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NEWSLETTER

23 NOVEMBER - 6 DECEMBER 2022

ISSUE 22

COMPETITION & REGULATORY NEWSLETTER

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CMA publishes final report in music and streaming market study

INTRODUCTION

On 29 November 2022, the Competition and Markets Authority (CMA) published its final report in connection with its market study into music and streaming services (the Final Report). The market study considered, amongst other things, whether any potential lack of competition between music companies could affect musicians, singers and songwriters. The CMA has found that competition operates effectively in the sector and is delivering good outcomes for stakeholders.

BACKGROUND

On 27 January 2022, the CMA launched a market study into music and streaming services, to examine the market "*from creator to consumer, paying particular attention to the roles played by record labels and music streaming services*". The CMA's decision to conduct a market study in this area reflects its growing importance, with 39 million monthly active users of music streaming services in the UK in 2021.[1]

Interested parties were invited to comment on the CMA's statement of scope, including music creators, music companies, music streaming service providers, industry bodies, regulators, and consumer groups.

In July 2022, the CMA published an update paper setting out its initial findings and its reasoning for proposing not to make a market investigation reference. The publication of the Final Report on 29 November 2022 now concludes the CMA's market study.

KEY FINDINGS

THE CONCERNS RAISED BY ARTISTS ARE NOT DRIVEN BY CONCENTRATION IN THE RECORDED MUSIC SECTOR

The CMA heard concerns from a range of artists about their inability to make a sustainable income from music streaming, and considered whether these outcomes are being caused by competition issues in the market.

The CMA has found that outcomes for artists as a whole seem to be improving. The CMA acknowledged that competition appears to be particularly focused on artists who are already popular or are likely to be, meaning that this improvement will not benefit all artists. However, the CMA also noted that "*it has long been the case in recorded music that only a very small minority of artists will achieve the highest level of success*".

The Final Report considers that outcomes for artists are largely driven by factors that are more inherent to digitisation in the music sector. The CMA's profitability analysis has also not found evidence of substantial and sustained excess profits by the major record labels in the UK. The CMA therefore concluded that a competition intervention, for example a

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[1] Para. 1.32 of the Final Report.

change to the structure of the market, is unlikely to result in a material increase in revenues for artists.

THE REVENUE SPLIT BETWEEN SONGWRITERS AND RECORD LABELS

Songwriters and their representatives argued to the CMA that publishing rights (rights to the underlying song and lyrics) are undervalued in comparison with recording rights (rights to the specific recording of a song), leading to an unfair revenue split. They argued that this was caused by the market power held by the major labels and their interests in both publishing and recording rights, and that it is financially advantageous for them to suppress publishing revenues in favour of the recording side of their business, possibly through tacit collusion.

The CMA disagreed with this assessment. It observed that there had been an increase in the share of revenues going to songwriters between 2008 and 2021, which was an indicator of competition, rather than tacit collusion to reduce songwriters' revenues. In the CMA's view, the difference in the revenue split was not a competition issue, but was likely due to a combination of the historic costs of physical distribution and "*licensing negotiation friction*" preventing those now reduced physical distribution costs from immediately feeding through into a more even split between publishing and recording rights.

LEGAL AGREEMENTS

The CMA found that, while the legal arrangements between the main record labels and music streaming companies are complex, they do not appear to be significantly hampering competition and innovation.

The CMA analysed a number of clauses in the legal agreements between record labels and music streaming companies, including:

- most-favoured nation clauses, which prevent music streaming companies from paying higher rates to third-party record labels, without then offering those higher rates to the original record label;
- non-discrimination clauses, which act to prevent the music streaming service from favouring music content based on price, for example, by giving more prominence to cheaper music; and
- 'must carry' clauses, requiring music streaming services to host the record label's entire music catalogue, removing music streamers' ability to threaten delisting of particular songs as part of negotiations.

Overall, the CMA was not persuaded that CMA-enforced contractual changes would significantly increase innovation or have a material impact on the market. Rather, in the CMA's view, the issue appears to relate to the need for music streaming services to agree with multiple rightsholders on what terms (financial or otherwise) they can use their content, including in new and innovative ways. The CMA concluded that "*it is the sheer volume and complexity of these negotiations that appear to be the main barrier to even greater innovation. However, these negotiations appear to be an inherent part of the licensing process […]*".

CONCLUSION

While the Final Report acknowledges that changes in the sector have made it harder for some creators to succeed, it also concludes that "*it is unlikely that the outcomes that concern many stakeholders are primarily driven by competition*" between firms. On balance, the CMA has found that competition operates effectively in the sector.

The CMA has therefore declined to make a market investigation reference, considering the greater risk that a competition intervention could result in unintended consequences, costs and uncertainty for both creators and consumers. Noting the "*limited potential for a competition intervention to improve outcomes*", the CMA considers that it is for Government and policymakers to determine whether wider policy interventions are required in the sector.

Slaughter and May advised Warner Music Group, a global music company, in relation to the CMA's market study.

OTHER DEVELOPMENTS

ANTITRUST

HONG KONG COMPETITION COMMISSION AND HK GOVERNMENT DEPARTMENTS CONDUCT JOINT OPERATION AT WHOLESALE FISH MARKET TO PROBE ALLEGED PRICE-FIXING

On 27 November 2022, the Hong Kong Competition Commission (HKCC) held a joint operation at the Aberdeen Wholesale Fish Market in Hong Kong, together with Hong Kong Government departments including the Hong Kong Police, the Agriculture, Fisheries and Conservation Department, the Food and Environmental Hygiene Department, the Fire Services Department, the Immigration Department and the Marine Department. The HKCC said it had received a complaint of alleged price fixing by fish wholesalers, in violation of the First Conduct Rule under the Competition Ordinance. The HKCC interviewed more than 30 wholesalers as part of the operation and is calling for those in the industry or members of the public with information on the allegations to come forward.

The HKCC pointed out that elements of anti-competitive conduct may contravene laws beyond the scope of the Competition Ordinance, such as criminal laws. It said it will continue to work closely with the Organised Crime and Triad Bureau of the Hong Kong Police (OCTB) and other relevant departments to effectively handle cases involving multiple contraventions, as it had done in January.

This is at least the second case in which the HKCC is working closely with the OCTB and highlights one of the HKCC's aims to pursue more cases that involve coordination with other Government departments. It is also consistent with the HKCC's recently stated enforcement priorities to tackle anti-competitive behaviour that affect people's livelihoods (e.g. low income or grass-root groups).

GENERAL COMPETITION

EU FORMALLY ADOPTS FOREIGN SUBSIDIES REGULATION

On 28 November 2022, the EU Council formally adopted the Foreign Subsidies Regulation (FSR) following the adoption of the regulation by the European Parliament earlier this month. Whereas until now the European Commission only had the ability to regulate subsidies granted by EU Member States under the EU state aid rules, the FSR provides the Commission with new powers to ensure that subsidies from non-EU countries (i.e. third states) are not unfairly affecting the internal market's competitive landscape.

The FSR provides the Commission with three new tools to investigate financial contributions granted by non-EU countries to undertakings engaging in economic activity in the EU.

The first tool is the introduction of a new mandatory notification requirement relating to concentrations. Notifiable concentrations may not be completed until they are cleared by the Commission. This notification requirement will be triggered where:

- At least one of the parties to the concentration is established in the EU and generates turnover in the EU of at least €500 million; and
- The undertakings involved in the concentration received combined third state financial contribution(s) of at least €50 million in the three years preceding the concentration.

The second tool relates to public procurement. The FSR introduces a mandatory notification obligation which applies to public tenders worth at least €250 million where the relevant tendering economic undertakings have been granted aggregate financial contributions equal to or greater than €4 million per third state in the three preceding years.

Finally, the FSR also provides the Commission with a general investigatory power to examine third state subsidies which are not caught by the mandatory thresholds relating to concentrations and public procurement, but which nevertheless are allegedly distortive of competition in the internal market. In assessing whether a third state

subsidy is distortive of competition in the internal market, the Commission will have regard to, amongst other factors, the amount and nature of the subsidy, as well as the size of the markets or sectors concerned.

The FSR will shortly be published in the Official Journal of the European Union and will enter into force 20 days after its publication. See also a previous edition of our newsletter for further details.

UK GOVERNMENT BLOCKS NEXPERIA/NEWPORT WAFER FAB DEAL UNDER NSI ACT

On 16 November 2022, pursuant to a final order made by the Secretary of State for Business, Energy & Industrial Strategy (BEIS) Grant Shapps, the UK Government blocked Nexperia BV's completed acquisition of Newport Wafer Fab on national security grounds. This acquisition is the third transaction to be prohibited under the National Security and Investment Act 2021 (NSIA) and the first public instance in which the UK Government has exercised its retrospective review powers under the NSIA regime.

Newport, which operates the largest microchip plant in Britain, was wholly acquired by Nexperia, in July 2021. Nexperia is ultimately controlled by Wingtech, a Chinese technology company. Following a lengthy period of debate as to whether Government intervention was warranted, including the publication of a critical report by the House of Commons Foreign Affairs Select Committee, the transaction was 'called-in' by BEIS for a full national security review on 25 May 2022. According to the terms of the final order blocking the transaction, the transaction could pose a risk to UK national security because:

- the technology and know-how that could result from a potential reintroduction of compound semiconductor activities at the Newport site could potentially undermine the UK's capabilities; and
- the location of the Newport site could facilitate access to technological expertise and know-how in the South Wales cluster, and the links between the site and the cluster could prevent the cluster being engaged in future projects relevant to national security.

The final order requires Nexperia to divest at least 86% of Newport, thereby reverting to the 14% minority shareholding it held prior to the July 2021 acquisition. In response to the decision, Nexperia released a press release in which it announced its intention to legally challenge the decision. Nexperia now has 28 days to commence proceedings in the High Court. However, a final order under the NSIA can only be challenged on standard judicial review grounds and so the merits of the decision will not be the subject of review.

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