a user group. However, in the music market, rather than simply being aimed at attracting consumers to other sides of the platform, these may also be aimed in some cases at attracting the user group to pay for an enhanced version of the same content, music. Nevertheless, we agree with the statement that the fact that the product is supplied at a zero monetary price does not imply that there is no relevant market for that product especially where, for example, the freemium offering of an individual platform has specific characteristics.

Section 5 Market Share

5. IMPALA agrees with the points at paragraph 105 of the Draft Notice that market shares are not the sole indicator of an undertaking’s strength in the market. This is particularly

true in digital markets, where IMPALA's members are active, licensing their recorded music and publishing rights in their repertoire to digital providers. This is especially the case in highly concentrated digital markets with strong network effects and high barriers to entry where a digital provider has interests across an ecosystem of companies in the wider digital market. This can also be the case in such a market where a company providing content to a digital provider, e.g. a music company, develops structural links with such a digital provider in a market, either through a strategic stake in the digital provider or through the digital provider taking a strategic stake in the music company. Equally, it can be the case in the field of merger control, where a company acquires market share in small increments through acquisitions that do not exceed merger control thresholds. This type of creeping influence is not new, and IMPALA has flagged in the past such issues in merger cases where market share is acquired through successive acquisitions of small players, often key players in a particular domestic market, although the increments in terms of market share are not necessarily significant and thus such an acquisition cannot be reviewed by the Commission as it does not exceed the thresholds.

6. We also agree with the points made in paragraph 107 of the Draft Notice. While market shares based on sales or revenues provide useful information to determine market shares, other metrics may also provide complementary or more useful information. In the music market, both the digital recorded music and music publishing markets, usage metrics are clearly important and we were surprised that, while the Draft Notice refers to number of downloads as an example of usage metrics, there is no mention of number of streams, although streaming now makes up the bulk of the digital music market (and other digital content markets). We also note that, specifically in the context of digital music content, presence on playlists would provide an additional indication of market share or at least, useful information to complement other information such as revenues and streams.
7. In addition, where music companies are licensing their rights to digital providers, a market share based on sales or revenues is not representative of the true market position of the music company as a key element is the size and indispensability of the company's repertoire to the digital provider. This may also be the case in other markets where companies are licensing content to digital providers. Thus, in the music markets, the Commission has in past decisions looked at the size of the repertoire controlled by a company and measured market power in those markets by using the 'control share' test in addition to looking at market shares i.e. the share of all songs made available for streaming or downloading by digital providers that the music publisher controls through fractional, or full publishing rights, or even recording rights.
8. A further issue linked to this is that market shares are unlikely anyway to give a full picture of market power in markets where multiple suppliers or licensors of content are indispensable. For example, no digital music service would be truly successful without being able to offer at least the repertoire of the two largest major record companies and probably not without that of all three majors. This is even more pronounced where there are both multiple suppliers or licensors of content supplying to multiple digital services that are also indispensable in the market.
9. Moreover, we note that there is no reference to data as another metric which may provide complementary or useful information to determine market share in the Draft Notice. While usage metrics are highly important reference points in digital markets, access to data is also important to measuring market shares and market power in the digital world. This is true both for digital providers and content providers. In the type of transaction that

we refer to above in paragraph 5, where a content provider like a music company develops structural links with a digital provider, a key driver will be access to data, especially in a situation where those links might allow it to leverage its market position in e.g. one geographical market into another. User as well as streaming data are key elements of agreements between music companies and digital providers, and music companies continually seek to improve the quality of this information that is provided to them by digital providers. Access to data is thus important on both sides of the market: both to content providers/licensors and to digital providers

10. In paragraph 110, the Commission notes that market share information may be provided in the form of estimates by the undertaking(s) involved, if precise market shares are not available to them. As the latter is rarely the case, and certainly rarely in the music markets, we would expect that the Commission's practice should now always be to test the estimates of the parties against information from other sources in order to have the most objective and independent information concerning market shares and thus market power available. We are therefore surprised that paragraph 110 reads:

"The Commission **can** (*our emphasis added*) additionally or alternatively use other sources of information on market size and market shares".

We would expect this to be done as a matter of course given changes in Commission practice since the publication of the current version of the Market Definition Notice first published in 1997.

Conclusion

11. IMPALA welcomes the Draft Notice and the updating of the Market Definition Notice published in 1997, particularly as regards practice concerning digital markets. IMPALA however hopes that the Commission will consider some of the additional suggestions that IMPALA has made above, especially in relation to market shares in digital content markets.