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ANNEX TO IMPALA SUBMISSION to the European Commission's public consultation on "Single Market - new complementary tool to strengthen competition enforcement"

This document is a summary of IMPALA's response to the European Commission's public consultation on "Single Market – new complementary tool to strengthen competition enforcement".

IMPALA was established in April 2000 to represent independent music companies. 99% of Europe's music companies are small, micro and medium businesses and self-releasing artists. Known as the "independents", they are world leaders in terms of innovation and discovering new music and artists. IMPALA now represents almost 5,000 independent music companies across Europe dealing on a daily basis with online platforms and accounting for more than 80% of all new releases and 80% of the sector's jobs. IMPALA welcomes the Commission's initiatives to review its competition policies and tools to make sure they are fit for purpose to deal with competition issue that arise on today's markets, especially digital. This is particularly relevant for the music industry, where digital accounted for 63.3% of the industry's global revenues in 2019. In Europe, streaming revenue grew by 24.1% in 2019 to \$3.1bn, representing alone more than half (50.9%) of the total European recorded music market.

It is therefore crucial for our members to have a say in this debate.

State of play

The role of competition authorities in the relevant markets should be to ensure that the conditions are in place to provide for a level playing field in cultural markets - for open and competitive cultural markets to thrive with a diversity of cultural entrepreneurs and cultural works. High levels of concentration and companies with entrenched dominant positions in any such market should be prevented: since cultural goods are unique and not substitutable, the impact of monopolisation is particularly serious in such markets. Large incumbent digital players are very difficult to dislodge and likely to have strong incentives to engage in anti-competitive behaviour: this scenario plays out in music markets both on the wholesale digital music market, as well as on the digital retail market.

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

The legal bases for European Commission intervention on competition grounds, Articles 101 & 102 TFEU, are not sufficient to address the structural competition problems that the music and related digital markets are facing today:

- Article 101 as an instrument is not able to address certain critical competition issues in today's market. For example, it is unlikely that Article 101 could be used to address the structural competition issues raised by this consultation because it is a legal provision that deals with anti-competitive agreements between undertakings. This instrument cannot be used in relation to gatekeepers, for example, who present SMEs with take it or leave it trading or contractual terms. While the contract partner may consider the terms unfair or anti-competitive, the agreement itself, if entered into, is unlikely to fall within the terms of Article 101. Further, another disadvantage of Article 101 in this context is that it is an ex-post instrument, rather than an instrument allowing preventative action.
- Article 102 relies on competition principles that should be reviewed to ensure that they are fit for purpose in the digital age. This may mean considering whether the concept of "dominance", "abuse of dominance" and the "essential facilities" doctrine need to be reviewed. Above all, the concept of dominance and how it is established should be considered. In digital markets, in particular, there may be issues as regards establishing the relevant market in which a finding of dominance may be made, as well as how to establish dominance itself in that market, given that simply assessing dominance through market share based on turnover may be inappropriate and there may be other criteria such as reach, user numbers and access to data that should be considered. More generally, market power linked to the concept of the 'unavoidable trading partner' is an issue in the digital wholesale and retail music markets – including through network effects, the concentration of content on the wholesale market and of reach/users on the retail market. Moreover, given that competition law seeks to isolate where competition problems lie, an approach, as suggested by the authors of the report commissioned by the Commission, Competition Policy for the digital era, which place more emphasis on theories of harm and identification of anti-competitive strategies may be necessary in the context of Article 102.

However, dealing with the type of structural competition issues raised by this consultation will also require new tools such as those proposed by the Commission in the context of this consultation, given that competition problems arise in content/digital markets even where companies do not have a dominant position.

In addition, there is a general need for the competition rules to offer greater protection for cultural diversity in cultural markets. The impact of behaviour on consumer welfare and choice is a fundamental aspect of the Commission's analysis in competition cases. In a content market like the music market, one of the results of ensuring cultural diversity is that it also ensures consumer choice. In addition, Article 167(4) TFEU provides that:

“The Community shall take cultural aspects into account in its action under the other provisions of this Treaty, in particular in order to respect and promote the diversity of its cultures”.

Lack of cultural diversity and consumer choice lead to consumer harm. The competition rules should thus 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.

Competition problems to address

We believe the new competition tool should address the issue of concentration/oligopoly in the market and its impact; tipping markets; the behaviour of gatekeepers in the market; and the issue of leveraging market power on one market into related markets.

A particular concern that IMPALA sees in the digital retail music market is ensuring competition, access and a level-playing field on platforms/digital music services for all music companies, including the SME independent music companies represented by IMPALA, and we have provided examples of where IMPALA considers there are or have been problems ensuring this.

It is also important for example to ensure that competition authorities are not only able to review cases where companies with market power buy up competitors but also problematic cases where minority shareholdings are acquired, which do not necessarily involve a change of control for the purposes of merger control, but form a type of creeping influence allowing companies to stay under the radar of regulators, which is a strategy that e.g. Tencent has been using for years in many different sectors and across different geographic markets, as well as companies like Google. As regards mergers, therefore, we call for a change of test for mergers to allow the EC to investigate certain acquisitions of minority shareholdings and thereby better to identify attempts to acquire creeping influence and thus better take into account consumer welfare. This would be in conjunction with an assessment that asks the type of questions suggested by the authors of Competition Policy for the digital era in relation to acquisitions of small start-ups by dominant platforms.

It is also critical to make sure that the EU can address issues before they are implemented. This is why we fully support Executive Vice-President Vestager’s proposal to make more use of precautionary measures (also called “interim measures”). It is also why we fully support the proposal for a new competition tool raised in this consultation, whereby preventive action could be taken even in relation to companies that are not yet dominant.

The new competition tool

An ex-ante tool will be key to address structural competition problems, especially the issue of concentration and the emergence of gatekeepers, and their behaviour

once they emerge, if providing dominance is an issue. It would also help where market players with market power but which are not dominant use this to leverage their position into multiple related markets.

Structural competition problems can arise in any market, especially as most markets are being digitalised. Moreover, physical or analogue markets may also be related to, and thus impacted by competition issues on related, digital markets. It is therefore critical for this tool to be applicable to all markets.

Given the speed at which markets are developing and evolving and new product markets emerging, the European Commission should have the ability to impose remedies under the new competition tool, but with the flexibility to apply lighter touch measures where appropriate, or to propose legislation where this is more appropriate.

The European Commission should be able to impose structural remedies if necessary. In IMPALA's experience, however, some issues which are at their origin structural may be remedied by non-structural remedies e.g. where a gatekeeper imposes unfair trading terms while others require the imposition of structural remedies e.g. in the same situation, by granting access to the platform it owns on non-discriminatory terms. On the other hand, other situations, such as the network of interlinked minority shareholdings between music companies and digital providers (as outlined in our complete submission) should be monitored and if remedies are necessary, only structural remedies are likely to be effective e.g. divestitures or a prohibition of further such acquisitions.

In our view, voluntary measures are unlikely to be sufficient to deal with the seriousness of the issues that arise as a result of structural competition problems.