COMPETITION LAW IN THE DIGITIZED MUSIC INDUSTRY: THE WINNERS TAKE IT ALL — BUT SHOULD THEY?

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I. INTRODUCTION

Alan Krueger has called the music business "the canary in the coal mine for innovations," given that "technological change typically occurs first in music."[2] A recent example concerns the move from sales to subscriptions, which we saw first in the music industry with the introduction of streaming and then in virtually every other industry.[3] The innovation of music streaming itself was a reaction to the previous wave of disruption caused by peer-to-peer file sharing, which decimated the industry.[4]

The music industry does not only face challenges of digitization, but also of competition. However, not each of those challenges is a competition *law* challenge; some are simply a reflection of the particular economics governing the music industry. For one, music is inherently a "superstar," "winners-take-all" business.[5] This dynamic is exacerbated in the digitized music industry, as illustrated by a recent study showing that one percent of artists generates 90 percent of all music streams.[6] There is thus a small number of global superstars, whose situation starkly contrasts with the large majority of musicians who struggle to make a living.

In such a situation, prices generally drop and producers exit the market. However, internal motives to make music and external incentives to achieve artistic/commercial success ensure a continuous stream of hopeful market entrants, forming a supply that significantly outmatches demand.[7] And even (budding) superstars are not always well off. Given that as much as 90 percent of all released music fails to break even, successful artists have to subsidize unsuccessful ones (a model not unlike venture capital).[8]

While not all music industry challenges are competition *law* challenges, a number of them certainly are. After a wave of consolidation in different layers of the music industry, abuse of bargaining power has become a legitimate concern (Section II). There are countervailing forces, such as technological disruption, as well as collective bargaining, but these can in turn be curtailed by competition law (Section III). The (perceived) ineffec-

2 Alan Krueger, *Rockonomics* (John Murray 2019) 6.

3 See Friso Bostoen & Wouter Devroe, "From sales to subscriptions in the car sector: competition law implications of servitization and the refusal to sell to consumers" (2018) 39 European Competition Law Review 411, 412–13.

4 For a review of piracy's impact on music sales, see Michael Smith & Rahul Telang, *Streaming, sharing, stealing: big data and the future of entertainment* (MIT Press 2016) 79–101.

5 Alan Krueger, *Rockonomics* (John Murray 2019) 78–105.

6 Emily Blake, "Data shows 90 percent of streams go to the top 1 percent of artists" (*Rolling Stone*, September 9, 2020) https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005/.

7 Martin Kretschmer & others, "The relationship between copyright and contract law" (Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy) 2010, 66.

8 Mark Mulligan, *Awakening: the music industry in the digital age* (Createspace 2015) 86.

tiveness of competition law has led some to suggest adopting/relying on other regulatory tools to address power imbalances (Section IV). This article brings together these various developments, but limits itself to EU (competition) law.[9]

II. RISING CONCENTRATION AND (AB)USE OF BARGAINING POWER

The music industry is characterized by a significant degree of concentration and centralization of power. This trend is discernible in each layer of the value chain, including recorded music, music publishing, live performances and music streaming. While buyer power in one layer can countervail power in another layer (e.g. record labels v. streaming services), it can also be abused in layers where players have no power, i.e. against artists.

A. Consolidation Across All Layers of the Music Industry

The major record companies (or "majors"), which have traditionally enjoyed a significant degree of power, have cemented their position through horizontal and vertical integration. First, on a horizontal level, the three remaining majors, namely Sony, Universal Music and Warner Music, hold a combined global market share of almost 70 percent in the recorded music market.[10] Incidentally, this proportion is comparable to the combined market share of Spotify, Apple Music and Amazon Music among the streaming services.[11] From a vertical perspective, all three major labels also have a music publishing division. Together, these divisions account for a market share of almost 60 percent.[12] Moreover, signing a contract with the record division of a major often also implies a publishing deal with its dedicated division. In addition, majors go further by acquiring partial or full ownership of new digital intermediaries in the marketing and distribution sector.[13]

The European Commission ("EC") did not sit by throughout the consolidation wave but did not intervene significantly either.[14] Importantly, the most consequential mergers took place during the crash of the recorded music industry.[15] Sony first entered into a joint venture with BMG and then bought out BMG's share in 2008, decreasing the number of majors from five to four. The EC recognized the concentrated nature of the market, but found anticompetitive effects unlikely.[16] In the digital music market, the possibility of a collective dominant position was assessed but found unlikely, among others due to the countervailing buyer power of iTunes. In the physical market, the EC more closely assessed potential coordination between the majors, but again found it unlikely. In 2012, Universal acquired the record label EMI, further shrinking the number of majors to three. The EC focused its investigation on potential anticompetitive effects in Universal's relation with digital service providers ("DSPs") such as Apple and Spotify.[17] To address the EC's concerns, Universal agreed to divest a number of labels (including Parlophone). In each of these decisions, the EC's focus was therefore on one side of the market, i.e. digital distribution — arguably, it thus neglected the impact of these mergers on artists.

While the EC considered DSPs a countervailing force to the (potential) market power of record labels, the omnipresence of streaming and the rise of curated playlists may have consolidated and even augmented the market power of the majors.[18] Industry powerhouses are ideally placed to get their artists' music onto such playlists.[19] Artists with the backing of a major can reach a broader audience on streaming services.

9 The U.S. legal landscape is also going through changes, but these are undoubtedly highlighted in other articles within this issue.

10 See 2019 data at https://musicandcopyright.wordpress.com/2020/05/20/umg-increases-recorded-music-market-share-lead-indies-enhance-publishing-dominance.

11 See 2019 data at https://www.counterpointresearch.com/global-online-music-streaming-grew-2019.

12 See 2019 data at https://musicandcopyright.wordpress.com/2020/05/20/umg-increases-recorded-music-market-share-lead-indies-enhance-publishing-dominance.

13 By way of example, Universal acquired digital agency Fame House as well as distribution and marketing company INgrooves, while Warner Music purchased UPROXX, a media company focusing on cultural news, and Sony has obtained full ownership of pioneering digital distributor The Orchard.

14 For a more elaborate discussion of the mergers discussed here as well as others, see Evgenia Kanellopoulou, *Test for echo: competition law and the music industries from a business model perspective* (University of Edinburgh 2017) 208–60.

15 For an in-depth account of one of these mergers, including the events leading up to it, see Eamonn Forde, *The final days of EMI: selling the pig* (Omnibus Press 2019).

16 *Sony/BMG* (Case COMP/M.3333) Commission Decision [2008] OJ C94/19 and *Sony/SonyBMG* (Case COMP/M.5272) Commission Decision [2008] OJ C259/5.

17 *Universal Music Group/EMI Music* (Case COMP/M.6458) Commission Decision [2012] OJ C220/15.

18 David Arditi, "iTunes: breaking barriers and building walls" (2014) 37 Popular Music and Society 408, 408–24; William Deresiewicz, *The death of the artist: how creators are struggling to survive in the age of billionaires and big tech* (Henry Holt and Company 2020) 130–31.

19 They have the marketing budget required to pay for extensive promotional campaigns and may moreover leverage the success of existing catalogue.

This, in turn, ensures the majors' future leverage. Thus, instead of democratizing the music industry, streaming appears to have led to a replication of traditional industry dynamics. Certain practices may even be likened to the now illegal practice of "payola," whereby radio DJs used to be paid to play certain songs on the radio.[20] Direct ties between streaming services and the majors in the form of ownership stakes provide an additional reason for concern in this context.[21] Finally, the power of the majors is consolidated through the technique of direct licensing with DSPs, which is treated in Section III.C below. In practice, therefore, the majors play a vital role in deciding the scope and modalities of exploitation of a work/performance — as well as the ensuing remuneration — by entering into contracts with providers of musical content (such as DSPs) to which musicians are not a party.[22]

The live performances industry is even more highly concentrated. It is difficult to overestimate the power of the vertically-integrated conglomerate Live Nation in relation to live music, especially following its merger with Ticketmaster. In relation to ticket resales, the buyout of Stubhub by Viagogo stands out as a recent notable acquisition — albeit one dubbed as the "worst deal ever" given the global shutdown of live music in the wake of the COVID-19 crisis.[23]

Again, competition authorities took a more than cursory look at *Ticketmaster/Live Nation* — with good reason: the merger brought together the dominant ticketing company with the largest live music promoter/operator of venues. Importantly, shortly before the merger, Live Nation entered the ticketing market through an agreement with the German Eventim, decreasing Ticketmaster's market share from 80 percent to 65 percent almost overnight. Competition authorities on both sides of the Atlantic assessed the transaction but still let it pass after obtaining divestitures that were supposed to bootstrap entrants and prohibiting certain practices.[24] However, the optimistic predictions regarding entry have not come to pass.[25] And given that Live Nation violated the conduct prohibitions "repeatedly and over the course of several years," the DOJ clarified and extended them for several years in 2020.[26]

20 See Alan Krueger, *Rockonomics* (John Murray 2019) 10, 183 and, for a recent example, Noah Yoo, "Could Spotify's new discovery mode be considered payola?" (*Pitchfork*, November 9, 2020) https://pitchfork.com/thepitch/could-spotifys-new-discovery-mode-be-considered-payola/.

21 See also Mark Mulligan, *Awakening: the music industry in the digital age* (Createspace 2015) 83; Chris Cooke, *Dissecting the digital dollar* (Music Managers Forum and CMU Insights 2020) 99–101. The majors also acquired a stake in the first digital start-ups in the music industry. By way of illustration, the day before Google bought YouTube in November 2006, the major labels received an equity share in Google. These stakes were quickly bought back by Google for a significant sum of money. These revenues could then be qualified as returns on investment, unhindered by any obligation to share them with musicians.

22 Séverine Dusollier, "EU contractual protection of creators: blind spots and shortcomings" (2018) 41 Columbia Journal of Law & the Arts 435, 450.

23 See Noah Kirsch, "Worst. Deal. Ever" (*Forbes*, May 27, 2020) https://www.forbes.com/sites/noahkirsch/2020/05/27/worst-deal-ever. The UK Competition and Markets Authority is currently investigating this acquisition; for the latest, see https://www.gov.uk/cma-cases/viagogo-stubhub-merger-inquiry.

24 All documents from the DOJ case are available at https://www.justice.gov/atr/case/us-et-al-v-ticketmaster-entertainment-inc-et-al; for the UK investigation, see Competition Commission, *Ticketmaster and Live Nation* (Report on the Completed Merger) 2010.

25 See e.g. Bill Pascrell, "Everyone's worst fears about the Live Nation-Ticketmaster merger have come true" (*Los Angeles Times*, May 17, 2018) https://www.latimes.com/opinion/op-ed/la-oe-pascrell-live-nation-concert-ticketing-20180517-story.html.

26 See DOJ, "Justice Department will move to significantly modify and extend consent decree with Live Nation/Ticketmaster" (press release, December 19, 2019) https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

B. (Ab)use of Buyer Power

This consolidation leads to significant market power on the part of a limited number of actors in the digitized music industry, which can be characterized as an oligopoly. In turn, this buyer power is susceptible to abuse on the part of those wielding it.

As indicated above, the leverage of major rights owners allows them to substantially determine which songs are included on streaming playlists, in effect locking out independent music companies and DIY artists. Thus, concentration risks entrenching the superstar economy and negatively impacting cultural diversity.

In addition, major corporate partners can leverage their market position to force disadvantageous deals on musicians. This ties in with the imbalance in bargaining power between musicians and their corporate partners, which characterizes contractual relationships along the music value chain and exists especially in the beginning of musicians' careers.[27] One of the main roots of this imbalance is a tenacious information asymmetry, whereby the knowledge of corporate partners that is relevant to the deal at issue greatly surpasses that of musicians.[28]

The flexibility of the legal framework, based on the freedom of contract, combined with an oversupply of musicians with low bargaining power, may prevent Coasean bargaining in practice. Put simply, it makes commercial sense for corporate players to lean towards exercising their bargaining power in a way that is disadvantageous to musicians. Until at least the turning of the century, music industry contracts were almost exclusively of a "take it or leave it" nature, with boilerplate language and a list of standard clauses that many aspiring superstars were nevertheless eager to sign.[29] Musicians who seek to enter into a commercial relationship in the 2021 music industry have a vast array of options at their disposal, as discussed in Section III.A below. This has led to some rules that used to be set in stone (such as a full transfer of rights against a small flat fee) becoming more malleable and open to modulation. However, some corporate music industry habits have proven rather hard to break and, in many cases, the traditional power relationships still seemingly prevail. This also rings true in relation to the live sector. In this regard, reference may be made to Live Nation's apparent plans to significantly reduce performer pay-out for concerts in 2021.[30]

In short, the bargaining power of a right holder is inversely proportionate to its accountability. The question whether this situation can be countered through the application of Article 102 TFEU is therefore a legitimate one.

In theory, an abuse of market power can be found in these cases. It would not be the well-known abuse of seller power (monopoly) but of buyer power (monopsony or bargaining power).[31] The potential economic effects include a restriction of input to reduce prices below competitive levels (allocative inefficiency) and the extraction of supplier surplus.[32] The EC generally tries to *prevent* the creation/strengthening of buyer power through merger control. However, as discussed above, mergers consolidating the recorded music industry have been approved. Combatting buyer power *ex post* is much more difficult.[33] This is all the more so in oligopoly situations, given that abuse of *collective* dominance is difficult to pursue and (therefore) not an enforcement priority for the EC. Taking on such cases would also contradict the findings of its merger investigations, where it found collective dominant positions unlikely.

27 The fact that this may happen to anyone is illustrated by the contractual dispute that arose from the initial record deal between the Beatles and Capitol Records, see Stan Soocher, They fought the law: rock music goes to court (Schirmer Books 1999) 85–108.

28 This imbalance exists in relation to composers, but is even more pronounced in relation to performers, whose rights are largely non-proprietary (i.e. an inalienable remuneration right instead of an assignable economic right) and who are moreover often unaware of those rights and the mandatory collective management of certain aspects thereof.

29 Séverine Dusollier, "EU contractual protection of creators: blind spots and shortcomings" (2018) 41 Columbia Journal of Law & the Arts 436.

30 Dylan Smith, "Live Nation Will Dramatically Reduce Performing Artist Payouts In 2021 — Here's the Leaked Memo" (*Digital Music News*, June 18, 2020) https://www.digitalmusicnews.com/2020/06/18/live-nation-reduces-2021-payouts/.

31 See extensively OECD, "Monopsony and buyer power" (Policy Roundtable) DAF/COMP(2008)38. Monopsony and bargaining power differ: in cases of monopsony power, a firm's share of purchases of the upstream input is sufficiently large that it can cause the market price to fall by purchasing less; in case of bargaining power, the firm is able to extract surplus from a supplier in bilateral negotiations.

32 Such reduced input prices do not (necessarily) reduce prices to consumers.

33 See extensively Chloé Binet, *Buyer power in EU competition law: a boon or impediment to consumer welfare?* (UCL 2015).

A rare example of an abuse of buyer power case in the music industry is *Platform Makers v. NPO*.[34] The public broadcaster was accused of forcing artists who wrote songs for the broadcaster to register their work with a related publisher. The contract with that publisher was alleged to be significantly imbalanced, including high kickback fees and the transfer of neighboring rights, among other unusually restrictive terms. After a preliminary assessment, however, the Dutch competition authority rejected the complaint because a restriction of competition — and in particular negative effects for consumers — was not apparent.

Academics and policymakers are increasingly recognizing the potential negative effects of buyer power abuses. This is reflected in the adoption or increased enforcement of national laws prohibiting abuse of superior bargaining power (which does not require *absolute* but only *relative* market power). Even if interest and enforcement action increases, however, the question is whether action will be focused on the music industry.[35]

While we have so far discussed record labels, publishers and streaming services, the digitization of the music industry has led to the prominence of another party: app stores. Music streaming services are accessible both on desktops and on mobile, with consumers spending significantly more time streaming music via their mobile app.[36] A majority of users also signs up via the mobile app.[37] However, there are only two significant app stores, the App Store and Google Play, each of which is embedded in their own mobile ecosystem, iOS and Android. Depending on how one defines the app store market (ecosystem-specific or not), these app stores hold either a monopoly or duopoly.[38] They take advantage of this position by charging a 30 percent commission fee on in-app subscriptions (lowered to 15 percent after the first year), including to music streaming services such as Spotify.

Spotify has complained about this 30 percent commission fee, which is enforced particularly stringently by Apple. The music streaming business is already low-margin due to significant marginal costs (to rightsholders) and the fee makes profitability an even more distant prospect.[39] A complicating factor is that Apple also operates its own music streaming service, Apple Music. Evidently, Apple Music does not need to pay the App Store a 30 percent fee (insofar as it does, it constitutes an internal transfer). Moreover, Apple does not even need to make any direct profit from its music streaming service given that it earns the vast majority of its revenue from iPhone sales.[40]

The EC is now investigating Apple's App Store rules.[41] It is examining the obligations imposed on developers that underlie the 30 percent commission fee, in particular "the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform iPhone … users of alternative cheaper purchasing possibilities outside of apps."[42] While the basis for the investigation appears strong, the legal and economic assessment promises to be difficult.[43] And it is not all bad: Apple Music actually pays artists significantly more than Spotify on a per-stream basis.[44] Of course, to the extent that this higher pay is the result of anticompetitive conduct, it can hardly be applauded.

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34 Nederlandse Mededingingsautoriteit, *Platform Makers v. NPO e.a.* (Decision 7213/27), April 27, 2012.

35 Recent cases in France, for example, have focused on online platforms, see e.g. Tribunal de commerce de Paris, case 2017050625, *Ministre de L'Economie et des Finances/ Amazon*, September 2, 2019.

36 "Comscore shows top music apps account for almost all time spent with music on mobile" (*Comscore*, December 26, 2019) https://www.comscore.com/Insights/Press-Releases/2019/12/Comscore-Shows-Top-Music-Apps-Account-for-Almost-All-Time-Spent-with-Music-on-Mobile.

37 In 2016, Spotify reported that "the majority of new users signing up for Spotify are mobile", see Mark Sweney, "Spotify UK revenues surge to almost £190m as mobile subscriptions take off" (*The Guardian*, October 14, 2016) https://www.theguardian.com/media/2016/oct/14/spotify-uk-revenues-surge-to-almost-190m-as-mobile-subscriptions-take-off. That same year, however, Spotify disabled the option to subscribe within the iOS app due to the 30 percent fee.

38 The EC defines ecosystem-specific markets, see *Google Android* (Case AT.40099) Commission Decision, para 281 (defining a market for "app stores for Android devices").

39 See Spotify Technology S.A., Form 20-F Annual Report to the SEC for the fiscal year ended December 31, 2019, 5 (showing significant operating losses in the years 2015–19).

40 The same goes for Google Play Music/YouTube Music and Amazon Music, the operators of which have significant other revenue streams. Not making — or even losing — money on distinct services can make sense if it increases demand for the ecosystem (be it iPhones or Amazon Prime).

41 EC, "Commission opens investigations into Apple's App Store rules" (press release, June 16, 2020) IP/20/1073.

42 These obligations are found in App Store Review Guidelines, section "3.1.1 In-App Purchase."

43 See extensively Friso Bostoen & Daniel Mândrescu, "Abuse of dominance in the platform economy: a case study of app stores" (2020) 16 European Competition Journal 431.

44 Daniel Sanchez, "What streaming music services pay (updated for 2020)" *Digital Music News* (December 25, 2018) www.digitalmusicnews.com/2018/12/25/streaming-music-services-pay-2019/ (Spotify pays between $0.003–5 per stream, while Apple pays $0.00735 per stream — almost double; however, Spotify's rates are lower in part due to its free tier, for which it pays artists significantly less on a per-stream basis).

III. DISRUPTING, BALANCING OR STREAMLINING MARKET POWER

While principles of competition law play a key role in preventing the creation and undue exercise of market power on the part of music industry moguls, they are not always entirely effective. In addition, evolutions endemic to the digitized music market may fulfil either a disrupting, balancing or streamlining role, again under the watchful eye of the competition enforcers.

A. Disrupting Market Power: Music Mavericks

In spite of the winner-takes-all tendencies of the music industry, potential disruptive forces are brewing internally. It has been argued repeatedly that the digital age brings an end to the need for "middlemen" in the music industry.[45] The promise of disintermediation vows to empower musicians on the global music market. Musicians can enter into direct contact with their audience via the so-called "celestial jukebox"[46] and get involved in the production, marketing and distribution of music.[47] Conversely, a form of re-intermediation may be identified, whereby digital intermediaries in all shapes and sizes have crafted their place in the online music market.[48] In addition, there is an increased (although apparently faltering) interest in the opportunities offered by blockchain technology and smart contracts.[49]

Taken as a whole, the digital context appears to be more favorable to independent artists than the analogue world. Artist independence is increasingly linked with empowerment and the possibility to enter into partnerships with a wide variety of service providers, under contract terms that are more tailored to the artist's needs.[50] These new types of intermediaries are grouped under the umbrella term "artist & label services" ("ALS").[51]

However, the competition to get and maintain audiences' attention is fierce and unrelenting. Both luck and leverage have an undeniable role to play. In relation to the latter, the oversupply of music, the fragmentation of repertoire and the considerable value of back catalogue negatively impact the leverage of smaller, independent industry players. As a result, artists are left with a dilemma: either they choose the DIY or ALS way and are likely to collect less streams but a higher proportion of revenue, or they seek a major label record deal that may lead to global exposure but a lower proportionate return.

The music industry has a history of leaving musicians to draw the short straw, especially in relation to revenue distribution. While a more artist-friendly environment is growing, many instances of unfairness remain. Certain players have a vested interest in the status quo. As a result, it appears unlikely that bottom-up changes will lead to an outcome that duly considers all justified interests. For positive change to occur, stakeholders' individual and collective voice must be harnessed. A seat at the table must be ensured for all, lest they risk being on the menu. Collective bargaining, the subject of Section III.B, can play an important role in this regard.

45 See e.g. Gary Graham & others, "The transformation of the music industry supply chain: a major label perspective" (2004) 24 International Journal of Operations & Product Management 1087; Joost Smiers & Marieke van Schijndel, Imagine there is no copyright and no cultures conglomerates too: an essay (Institute of Network Cultures 2009) 56.

46 See e.g. Paul Goldstein, *Copyright's highway: from Gutenberg to the celestial jukebox* (Stanford University Press 2003).

47 Several established mainstream artists have already taken to distributing their music directly to fans — the online release of Radiohead's cd In Rainbows in 2007 being an oft-cited and pioneering example.

48 By way of example, many streaming services, with the exception of DIY platforms such as SoundCloud and similar services) do not provide direct-to-fan access, leaving artists to call upon the services of digital distributors and publishing administrators.

49 See more extensively Marie-Christine Janssens & Jozefien Vanherpe, "Blockchain and copyright: beyond the buzzword?" (2018) IRDI 93.

50 ALS may also be (and is often) combined with a partnership contract with an independent music company. In such a case, the deal between musician and corporate partner may be characterized as a business partnership based on a services model, whereby artists retain their rights and thus control over their work, while the corporate partner only acquires a license.

51 Notably, both majors and large indies acknowledge the worth of such new business models and now also offer ALS to a certain extent, either directly or through subsidiaries.

B. Balancing Market Power: Collective Bargaining

A traditional solution for imbalances in bargaining power is to rebalance the relation through collective labor agreements. However, such agreements are illegal under Article 101 TFEU when they are concluded between undertakings. The European Court of Justice ("ECJ") defines "undertaking" broadly as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."[52] By contrast, workers do not constitute undertakings. Given that they perform work for and under the direction of undertakings, they form a single economic unit with that undertaking.[53] As a result, they can freely enter into agreements among themselves without breaching the cartel provision.[54]

The possibility of artists to enter into collective bargaining agreements thus turns on their status as undertaking or worker. Freelance musicians are more likely to constitute undertakings, while orchestra musicians may qualify as workers. Of course, undertakings may try to prevent musicians from bargaining collectively (and from obtaining the other social protections derived from employee status) by explicitly qualifying them as non-workers. In *FNV Kiem*, the ECJ held that such strategies were ineffective.

The case concerned a number of substitute orchestra musicians who entered into a collective labor agreement setting minimum fees. These substitute musicians carried out the same work as the musicians employed by the orchestra, but did so on a self-employed basis. A Dutch court wondered whether such collective labor agreements fell under Article 101 TFEU. However, the ECJ clarified that this situation falls outside of the provision's scope if the service providers "are in fact 'false self-employed,' that is to say, service providers in a situation comparable to that of employees."[55] In sum, *FNV Kiem* prevents misclassified workers from being subject to competition law, but it does not allow actual freelance musicians to bargain collectively.

The dichotomy between worker and undertaking has been challenged by the gig economy, as reflected in the ambiguous terms it gave rise to, e.g. "autonomous workers" or "economically dependent self-employed." Some have suggested this "intermediate category" may need to be formalized.[56] The EC is taking a different approach: it is sticking to the established categories but recently launched an initiative to ensure that "EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for solo self-employed."[57] While the EC initiative is targeted at platform workers (e.g. Uber drivers), it can make sense to broaden its scope. In that case, it seems only logical that the original *gig* economy workers, i.e. musicians, would be able to benefit from a potential exemption.

Of course, the law is not the only obstacle to collective bargaining by freelance musicians.[58] In the multi-layered music industry, there may also be practical issues in engaging the relevant counterpart. And perhaps the interests of different musicians are too heterogeneous to allow for effective organizing. Still, collective bargaining can undoubtedly contribute to a fairer remuneration model in the music industry.[59]

52 Case C-41/90 *Höfner and Elser v. Macrotron* EU:C:1991:161 [1991] ECR I-1979, para 21. "Economic activity" is defined as "offering goods and services on a given market," see e.g. Case C-205/03 P *FENIN v. Commission* EU:C:2006:453 [2006] ECR I-6295.

53 Case C-22/98 *Criminal proceedings against Jean Claude Becu a.o.* EU:C:1999:419 [1999] ECR I-5665, para 26.

54 Case C-67/96 *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430 [1999] ECR I-5751, paras 52–69 (see also the opinion of Advocate General Jacobs, in particular paras 191–93 which put forward three conditions for the immunity of collective bargaining agreements from Article 101 TFEU).

55 Case C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* EU:C:2014:2411, para 31.

56 See e.g. Andrei Hagiu & Julian Wright, "The status of workers and platforms in the sharing economy" (2019) 28 Journal of Economics & Management Strategy 97.

57 EC, "Collective bargaining agreements for self-employed – scope of application of EU competition rules" (Inception Impact Assessment) Ares(2021)102652, 2.

58 OECD, "The future of work: expert meeting on collective bargaining for own-account workers" (Summary Report) 2020, 4.

59 Kanye West, who has recently turned his attention to artists' rights, also supports collective bargaining, see https://twitter.com/kanyewest/status/1308443797802508290.

C. Streamlining Market Power: CMOs

A collective dimension is also present in the collective management of copyright. Collective management organizations ("CMOs") provide copyright licenses against payment of a fee on behalf of a plurality of rights holders in cases where individual licensing is either impossible or highly impracticable. Despite the obvious benefits in terms of efficiency and decreased transaction costs, collective rights management ("CRM") is met with a significant number of antitrust and other challenges.

A first issue stems from the tension between the territoriality of copyright and the global scale of the online music market.[60] Remuneration for the use of protected content outside CMOs' own national territories is managed through reciprocity agreements, by which CMOs confer powers of representation to each other and exchange remuneration. Over the years, attempts have been made to transcend the limitations of this system and grant EU-wide licenses. A first attempt, on the part of CMOs, was met with an EU veto on the basis of Article 101 TFEU.[61] Subsequently, following a non-binding EC Recommendation[62] on this topic, the EU legislator intervened by way of Title III of the 2014 CRM Directive.[63] This Title sought to facilitate online licensing of musical works[64] by introducing competition in a market that has traditionally been a natural monopoly. This led to a steep rise in "direct licensing" between DSPs and major rights owners, in effect bypassing the CMOs.[65] As a result, certain major rights owners have withdrawn their publishing repertoire from national CMOs.[66] Thus, territorial boundaries have in a way been replaced by repertoire fragmentation. The CMOs' response has been to further streamline the music licensing process,[67] but the issue persists. Potential solutions include recourse to the prohibition regarding abuse of dominance through excessive pricing on the part of direct licensing entities or the qualification of repertoire as an essential facility.[68]

Second, there is a long line of case law that applies Article 102 TFEU to the conduct of CMOs vis-à-vis both their members and (prospective) licensees. By way of example, CMOs have been prevented from limiting musicians' exploitation choices in relation to repertoire[69] and have been forced to accept artists from abroad as CMO members.[70] As for CMOs' relationship with users, most antitrust cases center around refusal to supply and excessive pricing.[71] In relation to the latter, disputes mainly arise in relation to the flat-rate royalties for blanket licenses calculated on the basis of abstract criteria and secondary indicators, such as ticketing revenues, instead of actual use. While the ECJ has ruled that CMO fees must be objectively economically justified, non-discriminatory flat rates are considered permissible in the absence of other methods available to precisely determine the amount due. It remains to be seen how technological developments allowing for more detailed reporting will affect this position.

60 The principle of territoriality implies that the application of copyright law is limited to the confines of a certain country. As a result, CMOs can only collect financial compensation for reproductions that take place on their own national territories.

61 See the Barcelona and Santiago Agreements and i.a. Case T-425/08 *Koda v. Commission* EU:T:2013:183 [2013]. The reason for concerns under Art 101 TFEU was that, under the envisaged regime, prospective exploiters could only obtain a license from the CMO in the country in which the exploiter had its place of business. This was deemed to be an illegitimate form of market sharing.

62 Commission Recommendation 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services [2005] OJ L276/54.

63 Directive 2014/26/EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72 ("CRM Directive").

64 The scope of this regime is limited to copyright sensu stricto and does not extend to the neighboring rights of performers and/or producers, which limits its use in practice.

65 See Ivan Pitt, Direct licensing and the music industry (Springer 2015).

66 As allowed under CRM Directive, arts 5(3) and 31.

67 See e.g. (i) ICE (www.iceservices.com), a cooperation between GEMA in Germany, PRS in the UK and STIM in Sweden; as well as (ii) Armonia (https://www.armoniaonline.com), a similar initiative by SACEM in France and SGAE in Spain that already has nine members.

68 These and other solutions are analyzed and assessed in the Ph.D. research of Lucius Klobucník at the Queen Mary University of London.

69 Case C-395/87 *BRT v. SABAM II* EU:C:1974:6 [1974] ECR 51.

70 Case C-7/82 *GVL v. Commission* EU:C:1983:52 [1983] ECR 483.

71 See e.g. Case C-402/85 *Basset v. SACEM* EU:C:1987:197 [1987] ECR 1747; Case C-395/87 *Ministère public v. Tournier* EU:C:1989:319 [1989] ECR 2521; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* EU:C:1995:98 [1995] ECR I-743; Case C-52/07 *Kanal 5 and TV 4 v. STIM* EU:C:2008:703 [2008] ECR I-9275; Case C-351/12 *OSA v. Lécebné lázne Mariánské Lázne* EU:C:2014:110 [2014]; Case C-372/19 *SABAM v. Weareone.World and others* EU:C:2020:959 [2020].

IV. REGULATORY TOOLS BEYOND COMPETITION LAW

An additional countervailing power to the market forces at play in the music industry is provided by the regulation of contracts.[72] In this regard, there is a tension between the legitimate interests of musicians and those of their corporate partners. The interests of both sides dictate a struggle for a bigger proportion of total revenues, with musicians vying for protective measures while their business partners usually point out the importance of freedom of contract and the undesirability of undue paternalism.

Most EU member states have laid down rules that protect the weaker party to a contract and many of these provisions directly impact the contractual bargain between musicians and their corporate counterparties, either through the application of relevant provisions of (copyright) contract law or through the regulation of unfair commercial practices and contract terms in a B2B context. First, there may be certain formal requirements, such as the need to prove contracts vis-à-vis the artist(s) in written form. Second, the legal framework may result in the prohibition of clauses deemed unfair or excessive, such as restrictions relating to rights in future works and/or methods of exploitation. Third, the legal framework may impose substantive obligations on one (or more) of the contracting parties, such as a duty to exploit and/or distribute revenues fairly.

While a generalized harmonization of unfair B2B practices at the EU level does not appear to be on the horizon,[73] an important move towards partial harmonization in the field of copyright contract law was made with a dedicated chapter in the (in)famous DSM Directive.[74] In addition to setting minimum benchmarks as to exploitation, remuneration and transparency, this directive paves the way for alternative dispute resolution in the creative industries. Awaiting their implementation into member state law (due by June 2021), it remains to be seen to what extent these provisions will deliver on their promise of securing a level playing field in the creative sectors.

V. CONCLUSION

The last few decades have seen the music industry evolve from a twentieth century behemoth to a complex and multi-layered digitized ecosystem. However, the traditional, pre-digital power dynamics of the music industry appear to have been entrenched in the digital age, with significant market power concentrated in the hands of international media conglomerates. While promising opportunities for change present themselves within the music industry itself, the regulatory framework consisting of competition law as well as the laws of (copyright) contract and unfair B2B practices also still have an ace to play.

72 This is the topic of the Ph.D. research of Jozefien Vanherpe at the KU Leuven.

73 The EU legislator has undertaken *specific* initiatives in this regard, such as (i) Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L111/59; and (ii) Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57. In addition, the recent proposals for a Digital Markets Act and a Digital Services Act (available at https://ec.europa.eu/digital-single-market/en/digital-services-act-package) merit our attention.

74 Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market [2019] OJ L130/92.

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