

Call for contributions - Shaping competition policy in the era of digitization

IMPALA

You will find IMPALA's views on the two following topics of discussions:

DIGITAL PLATFORMS' MARKET POWER. *The interests of platforms are not always aligned with the interests of their users, which can, as a result of platforms' market power, give rise in particular to: a) leveraging concerns (digital platforms leveraging their positions from one market to another); and b) lock-in concerns (network externalities, switching costs, better service due to accessibility of data make it difficult for users to migrate to other platforms, and allow platforms to "exploit" their user bases). What should/can competition policy do to address these concerns and how?*

PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY. *Do network effects, economies of scale and 'copycat' products impede innovation? In digital merger cases, is there scope to apply theories of harm based on a loss of innovation and/or loss of "potential competition" more often? Would a focus on innovation require updating our analytical tools?*

About IMPALA

IMPALA was established in April 2000 to represent European independent music companies operating in both the recorded music and music publishing businesses. One of IMPALA's missions is to keep the music market as open and competitive as possible and it was instrumental in securing a [key vote on copyright and platforms](#) in the European Parliament recently. IMPALA has an impressive record in competition cases in the music sector. The first EMI/Warner merger was withdrawn in 2001 following objections from the EU after IMPALA intervened, in its first year of existence. It also won a [landmark judgment in 2006 in the Sony/BMG case](#), and when [Sony acquired 30% of EMI publishing in 2012](#), it was at the cost of significant divestments. The biggest set of remedies proportionately ever in a merger case was secured later that year, when UMG was forced to sell two thirds of EMI Records and had to accept ten years of scrutiny over the terms of its digital deals. When [WMG bought Parlophone](#) in 2013, IMPALA secured a [hefty divestments package](#) for its members. On top of mergers, IMPALA has also been involved in other anti-trust cases involving the music sector, such as the [abuse complaint against YouTube](#) in 2014 and the [call for regulating unfair business practices](#) by large online players. See the organisation's other key achievements in [IMPALA's milestones](#).

ON DIGITAL PLATFORMS' MARKET POWER

The online world has brought many opportunities for citizens, businesses and creators but also many challenges. In the online world - and this is especially true in the music sector - there is an obvious imbalance between the bargaining power of some online platforms compared to that of SMEs.

IMPALA represents around 4,000 independent music companies across Europe dealing on a daily basis with online platforms. Accounting for over 80% of all new music releases, as well as over 80% of the music sector's overall jobs and investment, we believe it is important for our members to be heard in this debate.

With its limitless “shelf-space”, the internet represents a golden opportunity for cultural diversity to flourish in the digital age.

However, music SMEs face severe problems in terms of access to the music market. The impact on diversity, consumer choice and pluralism is clear.

While new technologies have given artists the means to broadcast their work to new audiences across the globe, it is increasingly difficult for smaller groups and individuals to make their work heard over the growing mass of “noise” online.

Despite the ease with which new works can be published online, being found amongst the millions of available tracks is extremely difficult. It is therefore imperative that digital services are subject to rules that guarantee the visibility of a diverse range of culture. Ensuring the findability of content online will become the main issue in maintaining diversity in years to come.

The role of competition authorities should be to make sure the conditions are in place for an open and competitive cultural market to thrive with a diversity of cultural entrepreneurs and cultural works. Excessive dominance of companies in any market should be proscribed, and as cultural goods are unique and cannot be substituted, monopolisation has particularly adverse effects.

The level of concentration visible in the music sector is not compatible with the principle of equitable access to the means of expression and dissemination. Market concentration has a detrimental effect on music SMEs, artists and consumers alike.

More generally, there is a need for new competition rules that offer greater protection for cultural diversity. These should ensure a level playing field in the music sector, taking into account the cultural market's specificities. Making sure the regulatory framework delivers a diversity of cultural works is one of the most important issues for music SMEs.

A considerable “power gap” exists between certain online platforms and their suppliers, especially SMEs like our members, over 4000 independent music companies across Europe, as certain platforms have become indispensable trading partners for their suppliers.

The market power of an online platform is closely linked to the number of visitors it attracts. The structure of certain online platforms' business model places them in a position of indispensable trading partner, “essential facility” or “gatekeeper”, when the number of visitors accessing the platform greatly surpasses that of its competitors,

regardless of revenue generated. Assessing market power through revenue-based market share only is therefore not fit for purpose in the case of online platforms.

Excessive market power repeatedly leads to unfair trading practices in the digital market. For example, independent record labels are often presented with “take it or leave it” terms which do not meet acceptable standards.

There have been several examples in recent years where this imbalance has led to unfair trading practices against music SMEs and the artists they work with. Some dominant players for example commonly use censorship-style negotiating tactics, such as threats to remove content or block access to it. You will find below a list of examples of unfair trading practices which we have compiled, as well as some principles that should be considered to address these practices.

1. Presenting independents with “take it or leave it” terms, which are unfavourable when compared to market rates, and non-negotiable.
2. Threatening to remove content and block access to its content management system used for monetisation of user-generated content on the free ad-based platform, unless non-negotiable licensing conditions were accepted.
3. Linked to 5 below, offering onerous/obscure conditions including offering overly stringent non-disclosure agreements.
4. Access to playlists, which are an important route to consuming and discovering music in the music market today, is skewed to a significant extent in favour of major record company repertoire, in particular as regards global playlists, despite independents accounting for 80% of new release (see end note).
5. Drafting obtuse contractual language in standard agreements resulting in agreements lacking clarity.
6. Failing to report good enough quality data to rights owners in order to allow them to properly exercise their rights under their agreements with services, for example:
 - a) a lack of complete and transparent information about the user data that services gather in relation to users of the music licensed to the service, or
 - b) a lack of complete and transparent data about the revenue that the service generates from the music licensed by our members.
7. Including ‘least favoured nation’ clauses ensuring the royalty rate of all independents would be aligned with the lowest rate agreed with any label worldwide, or if more than one major agrees a reduction, then other labels are deemed to have agreed this as well.

The following principles should be considered to fix the situation:

- Provide that access to platforms, and the various tools that those platforms provide, such as playlists* and content management systems, should be on fair, reasonable, transparent and non-discriminatory terms since key online platforms hold significant market power as de facto indispensable trading partners and/or gatekeepers to the digital world.
- Draft contracts in plain English.
- Linked to transparency point above, provide content licensors with best quality data available - on tariffs, users’ streaming/downloading of content, as well as search results.
- Apply a non-discrimination principle to search and data, including online music services, to prevent discrimination between large and small repertoire owners.
- Cease from applying LFNs (Least Favoured Nation clauses).

- Apply dispute resolution mechanisms that are not internal to the online platform concerned.

**The question of playlists and their power and the issue of access is the subject of these reports: Part 1 - Winners & Losers in the Battle for Spotify Playlist Supremacy (main findings available [here](#)) and Part 2 - Justin Bieber & The Self-Perpetuating Upward Spiral (main findings available [here](#)).*

In this context, unfair trading practices were also correctly identified as a priority area in need of intervention by the European Commission in their recently published draft Regulation on promoting fairness and transparency for business users of online intermediation services (and the European Parliament with the [Juvin/Virkkunen report](#)).

We very much welcome the fact that proposed new rules help to address the “power gap”, the imbalance between the contractual bargaining power of certain online service providers and SME suppliers or licensors. We hope to see the text strengthened by the Council and the Parliament. There could indeed still be further improvements/strengthening as we believe the text needs provisions going beyond transparency. We believe the text should include:

- a general obligation to ensure that terms and conditions, particularly of access to services and to the tools that they provide, such as playlists and content management systems, are ideally not only objective and non-discriminatory, but also fair and reasonable where appropriate;
- a clear prohibition of discriminations by platforms, which use their dominant positions to favour their own services to the detriment of other market competitors.
- clearer timeframes/notice periods in relation to certain provisions such decisions on suspensions/terminations;
- not only clarity as regards access to data but also better access to data.

ON PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY, WITH AN EMPHASIS ON NETWORK EFFECTS

On preserving digital innovation - the case of the music sector:

The level of concentration visible in the music sector has a detrimental effect on innovation with negative consequences on music SMEs, artists and consumers alike.

Increased concentration can lead to less technological innovation and new business models, along with restricted access to music. It also leads to an increased ability to shape online and other services using music. This, in turn, can create barriers to growth for the smaller competitors such as the independents, which will be left with discriminatory deals both in financial and non-financial, e.g. advertising/marketing, terms.

The recent announcement of Sony's (the world largest publisher) intention to buy out its partners in EMI Music Publishing illustrates this tendency and raises serious concerns and should be blocked.

These consequences for innovation in terms of shaping online services are something that IMPALA has raised in the past in relation to increased concentration in the market. Historically, major music companies put up barriers to the setting up of new services, as they initially resisted the development of online. They then embraced digital services but their ability to stifle innovation continued, by using their power to shape the way in which services operate, and the way they look. This resistance to change does not benefit consumers, who, rather than being given options to choose from, are presented with services that the majors have moulded. Putting further power into the hands of dominant players will increase their ability to shape deals with new services. Once a company has over a 45% control share (i.e. negative rights to at least 45% of repertoire available) it will have a huge amount of influence on the shape and feel of new services. This is also the case for how current services continue to develop and in future the terms and conditions on which they operate.

Overall, more concentration on the supply side for music, one of the key areas of the digital music market, is not a positive development. It cuts across the EU's Digital Single Market Strategy to deliver a genuine internal market in the digital sector, as well as to ensure that market is open, competitive, without barriers to entry and provides for a level playing field.

On network effects

In addition to a proposal to address fairness in platform to business relations, we also feel strongly that competition principles should be reviewed to ensure that they are fit for purpose in the digital age and specifically whether the notion of "abuse of dominance" and the "essential facilities" doctrine may need to be reviewed.

The digital market is characterised by multiple indispensable trading partners and the presence of one multi-level operator who benefits from unprecedented effects. As a consequence, competition in the digital market is hindered by an EU competition policy which is not up to date, and should be reviewed to fit the digital world. It is important for the EU to take the lead on this.

For example, the concept of dominance should be examined with specific reference to online platforms, given that market power itself may present in a different manner to that in a more traditional market.

Likewise, the issue of what constitutes an “essential facility” in this market sector is vital. It is important to understand that an online platform may not be dominant in terms of value/turnover but may have access to data on an unprecedented scale, as well as large numbers of users. Especially, it may benefit from network effects, where the number of users has a knock-on effect making the platform more attractive to advertisers and content providers and, in turn, with more attractive content, attracts even greater numbers of users. This happens when the number of unique users accessing a platform greatly exceeds that of its competitors, regardless of actual turnover generated. This tends to create further concentration in the online market, and give some platforms excessive bargaining powers when dealing with smaller actors.

Therefore, an online platform may not be dominant in accordance with how dominance is defined in the case law of the EU courts but the effect of the above factors may be a significant asymmetry in contractual relations/negotiations, especially when dealing with SMEs. As regards the cultural market, this is extremely important as these SMEs contribute the most in terms of jobs and innovation, as they account for 80% of jobs, 80% of investment in new works and 90% of added value generated. They are driving innovation and growth in the EU creative market.

In conclusion, unless the EU competition policy is updated to fit the digital era, network effects may impede digital innovation by increasing concentration - and therefore dominance - on the online market, and by giving more power to big actors at the expense of smaller ones.

The aim, fundamentally, should be to level the playing field and ensure fair competition between big and small enterprises.

On taxation

Taxation is another aspect of fair balance. Today we know that billions of euros are lost every year across the EU due to tax fraud and tax evasion (as illustrated by the Luxleaks, Panama papers and more recently the Paradise papers), and also that within the digital economy online giants often pay little to no taxes in EU countries where they make millions, if not billions of euros in profit.

Meanwhile, individuals and small and medium-sized enterprises such as our members, independent music companies, pay more than their fair share of taxes. The playing field is far from level, and this imbalance favours those who are already big, growing further the unfair competition which exists between supranational behemoths and small local companies.

In recent years, this imbalance has led to ludicrous [situations](#) where an independent music company was reported to have paid more tax in the UK than Google, Apple, Facebook and Amazon combined... As mentioned in the Commission Communication on a “fair and efficient tax system in the EU”, the Digital Tax Index found that, on average, domestic digitalised business models are subject to an effective tax rate of only 8.5%, less than half compared to traditional business models.

It should be a priority to get all multinationals to pay their fair share of taxes. SMEs and citizens accept their share of the fiscal burden, while many multinationals and online

giants appear to escape fair taxation through various loopholes and tax arrangements with certain member states.

With smaller actors and citizens shouldering the lion's share of the tax burden, it is time for Europe to make minimum fair and direct taxation of online operators and multinationals a reality. If we want citizens to re-engage with Europe, this would go a long way.