



Roles of EU competition law and platform regulation across online music platforms

Deliverable D2.3: Roles of EU competition law and platform regulation across online music platforms

WP2, Task 2.5

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Executive Summary

While the music sector was a pioneer in digital transformation, the lack of transparency and data-sharing practices between streaming platforms and artists has become a significant challenge, especially regarding remuneration. In contrast with the analog era, music rightholders today have limited control over the pricing of usage of their works and are largely dependent on platform exposure, and existing regulatory frameworks fail to ensure fair remuneration for creators, as well as sufficient data access that would allow them to assess the value of their rights. As explained in **Chapter 1**, the complexity of digital music distribution, which involves multiple stakeholders and opaque remuneration allocation systems, exacerbates these issues.

There is a growing recognition of the need for platform regulation to strengthen the rights outlined in Articles 18-23 DSM Directive, which aim to address power imbalances in the music industry. The Study provides insights for policymakers and stakeholders to enhance music creators' rights under the DSM Directive and improve their position in the digital music sector and promote a more sustainable industry. Through a detailed legal analysis, it explores the evolving application of competition law and platform regulation in supporting creators' rights.

It requires contextualisation to discuss how the rights of music creators under the DSM Directive could be rendered more effective by resorting to competition and EU platform regulation. The literature review in **Chapter 2** first traces the evolution of competition law enforcement in digital markets. Historically, the intervention of competition enforcers against large online platforms has followed two very different paths in the main antitrust jurisdictions on both sides of the Atlantic. US antitrust enforcement against large tech companies has been characterised as 'meek', while EU competition enforcers have been labelled 'aggressive' towards US Big Tech firms, judging by the number of antitrust investigations and sanctions imposed. There is a rich enforcement history in the EU, in particular against Google, that can fruitfully inform the debate as to how competition law could be used to enhance authors' and performers' rights under the DSM Directive. EU platform regulation has only begun to catch up, as the legislative approach to regulating online intermediary platforms in the US and in the EU has been equally lenient, offering broad safe harbour provisions until recently. Two important pieces of EU platform regulation are the Digital Markets Act (DMA) and the Digital Services Act. The DMA is a regulatory framework addressed at digital gatekeepers, which aims at keeping the markets in which gatekeepers operate open, fair and contestable. It can address similar problems of abuse of market power as under Article 102 TFEU, but it is more agile and faster than competition law enforcement in digital markets. Furthermore, its provisions are applicable *ex-ante*, as soon as the EU Commission has designated an online intermediary platform as gatekeeper. The DSA, on the other hand, was born out of the insight that the safe harbours given to online intermediaries were too broad and more transparency regarding content moderation and possible risks from user-generated content (UGC) was needed.

The principle of fairness plays an important role in competition law and EU platform regulation. Within EU competition law, it is regularly used to denote goals beyond consumer welfare that can be pursued in the enforcement of EU competition law (e.g. the protection



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of workers, plurality of press etc.). While its relevance for the enforcement of EU competition law is contested, it has witnessed a renewed interest and prominence during the term of Competition Commissioner Margarethe Vestager. In the literature, it has been argued that the principle of fairness can act as a binder or doorway to allow a joint and systemic enforcement of various areas of EU law, such as competition and data protection law. Within platform regulation, fairness denotes the goal of levelling the playing field between platforms and their (business) users by providing more transparency as to terms and conditions, the workings of algorithms, and possible harms, and by remedying excessive inequality of bargaining power.

Chapter 3 lays out preliminary considerations as to definition and scope of the study. None of the legal frameworks discussed is sector-specific, and both the application of competition law and of platform regulation faces some challenges when it comes to the music sector and the goal of improving the position of authors and performers. Under EU competition law, abuse of dominance provisions could provide potential avenues for authors and performers to request data access or to claim fair and adequate remuneration. Yet, establishing dominance is methodologically more challenging in multi-sided platform markets, where market definition is not straight forward, and market shares might not be adequate reflections of dominance. The preconditions for applying economic dependency rules under national competition law might be more beneficial to scrutinise the conduct of digital service providers (DSPs) and UGC platforms, as the thresholds to establish a position of relative dominance are lower. Under the DSA and DMA, the main challenge lies in the fact that the main activity of streaming platforms falls outside the scope of these. Major UGC platforms, however, like YouTube, TikTok, Facebook and Instagram, however, fall under the scope of these Regulations. Furthermore, under both regimes it requires interpretation to verify whether authors and performers qualify as beneficiaries of the obligations imposed on UGC platforms. While the term ‘business user’ under the DMA is likely to capture authors and performers, as well as other rightholders and even collecting societies, the concept of ‘user’ or ‘recipient of the service’ is not as easily applicable to authors and performers, and very likely not applicable to their representatives. Nonetheless, both DMA and DSA contain important platform obligations and transparency provisions that could likely be instrumentalised to improve the position of authors and performers, at least vis-a-vis UGC platforms. One of the main obstacles for materialising this potential seems to be the lack of awareness of these regulatory frameworks among stakeholders in the music industry. The inconsistent implementation of Articles 18 and 19 of the DSM Directive further hinders the enforcement of fair remuneration and transparency, as access to detailed exploitation data remains limited. While platforms possess more exploitation data than other stakeholders, they often withhold key information. This is particularly problematic for social media platforms, where opaque algorithmic content sharing and inconsistent metadata practices hinder rightholders' ability to track usage and receive fair remuneration.

Chapter 4 finds that denying access to exploitation data could be considered an abuse of dominance under Article 102 TFEU, using the essential facilities doctrine. Emerging EU standards may relax the indispensability criterion, potentially benefiting rightholders. The EU Commission's guidelines on exclusionary abuses introduce new criteria for assessing data access, though uncertainty remains regarding their application to music platforms. Recent competition enforcement cases, including the Commission's decision in *Apple App Store*, highlight the importance of transparent data sharing but show limited precedent for



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competition law remedies in this context. This Chapter also shows the potential of platform regulation to counteract the lack of transparency. The DSA mandates platform transparency, requiring clear terms (Article 14), disclosure of content moderation practices (Article 15), and reasoning for content removals (Article 17), which can help rightholders understand platform policies. However, the DSA's transparency provisions lack the granularity in reporting income and content usage, and their application may vary across platforms. The DMA's data access provisions (Articles 6(9) and 6(10)) offer insights into content performance but exclude key revenue data and require creators to actively request data, posing practical challenges.

In a varied licensing landscape characterised by the imbalance of power of digital music platforms over music authors and performers and the latter's chances for fair remuneration hinging on ad hoc negotiations between platforms and music licensors that do not usually involve them directly and often rely on non-transparent payment structures, **Chapter 5** examines which avenues competition rules and platform regulation offer towards strengthening licensing and remuneration opportunities for creators on digital music platforms. While at national competition law level, the developments in the Italian *Meta v SIAE* case do not yet allow for safe conclusions about relying on economic dependency rules to strengthen artists' position, recent developments in competition law at EU level, namely findings in the Apple antitrust decision and, most importantly, the possibility of authors and performers entering into collective agreements with platforms under the shield of the Commission Guidelines on Solo Self-Employed, offer more encouraging prospects in this respect. When it comes to platform regulation, a number of DSA provisions, notably Articles 15 and 26, work towards increasing the overall transparency and accountability of music-exploiting platforms, which in itself helps artists, but they seem to fall short in terms of concretely and tangibly enabling them to negotiate fairer licensing and remuneration conditions. DMA provisions, such as Articles 6(12) and 5(4), can also be seen as holding (directly or indirectly) promise for the improvement of artists' financial or negotiating position, yet they come with significant limitations and uncertainty as regards their applicability and immediate relevance for the artist-platform relationship.

Chapter 6 explores enforcement avenues for the rights of authors and performers assessed throughout the Study. The public enforcement of artists' rights outlined in this study rests, to a large extent, with the European Commission, which in principle enjoys discretion regarding the course of action. For artists to act on the basis of platforms' non-compliance with their obligations, internal and external complaint-handling mechanisms can be available, as mandated mainly by the DSA and the P2B Regulation, or they can assume the role of informant or complainant, depending on the legal instrument they draw their rights from. Judicial redress, such as actions for damages, is available to authors and performers to individually enforce their rights under platform regulation or competition rules before national courts but it may be an unattractive option due to, most notably, litigation costs. Collective action is, potentially, the most realistically accessible and effective tool for addressing infringing conduct of digital platforms to the detriment of artists. CMOs, authors' and performers' unions or other representative organisations seem to be the most viable option to lead action to that end.

To conclude the analysis, **Chapter 7** integrates the findings of this research with the Study on music creators' rights under EU law (Fair MusE D2.2 Deliverable). Most notably, one of



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the findings in D2.2. is that the enforcement of music creators' rights under the DSM Directive remains fragmented across the EU, as national implementations of its procedural remedies vary significantly. Thus, while the DSM Directive primarily focuses on substantive rights such as fair remuneration and transparency, this chapter examines how competition law and platform regulation offer procedural tools that could enhance the effectiveness of music creators' rights by addressing the gaps and problems that originate due to specific platform business models. Starting from the assumption that Article 17 DSM Directive, which imposed direct obligations on Online Content-Sharing Service Providers, marked a regulatory shift that later influenced the DSA and DMA, here the Chapter offers a comparative analysis of the DSM, DSA, and DMA reveals complementarities that could provide a more integrated copyright enforcement framework, particularly by leveraging the DSA's dispute resolution mechanisms and the DMA's data access mandates for gatekeepers to supplement the transparency obligations under Article 19 DSM. Additionally, competition law, as seen in the French Google Press Publishers case, can act as a 'gap filler' to reinforce copyright enforcement, particularly through the new Commission Guidelines on Article 102 TFEU and economic dependency rules, as illustrated in *Meta v SIAE*. However, the integration of these regulatory instruments faces limitations, including among others conflicting licensing frameworks between social media platforms and CMOs, inadequate transparency obligations for VLOPs regarding copyright enforcement, and tensions between fundamental rights protections under the DSA and the enforcement of copyright law. Accordingly, here the findings suggest that addressing these enforcement deficits requires a systemic approach that harmonises platform regulation, competition law, and copyright enforcement. Ultimately, this regulatory convergence could enhance the enforceability of the DSM Directive's objectives, and thus reinforce the EU's commitment to a fairer digital music ecosystem.

In its **Conclusion**, the Study reveals that while the current regulatory framework—embodied by the DSM Directive, DSA, DMA, and evolving competition law enforcement—has begun to address long-standing inequities in the digital music market, significant challenges still persist. The analysis highlights that despite progress in mandating transparency and creating avenues for contractual renegotiation under Articles 18–22 DSM Directive, music creators continue to face opaque data practices, imbalanced bargaining power, and fragmented enforcement across Member States. These gaps undermine the fair remuneration and control that artists are entitled to, leaving them vulnerable within a system that often favours dominant platforms. To remedy these deficiencies, a coordinated and proactive approach is critical. Policy recommendations include the development of harmonised guidelines for detailed data disclosure and robust enforcement mechanisms. Such measures would not only strengthen the rights of music creators but also promote a more competitive and dynamic digital music ecosystem. Ultimately, this Study serves as a critical roadmap for policymakers and industry stakeholders to foster a fairer, more transparent, and sustainable future for the music sector in the digital age.



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List of Abbreviations

'ABMD'	Associated Business Music Distributors
'ADR'	Alternative Dispute Resolution
'AG'	Advocate General
'AGCM'	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
'AI'	Artificial Intelligence
'B2C'	Business-to-consumer
'CJEU'	Court of Justice of the European Union
'CMA'	Competition and Markets Authority (United Kingdom)
'CMO'	Collective Management Organisation
'CPS'	Core Platform Service
'DMA'	Digital Markets Act
'DSA'	Digital Services Act
'DSC'	Digital Service Coordinator
'DSM'	Digital Single Market
'DSP'	Digital Service Provider
'EC'	European Community
'ECN'	European Competition Network
'EEA'	European Economic Area
'EU'	European Union
'FCA'	French Competition Authority
'FCO'	German Federal Cartel Office
'FRAND'	Fair, reasonable and non-discriminatory
'FTC'	Federal Trade Commission (Agency of the US)
'GDPR'	General Data Protection Regulation
'GRD'	Global Repertoire Database
'IME'	Independent Management Entity



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'IP'	Intellectual Property
'ISRC'	International Standard Recording Code
'MFN'	Most favoured nation (contractual clause)
'NDA'	Non-disclosure agreement
'OCSSPs'	Online Content-Sharing Service Providers
'ODS'	Out-of-court Dispute Settlement
'OECD'	Organisation for Economic Co-operation and Development
'OJ'	Official Journal
'P2B'	Platform-to-Business
'RAD'	Representative Actions Directive
'SFV'	Short-form video
'SIAE'	Società Italiana degli Autori ed Editori (Italian Collective Management Organisation)
'SSNIP'	Small but significant and non-transitory increase in price
'SSNQD'	Small but significant and non-transitory decrease in quality
'T&Cs'	Terms and Conditions
'TFEU'	Treaty on the Functioning of the European Union
'ToS'	Terms of Service
'UCTD'	Unfair Contract Terms Directive
'UGC'	User-Generated Content
'UK'	United Kingdom
'US'	United States
'VLOPs'	Very Large Online Platforms
'VLOSE'	Very Large Online Search Engine



1 Introduction

1.1 Music, platforms, and EU law

Digitalisation and the *platformisation* of the economy have dramatically reshaped the music industry, which experienced an unprecedented transformation through the rise of digital platforms that redefined how music is created, distributed and monetised.¹ The music sector has been a pioneer in digital transformation, even before the proliferation of streaming services.² The introduction of the iPod by Apple in 2001 marked an important moment, in which music consumption began to shift from physical media to digital formats.³ The iPod's success was intrinsically linked to iTunes, as a platform where users could purchase and download music. This early form of *platformisation* and the subsequent “re-intermediation”,⁴ whereby digital platforms displaced traditional gatekeepers such as record stores and physical media distributors and that transformed the music industry, set the stage for the contemporary landscape, currently dominated by music streaming services like Apple Music, Spotify and, to a lesser extent, Deezer.

More specifically, both music streaming and social media platforms have transformed how music is distributed and consumed.⁵ Artists now need to be present across multiple platforms to reach their audience. Unlike the audiovisual sector, where content exclusivity drives platform success, music artists need to ensure their presence on at least the largest platforms to maximise their reach and potential earnings. This need for *omnipresence* across multiple platforms, alongside competition law considerations, raises critical concerns regarding the consequences of this structurally limited competition for fairness and transparency in remuneration processes and practices.

Moreover, in contrast to the analogue music market, rightholders today have limited influence over the pricing for the use of their works.⁶ Instead, they compete based on the number of streams that generate remuneration, making them highly dependent on the exposure and discoverability of their content on streaming platforms.⁷ Therefore, it is not

¹ Allan Watson and Andrew Leyshon, ‘Negotiating Platformisation: MusicTech, Intellectual Property Rights and Third Wave Platform Reintermediation in the Music Industry’ (2022) 15 Journal of Cultural Economy 326.

² Keith Negus, ‘From Creator to Data: The Post-Record Music Industry and the Digital Conglomerates’ (2019) 41 Media, Culture & Society 367.

³ *ibid.*

⁴ Watson and Leyshon (n 1). See also Kenny Barr, Magali Eben and Martin Kretschmer, ‘The Re-Intermediation of the Music Industries Value Chain: Market Definition, Streaming Gatekeepers and the Control of Data’ (2022). Working Paper. UK Copyright and Creative Economy Centre, Glasgow.

⁵ Valdy Wiratama, Heritiana Ranaivoson, Adelaida Afilipoaie and Anders Henten, ‘From value networks for recorded music to music ecosystem’ (2024) Fair MusE report of D3.1, available at <https://fairmuse.eu/fairmuse-resources/>. See also Morten Hviid, Sofia Izquierdo-Sanchez and Sabine Jacques, ‘Digitalisation and Intermediaries in the Music Industry: The Rise of the Entrepreneur?’ (2018) 15 SCRIPTed 242.

⁶ Competition and Markets Authority, *Music and Streaming: Final Report* (29 November 2022) <https://assets.publishing.service.gov.uk/media/6384f43ee90e077898ccb48e/Music_and_streaming_final_report.pdf> 117.

⁷ CMA (2022) (n 6) 73-74



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surprising that one of the key issues that has emerged in this new landscape is the generalised lack of transparency and data-sharing practices between streaming platforms, collective management organisations (CMOs) and artists.⁸ Also, the terms of the agreements between platforms, labels, and artists are often opaque, with artists having little control over how their work is distributed and remunerated across different platforms as these terms are contained in “data silos”.⁹ There have been attempts to address this issue through the use of rights to access information under the EU General Data Protection Regulation (GDPR),¹⁰ but these efforts have had limited success.¹¹

One of the main challenges for accessing and tracking information for royalty collection and distribution is the lack of available metadata regarding musical rights and works and, where they exist, they are often fragmented, making it difficult to enforce remuneration rights. As a result, there have been attempts to create a trustworthy register for information and ownership of musical works. The most notable initiative was the Global Repertoire Database (GRD), which aimed to provide a centralised source of information on music rights.¹² However, the project was ultimately abandoned in 2014 due to a lack of support from key industry players.¹³ The failure of the GRD initiative is an example of the need for more effective regulation for standardised data and data access in the digital music industry.

However, even in today’s data-driven era, there are various regulatory and sector-specific dynamics that, to date, have prevented authors and performers from receiving ‘appropriate and proportionate remuneration’ as enshrined in Article 18 Directive in the Digital Single Market (hereinafter ‘DSM Directive’).¹⁴ First, early regulatory frameworks have also been an obstacle to artists securing fair remuneration in the platform economy. For example, the eCommerce Directive¹⁵ provided a special immunity regime for online intermediaries (so-called ‘safe harbour’), which made it difficult for creators to understand and effectively challenge policies affecting their income.¹⁶ Second, the music sector operates within an asymmetric landscape where a few popular artists capture a significant share of the market,

⁸ Giuseppe Mazziotti and Heritiana Ranaivoson, ‘Can Online Music Platforms Be Fair? An Interdisciplinary Research Manifesto’ (2024) 55 IIC - International Review of Intellectual Property and Competition Law 249.

⁹ Chapter 8 of Fair MusE D2.2 Deliverable – Music creators’ rights under EU law, hereinafter ‘Fair MusE D2.2 Deliverable’.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2006] OJ L 119/1.

¹¹ Sophie Veys and others, ‘Pursuing Usable and Useful Data Downloads Under GDPR/CCPA Access Rights via Co-Design’; Frank Lyons and others, ‘Music 2025 – The Music Data Dilemma: Issues Facing the Music Industry in Improving Data Management’ [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3437670>> accessed 17 May 2024.

¹² World Intellectual Property Organization, *How to Make a Living from Music* (Unknown) <<https://tind.wipo.int/record/45019>> accessed 17 May 2024.

¹³ Chapter 8.2.1.1. of Fair MusE D2.2. Deliverable.

¹⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

¹⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [2000] OJ L 178/1.

¹⁶ Giuseppe Mazziotti, ‘Chapter 11: A Data-Driven Approach to Copyright in the Age of Online Platforms’ in Daniel J. Gervais (ed) *The Future of Intellectual Property* (Edward Elgar 2021).



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leaving most artists with below-average earnings, a disparity exacerbated by algorithmic amplification of widely popular content at the expense of niche artistry¹⁷ and the pro-rata royalty model, which structurally favours high-streaming artists over those with smaller but dedicated audiences. Third, CMOs have traditionally been slow to implement efficient and transparent licensing schemes for online use, hindering a precise allocation of revenues.¹⁸ Also, the lack of detailed data on content exploitation and rights ownership further complicates licensing agreements and undermines the establishment of a level playing field for all contributors.¹⁹ Lastly, this is compounded by the fragmentation of licensing of certain types of rights for online use, where some publishers have withdrawn their rights from CMOs, while others still licence through CMOs.²⁰

In principle, these issues should be addressed under copyright law. However, copyright laws are ineffective in ensuring fair remuneration for creators, which arguably suggests that data transparency and rights to data access could be more beneficial because creators would be likely to gain higher and fairer remuneration if they were granted transparency and access to data on the exploitation of their works in the platform economy.²¹ In sum, a data-driven approach to copyright is needed to allow creators' remuneration to regain centrality and to address issues like the secrecy around how platforms extract value from content and the lack of international standards for rights management.²²

At the same time, the new business models of music distribution based on online platforms which need to allocate revenues to music rightholders are complex due to the plurality of transactions, participants, and the rights involved.²³ On the one hand, digital music platforms typically operate under different revenue models, including per-transaction micropayments (e.g., song downloads) and subscription-based streaming. In the dominant *pro-rata model*, streaming services pool all subscription revenue and distribute it proportionally based on the total number of streams within a given territory, favouring high-streaming artists. In contrast, the *user-centric model* allocates each subscriber's fees directly to the artists they listen to, which potentially offers a fairer distribution for niche and independent artists. While streaming royalties are predominantly calculated through the pro-rata system, user-centric models have been proposed as an alternative approach to better reflect individual listening

¹⁷ Anastasiia Klimashevskaja and others, 'A Survey on Popularity Bias in Recommender Systems' (2024) 34 User Modeling and User-Adapted Interaction 1777.

¹⁸ Mazziotti, 'Chapter 11' (n 16). The administrative costs involved in obtaining accurate information, arguably often lead to the tendency of collecting societies to use statistical methods or other less accurate methods for the purposes of calculating and allocating remuneration to rightholders. This occurs even in today's digital era. See Rooth Towse, 'The Economic Effects of Digitization on the Administration of Musical Copyrights' (2013) 10(2) Rev Econ Research on Copyright Issues 55, 60.

¹⁹ European Parliament resolution of 17 January 2024 on cultural diversity and the conditions for authors in the European music streaming market (2023/2054(INI)).

<<https://www.europarl.europa.eu/news/en/press-room/20240112IPR16773/music-streaming-sector-eu-must-ensure-just-pay-for-artists-and-fair-algorithms>> accessed 27 May 2024.

²⁰ Lucius Klobučnik, 'Navigating The Fragmented Online Music Licensing Landscape In Europe: A Legislative Compass In Sight?' (2020) 11(3) JIPITEC 3.

²¹ Mazziotti and Ranaivoson (n 8); Mazziotti 'Chapter 11' (n 16).

²² Mazziotti 'Chapter 11' (n 16).

²³ Fair MusE D3.3 Deliverable - Innovative business models in the music sector.



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behaviour.²⁴ On the other, the remuneration system involves numerous stakeholders, including digital platforms themselves, music aggregators, record labels, publishers, collecting societies, authors, performers, and producers of phonograms. Accordingly, there is a variety of rights to be collected for different beneficiaries, such as authors' rights for composers and neighbouring rights for performers, producers, and phonogram producers.²⁵ This is further complicated when platforms' rules for royalty allocation to rightholders, which are often opaque, are added to the equation.

This complexity necessitates transparent management. However, there has been a structural lack of transparency in the system regarding the income received by each party.²⁶ The opacity of revenue structures in the music industry is evident in various aspects of the process.²⁷ Artists often receive unclear reports about the revenue generated from their works through streaming or downloads.²⁸ Often, this uncertainty benefits intermediaries, whether music aggregators, record labels or platforms themselves, and can result in large payments being misallocated,²⁹ especially in the presence of gatekeeper relationships.³⁰ Additionally, the lack of clarity about how remuneration is calculated hinders any potential for claims or disputes. The situation is exacerbated by private and confidential agreements between artists and their record labels or publishers, and between the record labels and digital platforms.³¹ For artists represented by record labels, the labels initially receive the revenue from the use of their works and then pay the artists according to their contracts, often without disclosing the original amounts received and not necessarily connected to the number of streams and/or views.³²

Creators also face lack of transparency regarding the percentage of income they will receive when distributing their music through digital and online platforms.³³ Information is often unavailable, or payments are based on complex formulas. For instance, Spotify royalties are

²⁴ Janek Meyn and others, 'Consequences of Platforms' Remuneration Models for Digital Content: Initial Evidence and a Research Agenda for Streaming Services' (2023) 51 *Journal of the Academy of Marketing Science* 114; François Moreau and others, 'Fairness and Royalty Payment Systems on Music Streaming Platforms' (14 October 2022) <<https://papers.ssrn.com/abstract=4248175>> accessed 5 July 2024. See also below, Chapter 5.1.

²⁵ Patryk Galuszka, 'Music Aggregators and Intermediation of the Digital Music Market' (2015) 9 *International Journal of Communication* 20.

²⁶ Mazziotti (n 16).

²⁷ European Commission, *Study on the International Dimension of the Single Equitable Remuneration Right for Phonogram Performers and Producers and Its Effect on the European Creative Sector: Final Report* (Publications Office of the European Union 2023) <<https://data.europa.eu/doi/10.2759/207313>> accessed 9 July 2024.

²⁸ *ibid.*

²⁹ Giuseppe Mazziotti, 'Remuneration of Content Creators in the Digital Space: Challenges, Obstacles and a Common Language to Foster Economic Sustainability and Cultural Diversity' (Discussion paper, 8 February 2019).

³⁰ Dario Azzellini, Ian Greer and Charles Umney, 'Why Isn't There an Uber for Live Music? The Digitalisation of Intermediaries and the Limits of the Platform Economy' (2022) 37 *New Technology, Work and Employment* 1.

³¹ *ibid.*

³² David Hesmondhalgh, 'Is Music Streaming Bad for Musicians? Problems of Evidence and Argument' (2021) 23 *New Media & Society* 3593; Meyn and others (n 24).

³³ Frederik Juul Jensen, 'Rethinking Royalties: Alternative Payment Systems on Music Streaming Platforms' [2024] *Journal of Cultural Economics* <<https://doi.org/10.1007/s10824-024-09507-z>> accessed 5 July 2024.



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calculated using a complicated formula that is nearly impossible to verify due to the lack of access to critical data, such as Spotify's total revenue and total streams.³⁴ Similarly, understanding YouTube's payment system for song monetisation is nearly impossible. YouTube pays artists based on advertising revenue generated by their content, but not all ads are compensated equally.³⁵ Some ads are paid per view, others per click, and ad rates vary by geographic location and language. Additionally, YouTube shares revenue with video creators and decides which ads to display, making it difficult to calculate precise earnings.³⁶

Against this background, user-generated content ('UGC') platforms such as YouTube or TikTok are, *de facto*, the largest music streaming services at the moment. For example, in 2015, YouTube had 140 million weekly music video users.³⁷ This shows how the influence of these platforms in the music industry is substantial and continues to grow. This dominance is particularly pronounced among younger demographics who use social media not only for listening to music but also to discover new artists and trends.³⁸ This tendency of music consumption prompted discussions about the use of algorithmic filtering for personalised recommendations by these platforms and how they impact the visibility and discoverability of creators, which ultimately impacts remuneration.³⁹

The question that this Study seeks to address is whether other areas of EU law, in particular EU platform regulation and EU competition law, could support the implementation of fairer market conditions in digital music markets and help the rights granted to rightholders to materialise. Taking an example from EU competition law, the European Commission's decision to fine Apple over abusive App Store rules for music streaming app developers is one of the latest examples of the increasing scrutiny on digital platforms enabled by EU competition rules.⁴⁰ Competition law has been used to address some of the issues arising from the dominance of platforms like Apple, which ultimately also affects important players like Spotify in music streaming markets and may have positive ripple effects for authors and performers.⁴¹ There is a growing recognition, however, that a more comprehensive approach is needed to ensure fairness and transparency in the industry. This Study looks at how the emerging EU platform regulation framework and EU competition law contribute to operationalising creators' rights under the DSM Directive.

³⁴ Daniel Antal, Amelia Fletcher and Peter L Ormosi, 'Music Streaming: Is It a Level Playing Field?' [2021] Competition Policy International; see also Lee Marshall, "'Let's Keep Music Special. F—Spotify": On-Demand Streaming and the Controversy over Artist Royalties' (2015) 8 Creative Industries Journal 177.

³⁵ Seun Lari-Williams, 'Bridging the Value Gap Between Content Creators and Digital Media Platforms: A Case Study of YouTube' (16 September 2020) <<https://papers.ssrn.com/abstract=3903986>> accessed 5 July 2024.

³⁶ *ibid.*

³⁷ Marshall (n 34).

³⁸ Lari-Williams (n 35). See also 'User-Generated Video Content Fuels Music Discovery and Fandom among Younger People' (Deloitte Insights)

<<https://www2.deloitte.com/us/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/2024/ugc-videos-music-discovery.html>>

³⁹ Christopher Buccafusco and Kristelia Garcia, 'Pay-to-Playlist: The Commerce of Music Streaming' (2021) 12 UC Irvine Law Review 805; Benjamin Boroughf, 'The next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation' (2015) 25 Albany Law Journal of Science & Technology 95.

⁴⁰ *Apple - App Store Practices (music streaming)* AT.40437 Commission Decision C(2024) 1307 final ('Apple case' or 'Apple decision').

⁴¹ Interview with representatives of a music streaming platform.



1.2 Context, purpose and scope of this Study

This Study investigates how competition law and platform regulation, mainly the Digital Services Act ('DSA')⁴² and the Digital Markets Act ('DMA')⁴³ but also the Platform-to-Business Regulation ('P2B Regulation'),⁴⁴ can contribute to addressing the structural imbalances in a platform-mediated music sector. In doing so, this Study starts from the assumption that existing and new competition and regulatory instruments may improve the position of artists and recalibrate the dynamics of the sector by imposing transparency obligations, enhancing rights vis-à-vis platforms under the DSM Directive and levelling the playing field in the platform economy to create a fairer and more sustainable music sector.

The aim of the study is to provide valuable insights for policymakers, legislators, digital service providers (DSPs), media, record labels, artists, CMOs, and other stakeholders in the music industry. These insights will help to better understand the challenges artists face concerning transparency and revenues from the exploitation of music online. The study places a focus on empowering music creators to gain greater control over their works, to enhance their bargaining power in a platform-driven music economy, and to ultimately ensure fair remuneration for the online exploitation of their works.

The DSM Directive and, in particular, its Article 17, represent a game-changer in the regulation and liability regime of UGC platforms. This provision requires platforms to make "best efforts" to secure licensing agreements and prevent unauthorised use of copyrighted materials. In doing so, Article 17 established a framework that, presumably, levels the playing field between social media platforms and music streaming services.⁴⁵ This convergence has significant implications for rightholders, as it seeks to mitigate the disparities in value extraction between these two types of platforms. However, the Directive's implementation has exposed significant challenges, especially regarding the divergent transpositions across Member States and serious debates about its impact on freedom of expression.⁴⁶

Beyond the immediate implications of Article 17, there is a growing recognition of the need for platform regulation to enhance the rights enshrined in Articles 18-23 DSM Directive.⁴⁷ These provisions include transparency obligations, fair remuneration mechanisms, and

⁴² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277/1.

⁴³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1.

⁴⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service [2019] OJ L 186/57.

⁴⁵ Chapter 5.1.1 of Fair MusE D2.2. Deliverable.

⁴⁶ Eleonora Rosati, 'The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law' (2020) 15 Journal of Intellectual Property Law and Practice 11, 874; João Pedro Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 42 European Intellectual Property Review 1, 28; Julia Reda, Joschka Selinger, and Michael Servatius. 'Article 17 of the Directive on Copyright in the Digital Single Market: a fundamental rights assessment' (2020). Available at SSRN: <https://ssrn.com/abstract=3732223> or <http://dx.doi.org/10.2139/ssrn.3732223>.

⁴⁷ Mazziotti and Ranaivoson (n 8).



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dispute resolution processes, which aim to address the systemic power imbalances that disadvantage creators in their relationships with, among others, platforms. For example, Article 18 DSM Directive mandates appropriate and proportionate remuneration for authors and performers, while Article 19 recognises the right to receive detailed information on the exploitation of their works.

The materialisation of these rights hinges on robust enforcement mechanisms and harmonised implementation across Member States of the DSM Directive. However, variations in its transposition have led to significant disparities in how authors' and performers' rights are upheld. Thus, the fragmented application of these rules across jurisdictions has hindered their efficacy, which stresses the role of platform regulation in creating a more cohesive and equitable framework.⁴⁸ For instance, some Member States implemented novel measures, such as Belgium's unwaivable remuneration rights for online exploitations of authors' and performers' works,⁴⁹ whereas others have relied on verbatim transpositions that lack additional safeguards.

Against this background, platforms have prioritised their own interests over the rights of artists, leading to persistent power asymmetries and exploitation. For instance, platforms that fail to integrate transparency obligations into their governance structures can obscure revenue streams and data critical for fair remuneration.⁵⁰ Similarly, as further examined in Chapter 6, inadequate adherence to dispute resolution mechanisms can leave rightholders without effective recourse, which perpetuates structural inequalities. The new legal regime for platforms attempts the alignment of self-regulatory practices with statutory requirements to ensure that platforms operate within a framework that supports a fairer digital economy for all stakeholders. Yet, especially in the music sector, it is still early to assess how the new platform rules have provided tangible benefits for artists. Meanwhile, competition law can be considered a complementary tool for addressing imbalances in the platform economy such as market dominance, unfair practices and data monopolies.

In light of this, we start from the hypothesis that the newly established EU regulatory framework for online platforms mainly under the DSA and the DMA can significantly contribute to the materialisation of music creators' rights. Along these lines, it has been already argued that the DSA, with its focus on intermediary due diligence obligations, will be critical in the future of online copyright enforcement.⁵¹ In line with this, Husovec argues that the DSA could serve as a "creator's charter", significantly improving data access and transparency for creators.⁵² More specifically, the DSA will function as a digital due process regulation, integrating various risk management tools.⁵³ By promoting transparency and access to data, establishing universal due process guarantees, and mandating continuous

⁴⁸ See Chapter 9.1.4 of Fair MusE D2.2. Deliverable.

⁴⁹ See Chapter 4.2.3. of Fair MusE D2.2. Deliverable.

⁵⁰ Mazziotti and Ranaivoson (n 8); Allen Bargfrede, and Panos Panay. *Fair music: Transparency and payment flows in the music industry* (2015) Berklee Institute for Creative Entrepreneurship (BerkleeICE) Boston, Massachusetts.

⁵¹ Alexander Peukert and others, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.

⁵² Martin Husovec, 'The DSA as a Creator's Charter?' (2023) 18 Journal of Intellectual Property Law & Practice 71.

⁵³ *ibid.*



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risk management by large platforms, the DSA can provide creators with enforceable procedural rights and provide regulators with tools to hold platforms accountable, while empowering rightholders to better enforce their rights on a larger scale.⁵⁴

The Study includes an in-depth legal analysis into the chronological interpretation and application of competition law and policy, with a detailed examination of its enforcement, and a thorough scrutiny of the most relevant legal provisions from the new framework for platforms such as the DSA, the DMA or the P2B Regulation.

Methodologically, we have completed this study by conducting an extensive literature review, desk research and empirical research. The desk research and legal analysis have been conducted based on the applicable legal frameworks up to February 2025, considering the latest transpositions of the DSM Directive and the developments following the entry into force of the DSA and the DMA. The empirical research sought to incorporate real-world perspectives from affected stakeholders, capturing their experiences with contractual negotiations, data transparency, and platform governance. The interviews, conducted between March 2024 and November 2024, provided critical insights into the practical application of the regulatory frameworks and their perceived effectiveness in addressing systemic imbalances in the music sector. Several stakeholders participated in our interviews (specific to Task T2.5 of Fair MusE), either orally or in writing, representing a diverse cross-section of the music sector, including CMOs, policymakers, legal experts, practitioners and platform representatives. Feedback from numerous interviews conducted under Tasks T2.2, T2.3, T2.4 and T3.2 of Fair MusE was also factored into the analysis.

The Study shows that, while the regulatory landscape has evolved to introduce key transparency and fairness obligations, significant gaps remain in the effective enforcement and materialisation of rightholders' rights. The DSM Directive, the DSA, and the DMA each provide mechanisms that, in theory, should foster a fairer music ecosystem. However, their effectiveness depends on their proper implementation, enforcement, and interaction with industry practices. Thus, without meaningful oversight, platforms retain the ability to interpret their obligations in ways that prioritise their commercial interests over fairness for artists and rightholders. Moreover, procedural barriers, such as fragmented national transpositions and the lack of harmonised enforcement mechanisms, hinder the full realisation of these regulatory objectives for a fairer online music sector.

One of the most critical issues also identified in the Study is the lack of awareness regarding how both competition law and, more notably, platform regulation, can be used to enforce the rights granted under the DSM Directive. While the DSM Directive introduced key rights for authors and performers, their enforcement has remained weak in practice, in part due to a limited understanding of the regulatory tools available. Competition law and new platform regulatory frameworks, particularly the DSA and DMA, offer unexploited opportunities that could be leveraged to strengthen the bargaining position of artists and rightholders. However, because these regulatory frameworks are relatively new, their potential remains largely unknown to stakeholders in the music industry.⁵⁵ For instance, the analysis suggests that certain provisions from platform regulation could be used to challenge opaque

⁵⁴ *ibid.* See Part II in this Study.

⁵⁵ Interview with representatives of a CMO.



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contractual practices, address discriminatory revenue-sharing mechanisms, and promote more transparent licensing agreements. In particular, the DSA's transparency framework and procedural architecture can be leveraged by music creators to enforce their rights against certain intransparent platform practices that impact remuneration. The different transparency provisions, including information on content monetisation from advertising, offer the possibility for rightholders to better understand how advertising revenue is generated and how it affects the distribution of protected content by platforms. Similarly, the DMA's provisions could be mobilised to prevent gatekeeper platforms from imposing exploitative terms on artists and labels. Still, these mechanisms are not yet widely recognised or employed by industry stakeholders.⁵⁶

Findings from the competition law analysis in this Study indicate that the ongoing adaptation of competition enforcement on digital markets could be usefully explored for the music sector, too. When it comes to refusals to accessing data or discriminatory treatment of rightholders by DSPs or social media platforms, the direction that the EU Commission is taking in cases like *Google Shopping* and *Google Android*, as well as in its draft Guidelines on Article 102 TFEU could potentially support competition complaints by authors and performers. Establishing dominance in respect of some DSPs and social media platforms, however, might pose challenges. This obstacle might be circumvented by resorting to national economic dependency rules that have recently been adapted in various Member States to address asymmetries of bargaining power in digital markets.

The Study highlights the untapped potential of educational initiatives and strategic enforcement efforts that could bridge the gap between the rights granted under the DSM Directive and the legal tools available under competition and platform law. Rightholders, policymakers, and enforcement bodies must understand how copyright law, competition law and platform regulation interact to translate music creators' rights under the DSM Directive into tangible improvements.

1.3 Outline of the Study

As outlined above (1.2), this study focuses on the examination of the relationship between digital platforms, where music is exploited, and the music creators, whose works are made available on these platforms. Since the main focus of our analysis will be on the ways EU platform regulation and competition law can enhance the position of authors and performers by complementing their rights under Articles 18–23 of the DSM Directive, we will predominantly use the terms 'creators', 'artists' and 'rightholders' as referring to music authors and performers. However, depending on the specific context and argument of the analysis, the term 'rightholders' may also be used in the broader sense, to mean every natural or legal person owning intellectual property rights in musical compositions, music performances and/or sound recordings.⁵⁷

⁵⁶ Interview with representatives of a CMO.

⁵⁷ This approach is narrower than in Chapter 1.1 of Fair MusE D2.2 Deliverable, where the term 'music creators' is defined as "(...) both persons and enterprises who are involved in the composition, performance and recording of musical works" therefore including "(...) composers, lyricists, performers (such as featured performing artists and session musicians) and record producers".



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Similarly, the term ‘digital platforms’ or, simply, ‘platforms’ may encompass a broad range of online services and intermediaries, and each regulatory framework focuses on and targets different types of platform functionalities and market roles. The DSA deals with online platforms,⁵⁸ the DMA with gatekeepers,⁵⁹ the DSM Directive with (among others) online content-sharing service providers (OCSSPs),⁶⁰ the P2B Regulation with providers of online intermediation services⁶¹ and so forth. For the purposes of our analysis, in this Study we use the term ‘platform’ as encompassing both UGC platforms and DSPs. For the former category, we place the focus on music-intensive platforms in the social media and video-sharing spaces, namely Facebook, Instagram, TikTok and YouTube and for the latter category we will be mostly concerned with music streaming services like Spotify, Deezer, Amazon Music and Apple Music.

This study is divided into three main parts.

Part I explores the theoretical and regulatory foundations of platform governance and competition law in the music sector. Here, the Study offers a comprehensive literature review that provides an analytical overview of the economic, legal, and policy frameworks that have shaped digital music distribution. Chapter 2 contextualises the legal evolution of platform regulation and competition enforcement within the music sector and shows how shifts in EU policy have influenced the bargaining position of music creators. The chapter further assesses how the literature has dealt with the interplay between transparency obligations, remuneration mechanisms, and contractual fairness in the platform economy, thus setting the stage for the legal and empirical analyses that follow.

Part II presents a legal and empirical analysis of the key regulatory instruments governing digital platforms and their impact on rightholders. Spanning Chapters 3 through 6, this part provides a detailed assessment of competition law and enforcement and platform regulation. It analyses their potential and limitations in addressing the systemic challenges faced by creators in the context of the rights conferred upon by the DSM Directive. More specifically, Chapter 3 presents key preliminary considerations for understanding the regulatory scope of competition law and platform regulation in digital music markets, clarifying definitional issues and methodological choices. Chapter 4 scrutinises the transparency and data access provisions under competition law and platform regulation and assesses how they influence rightholders’ ability to obtain and control information about the exploitation of their works. Chapter 5 investigates the role of competition law and platform regulation in tackling market imbalances. In particular, this chapter examines how dominant platforms influence market access for rightholders and whether the current regulatory framework facilitates or restricts fair licensing conditions. Chapter 6 focuses on enforcement and redress mechanisms. Here, the Study examines existing and new procedural mechanisms available to rightholders, facilitated by new developments in competition law and platform regulation, to enforce their rights under the DSM Directive in a platform-mediated context. The chapter also evaluates the effectiveness of dispute resolution mechanisms under the DSA and the role of national enforcement bodies and competition authorities in identifying obstacles to fair remuneration

⁵⁸ Defined in Article 3(i) DSA.

⁵⁹ Defined in Article 2(1) in combination with Article 2(2) DMA

⁶⁰ Defined in Article 2(6) DSM Directive.

⁶¹ Defined in Article 2(2) and (3) P2B Regulation.



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and potential solutions through regulatory interventions and collective bargaining mechanisms.

Part III integrates the Study's findings and delineates some recommendations to enhance the effectiveness of EU regulatory measures for a fairer digital music sector. Chapter 7 integrates the legal and empirical findings following the analysis of current competition and platform frameworks with the findings of D.2.2. Here, the Study suggests that a siloed approach to copyright law is insufficient to address the structural challenges of digital music markets and emphasises the need for an integrated regulatory strategy that enhances transparency, greater competition in the digital music sector, and fairer contractual relations between platforms and rightholders. Chapter 8 concludes the Study by summarising the main findings of the research and proposing pathways to strengthen enforcement, improve access to data, and potentially address the challenges posed by emerging technologies such as AI-generated music. This final chapter also reflects on the broader implications of digital music governance. Here, the Study highlights the need for continuous regulatory adaptation to ensure that music creators' rights are effectively safeguarded in a platform-dominated environment.



Part I



2 Literature review

2.1 Introduction

Before exploring the relevant literature on enhancing rightholders' rights in the digital music sector under EU platform regulation and EU competition law, this literature review is contextualised in the evolution of EU platform regulation more generally, as well as in the evolution of competition law enforcement in digital markets (Chapter 2.1). The relevant developments in both areas will be concisely presented in the rest of this chapter. Furthermore, since the goal is to ultimately scrutinise fairness in digital music markets, Chapter 2.2 provides an overview of how the principle of fairness has influenced EU platform regulation as well as its contested position within EU competition law. Chapter 2.3 then deals in detail with the question of how EU competition law could help in promoting the position of rightholders in terms of transparency, data access, and fair remuneration in digital music markets. Chapter 2.4 does the same for EU platform regulation, with a particular focus on the DSA and the DMA.

2.1.1 The evolution of competition law enforcement in digital markets

The online platform economy, despite its numerous benefits to consumer welfare and the access to multiple services it provides, has led to the dominance of few super-dominant stakeholders,⁶² which are in the position to abuse their market power. Historically, the competition law enforcement in digital markets and against Big Tech has followed two very different paths in the main antitrust jurisdictions on both sides of the Atlantic. US antitrust enforcement against large tech companies has been characterised as 'meek', while EU competition enforcers have been labelled 'aggressive' towards US Big Tech firms,⁶³ judging by the number of antitrust investigations and sanctions imposed.⁶⁴ This divergence in enforcement has been explained by differences in economic ideology: the US is considered more prone towards a liberal, laissez-faire approach, which respects the freedom of even hyper dominant firms and advocates for minimalist government interference in markets.⁶⁵ The EU, in contrast, is seen as more interventionist and focused on making sure that markets remain contestable even in the presence of a dominant firm.⁶⁶ Nonetheless, the tide seems to be turning in the US, with recent proceedings having been brought by the US Department of Justice against Google's search engine and online advertising businesses

⁶² Vincenzo Iaia, 'The remodeled intersection between copyright and antitrust law' (2021) 29(3) International Journal of Law and Information Technology, 169-170.

⁶³ See, e.g. Eleanor M. Fox, 'Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide' (2019-2020) Nebraska Law Review 98, 297-318.

⁶⁴ See, e.g. Umberto Nizza and Cristina Poncibò, 'Antitrust Mega Fines in Digital Markets and Their Impact on Compliance: An Overview of EU and US Approaches', Stanford – ViennaTransatlantic Technology Law Forum Working Paper, No. 115.

⁶⁵ Fox (n 63).

⁶⁶ Ibid.



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for monopolisation in 2023,⁶⁷ and by the Federal Trade Commission (FTC) against Meta for monopolising the market for social networking services in 2024.⁶⁸

The European Commission has shown readiness to protect not only consumers but competitors,⁶⁹ when enforcing EU competition law in online platform markets.⁷⁰ This approach is well-illustrated in the General Court's *Google Shopping* judgment from 2021, in which heavy fines were issued against Google for, inter alia, denying equivalent access to its online shopping search platform for its competitors.⁷¹

Lastly, it should be noted that competition enforcement in digital markets remains relevant, irrespective of the introduction of specific instruments of platform regulation in the EU. The ongoing establishment of a comprehensive oversight of online platforms under the new EU platform regulation (as elaborated below) is not supplementary to the broader regulatory framework under the EU competition law, which continues to exist in parallel. In this context, Iaia highlights the importance of finding unified solutions at the EU level that would prevent imposing multiple penalties and a disproportionate oversight on online platforms.⁷²

2.1.2 The evolution of platform regulation in the EU

During the late 20th and early 21st century, platforms were regarded as digital safe havens that offered a vision of a world free from intermediaries and regulation.⁷³ These proliferating businesses found themselves in an environment where they could redefine the governance of the Internet. Therefore, in a space with very few regulatory limitations, these platforms wielded the power to reform traditional legal frameworks.⁷⁴ This era, which could be encapsulated by Zuckerberg's axiom "move fast and break things," witnessed a transformation of these platforms from simple facilitators to shapers of digital law.⁷⁵ Initially, the absence of comprehensive regulations for online platforms resulted in these entities crafting their own legal regimes, often embedded within their Terms of Service (ToS).⁷⁶ This

⁶⁷ DOJ, Press Release, 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies' (Jan. 24, 2023)

<<https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>>.

⁶⁸ FTC, Press Release, 'FTC Sues Facebook for Illegal Monopolization' (Dec. 9, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

⁶⁹ The goal is not to protect inefficient, but as-efficient competitors, and to keep markets open. See Fox (n 63).

⁷⁰ Mazziotti (n 16).

⁷¹ Case T-612/17 Google and Alphabet v Commission (Google Shopping) ECLI:EU:T:2021:763.

⁷² Iaia, 'The remodeled intersection' (n 62) 197.

⁷³ John Perry Barlow, 'A Declaration of the Independence of Cyberspace | Electronic Frontier Foundation' (*Electronic Frontier Foundation*, 1996); David R Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

⁷⁴ Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1997)

⁷⁶ *Texas Law Review* 553.

⁷⁵ Orly Lobel, 'The Law of the Platform' (2016) 101 *Minnesota Law Review* 87; Nicolas P Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019).

⁷⁶ Luca Belli and Jamila Venturini, 'Private Ordering and the Rise of Terms of Service as Cyber-Regulation' (2016) 5 *Internet Policy Review* 1; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press



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self-regulatory regime encompassed a variety of elements, ranging from technical infrastructure like coding and norms to community-driven aspects such as reputation systems.⁷⁷ All of these efforts were self-regulatory; the lack of formal state-imposed regulations for the online domain was significant during the early days of the platform economy.

Attempts at establishing a regulatory structure were hindered by the complexity inherent in online interactions and the transnational nature of platform operations. Recognising these obstacles, the early 2000s saw the introduction of legal frameworks like the Digital Millennium Copyright Act and the Communications Decency Act in the United States, as well as the 2001 eCommerce Directive in the EU. These pieces of legislation aimed at protecting intellectual property and ensuring freedom online by establishing ‘safe harbours’. Therefore, the extent to which online platforms have been exempt from liability has largely been shaped by court decisions. The judiciary showed a growing awareness of public sentiment, as seen in cases like *Delfi AS v. Estonia* (2015) in the European Court of Human Rights. However, they have been arguably more significantly influenced by those who view these safe harbours as a threat to intellectual property rights. This perspective is evident in European rulings such as the Court of Justice of the European Union’s (CJEU) case C-324/09 – *L’Oréal and Others*,⁷⁸ which stands in contrast to American decisions like *Tiffany (NJ) Inc. v. eBay Inc.* 600 F.3d 93 (2nd Cir. 2010). The enforcement of other regulations on platforms, including competition law, consumer rights, and data protection, was relatively deficient during this time.⁷⁹ When such rules were applied, it was often due to consumer activism, exemplified by the case C-131/12 – *Google Spain*, or driven by political motives, as in case T-201/04 – *Microsoft v Commission*.

The landscape began to shift with the emergence of sharing economy platforms like Airbnb and Uber. These platforms represented more than new business models; they symbolised a break from the established (and regulated) order.⁸⁰ Much like other domains of transnational private regulation, the governance exercised by these platforms was partly a response to the fragmented international legislative landscape, striving to bring some harmonisation to platform operations.⁸¹ During this period, platforms began to take on a more active regulatory role, and states started to use platforms’ extensive networks for enforcing laws.⁸² However, soon the literature pointed at the problems associated with using platforms as tools for regulatory purposes. Firstly, while platforms’ ToS often include regulations against harassment or hate speech, these measures are frequently insufficient

2015); Matthias C Kettemann, *The Normative Order of the Internet: A Theory of Rule and Regulation Online* (Oxford University Press 2020).

⁷⁷ Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

⁷⁸ Judgment of the Court (Grand Chamber) of 12 July 2011. *L’Oréal SA and Others v eBay International AG and Others*. ECLI:EU:C:2011:474.

⁷⁹ Marta Cantero Gamito, ‘Do Too Many Cooks Spoil the Broth? How EU Law Underenforcement Allows TikTok’s Violations of Minors’ Rights’ (2023) 46 *Journal of Consumer Policy* 281.

⁸⁰ Benjamin Edelman and Damien Geradin, ‘Spontaneous Deregulation’ [2016] *Harvard Business Review* 80.

⁸¹ Michael A Cusumano, Annabelle Gawer and David B Yoffie, ‘Can Self-Regulation Save Digital Platforms?’ (2021) 30 *Industrial and Corporate Change* 1259.

⁸² Christoph Busch, ‘Self-Regulation and Regulatory Intermediation in the Platform Economy’ in Marta Cantero Gamito and Hans Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering* (Edward Elgar 2020).



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due to lack of enforcement by the platforms themselves.⁸³ Secondly, the notion that self-regulation by platforms can address the issue of information asymmetry –owing to their industry insight– is flawed.⁸⁴ The algorithms tasked with enforcing these policies often operate as ‘black boxes’, where their processes are hidden and unexplained.⁸⁵ Thirdly, the opaque nature of decision-making and undisclosed enforcement procedures, within a market tending towards increased concentration of power, undermines fundamental rights and the principles of due process.⁸⁶ Accordingly, the idea that private entities are equipped to pursue public values or to effectively achieve regulatory aims, especially in contexts where private efforts alone are inadequate to mitigate external effects, became increasingly unsustainable.⁸⁷

As a result, regulations continued to evolve, particularly in the EU, which aimed to set rules that would influence platform practices worldwide.⁸⁸ Notable regulatory efforts include the GDPR in 2016, the P2B Regulation in 2019 and, in 2022, DMA and the DSA, which sought to improve transparency and accountability in platform operations. Together with competition law, these regulations promote data access, fairness and transparency in the relationships between online platforms and their (business) users.⁸⁹

With specific regard to the DMA, and according to Akman,⁹⁰ it sets itself apart from other regulatory instruments as it does not apply to a specific sector of the economy (digital markets include businesses from various sectors) but rather to some of their activities of a specific group of entities in different markets. It is the DMA’s primary concern to regulate

⁸³ Suzor (n 75).

⁸⁴ Cantero Gamito (n 79).

⁸⁵ Frank Pasquale, *Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2016).

⁸⁶ Belli and Venturini (n 76).

⁸⁷ José van Dijck, ‘Governing Digital Societies: Private Platforms, Public Values’ (2020) 36 *Computer Law & Security Review* 105377.

⁸⁸ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

⁸⁹ Christoph Busch, ‘The P2B Regulation (EU) 2019/1150: Towards a “Procedural Turn” in EU Platform Regulation?’ (2020) 9 *Journal of European Consumer and Market Law* 4, 133.

⁹⁰ Pinar Akman, ‘Regulating in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act’ (2022) 47 *European Law Review* 85, 103ff.



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Core Platform Services (CPSs) and less so the gatekeepers,⁹¹ and the latter may be caught under the DMA for some of their services and not for others.⁹²

The European Commission moved ahead with the first wave of designations in September 2023, when it designated six companies as gatekeepers for 22 Core Platform Services.⁹³ From the designated ones, Meta (Facebook and Instagram as social networking CPSs), Alphabet (YouTube as video-sharing CPS) and ByteDance (TikTok as social networking CPS) are of relevance for the digital music market and for our study because of the copyright-protected music content they host.⁹⁴ Apple is another designated gatekeeper of which the App Store (online intermediation CPS⁹⁵) practices also have a ‘spillover’ impact on the digital music world, as will be further mentioned under Chapters 2.4.2.3 and 5.3.2.2.

Despite the DMA being a regulatory instrument, it is rooted in competition law and needs to be read in its light. In digital markets where gatekeepers are present and given the characteristics of CPSs, traditional competition law was not considered capable of ensuring “fair economic outcomes”.⁹⁶ It demonstrated limitations by focusing on anticompetitive agreements and abuse of dominance, an *ex-post* case-by-case assessment and lengthy investigations and review processes not apt for the rapidly-changing digital markets or their structural issues.⁹⁷ Podszun illustrates how the “more economic approach” guiding EU competition law enforcement since the beginning of the 21st century did not perform well with the rise of platforms in digital multi-sided markets and the application of EU competition law was not a perfect fit for emerging cases.⁹⁸ Such an effects-based approach required complex *ad hoc* assessments which meant that both enforcement and compliance became harder and allowed less room for legal certainty. What is more, the more economic approach of competition law was based on knowledge that predated the *platformisation* of digital

⁹¹ Carsten Koenig, ‘Chapter 11 Introduction to the Digital Markets Act (DMA)’ forthcoming in Björn Steinrötter, Christian Heinze and Michael Denga (eds), *EU Platform Regulation* (Beck Nomos Hart 2024), para 36.

⁹² For example, at the time of writing, ByteDance has been designated a gatekeeper for its social networking CPS TikTok (*ByteDance – Online social networking services* (Case DMA.100040) Commission Decision C(2023) 6102 final) but not for TikTok Ads (European Commission Press Release IP/24/2561 ‘Commission designates Booking as a gatekeeper and opens a market investigation into X, 13 May 2024 < https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561>). Against its designation decision, ByteDance had filed for interim measures before the General Court and the application was dismissed (Case T-1077/23 *Bytedance Ltd v European Commission* ECLI:EU:T:2024:94). Finally, the General Court dismissed ByteDance’s appeal against its designation Case T-1077/23 *Bytedance v Commission* ECLI:EU:T:2024:478.

⁹³ European Commission Press Release IP/23/4328, ‘Digital Markets Act: Commission designates six gatekeepers’ 6 September 2023 < https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328 >. Since then Booking.com has also been designated, see Press Release n 92.

⁹⁴ Designation Decisions: *Meta - online social networking services* (Case DMA.100020) Commission Decision C(2023) 6105 final; *Alphabet – Video sharing* (Case DMA.100005) Commission Decision C(2023) 6101 final and *ByteDance – Online social networking services* above n 92.

⁹⁵ Designation decision *Apple – online intermediation services – app stores* (Case DMA.100013) Commission Decision C(2023) 6100 final.

⁹⁶ Recital 5 DMA.

⁹⁷ See OECD ‘Ex-Ante Regulation and Competition in Digital Markets – Note by BEUC’ DAF/COMP/WD(2021) 66 and European Parliamentary Research Service EPRS, ‘Regulating Digital Gatekeepers: Background on the Future Digital Markets Act’ (Briefing, European Parliament 2020) available at <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI\(2020\)659397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI(2020)659397_EN.pdf)>.

⁹⁸ Rupperecht Podszun, ‘From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act’ (2023) 17(1) *Economics* 1-2.



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markets, when the combined effects and impact of characteristics such as network effects, consumer lock-in and the role of data had not been factored in economic theories. Lastly, the attainment of lower prices as the yardstick for consumer welfare disregarded other objectives, such as innovation.⁹⁹

The DMA not only draws inspiration from competition law but was also meant to provide a solution to the enforcement issues with regard to Article 102 TFEU.¹⁰⁰ Many of the obligations established for platforms under Articles 5, 6 and 7 of the DMA are based on previous competition cases.¹⁰¹ For instance, the enforcement experience gained by the European Commission in the *Google Search (Shopping)* case¹⁰² is reflected in Article 6(5) DMA obligation of gatekeepers to refrain from ranking their own products and services more favourably compared to those of third parties (so-called 'self-preferencing') and the Article 6(12) DMA obligation to give access to business users to their online search engines, app stores and social networks on fair, reasonable and non-discriminatory (FRAND) conditions.

The European Commission presented the DMA as a complement to competition rules, which does not pursue the objective of ensuring undistorted competition - as competition rules do - but that of ensuring "...that markets where gatekeepers are present are and remain contestable and fair..." and which does not require an *ad hoc* analysis of the effects of gatekeeper conduct on competition.¹⁰³ This was reiterated by the Commission in the *Apple* decision,¹⁰⁴ where it stated that "The fact that both Article 102(a) of the Treaty and that secondary EU legislation concern the fairness of certain conducts does not mean that they pursue the very same objective".

Specifically on the issue of overlap and departure between the DMA and competition law, the *Apple* antitrust decision¹⁰⁵ targeting Apple's anti-steering practices and the DMA's Article 5(4) prohibition of the same type of conduct provide an opportunity for comparison. Article 5(4) DMA obliges gatekeepers to allow business users, at no cost, to inform their (acquired) customers about and direct them to offers for products or services other than those existing on the platform.¹⁰⁶ According to the Commission, the existence of the DMA prohibition further supports the characterisation of the conduct as unfair when it comes from a dominant undertaking.¹⁰⁷ However, as Monti also points out, infringement of the DMA obligations does not mean that the finding of unfairness for the purposes of Article 102 TFEU and that an abuse of a dominant position are confirmed.¹⁰⁸ The latter can happen only upon a dominant

⁹⁹ *ibid* 4.

¹⁰⁰ Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 *The Antitrust Bulletin* 263, 265.

¹⁰¹ Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, Section 5.2.2. and Bostoen (n 100) 282-284.

¹⁰² *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final.

¹⁰³ Recitals 10 and 11 DMA. The legislative context in which the DMA arose and the intended complementarity with competition law is also acknowledged in *Bytedance v Commission* (n 92) para 19.

¹⁰⁴ *Apple* decision (n 40) para 551.

¹⁰⁵ Further analysed below in Chapter 4.2.4.

¹⁰⁶ See also DMA Impact Assessment Report (n 101) para 39.

¹⁰⁷ *Apple* decision (n 40) para 552.

¹⁰⁸ Giorgio Monti, 'Exploitative Abuse -Takeaways from the Apple App Store Practices Decision' (2024) <<https://ssrn.com/abstract=4853304>> 12.



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company's behaviour on the market and its competition assessment,¹⁰⁹ which is also what contributes to the lengthiness of antitrust enforcement as compared to DMA enforcement.

Nevertheless, various voices in the literature have taken the view that the DMA, despite its stated intentions, does not depart significantly from competition law. For instance, Akman argues that the DMA intersects with rather than complements competition law insofar as it represents the *ex-ante* codification of competition law obligations that were, thus far, enforced *ex post*.¹¹⁰ As far as fairness is concerned, it is not a new notion in EU competition law and enforcement, and it is one of the goals that competition law pursues according to certain authors.¹¹¹ Others argue that both fairness and contestability are goals (also) pursued by competition law¹¹² or, to the same end, that the DMA essentially aims at preserving the competitive process and keeping markets open.¹¹³

As will be further elaborated below, in the music sector, platform regulation has the potential and capacity to address the need for transparency and data access to ensure fair remuneration for artists by establishing mechanisms for copyright accountability.¹¹⁴

2.2 The principle of fairness in platform regulation and EU competition law

The EU has increasingly prioritised 'fairness' as a core principle in its policy and regulatory frameworks in the music sector.¹¹⁵ In general, fairness has long been a cornerstone of EU law, embedded in the wording of the EU Treaties' competition law provisions since the Rome Treaties. Yet, ever since the turn to the more economic approach under EU competition law, which places consumer welfare at the core of competition enforcement, the role of a concept of 'fairness' in EU competition law has been cast somewhat to the sidelines. As Lamadrid explains, some academics and practitioners consider this to be welcomed: having fairness as a governing principle in EU competition law would politicise the technocratic area of competition policy in an undesirable way.¹¹⁶ He cautions that this is true in as far as fairness

¹⁰⁹ Ibid.

¹¹⁰ Akman (n 90) 2.

¹¹¹ Konstantinos Stylianou and Marios Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42 Legal Studies 620, 629.

¹¹² For instance, Heike Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal' (2021) ZEuP available at <<https://ssrn.com/abstract=3837341>>; Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 Journal of European Competition Law 542, 544.

¹¹³ Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021); Koenig (n 91) para 23; Schweitzer (n 112) 12.

¹¹⁴ Mazziotti, 'Chapter 11' (n 16).

¹¹⁵ Fair MusE D2.1 Deliverable – Origins, goals, and effects of EU law and policy in the online music sector.

¹¹⁶ Alfonso Lamadrid de Pablo, 'Competition Law as Fairness' (2017) 8(3) Journal of European Competition Law & Practice 147–148.



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considerations might instrumentalise competition law to be used as a weapon against companies simply because they are large in size.

Towards the end of the 2010s, however, the concept of fairness is making an important comeback in competition policy. As scholars such as Marco Colino, and Ducci and Trebilcock, for example, highlight, there has been a perceptible shift in policy and public opinion that competition rules should not only be enforced to foster economic efficiency in markets. The rhetoric of fairness has been used to argue for the inclusion of non-economic policy goals in competition enforcement.¹¹⁷ Competition Commissioner Margrethe Vestager, who shaped EU competition policy significantly in the last decade, is often pinpointed as a core actor in pushing a fairness agenda in EU competition law.¹¹⁸

The inclusion of fairness as a goal of EU competition policy also allows the deployment of various areas of EU law in unison against certain harmful behaviours by corporate actors. It thus acts as a binder across various fields of EU law. As Graef et al point out, for example, fairness underpins the EU's General Data Protection Regulation, consumer law, and competition law.¹¹⁹ Therefore, important synergies can be generated if these three areas of law are enforced by reference to each other. In the area of data protection law, this approach has also been found legitimate by the CJEU in the *Meta* case.¹²⁰ The Court approved the German Federal Cartel Office's (FCO) investigation into whether Meta had complied with the GDPR as a factor in establishing an abuse of dominance under Article 102 TFEU.

Scheurer gives a broad overview of how fairness is a principle to be found in all areas of EU law that govern the digital economy, including EU competition law.¹²¹ He explains how the fairness principle is one of the instruments in EU law that allows the creation of a "normative bridge between law and society", so as to allow the law to adapt to pressing societal issues, and the complex web of state and non-state norms that shape the market order.¹²² This is certainly true for the manifestation and the revival of the concept of fairness in competition law. It can be seen in different areas beyond a new interest in the intersection between competition law and data protection law, such as sustainability, and protection of workers'

¹¹⁷ Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law. The Chinese University University of Hong Kong Faculty of Law Research Paper No. 2018-09; Ducci, F., & Trebilcock, M. (2019). The Revival of Fairness Discourse in Competition Policy. *The Antitrust Bulletin*, 64(1), 79-104.

¹¹⁸ Damien Gerard. 'Foreword' in Damien Gerard, Assimakis Komninos, Denis Waelbroek (eds). *Fairness in EU Competition Policy: Significance and Implications*. Brussels: (Bruylant, 2020), 3; Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications', (2018) 9(4) *Journal of European Competition Law & Practice*, 211–212.

¹¹⁹ Inge Graef, Damian Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) 8(3) *International Data Privacy Law*, 200–223. See also Natali Helberger and others, 'Towards Digital Fairness' (2024) 13 *Journal of European Consumer and Market Law* 1, 24.

¹²⁰ Case C-252/21 *Meta Platforms and Others*, ECLI:EU:C:2023:537.

¹²¹ Stefan Scheuerer, *The Fairness Principle in Competition-Related Economic Law*, GRUR International, Volume 72, Issue 10, October 2023, 919–932, <https://doi.org/10.1093/grurint/ikad081>

¹²² Ibid.



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rights.¹²³ In particular, this latter focus could be relevant for digital music markets, if musicians are seen through the lens of creative workers.

It is important to note that fairness is a complex and evolving concept and, as such, it raises critical conceptual questions about whether and how fairness could be used in competition and regulation for correcting market failures. In the area of competition, Garcés & Colangelo note a shift towards a more assertive defence of equal opportunities and fair outcomes in EU competition policy.¹²⁴

This approach towards a more social market economy in competition law¹²⁵ is consistent with the approach followed by EU policymakers with regard to platform regulation. For example, the 2019 P2B Regulation emphasises procedural fairness in the relationships between platforms and business users.¹²⁶ Moreover, although Bostoen suggests that operational principles such as neutrality, fairness, and freedom should guide platform regulation, he also claims that the specific implementation of these principles is still a matter of debate.¹²⁷ The difficulty of operationalising fairness is further explored by Rutgers and Sauter. They suggest that fairness can be enforced through proportionality (through a balancing exercise) and a duty of care in platform regulation.¹²⁸

One of the core issues in the conceptualisation of fairness in EU digital policy and platform regulation is the asymmetric distribution of bargaining power among stakeholders. The digital music sector, characterised by power and information asymmetry and contractual dependency often skews relationships arising to the detriment of certain parties, particularly content creators who may find themselves at a disadvantage in negotiations with larger platforms.¹²⁹ Therefore, understanding fairness requires an exploration of this relational dynamic, with a view to reestablishing balance where such asymmetry exists.

The DSM Directive became an important step in this direction, with its provisions aimed at increasing transparency and fairness in creative industries, which can contribute to further strengthening the protection of authors and performers in the music sector.¹³⁰ The Directive explicitly addresses the vulnerabilities of authors, recognising the imbalance in bargaining power between individual creators and powerful digital platforms.¹³¹ This imbalance often leads to unfair contractual terms and insufficient remuneration. The Directive aimed at

¹²³ See below, Chapter 3.4.

¹²⁴ Eliana Garcés and Giuseppe Colangelo, 'Markets, Competition, and Fairness in the EU' [2023] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4349587>> accessed 27 May 2024.

¹²⁵ Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84 *The Modern Law Review* 230.

¹²⁶ Busch (n 89).

¹²⁷ Friso Bostoen, 'Neutrality, Fairness or Freedom? Principles for Platform Regulation' (2018) 7 *Internet Policy Review* 1.

¹²⁸ Jacobien Rutgers and Wolf Sauter, 'Promoting Fair Private Governance in the Platform Economy: EU Competition and Contract Law Applied to Standard Terms' (2021) 23 *Cambridge Yearbook of European Legal Studies* 343.

¹²⁹ Helberger and others (n 119).

¹³⁰ Giulia Priora, 'The Principle of Appropriate and Proportionate Remuneration in the CDSM Directive: A Reason for Hope?' (2019) 42 *European Intellectual Property Review* 1.

¹³¹ Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition' (2020) 57(4) *Common Market Law Review* 979, 1004.



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rectifying this by ensuring fair and proportionate remuneration for authors and performers, thereby protecting their economic interests and ensuring they benefit adequately from the digital exploitation of their works.¹³² However, the effectiveness of creators' rights significantly depends on the national implementation of the Directive,¹³³ as well as the effective enforcement of the provisions of platform regulation that address the specific challenges faced by the music sector.

In a platform-dominated music ecosystem, which significantly relies on music recommender systems and personalised user experience, fairness is an issue to tackle not only conceptually but also structurally. For example, altered visibility in music streaming and social media platforms impairs fair remuneration. The presence of popularity bias in these platforms can lead to the favouring of mainstream content over niche items. To mitigate this bias, Salganik proposes a domain-aware, individual fairness-based approach to discover content within large databases.¹³⁴ Similarly, Dinnissen & Bauer underline the need for different fairness considerations for various stakeholders, including users and artists¹³⁵, and further suggest that increasing transparency and control for users could improve artist fairness.¹³⁶ Here is where platform regulation, particularly the recently enacted DSA and DMA, can play a significant role in enhancing a fairer treatment for music creators in the digital music industry.

In the DMA context, the corrective role of fairness has been considered as “the cure for bigness”¹³⁷ in the world of digital services where large gatekeepers can wield significant power over other platforms, business users and end users.

Several behavioural obligations for gatekeepers were introduced by the DMA in Articles 5, 6 and 7 with the aim of achieving more fairness and contestability in digital markets. Among those, explicit mention of fairness is made in Article 6(5) DMA on refraining from favouring the gatekeeper's own services or products, in Article 6(11) DMA on FRAND access to data to rival search engines and in Article 6(12) DMA on FRAND access to application stores,

¹³² Eleonora Rosati, 'Article 18—Principle of Appropriate and Proportionate Remuneration' in Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021).

¹³³ Raquel Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive... = El Principio de Remuneración Adecuada y Proporcionada de Autores y Artistas En El Art.18 Directiva Sobre' [2020] InDret <<https://raco.cat/index.php/InDret/article/view/375587>> accessed 16 May 2024. See also Chapter 4 of Fair MusE D2.2. Deliverable.

¹³⁴ Rebecca Salganik, Fernando Diaz and Golnoosh Farnadi, 'Fairness Through Domain Awareness: Mitigating Popularity Bias For Music Discovery' (arXiv 2023) <<https://arxiv.org/abs/2308.14601>> accessed 7 June 2024.

¹³⁵ 'Fairness in Music Recommender Systems: A Stakeholder-Centered Mini Review' <<https://karlijnd.github.io/publication/2022-07-FairnessinMusicRS>> accessed 7 June 2024.

¹³⁶ Karlijn Dinnissen and Christine Bauer, 'How Control and Transparency for Users Could Improve Artist Fairness in Music Recommender Systems' (ISMIR 2023) <<https://zenodo.org/doi/10.5281/zenodo.10265331>> accessed 7 June 2024.

¹³⁷ Giuseppe Colangelo, 'In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets' (2023) 68 Antitrust Bulletin 618. Bostoen also recognises that the DMA sees platform size as an issue to be addressed by means of contestability-enhancing obligations (n 100) 281.



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search engines and social networking for business users. Interestingly, none of these three provisions is addressed to end users.

Despite its existential significance for the DMA, a definition for ‘fairness’ has not been provided in its text. Yet, the notion of ‘unfairness’ is outlined as a situation where there is “...an imbalance between the rights and obligations of business users and the gatekeeper obtains an advantage from business users that is disproportionate to the service provided...”.¹³⁸ Behind the fairness objective, therefore, the DMA seems to seek the prevention of unequal treatment of business users¹³⁹ and ensure an ‘impartial’ conduct by the gatekeeper towards them. Consequently, and as alluded to above, the focus here seems to be the relationship between gatekeepers and business users and the term fairness seems connected with competition within the platform (‘intra-platform competition’).¹⁴⁰

Besides fairness, the notion - and goal - of ‘contestability’ is of major importance in the DMA. Contestability of CPSs is linked with “...the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services”.¹⁴¹ Aside from raising barriers to entry or expansion in a market where a gatekeeper is present, a gatekeeper’s practice may limit contestability also when it prevents access to a “key input” (Article 12(5)(a) DMA), such as data, for instance. It follows that the notion of contestability connects with inter-platform competition, understood as competition between a gatekeeper and other platforms which are possible CPS gateways.¹⁴²

Although the platform-to-business-user relationship takes centre stage, end users are also said to be benefiting from these goals of the DMA,¹⁴³ with provisions such as Article 6(6) DMA seeking to reduce consumer lock-in effects. Gatekeepers’ obligations and their overall relationship towards consumers, however, are not as prominent in the DMA. Bania describes them as not effectively safeguarding fairness because of the burden placed on the end user¹⁴⁴. She argues that end users granting consent for the processing of their data under Article 5(2) DMA or making a decision to uninstall a gatekeeper’s pre-installed application under Article 6(3) DMA may eventually not function in the fairness-achieving way that the DMA intends. In reality, end users’ actions online do not reflect their privacy concerns (behaviour also known as the ‘privacy-paradox’), they have limited options as to the use of their data or are prompted to agree to the gatekeeper’s preferred choice. Davola and Malgieri also argue in this respect that network effects and consumer lock-in,

¹³⁸ Article 12(5)(b) and Recital 33 DMA.

¹³⁹ See Koenig (n 91) paras 23-24.

¹⁴⁰ Schweitzer (n 112) 9; Bostoen (n 100) 303; Natalia Moreno Bellosso and Nicolas Petit, ‘The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove’ (2023) 48 *European Law Review* 3 15. Monti on the basis of DMA Recital 33, concludes that fairness in the DMA concerns only the platform-to-business relationship (n 108) 13. See also Rupprecht Podszun, ‘The Digital Markets Act: What’s in it for Consumers?’ (2022) 11 *Journal of European Consumer and Market Law* 1 3-4.

¹⁴¹ Recital 32 DMA.

¹⁴² Bostoen (n 100) 303, Bellosso and Petit (n 140) 15.

¹⁴³ DMA Recital 4. See also Koenig (n 91) para 24.

¹⁴⁴ Konstantina Bania, ‘Does the DMA (effectively) protect fairness in platform-to-consumer relations?’ (*The Platform Law Blog*, 7 December 2023) <<https://theplatformlaw.blog/2023/12/07/does-the-dma-effectively-protect-fairness-in-platform-to-consumer-relations/>>.



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characteristics of large platforms, can act as prompts leading end users to act in ways that ultimately benefit the platform.¹⁴⁵

Lastly, fairness and contestability are described as “intertwined”, with certain gatekeeper obligations aiming at addressing fairness, others contestability and others both (Recital 34 DMA). There is no clear categorisation provided by the text of the DMA as to which obligations ultimately serve the fairness goal, the contestability goal or both. Although some attempts to clarify the situation have been made in the literature,¹⁴⁶ some ambiguity still exists, seemingly created either by the text of the DMA itself,¹⁴⁷ and diverging interpretations are noted in the literature as to which goal a particular DMA obligation may protect.¹⁴⁸

2.3 The potential of competition law enforcement in enhancing fairer conditions in EU digital music market(s)

2.3.1 Introduction

As pointed out in the introduction, and similarly to other multi-sided markets, digital music markets are made up of a complex network of a variety of actors: there are music authors like composers and lyricists. Their works are interpreted by performing artists who normally have agreements with record labels over recordings and their distribution. The rights of music authors on the one hand, and performers and producers on the other, can be assigned to collective rights management organisations. Furthermore, the publication and distribution of recorded music now mainly involves digital channels, in particular music streaming platforms and other online intermediaries, like content sharing platforms and social media platforms. Lastly, as the Commission’s *Apple App Store* decision shows, even app stores as basic infrastructures of digital markets influence how competition plays out in digital music markets.

In order to determine whether digital music markets are working well from a competition law perspective, a variety of factors are relevant. First, the level of market concentration. If there are a few dominant players that can shape market outcomes in their favour due to their market power, or if there is consolidation of various players into one dominant player, their conduct can be scrutinised under the prohibition of abuse of dominance under Article 102 TFEU or under merger control.

Traditionally, whether a market player is dominant was determined by market share, which in turn was assessed by defining the relevant market with the help of the so-called SSNIP

¹⁴⁵ Antonio Davola and Gianclaudio Malgieri, ‘Data, Power, and Competition Law: The (Im) possible Mission of the DMA?’ (2023) In Frank Fagan and James Langenfeld (eds), *The Economics and Regulation of Digital Markets* (Emerald Publishing Limited 2023).

¹⁴⁶ See, for instance, Colangelo (n 137) 14, Koenig (n 91) paras 21 and 23.

¹⁴⁷ Colangelo (n 137) 14.

¹⁴⁸ For example Colangelo (n 137) 14 categorises DMA Article 6(12) as protecting fairness whereas in Despoina Mantzari, ‘FRAND in Article 6(12) DMA: A Pragmatic Approach with Unintended Consequences’ [2024] *Journal of Antitrust Enforcement*, Special Issue on the DMA and the DSA (forthcoming) available at <<https://ssrn.com/abstract=4763209>> 2, the same provision promotes both contestability and fairness.



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test.¹⁴⁹ As the EU Commission explains, “[t]he theoretical criterion often used to determine whether the candidate market constitutes a relevant product market is whether a hypothetical monopolist in the candidate market could exercise market power. This question can be assessed by asking whether a hypothetical monopolist in the candidate market would find it profitable to implement a small but significant non-transitory increase in price (‘SSNIP-test’).¹⁵⁰ In essence, the test involves an analysis of cross-price elasticities. For some players in digital music markets, for example record labels, such an analysis is still useful to determine whether and which actors are dominant. The concept of dominance in digital markets is shifting, however, since the power of dominant firms to influence prices does not neatly map onto markets in which platforms simultaneously serve different user groups, some of which do not pay for services in monetary terms.¹⁵¹ Whether a platform like Spotify, Deezer or Apple Music is dominant thus requires a different form of inquiry, like how large their user base is.¹⁵² The question of whether there is any form of abuse of dominance in digital music markets thus requires a look at competition enforcement against other online platforms in order to understand how the dominance concept is made operational in digital markets.

Secondly, the contractual practices between various players, i.e. artists and labels, labels and platforms, CMO’s collective agreements and their agreements with platforms are relevant in order to determine whether intervention under competition law might be warranted. Under certain circumstances, contractual clauses can be found to be anti-competitive under Article 101 TFEU. This will be the case, for example, for so-called hardcore restrictions, like price-fixing among competitors. In case a contractual practice involves a dominant undertaking, it can be held liable both under Article 101 and 102 TFEU, e.g. when a dominant player discriminates between various smaller contractual parties in their contractual terms and conditions. This form of discriminatory treatment as a violation of competition rules has gained importance in the area of competition enforcement since the *Google Shopping* case.¹⁵³

2.3.2 Literature on the role of competition law in the digital music sector

Competition law essentially aims at safeguarding the completeness and fairness of competitive processes.¹⁵⁴ The market for digital music entails a significant complexity in this regard. The music industry, with its multi-layered distribution chain, is characterised by an inherent consolidation throughout the various levels of recorded music, publishing, live music and music consumption - mainly via music streaming platforms, at present.¹⁵⁵

¹⁴⁹ See Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645).

¹⁵⁰ Ibid, 29.

¹⁵¹ Ibid, 30.

¹⁵² See e.g. the *Google Shopping* decision (n 102) where the number of monthly users of Google Search was used as an indicator for Google’s dominance in the search engine market.

¹⁵³ See the Commission Decision (n 102) and judgment by the General Court (n 71).

¹⁵⁴ John T. Cross & Peter K. Yu, ‘Competition Law and Copyright Misuse’ (2008) 56 Drake L Rev 427; Colangelo (n 137).

¹⁵⁵ Friso Bostoen & Jozefien Vanherpe, ‘Competition Law in the Digitized Music Industry: The Winners Take It All — But Should They?’ (2021) CPI Antitrust Chronicle 30, 31-32.



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Consequently, the existence of competition law oversight in the market for digital music is rather crucial. Yet, challenges arise concerning the application of competition rules in the market for digital music, as they are required to delicately balance between often-conflicting rights and interests of the market's stakeholders, primarily music creators and digital music platforms.¹⁵⁶

The relationship between competition law and copyright law and the role of competition law in curtailing misuse of rights in copyrighted works (including musical works) has long been studied. Cross & Yu have listed four primary cases of abuse of copyright rights: '(1) the use of copyright to exact concessions from the licensee; (2) restriction of the licensee's ability to deal with the copyright owner's competitors; (3) dealings that limit another's ability to compete; and (4) the anticompetitive use of the judicial system.'¹⁵⁷ The second and third cases are of particular relevance in the context of digital music, as ongoing market practices - either from the side of the digital music platforms or certain rightholders - potentially resonate with these described cases.

Due to the aforementioned structure of the music industry, buyer power on one level could lead to power on another. A prominent example is the high aggregated market share of the three international major record labels (namely Warner, Sony Music and Universal). All three own publishing departments and usually oblige the rightholders they contract with to engage in both distribution and publishing contracts.¹⁵⁸ This common phenomenon illustrates the potential of anticompetitive practices, such as abuse of acquired market power, to occur on different levels of the market's distribution chain, and amongst various stakeholders.

The European Commission generally has two sets of competition law-based enforcement mechanisms it can use to assess anticompetitive or potentially anticompetitive practices: merger control regulation to assess mergers and acquisitions *ex-ante*, i.e., before they take place; and *ex-post* review of anticompetitive practices in retrospect.¹⁵⁹ When it comes to concentrations in the market for digital music, these have an inherent risk of strengthening the power of the most popular music creators and negatively impacting independent artists and the promotion of cultural diversity.¹⁶⁰ In the past two decades, the Commission has assessed several mergers and acquisitions in the market.¹⁶¹ However, neither of these cases resulted in any significant intervention. By way of adopting measures to address the concerns raised by the Commission in those cases, the mergers in the industry were eventually cleared, despite these concerns and the resulting significant consolidation within the market.

In comparison with merger control, assessing anticompetitive practices with *ex-post* mechanisms is considered more complicated, prominently since it requires meeting a higher

¹⁵⁶ Iaia, 'The remodeled intersection' (n 62) 174-75.

¹⁵⁷ Cross & Yu (n 154) 434.

¹⁵⁸ Bostoen & Vanherpe (n 155) 31.

¹⁵⁹ Podszun, 'From Competition Law to Platform Regulation' (n 98) 7-8.

¹⁶⁰ Bostoen & Vanherpe (n 155) 33.

¹⁶¹ See, for instance: 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; Universal Music Group/EMI Music (Case COMP/M.6458) Commission Decision [2012] OJ C220/15.



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standard of proof.¹⁶² Scholars and stakeholders in the industry alike have highlighted several common practices in the digital music market that have risks of anticompetitive effects.

The digitisation of the music market, and particularly the current dominance of streaming platforms as the main medium through which music is consumed, has provided consumers with access to a larger and more diverse music catalogue than ever before.¹⁶³ However, quite similarly to the situation that existed in the offline world, the vast majority of the benefits of music streaming are enjoyed by a limited number of the market's stakeholders.¹⁶⁴ The 2022 Report on music streaming markets by the UK Competition & Markets Authority (CMA) highlights the tendencies of the majority of consumers to prefer listening to a relatively marginal class of artists, as well as the uncertainty concerning the likelihood of becoming successful in this highly competitive market, as market features that lead to this phenomenon.¹⁶⁵

The CMA report from 2022 is one of the most comprehensive studies of digital music markets undertaken in recent years by competition enforcers. It is the only study conducted by a competition enforcer to date in the market for music streaming. Given that the structure of digital music markets in the UK is comparable to that of other national and cross-border digital music markets, it has important informational value for other competition law jurisdictions, too.

The CMA study came to the overall conclusion that there might be limited potential for competition intervention to improve outcomes in digital music markets. Yet, the CMA found that it would be more appropriate for the government and policymakers to assess whether the current distribution of revenues in the sector is fair and appropriate, in particular under copyright law. This passing of the ball to another court by the CMA does not solve current problems, however, as copyright law is currently not able to address these concerns.¹⁶⁶

At the same time, however, the CMA acknowledged that the lack of transparency for artists and the limitations of access to data through non-disclosure agreements (NDAs) between majors and streaming platforms poses a problem. Yet again, the CMA finds that this problem is not to be addressed under competition law but as a contractual problem in need of regulation from another field, like copyright law.

The CMA acknowledges that there may be some problematic clauses in music licensing agreements between streaming platforms and majors. These include agreements containing non-discrimination clauses, which hindered music streaming providers from

¹⁶² Cf Marilena Filippelli, *Collective Dominance and Collusion: Parallelism in EU and US competition law* (Edward Elgar 2013) 113.

¹⁶³ Legrand Network, 'Study on the Place and Role of Authors and Composers in the European Music Streaming Market' (September 2022) <<https://authorsocieties.eu/content/uploads/2022/09/music-streaming-study-28-9-2022.pdf>> accessed 21 February 2025, 7, 10.

¹⁶⁴ Bostoen & Vanherpe (n 155) 31.

¹⁶⁵ CMA (2022) (n 6).

¹⁶⁶ See above in the Introduction Chapter 1.1.



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favouring music content based on price, e.g. by giving more prominence to music licensed under cheaper terms.

Despite the hands-off conclusion by the CMA, there could arguably be further anti-competitive practices in digital music markets. A prominent example of a practice with potential anticompetitive effects is the use of playlists in music streaming platforms like Apple Music, Deezer and Spotify. It arguably contributes to the market power of the majors (and its potential abuse) significantly. The reason is that it provides them with leverage for their existing catalogues, given their marketing budget and influence - resembling practices that are presently recognised as anti-competitive, e.g., payola schemes.¹⁶⁷ Together with the lack of transparency regarding the functioning of recommendation algorithms in the music streaming platforms and how certain playlists are curated, this may also create an exclusionary effect on certain groups of artists, particularly those with niche repertoires.¹⁶⁸

Additional potential economic effects of the abuse of buyer power include a limitation of the input to reduce prices below the competitive level (inefficient allocation) and extraction of surplus of supply.¹⁶⁹ Consequently, one would expect that such practices in the digital music market are assessed and addressed - should there be indications for anticompetitive behaviour. However, the Commission has assessed but not yet found an abuse of buyer power in this context, including in the form of collective buyer power. Bostoen and Vanherpe highlight that reaching such findings of an abuse of a buyer power at the *ex-post* stage would also mean that the Commission had erred when it cleared the mergers based on an assumption of lack of harm to consumers.¹⁷⁰

A recent application of this approach in the context of online music streaming platforms is the decision of the EU Commission in the *Apple* case. In this decision, the Commission's investigation found that Apple has restricted competing music streaming services through its AppStore platform by way of imposing anti-steering provisions.¹⁷¹ That is, competing app developers were obliged, among other things, not to inform end users about purchase possibilities outside Apple's AppStore. These practices, which have been in place for over a decade, were found to breach Article 102(a) TFEU. The Commission stressed that Apple's practices may have led to higher subscription fees amongst users of the competing music streaming services.

Despite the specific circumstances of the case, and in particular Apple's market position in both the market for online application stores and the online music streaming market, the Apple decision potentially hints to a shift in the Commission's approach regarding the online music platform market. In previous decisions, e.g., the Sony/BMG case, the Commission held that online music platforms have a countervailing buyer power vis-a-vis the majors. However, the circumstances have changed since that decision was issued. Music streaming platforms have become the dominant formats for consuming digital music. Moreover, in the past, with the dominance of iTunes as a digital music platform, the position of the

¹⁶⁷ Bostoen & Vanherpe (n 155) 32.

¹⁶⁸ Ibid 33; Legrand Network (2022) (n 163) 23.

¹⁶⁹ Victoria Daskalova, *The monopsony paradox: Buyer Power and enforcement of the EU antitrust provisions* (Tilburg University 2016) 64-65.

¹⁷⁰ Bostoen & Vanherpe (n 155) 34.

¹⁷¹ Apple Decision (n 40), para 1028.



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Commission was that there is no risk of collective buyer power. This is not necessarily the case at present, given that multiple music streaming platforms are in place, and rightholders wish to be present in as many platforms to maximise their exposure and revenues.

Moreover, rightholders and other market stakeholders have highlighted various practices by the platforms that are detrimental to their discoverability and visibility on the platforms. These include a lack of transparency regarding various tools the platforms employ (e.g., recommendation algorithms and content-identification mechanisms), which potentially enables platforms to favour certain content at the expense of other rightholders.¹⁷² Hence, the case may be an indication for a different approach of the Commission regarding the market power of music streaming platforms, and further competition law intervention in the music streaming market in the future.

2.3.3 The potential of competition law in addressing existing barriers to data access and transparency for rightholders under Article 19 of the DSM Directive

The previous sub-chapter highlighted the unique structure of the digital music sector, with its multiple layers and groups of stakeholders. It further listed potential cases and behaviours that can be addressed with competition law enforcement mechanisms. When it comes to practices of online music platforms that may result in discriminatory or other anti-competitive effects towards certain rightholders, transparency is a key to identifying and addressing such practices. Here, competition law may be used to increase data flow from online music platforms to rightholders, to fulfil the purpose of Article 19 to allow rightholders to comprehend the commercial value of their rights.¹⁷³

It is particularly important, considering the above-mentioned inherent power imbalances between music platforms that generate and compile the data, and rightholders, who provide the content to those platforms.¹⁷⁴ There is a growing body of case law that details the principles under which competition law can be used to address cases of withholding of essential data, by way of assessing whether it constitutes an abuse of a dominant position by an undertaking under Article 102 TFEU.¹⁷⁵ Specific cases that involve online music platforms and rightholders have not yet been brought by competition enforcers or have been challenged before the courts, and are understudied in the literature. However, there are

¹⁷² European Composer and Songwriter Alliance, *Response to the Public Consultation on the Digital Services Act* (8 September 2020)

<<https://composeralliance.org/media/62-ecsa.responsetothepublicconsultationonthedsa.final.08.09.2020.pdf>> p. 5; Legrand Network (n 163) 34-35.

¹⁷³ Giuseppe Colangelo, 'Enforcing copyright through antitrust? The strange case of news publishers against digital platforms' (2021) *Journal of Antitrust Enforcement* 1, 3.

¹⁷⁴ Cf Iaia, 'The remodeled intersection' (n 62) 177.

¹⁷⁵ See, for instance, Case C-241/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, EU:C:1995:98; Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569; Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health*, EU:C:2004:257.



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some guiding principles and hurdles that should be considered in the assessment of such cases.

Firstly, since such cases are classified as an abuse of a dominant position, it must be established that an undertaking is indeed dominant in the relevant market. The characteristics of the digital economy have often made it difficult to reach such findings by using the traditional economic approach competition law, focusing on price-based tests.¹⁷⁶ Many online music platforms, like Spotify and YouTube, offer, apart from subscription-based plans, the possibility of consuming music for “free” and receiving advertisements instead. This is a prominent example of cases in which the traditional tests are difficult to apply.

The Commission recently addressed this difficulty in its new Notice on the definition of the relevant market, listing alternative tests that can be employed for the assessment of market definition.¹⁷⁷ However, even such alternative tests, when applied to the current structure of the music sector, as detailed above, may result in a conclusion of lack of dominance amongst most (if not all) of the online music platforms.¹⁷⁸ Monti highlights that the recent *Apple* decision shows that, in a market involving ecosystems (which arguably applies to many digital music platforms), a “holistic” analysis is necessary, in order to fully understand how the market functions and assess the market practices accordingly.¹⁷⁹

Even when market dominance is established, establishing that withholding data from rightholders counts as abuse by a platform is yet another obstacle to overcome. Under the essential facilities doctrine, a determining factor for establishing an abuse is that the required data is indispensable.¹⁸⁰ The older case law detailed above poses a restrictive approach to this condition, depending on the specific kind(s) of required data.¹⁸¹ However, more recent developments in the enforcement practices of the EU Commission, as well as those of national competition authorities, may indicate that a new - and rather more relaxed - standard is being developed to establish indispensability. In particular, the recent *Google Shopping* decision, which was upheld by the General Court arguably provides such an indication. The case concerned a case of self-preferencing in which Google was found to be abusing its dominant position in the market for Internet Search by placing its own shopping services in the search window design in a more favourable way than those of other shopping-comparison sites. The General Court framed Google’s abuse as an abuse based on discrimination.¹⁸²

Yet another obstacle is the need to prove a potential harm for consumers. The recent *Apple* case may provide some important guidance here as well. The Commission acknowledged in the *Apple* decision that in the music streaming market, conducts taking place in the P2B

¹⁷⁶ Podszun, ‘From Competition Law to Platform Regulation’ (n 98) 3-4.

¹⁷⁷ EU Commission Notice on the Definition of the Relevant Market (C/2024/1645), para. 98 (‘Commission Notice’).

¹⁷⁸ CMA (2022) (n 6) 18.

¹⁷⁹ Monti (n 108).

¹⁸⁰ Inge Graef, ‘Rethinking the Essential Facilities Doctrine for the EU Digital Economy’ (2019) 53 RJT ns 33, 41-43.

¹⁸¹ Ibid.

¹⁸² Friso Bostoen. The General Court’s Google Shopping Judgment Finetuning the Legal Qualifications and Tests for Platform Abuse. (2022) JECLAP 13(2), 75-86.



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side may lead to harm for consumers. The conduct there was concealing of access to information to reach consumers. However, these could be other kinds of conduct, potentially including withholding of data that should be provided under Article 19 DSM Directive. The Commission further held that even nuances in the ways of providing information by platforms may have an impact on costs, and thus harm consumers.¹⁸³

2.3.4 Fostering fairness for performers and artists through labour antitrust

The field of labour antitrust is emerging as a significant trend, both academically and in the enforcement practice of national competition authorities in the EU as well as in the US.¹⁸⁴ One of the core discussions is how far the prohibition of anticompetitive agreements might stand in the way of legitimate collective bargaining efforts by self-employed. This discussion is relevant for authors and performers who will regularly be self-employed.

A potential way to promote a more balanced bargaining power for rightholders vis-a-vis the digital music platform would precisely be collective bargaining. This could lead to an improvement of the conditions of rightholders, by setting minimum remuneration rates, standard agreements with predetermined terms, etc.¹⁸⁵ However, here competition law poses a major challenge. Collective bargaining between self-employed, who would qualify as “undertakings”, is generally prohibited under Article 101 TFEU. The existing case law of various national courts, as well as of the CJEU, has determined that self-employed authors fall under the definition of “undertakings”. Accordingly, collective negotiations on financial terms are usually considered as “price fixing” that could harm competition.¹⁸⁶ However, in cases where the parties to the collective negotiations are classified as workers, rather than freelancers, Art 101 TFEU may not apply to them. Such was the result in the *FMV Kiem* case of the CJEU, in which freelance orchestra players were classified by the court as workers, or ‘false self-employed’ and were thus able to negotiate their terms collectively.¹⁸⁷ In 2022, the European Commission issued guidelines on the application of competition law to collective bargaining of solo self-employed.¹⁸⁸ The guidelines highlight that the legislation of the EU recognises cases in which there may be a reliance of authors on collective

¹⁸³ *Apple* decision (n 40) para. 789.

¹⁸⁴ See, e.g. Maria Jose Schmidt-Kessen and Max Huffmann ‘The Interaction of Competition and Labour Law with a Focus on the Gig Economy’ in Parcu, P.L., Rossi, M.A., & Botta, M. (eds). *Research Handbook on Competition & Technology* (Elgar, 2025).Ch. 19; Max Huffmann and Maria Jose Schmidt-Kessen, ‘Non-Competes and No-Poach Agreements in Labour Market Antitrust’ in Sofia Pais et al (eds.) *Encyclopedia of Competition Law* (Elgar, forthcoming).

¹⁸⁵ This is also foreseen in the DSM Directive, see Recital 73 and Article 18 (2).

¹⁸⁶ Charalampos Stylogiannis, ‘The Effective Application of the Right to Collective Bargaining for Self-Employed (Platform) Workers: ‘Not such an easy task” (2023) 14(4) *European Labour L J* 494, 496. It should be noted that there may be cases in which collective negotiations are not to determine the remuneration rates of rightholders, and are thus not subjected to the scrutiny of art 101 TFEU. For example, in France, there have been initiatives led by the French Government concerning the digital exploitation of books and fair distribution of music streaming revenues. See Séverine Dusollier, ‘EU contractual protection of creators: blind spots and shortcomings’ (2018) 41 *Columbia J L & the Arts* 435, 443

¹⁸⁷ Case C-413/13 *FNV Kunsten Informatie en Media v. Staat der Nederlanden* EU:C:2014:2411

¹⁸⁸ Communication from the Commission, 30 September 2022 OJ C 374/2 (The Guidelines).



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bargaining, as an attempt to correct bargaining imbalances with powerful counterparties.¹⁸⁹ A prominent example which is specified in the guidelines is the principle that authors and performers are entitled to appropriate and proportionate remuneration when they transfer or grant licenses in their exclusive rights, as set under Article 18 DSM Directive.

The guidelines specify conditions under which, when met, collective agreements will not be considered prohibited under Article 101 TFEU. This includes the services of performers in cases similar to those of *FMV Kiem*, i.e., when they are freelancers who work side by side with employed persons. In addition, the guidelines specify cases in which there would be no priority in enforcement. That includes cases in which the counterparty has monopsony or buyer power.¹⁹⁰ Another case is when collective bargaining is industry-wide mandated by national legislation. Höpner criticises this provision since competition law usually gives the highest priority in enforcement to cases that have an industry-wide application. It is being enforced when these are collective agreements of labour unions, for instance.¹⁹¹

Another criticism by Höpner is that instead of choosing the lower enforcement priority route, the Commission could have declared waiver of fines or adopted a block exemption regulation, which would contribute to the prevention of a chilling effect among parties with lower negotiation power.¹⁹²

One can think of several reasons to apply the guidelines to collective bargaining of economically independent freelance musicians versus digital music platforms (both streaming platforms and user-generated content platforms). Musicians are often dependent on their heterogeneous intellectual performance for their success.¹⁹³ In addition, many musicians use their influence on social media platforms, such as Instagram, TikTok and YouTube, as a means to monetise from content they share with their followers (e.g., photos, videos, etc.). Their revenues are thus very sensitive to the platforms' terms and conditions, as well as changes in the platforms' business models.¹⁹⁴ However, the application of the Commission's guidelines in those cases is uncertain. It should be noted that Dusollier highlighted the possibility of using collective bargaining as a tool to ensure the fulfilment of licensees' obligations under the DSM Directive, including the transparency obligations of Article 19.¹⁹⁵ This is one potential case in which, as long as the conditions for prohibited

¹⁸⁹ Ibid, para 37-38.

¹⁹⁰ The guidelines offer a threshold for a presumption of monopsony power which is a turnover of more than 2 million euros or above 10 employees.

¹⁹¹ Thomas Höpner, 'Collective Copyright Licensing and the Ban on Cartels for the Solo Self-Employed' (2023) SSRN (Original: AfP 1&2/2023 (Kollektives Urhebervertragsrecht und das Kartellverbot für Solo-Selbständige) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4380497> 23.

¹⁹² Ibid 27.

¹⁹³ Ibid 28.

¹⁹⁴ Aurelija Lukoseviciene, 'Protection of platform authors in the context of the EU DSM Directive: The invisible "Gig Authorship"?' (2023) 3-4.

¹⁹⁵ Dusollier (n 131) 1024.



conducts under Article 101 TFEU are not created, rightholders may operate jointly to promote fairer conditions in their contractual relationship with online music platforms.¹⁹⁶

2.4 The potential of platform regulation in enhancing fairer conditions in EU digital music market(s)

Platforms' dominance often comes with several challenges that threaten fair market conditions, particularly in terms of competition, transparency, and the fair treatment of authors, performers, and other rightholders. The EU has put significant efforts in addressing these concerns through a series of regulatory frameworks aimed at curbing anti-competitive behaviour and ensuring more equitable conditions for businesses and consumers alike. The Platform-to-Business (P2B) Regulation laid the foundation for the EU's broader regulatory efforts in this space, specifically targeting online platforms and their relationships with business users. Later, and with a broader purpose, the Digital Markets Act (DMA) and the Digital Services Act (DSA) are set to become key rulebooks of this regulatory landscape in a complementary manner.¹⁹⁷ These rules aim to address power imbalances, ensuring fairer conditions for digital services (for individual and business users). Below we explore how these rules contribute to operationalising the right to fair remuneration as outlined in the DSM Directive.

The P2B Regulation, enacted in 2020, represents the first significant effort to address the power asymmetries between online platforms and business users. This regulation was designed to ensure greater transparency, fairness, and predictability in the relationship between platforms and businesses that rely on them to access consumers. One of the central provisions of the P2B Regulation is the requirement for platforms to provide clear terms and conditions that outline how they operate, including details on ranking, visibility, and monetisation practices (Article 5). Arguably, this can help to curb certain dynamics that can be seen, for instance, in Spotify's controversial payment model, which has faced widespread criticism for its low payout to artists, particularly independent musicians.¹⁹⁸ The platform's reliance on algorithms to determine which music is promoted or placed on popular playlists has often resulted in unfair visibility and revenue distribution, where larger labels with more market power receive the majority of the profits.¹⁹⁹ Under the P2B Regulation, smaller businesses, including independent musicians, can demand clearer terms of service from platforms, pushing for a more equitable division of revenues. While the regulation does not directly address payment structures, its requirement for transparency in business practices lays the foundation for addressing these issues. The regulation also prohibits unfair practices such as self-preferencing—where platforms prioritise their own services over those of competitors. As seen above, in the context of digital music, this could mean platforms giving preferential treatment to their own music services (e.g., Apple Music on the App Store) over competitors like Spotify, thereby limiting access to potential consumers for third-party services. The P2B Regulation, by forcing platforms to disclose and justify such

¹⁹⁶ On this point see also Bostoen and Vanherpe (n. 155).

¹⁹⁷ Oles Andriychuk, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition' (2021) 44 World Competition 3, 261.

¹⁹⁸ Marshall (n 34).

¹⁹⁹ *ibid.*



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actions, could help mitigate the adverse effects of these practices on competition and remuneration for rightholders.

Following the P2B Regulation, the DSA, adopted in 2022, takes a broader approach to regulating digital platforms, with a focus on ensuring safe online spaces, accountability, and protecting consumers and business users from harm.²⁰⁰ The DSA can be particularly relevant for the music industry, as it imposes significant obligations on Very Large Online Platforms (VLOPs) such as YouTube, which have become central to the distribution of digital music. For example, despite YouTube's efforts to address copyright infringement through its Content ID system, some argue that the platform has not done enough to combat the spread of unauthorised uploads. Under the DSA, platforms are required to take stronger measures to remove illegal content more swiftly and be more transparent in their actions.²⁰¹ This could directly benefit music creators by ensuring that their intellectual property is better protected from unauthorised use, a key concern for authors and performers seeking fair compensation for their work.

At the same time, the DSA introduces new rules around algorithmic transparency, forcing platforms to disclose how their algorithms operate, particularly how content is promoted or demoted. By requiring platforms to be more transparent about how these algorithms work, the DSA could provide rightholders with more insight into how their content is distributed, potentially offering them more control and visibility. For example, independent artists on platforms like Spotify have long complained that algorithmic-driven playlists favour popular music, which leaves niche or emerging artists with limited opportunities to be heard.²⁰² By shedding light on these opaque practices, the DSA could allow for a more equitable distribution of opportunities for visibility and monetisation, enabling fairer conditions for music creators.

While the DSA tackles issues related to content moderation and transparency, the DMA, which came into force in 2022, focuses specifically on regulating the dominant digital platforms, or 'gatekeepers', that wield significant control over access to the digital marketplace. Platforms with relevant power to dictate the terms of access to both consumers and creators, such as YouTube, are identified as gatekeepers in the digital music industry. The DMA aims to curb anti-competitive practices that harm stakeholders ranging from smaller competitors to end users and undermine fairness in digital markets. One of its most critical provisions is the prohibition of self-preferencing, where gatekeepers are banned from favouring their own services (e.g., prioritising their own music offerings over those of competitors). Additionally, the DMA mandates that platforms provide third-party apps with effective access to the gatekeeper's operating system, ensuring that music services have the ability to compete on more equal terms. An example of the DMA's potential impact in the digital music sector can be seen in the European Commission's investigations into Apple's AppStore practices which have recently drawn significant attention. Apple has been under scrutiny for imposing anti-steering terms and charging high commissions on third party

²⁰⁰ Husovec (n 52).

²⁰¹ Andrew Chu and others, 'Behind the Tube: Exploitative Monetization of Content on {YouTube}' (2022) <<https://www.usenix.org/conference/usenixsecurity22/presentation/chu>> accessed 22 October 2024.

²⁰² Ignacio Siles and others, 'Folk Theories of Algorithmic Recommendations on Spotify: Enacting Data Assemblages in the Global South' (2020) 7 Big Data & Society 2053951720923377; Maria Eriksson and others, *Spotify Teardown: Inside the Black Box of Streaming Music* (MIT Press 2019).



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app sales and subscriptions and app installations, including on music services like Spotify.²⁰³ By addressing these practices, the DMA can help ensure that independent music services can compete more effectively, with fairer access and more equitable terms of service and redistribute earnings among rightholders.²⁰⁴

2.4.1 The Digital Services Act (DSA) - towards greater transparency and data accessibility

Access to data is crucial for ensuring fair remuneration and transparency for rightholders. This is particularly important in two-sided environments, where platforms mediate between the users (demand side) and the labels or artists (supply side). Recent research is trying to fill the gap in the understanding of how fairness is considered in the context of algorithmic recommendations embedded in platforms that significantly impact music consumption.²⁰⁵ However, although there has been research into fairness from both the user and artist perspectives in the music industry, empirical studies that directly consult artists are relatively scarce, with some exceptions.²⁰⁶

Existing empirical research in this area highlights the importance of transparency in music recommender systems, considering both users and artists perspectives. For example, Dinnissen and Bauer have shown that increasing transparency and control for users can also improve fairness for artists by providing more equitable exposure and opportunities.²⁰⁷ According to their research based on interviews with stakeholders, artists demand greater user control over recommendation processes, expecting platforms to actively promote music diversity and mitigate biases that favour already popular tracks.²⁰⁸ They also highlight that concerns about gender fairness and popularity bias are prevalent, which indicates systemic issues in current recommendation algorithms that need addressing to ensure equitable representation.²⁰⁹ Additionally, further empirical research based on user interviews by Somboli et al reveal the need for features that enhance understanding and trust in fairness-

²⁰³ European Commission Press Release IP/24/3433, 'Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act' 24 June 2024 <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433>.

²⁰⁴ Interview with a music industry stakeholder.

²⁰⁵ Karlijn Dinnissen, 'Improving Fairness and Transparency for Artists in Music Recommender Systems', *Proceedings of the 45th International ACM SIGIR Conference on Research and Development in Information Retrieval* (ACM 2022) <<https://dl.acm.org/doi/10.1145/3477495.3531681>> accessed 15 July 2024; Karlijn Dinnissen, 'Fairness and Transparency in Music Recommender Systems: Improvements for Artists', *Proceedings of the 18th ACM Conference on Recommender Systems* (Association for Computing Machinery 2024) <<https://dl.acm.org/doi/10.1145/3640457.3688024>> accessed 21 October 2024.

²⁰⁶ Karlijn Dinnissen and Christine Bauer (n 136); *ibid*; Karlijn Dinnissen and Christine Bauer, 'Fairness in Music Recommender Systems: A Stakeholder-Centered Mini Review' (2022) 5 *Frontiers in Big Data* <<https://www.frontiersin.org/journals/big-data/articles/10.3389/fdata.2022.913608/full>> accessed 15 July 2024; Andres Ferraro, Xavier Serra and Christine Bauer, 'What Is Fair? Exploring the Artists' Perspective on the Fairness of Music Streaming Platforms' (arXiv, 4 June 2021) <<http://arxiv.org/abs/2106.02415>> accessed 11 July 2024; Eva Zangerle and Christine Bauer, 'Evaluating Recommender Systems: Survey and Framework' (2022) 55 *ACM Comput. Surv.* 170:1.

²⁰⁷ Karlijn Dinnissen and Christine Bauer 2023 (n 136).

²⁰⁸ Karlijn Dinnissen and Christine Bauer 2022 (n206).

²⁰⁹ *Ibid*.



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aware recommender systems.²¹⁰ In particular, they suggest that transparency in recommender systems should serve as a means of educating users, especially for fairness-aware systems where the objectives of recommendation algorithms are often unknown or misunderstood.²¹¹ In line with this, Ferraro et al found that artists emphasise the importance of fair representation, transparency, and addressing biases in streaming platforms.²¹² Accordingly, they advocate for mechanisms that address inherent biases and ensure that a diverse range of music is promoted.²¹³

Beyond transparency for awareness (users) and visibility (artists/creators), Verifi Media's White paper on music rights, data and collaboration highlights the importance of data collaboration in the music industry and stresses the need for platforms to share data transparently.²¹⁴ Transparency allows artists to make informed decisions about their work and ensures they receive fair compensation.²¹⁵ In this regard, it has been argued that the DSA establishes a global transparency regime,²¹⁶ which is expected to be critical for allowing authors and performers to understand how their work is used *and* monetised across platforms.

The above is in line with the position of the European Parliament on the music streaming market. The Parliament stresses the need to ensure that music streaming platforms 'continue their efforts to increase overall transparency and traceability on many operational aspects of high relevance to authors, performers and other rights holders' while respecting trade secrets of their algorithms and recommender tools.²¹⁷

However, despite the existing attempts to increase transparency, its actual meaning and how effective information duties are in practice, particularly in the context of platform governance and platform regulation, are difficult to ascertain. To begin with, the definition of transparency involves complex power dynamics and conflicting interests.²¹⁸ The literature has already emphasised the importance of transparency in online platforms and the challenges in balancing creator rights, user experiences, and platform obligations in the digital age. Still, while transparency is widely acknowledged as essential for maintaining

²¹⁰ Nasim Sonboli and others, 'Fairness and Transparency in Recommendation: The Users' Perspective', *Proceedings of the 29th ACM Conference on User Modeling, Adaptation and Personalization* (2021) <<http://arxiv.org/abs/2103.08786>> accessed 8 July 2024.

²¹¹ Ibid.

²¹² Ferraro, Serra and Bauer (n 206).

²¹³ Ibid.

²¹⁴ Verifi Media, Music rights and data collaboration. The key to the next level of revenue in the music industry (September 2023)

<<https://static1.squarespace.com/static/5ff6e081512cb41da450d998/t/652965dbd246a7460066bd0a/1697211879341/MusicRightsAndDataCollaborationWhitePaper.pdf>> accessed 5 July 2024.

²¹⁵ Mazziotti (n 29).

²¹⁶ Natali Helberger and Pamela Samuelson, 'The Digital Services Act as a Global Transparency Regime' [2024] *Verfassungsblog* <<https://verfassungsblog.de/the-digital-services-act-as-a-global-transparency-regime/>> accessed 7 June 2024.

²¹⁷ European Parliament (n 19).

²¹⁸ Robert Gorwa and Timothy Garton Ash, 'Democratic Transparency in the Platform Society' in Joshua A Tucker and Nathaniel Persily (eds), *Social Media and Democracy* (Cambridge University Press 2020); Tarleton Gillespie, 'The Politics of "Platforms"' (2008) 12 *New media & society* 347.



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legitimacy in platform governance, scholars increasingly argue that it alone is insufficient. Accordingly, a comprehensive regulatory approach must accompany transparency measures to address the complexities of platform operations and power dynamics.²¹⁹

Below, we highlight how the literature interprets transparency across various aspects of the music industry within the platform economy, namely i) transparency of algorithmic recommendations, ii) transparency in the exploitation of the data, and iii) transparency of contracts between platforms and rightholders.

2.4.1.1 Transparency of algorithmic recommender systems

The opacity of algorithmic recommendations is a critical issue in platform governance. Platforms like YouTube, Spotify, or TikTok exercise considerable influence over the visibility of content through recommendation algorithms, but how these algorithms operate remains largely hidden from public scrutiny.²²⁰ Thus, while internally, platforms may use sophisticated data analytics and machine learning to monitor and manage user behaviour, externally they reveal only what is strategically necessary for the purposes of regulatory compliance. What occurs at the level of platform operations remains a 'black box', where platforms maintain internal openness to data but external opacity to users and regulators.²²¹ Some researchers propose tiered transparency systems that offer different levels of disclosure to various stakeholders, including regulators, creators, and the general public.²²² Such systems are designed to ensure that sensitive platform information remains protected while still offering meaningful insights into how decisions are made. In this regard, Geng advocates for *outcome-focused transparency*, which aligns transparency efforts with specific behavioural goals, such as promoting diversity in recommendations or reducing misinformation.²²³ Similarly, these approaches can benefit authors and performers.

Despite these efforts to disclose platforms' internal mechanisms, transparency alone may be insufficient to address the broader concerns about fairness and accountability in algorithmic governance. Zornetta and Mirghaderi et al stress the need for transparency in algorithmic processes, content moderation, and digital advertising, given their far-reaching implications for public discourse and democratic governance, which can arguably be

²¹⁹ Rolf H Weber, 'Transparency on Digital Platforms' [2023] Jusletter-IT <https://jusletter-it.weblaw.ch/issues/2023/31-August-2023/transparency-on-digi_6126cff349.html> accessed 21 September 2024; Mark MacCarthy, 'Transparency Requirements for Digital Social Media Platforms: Recommendations for Policy Makers and Industry', *SSRN Electronic Journal* (2020) <<https://www.ssrn.com/abstract=3615726>> accessed 21 September 2024.

²²⁰ Tarleton Gillespie, 'Custodians of the Internet' (Yale University Press, 2018).

²²¹ Pasquale (n 85).

²²² Yinuo Geng, 'Transparency for What Purpose?: Designing Outcomes-Focused Transparency Tactics for Digital Platforms' (2024) 16 Policy & Internet 83.

²²³ *ibid.*



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extended to visibility and its impact on the remuneration of rightholders of copyright-protected musical works and the sustainability of the sector as a whole.²²⁴

In this light, researchers have proposed several technical solutions to enhance fairness in algorithmic recommender systems.²²⁵ For instance, re-ranking approaches are suggested to mitigate unfairness between different user groups to ensure that recommendations do not disproportionately favour certain demographics or types of music.²²⁶ Without re-ranking, a recommendation system might consistently promote music from dominant genres or popular artists, reinforcing existing inequalities in exposure. Re-ranking techniques can adjust the order of recommendations to ensure that a broader range of music, artists, or genres is shown, promoting diversity and reducing the impact of any algorithmic biases. Additionally, counterfactual evaluation techniques are proposed to optimise the trade-off between relevance and fairness, helping to balance user satisfaction with equitable artist exposure.²²⁷ These findings collectively suggest that improving fairness and transparency can benefit both users and artists, leading to a more equitable and trusted music recommendation ecosystem.²²⁸ However, enhancing fairness through transparency presents challenges, as it often involves compromises, such as diminishing the overall quality of recommendations or impacting user satisfaction.²²⁹ The situation becomes even more complicated when trying to address the diverse, and sometimes conflicting, goals of different stakeholders.²³⁰

2.4.1.2 Transparency of exploitation data

Data on platforms' exploitation of works is another area where transparency is necessary but insufficient.²³¹ Transparency reports provided by platforms often fail to disclose how data is used to drive algorithmic recommendations or targeted advertising.²³² Moreover, as

²²⁴ Alessia Zornetta, 'Platform Transparency for News Sustainability' [2024] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4826600>> accessed 24 September 2024; Leilasadat Mirghaderi, Monika Sziron and Elisabeth Hildt, 'Ethics and Transparency Issues in Digital Platforms: An Overview' (2023) 4 AI 831.

²²⁵ Dinnissen, *Improving fairness* ... (n 205).

²²⁶ Karlijn Dinnissen, 'Fairness and Transparency in Music Recommender Systems: Improvements for Artists', *Proceedings of the 18th ACM Conference on Recommender Systems* (Association for Computing Machinery 2024) <<https://dl.acm.org/doi/10.1145/3640457.3688024>> accessed 21 October 2024; Sonboli and others (n 208).

²²⁷ David Hesmondhalgh and others, 'The Impact of Algorithmically Driven Recommendation Systems on Music Consumption and Production: A Literature Review' (Social Science Research Network, 9 February 2023) <<https://papers.ssrn.com/abstract=4365916>> accessed 13 October 2024.

²²⁸ Karlijn Dinnissen and Christine Bauer, 'Amplifying Artists' Voices: Item Provider Perspectives on Influence and Fairness of Music Streaming Platforms', *Proceedings of the 31st ACM Conference on User Modeling, Adaptation and Personalization* (ACM 2023) <<https://dl.acm.org/doi/10.1145/3565472.3592960>> accessed 15 July 2024.

²²⁹ Nasim Sonboli and others, 'The Multisided Complexity of Fairness in Recommender Systems' (2022) 43 AI Magazine 164.

²³⁰ Dinnisen (n 205).

²³¹ Mazziotti and Ranaivoson (n 8); Antoine Henry, Valdy Wiratama, Adelaida Afilipoaie, Heritiana Ranaivoson and Eric Arrivé, 'Impacts of AI on Music Consumption and Fairness' (2024) 2(3) Emerging Media 382.

²³² Leerssen, P. (2024). Outside the Black Box: From Algorithmic Transparency to Platform Observability in the Digital Services Act. *Weizenbaum Journal of the Digital Society*, 4(2).



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pointed out in the literature, the lack of granularity in these reports prevents stakeholders from fully understanding how their data is being manipulated or monetised.²³³

In particular, two papers/studies, 'Music 2025: The Music Data Dilemma' and 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the DSM Directive',²³⁴ provide detailed insights into the challenges of transparency for authors and performers while also highlighting other systemic problems inherent in digital music markets. A key issue identified is the absence of standardised data formats and protocols, which creates inconsistencies across platforms and intermediaries.²³⁵ This lack of uniformity makes it challenging for creators to track the use of their works, understand their reach, and verify earnings. As Peukert et al. note in their discussion of copyright governance, this fragmentation in data systems reflects broader power asymmetries in the digital ecosystem, where dominant platforms control critical information flows.²³⁶ The proprietary data practices of these platforms further exacerbate this problem, creating silos that limit access to usage data for independent artists and smaller producers.

The issue of data accessibility is particularly problematic from the perspective of fair remuneration based on actual exploitation. Creators often lack access to detailed, real-time information about how their works are used on platforms, including the demographics of listeners, geographic distribution, and specific engagement metrics.²³⁷ This lack of transparency impedes their ability to make informed career decisions, optimise the promotion of their works, and negotiate fairer contracts with platforms and labels. As noted by Geng, tiered transparency systems that provide differentiated levels of access to data could help address this imbalance, offering creators the insights they need while protecting sensitive commercial information.²³⁸ Further complicating the situation is the widespread use of NDAs in licensing and revenue-sharing arrangements. These NDAs prevent the sharing of critical information between stakeholders, perpetuating a culture of secrecy in the industry. The inefficiencies of current data management practices, which rely on outdated systems prone to errors and delays, only exacerbate these challenges, which has led to the

²³³ MacCarthy (n 219). Leone de Castris, A. (2024). Types of Platform Transparency: An Analysis of Discourse Around Transparency and Global Digital Platforms. *Public Integrity*, 1-15.

²³⁴ Martin Senftleben and others, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' (2022) 13 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 67.

²³⁵ Ibid. Also highlighted by Henry and others (n 231).

²³⁶ Peukert and others (n 51).

²³⁷ Lyons and others (n 11).

²³⁸ Geng (n 222).



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literature to highlight how inefficient data infrastructure undermines rightholders' ability to monitor their works' performance accurately.²³⁹

2.4.1.3 Transparency of contracts

Transparency in the contractual relationships between platforms and content creators, particularly around licensing agreements and royalty payments, is a significant topic of discussion. For example, Kaye and others found that YouTube's royalty management system, while designed to protect copyright holders, remains opaque, leaving creators uncertain about how their work is being monetised.²⁴⁰ This lack of transparency is a widespread issue across creative industries, where platforms often hold the majority of bargaining power in negotiating licensing terms.²⁴¹

Platforms control granular data on listener demographics, streaming behaviours, and geographic reach, which are essential for understanding the performance of musical works. However, creators are often denied access to this data or receive it in aggregated, non-actionable formats. This imbalance prevents them from making informed decisions about licensing, promotion, and pricing, as shown in other sectors.²⁴² Without access to detailed exploitation data, music creators struggle to negotiate contracts that reflect the true value of their works.

Complex licensing agreements, coupled with the involvement of multiple intermediaries, also obscure the allocation of revenues generated from music exploitation. This opacity prevents creators from verifying the accuracy of their earnings and understanding whether they are receiving their fair share. Zuboff's concept of 'surveillance capitalism' provides a useful framework here, illustrating how platforms/DSPs leverage control over data for their benefit while marginalising those without access. For music creators, the lack of insight into revenue distribution translates into financial uncertainty and diminishes their bargaining power in an already imbalanced market. Accordingly, recent scholarship suggests that transparency around royalty calculations and licensing terms is critical for ensuring a fairer distribution of revenue between platforms and creators.²⁴³ Furthermore, the implementation of transparency standards in contracts could be strengthened by universal digital advertising

²³⁹ Arcangelo Leone de Castris, 'Types of Platform Transparency: An Analysis of Discourse Around Transparency and Global Digital Platforms' 0 Public Integrity 1.

²⁴⁰ Kaye, D. B. V., & Gray, J. E. (2021). Copyright Gossip: Exploring Copyright Opinions, Theories, and Strategies on YouTube. *Social Media + Society*, 7(3). Perel M., Elkin-Koren N. (2017). Black box tinkering: Beyond transparency in algorithmic enforcement. *Florida Law Review*, 69(1), 181–221.

²⁴¹ Peukert and others (n 51).

²⁴² Cf. Geng (n 222); Zornetta (n 224).

²⁴³ MacCarthy (n 219).



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transparency standards, in line with what has been proposed by Edelson et al.²⁴⁴ These standards would provide greater insight into how digital ads are sold and distributed.

In light of the foregoing, while the DSM Directive attempts to strengthen authors' bargaining positions, it may need adaptation for "gig authors" on platforms.²⁴⁵ At the same time, the music industry has seen shifts in artist-label contracts due to streaming, potentially benefiting artists but also increasing their responsibilities. Moreover, UGC platforms, which facilitate content sharing and transactions, often use unilateral terms of service that create contractual imbalances between platforms, users, and content creators.²⁴⁶ However, despite claims of reduced disparities in the platform economy with the new regulatory framework for platforms, concerns persist about protecting weaker parties, as platforms leverage their power through boilerplate contracts, architecture, and algorithms.²⁴⁷ In this regard, as pointed out by Kjus, the changes in the investments and returns for artists and labels due to streaming should be accompanied by changes in the legal protections for creative work.²⁴⁸

In sum, the literature has collectively suggested that addressing these issues requires systemic reform, including the implementation of standardised data-sharing practices, the regulation of intermediary practices, and the introduction of transparency obligations for platforms.²⁴⁹ In this light, the DSA is a step towards greater data access, improved bargaining position, or enhanced platform interoperability.²⁵⁰ Combined with initiatives in the field of competition to combat monopolistic data practices with the DMA, such measures have the potential to empower creators with the information needed to participate in the digital music market effectively and secure fair remuneration for their works, although

²⁴⁴ Laura Edelson and others, 'Universal Digital Ad Transparency' (Social Science Research Network, 3 August 2021) <<https://papers.ssrn.com/abstract=3898214>> accessed 19 October 2024.

²⁴⁵ Yngvar Kjus, 'Twists and Turns in the 360 Deal: Spinning the Risks and Rewards of Artist–Label Relations in the Streaming Era' (2022) 25 *European Journal of Cultural Studies* 463; Aurelija Lukoseviciene, 'Protection of Platform Authors in the Context of the EU DSM Directive: The Invisible "Gig Authorship"?' (Social Science Research Network, 6 September 2023) <<https://papers.ssrn.com/abstract=4562844>> accessed 21 October 2024.

²⁴⁶ João Pedro Quintais, Giovanni De Gregorio and João C Magalhães, 'How Platforms Govern Users' Copyright-Protected Content: Exploring the Power of Private Ordering and Its Implications' (2023) 48 *Computer Law & Security Review* 105792.

²⁴⁷ Guido Smorto, 'The Protection of the Weaker Parties in the Platform Economy' in John J Infranca, Michèle Finck and Nestor M Davidson (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2018); Guido Smorto, 'La tutela del contraente debole nella platform economy' [2018] *Giornale di Diritto del Lavoro e di Relazioni Industriali* 158, 423.

²⁴⁸ Kjus (n 245).

²⁴⁹ Mazziotti and Ranaivoson (n 8); Henry and others (n 231).

²⁵⁰ Martin Eifert and others, 'Taming the Giants: The DMA/DSA Package' (2021) 58 *Common Market Law Review* 4, 1028.



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specific/dedicated provisions that cater for the specific needs of the music sector should be considered.

2.4.2 The DMA's interplay with the DSM Directive and relevance for the music sector

The DMA does not regulate issues relevant to copyright and does not seem to create overlaps with the DSM Directive.²⁵¹ Yet, and in connection to the music sector, it has been highlighted above (Chapter 1.1) that transparency, information-sharing and the overall asymmetry in negotiating power are important issues faced by artists in their use of platforms for the exploitation of their music and they directly impact their remuneration opportunities. Based on what has been outlined above, it is the provisions contributing to the goal of fairness of the DMA, addressing the relationship between users (in this case authors and performers) and platforms and pertaining to intra-platform competition, that are relevant for the digital music sector and, hence, for the Fair MusE research. The question arises if the fairness-enhancing tools of the DMA have the potential to build on the advancements achieved by the DSM Directive in strengthening the position of authors and performers.

At the time of writing, there is no available literature studying the impact of the DMA specifically on the rights of artists, music consumers, record labels and other rightholders, their representatives or the digital music market as a whole. In order to grasp the potential role for the DMA to play in the digital music sector at such an early stage in its implementation, we will consider how the DMA and some of its tools have been seen by the literature as contributing generally towards the improvement of issues and the correction of 'imbalances' that could perhaps, ultimately, also prove beneficial by analogy for creators in digital music markets and useful in their relationships with digital platforms.

2.4.2.1 Data access and portability

The DMA has been welcomed for, among others, the data access and portability rights it recognises for business users under Article 6(10) and end users under Article 6(9).²⁵² In doing so, it goes beyond the right to data portability of Article 20 GDPR by establishing this right not only for individuals but also for business users as well as beyond Article 102 TFEU because the obligations do not presuppose the existence of an abuse of a dominant position. Article 6(9) DMA enables end users of any CPS (and authorised third parties) to request from the gatekeeper access to the data that they provide or generate by using a CPS and to have at their disposal tools to port such data. For the portability of their data to be 'effective', the tools provided by the gatekeeper need to be free of charge and the access to data continuous and real-time. Article 6(10) DMA enables business users of any CPS (and authorised third parties) to request access to personal and non-personal data that they and

²⁵¹ Konstantina Bania, 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice clause"' (2023) 19 European Competition Journal 116 117.

²⁵² Heike Schweitzer and Axel Matzger, 'Data Access under the Draft Data Act, Competition Law and the DMA: Opening the Data Treasures for Competition and Innovation?' GRUR International (2023) 72(4), 337; Laura Edelson, Inge Graef and Filippo Lancieri, 'Access to Data and Algorithms: For an Effective DMA and DSA Implementation' CERRE (2023) available at <https://cerre.eu/publications/access-to-data-and-algorithms-for-an-effective-dma-and-dsa-implementation>.



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their end users provide or generate through the use of a CPS. The access to such data has to be “free of charge, (...) effective, high-quality, continuous and real-time”.

Under the premise that music creators can make use of these rights,²⁵³ these provisions could be relied upon to request continuous and real-time access to the data that they provide to or generate by using the gatekeepers’ CPSs, as will be discussed further below in Chapter 4.3.2.

According to the Monopolies Commission,²⁵⁴ generally speaking, data (access and) portability promotes competition between services. Enabling access to data and data portability to user-generated data signals that these datasets are no longer under the exclusive control of the gatekeeper and users can port their data and opt for a competing platform service provider. It is, however, unclear if there is any true competitive upside to porting data that users themselves generate - as is the case with Article 6(9) and (10) DMA.²⁵⁵ Along similar lines, De Streel, Kraemer and Senellar also point out that, pursuant to classic economic literature on switching costs, data portability is likely to increase competition on the market by facilitating switching and lowering switching costs.²⁵⁶ Yet, portability rights, both under the GDPR and the DMA, concern the “raw” categories of data - volunteered and observed data - and this can be perceived as less competition-enhancing because it is actually inferred data that hold the key to competition between data-intensive undertakings.²⁵⁷

2.4.2.2 FRAND access

The DMA also seeks to instil fairness and correct imbalances in the relationship between (business) users and gatekeepers and the latter’s superior bargaining power by introducing Article 6(12) and mandating the publishing and application of FRAND conditions for access to three CPSs: app stores, online search engines and - most relevantly for the Fair MuseE research - social networks. The most obvious cases falling under this article have to do with the (price) conditions for app developers to access application stores²⁵⁸ and they are what the Commission had in mind when the DMA was first proposed.²⁵⁹ The addition of the requirement for FRAND access for business users to online social networking services came

²⁵³ Discussed below, Chapter 3.1.3.2.

²⁵⁴ Monopolies Commission, ‘Recommendations for an effective and efficient Digital Markets Act’ (2021) Special Report 82 Report by the Monopolies Commission pursuant to section 44 subsection (1), sentence 4, of the German Act against Restraints of Competition 40.

²⁵⁵ Ibid 41, para 124.

²⁵⁶ Alexandre de Streel, Jan Kraemer and Pierre Senellart, ‘Making Data Portability More Effective for the Digital Economy’ CERRE Report (2021) available at <<https://ssrn.com/abstract=3866495>> 56.

²⁵⁷ Ibid 51, referencing also the Guidelines on the right to data portability, as regards the GDPR. As regards the DMA, inferred data fall outside the scope of Article 6(9) and 6(10). See below, Chapter 4.3.2.3.

²⁵⁸ As evident from Recital 62 DMA. See also, for instance, Bostoen (n 100) 300; Mantzari (n 148) 2 and Damien Geradin, ‘Article 6(12) of the Digital Markets Act: Implementing the FRAND requirement’ (*The Platform Law Blog*, 10 July 2023) <<https://theplatformlaw.blog/2023/07/10/article-612-of-the-digital-markets-act-implementing-the-frand-requirement/>>.

²⁵⁹ Article 6(1)(j) of the DMA Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final.



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only later in the legislative process, which may explain the lack of reference and further relevant specification in the recitals,²⁶⁰ as will be shown below.

There is no definition or specification of what FRAND means in the DMA, especially in the context of online search engines and social networking services, and the benchmarks provided by recital 62, paragraph 2 DMA to assess fairness of access terms refer explicitly only to app stores and not to the other two CPSs covered by Article 6(12). Still, Recital 62, paragraph 2 gives three general categories of what would be considered unfair, that is price or other general access terms that “... lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper.”.

Access to TikTok, Instagram and Facebook is, in principle, costless but, as Geradin mentions, that does not ensure that (other) terms of access to these social networks are FRAND.²⁶¹ According to Ribera Martínez, compliance with the FRAND access requirement of Article 6(12) DMA may happen in many different ways, potentially including a “balanced negotiation” procedure with the gatekeeper.²⁶² Mantzari also puts forward that FRAND terms will result from a “bargaining process between the gatekeeper(s) and the business users” with the Commission playing the role of the supervisor of this implementation.²⁶³ What is more, Article 6(12) DMA could also be seen as a procedural provision which requires that gatekeepers publish the conditions of access to the social networking CPS and establish an alternative dispute resolution (ADR) mechanism leaving to the Commission the role of assessing compliance of access terms with the provision.²⁶⁴

The potential of this provision to impact on the position of authors and performers vis-a-vis social media platforms, enhancing the terms under which they access and use such platforms to reach their audience and monetise their works will be discussed in Chapter 5.3.2.

2.4.2.3 Anti-steering

The *Apple* decision,²⁶⁵ triggered by a complaint by streaming service Spotify in 2019, put forward the relevance and impact of anti-steering practices on the online music (streaming) market and on music consumption. It is important to mention that the same conduct is also

²⁶⁰ See Frontier Economics, ‘FRAND in the DMA’ (2022) available at <<https://www.frontier-economics.com/media/5kgavogf/frand-in-the-dma.pdf>>.

²⁶¹ Damien Geradin (n 259).

²⁶² Alba Ribera Martínez, ‘Third Workshop on the DMA – This is not a Blueprint for the DMA: The Proof of the App-Store Pudding is in the Eating’ (*Kluwer Competition Law Blog*, 7 March 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/03/07/third-workshop-on-the-dma-this-is-not-a-blueprint-for-the-dma-the-proof-of-the-app-store-pudding-is-in-the-eating/>>

²⁶³ Mantzari (n 148) 2.

²⁶⁴ Ribera Martinez (n 262). Also, Christian Rusche and Jeanne Mouton, ‘The anti-steering provision of Article 5 (4) of the DMA: a law and economics assessment on the business model of gatekeepers and business users’ (2023) *European Journal of Law and Economics* 57, 207 233.

²⁶⁵ N 40.



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prohibited by the DMA and the European Commission is scrutinising Apple's practice under the DMA lens as well.

Article 5(4) DMA obliges gatekeepers to allow business users, at no cost, to inform their (acquired) customers about and direct them to offers for products or services other than those existing on the platform.²⁶⁶ Rousche and Mouton compare this obligation to the competition law enforcement and point out how it extends beyond the music streaming market, as was defined in the *Apple* case, and binds gatekeepers in any of their designated CPSs regardless of the finding of dominance and abuse.²⁶⁷

This comparison also highlights the faster enforcement of the DMA in practice.²⁶⁸ In the case of Apple, in particular, the European Commission's DMA enforcement actions have been a testament to that. Shortly after the announcement on 4 March 2024²⁶⁹ of the antitrust fine imposed on Apple for abuse of its dominant position on the market for the distribution of music streaming apps (Article 102(a) TFEU) by means of employing anti-steering practices, the Commission announced on 25 March 2024 the opening of DMA non-compliance investigations against the same anti-steering practices of Apple, falling under Article 5(4) DMA.²⁷⁰ In June 2024, the Commission informed Apple of its preliminary findings that it was in breach of Article 5(4) DMA by continuing to prevent app developers from fully and freely informing consumers of alternative, more favourable offers and other content.²⁷¹ At the time of writing, it is being reported that the gatekeeper will be the first one to receive a fine for breach of the DMA.²⁷²

Interestingly, Rousche and Mouton also point out that one of the effects of the Article 5(4) DMA obligation is that business users would be more incentivised to use the gatekeeper's platform, as the latter becomes more attractive and has more chances of retaining its gatekeeper status.²⁷³

As evident from its enforcement so far, therefore, the anti-steering prohibition can and does already have an impact on the digital music industry.

²⁶⁶ Chapter 5.3.2.2.

²⁶⁷ Rousche and Mouton (n 264) 209.

²⁶⁸ Ibid.

²⁶⁹ European Commission Press Release IP/24/1161, 'Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers' 4 March 2024 available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161>.

²⁷⁰ European Commission Press Release IP/24/1689, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act' 25 March 2024 available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689>.

²⁷¹ Press release IP/24/3433 (n 204).

²⁷² <<https://www.reuters.com/technology/apple-set-face-fine-under-eus-landmark-digital-markets-act-sources-say-2024-11-05/>>.

²⁷³ Rousche and Mouton (n 264) 231.



Part II



3 Main preliminary considerations

This Chapter sets the stage for our in-depth analysis by outlining the foundational considerations that underlie our approach to EU competition law and platform regulation in digital music markets. Here, we first clarify key definitions and delineate the scope of our analysis, paying special attention to the challenges of applying conventional market analysis tools to digital environments characterised by “freemium” models and non-price competitive dynamics. We also flag the issues surrounding the application of the DSA to music streaming platforms, the exclusion of some platforms for gatekeeper designation under the DMA, and the lack of awareness among authors and performers regarding their rights under both frameworks, which stress the complexities and gaps that prevent effective regulatory protections.

3.1 Definitions and problems of scope

3.1.1 EU Competition Law - possible challenges for scrutinising digital music markets

One of the important preliminary considerations in light of the subsequent analysis under competition law, is that this study takes the perspective of authors and performers as a starting point. This does not follow the orthodox approach under competition law, which would always use consumer welfare as its analytical reference point.²⁷⁴ Nonetheless, authors and performers can be considered as business users in DSPs and social media platforms, and the conduct of the platforms that affects competition for authors and performers also impacts end consumers. Taking the example of technological tying, a platform that ties its apps to its dominant operating system might harm consumers by reducing their choice of apps.²⁷⁵ At the same time, tying behaviour can exclude third-party app developers from the market, thus also harming the app developers themselves. If one is to draw a parallel to digital music markets, practices by DSPs and social media platforms exploiting music creators can result in lower music choice, quality, and diversity for end users. The harm done to music creators can thus also lead to harm of consumers. This being said, if the only relevant parameter to look at was prices for end users, then these platforms might not be seen as causing a loss in consumer welfare.²⁷⁶ This approach is, however, conceived as too narrow by the study and the overall Fair MusE project. We therefore proceed with our analysis from the perspective of authors and performers.

As outlined above, before scrutinising the behaviour of any undertaking under EU competition law, certain preconditions must be met. Firstly, the undertaking must either hold

²⁷⁴ John Vickers, ‘Competition Policy And The Consumer Welfare Standard’ (2024) Journal of Antitrust Enforcement.

²⁷⁵ This was the factual background of the *Microsoft* case (in which the Commission’s tying analysis was confirmed by the General Court in T-201/04 *Microsoft v Commission* and the *Google Android* case, where the Commission’s tying analysis was confirmed by the General Court in T-604/18 *Google Android* and which is currently pending before the CJEU as appeal case Case C-738/22 P).

²⁷⁶ The CMA notes in its Report on Music Streaming that consumer prices have been falling due to competition between streaming services and innovation (see CMA (2022) (n 6) 82)



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a dominant position in a relevant market, in accordance with Article 102 TFEU, or be involved in a joint agreement that has the potential to prevent, restrict, or distort competition within the internal market, as per Article 101 TFEU. Furthermore, their behaviour needs to affect trade between Member States. The establishment of joint conduct does not pose significant challenges in digital music markets, in as far as joint conduct can easily be proven in the form of contracts and contractual clauses. Neither does the threshold to show that there is an effect on trade between Member States pose particular difficulties. For certain stakeholders, like CMOs, also showing dominance on the relevant market will not be a challenge, as the conduct of CMOs has regularly been scrutinised under Article 102 TFEU.²⁷⁷ As paradoxically as it may seem, however, and as will be further elaborated below, it might be more difficult to establish dominance for music streaming platforms and UGC platforms under EU competition law. The first challenge to applying EU competition rules to digital music markets is thus whether any platform in those markets can fulfil the definition of dominance under Article 102 TFEU.

A second challenge is the aforementioned study by the UK CMA of the UK music streaming market in 2022, which found that no competition intervention in music streaming markets was warranted.²⁷⁸ The study focused on exploring how competition challenges in the market may be limiting innovation, affecting remuneration distribution to rightholders, and negatively impacting consumers.²⁷⁹ While the study concluded that there is an overall improvement in terms of the results for consumers (like easier access to large catalogues of music covering an array of genres and time periods for a fixed monthly price, or free with ads) and authors and performers (by giving a more diverse choice of deals with labels or the option of direct publishing, as well as increased revenues from streaming for some), it nevertheless noted some significant challenges posed by the current structure in the market. It was found that, at the time of writing the report, competition law enforcement is unlikely to remedy those challenges, as the imbalances in the market do not stem from how firms compete in the market.²⁸⁰ However, the study also highlighted the rapid changes in the market for digital music and the potential of newly introduced innovations to distort competition and necessitate future intervention. Additionally, the study did not put its main emphasis on the transparency obligations of digital music platforms in the EU or the potential role of competition law enforcement in driving improvements in this area. After engaging with the CMA's arguments, it is explained why a competition law scrutiny of digital music markets might be warranted after all.

²⁷⁷ For a comprehensive summary of the topic and the primary CJEU case law, see Josef Drexler, 'The Contributions and Limitations of Competition Law to Regulate Collective Rights Management in the EU' in Rudolf Leška (ed) *Managing Copyright: Emerging Business Models in the Individual and Collective Management of Rights* (Kluwer Law International, 2022).

²⁷⁸ See also Chapter 2.3.2 above.

²⁷⁹ CMA (2022) (n 6), 163.

²⁸⁰ It should be highlighted that the CMA report is perceived by national competition authorities within the EU as an indication for the lack of need to intervene in the market for digital music, as noted, e.g., by the President of the Portuguese Competition Authority (Autoridade da Concorrência) Professor Nuno Cunha Rodrigues, during Fair MusE Policy Workshop on The Role of Regulation in the European Digital Music Ecosystem (11 December 2024). Accordingly, and despite the different geographic scope covered under the CMA report, it is covered under this deliverable.



3.1.1.1 Market definition and dominance in online platform markets

Article 102 TFEU prohibits abuses of dominance, i.e. it prohibits market actors of a certain size and power from engaging in a market behaviour considered abusive. In order to assess whether Article 102 TFEU could be a useful tool to address conducts by streaming and social media platforms harming authors and performers, it needs to be assessed whether the platform in question is dominant. The Court of Justice of the European Union (CJEU) has developed the well-known formula that dominance can be established when an undertaking enjoys “a position of economic strength [...] which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.²⁸¹ Several factors can be used to establish dominance, the most common one being market share. An undertaking’s market share is assessed based on the definition of the relevant product and geographical market. A market share of more than 50% is considered as a rebuttable presumption of dominance.²⁸²

Another factor commonly acknowledged in EU competition law as an indication for dominance is the ability of an undertaking to act independently from its competitors.²⁸³ Additionally, there have been instances in the past where unique circumstances prompted the EU Commission and the CJEU to assess the dominance of undertakings based on their ability to exercise their power over their customers, even when their market share was below 50%.²⁸⁴ It is important to note that digital music markets are multi-sided markets, in which platforms are acting as intermediaries between rightholders on one side and end users on the other. The interests of rightholders, who seek to maximise their exposure on the platforms and, consequently, their remuneration, do not always align with the platforms’ goal of expanding their user base and increasing user engagement.²⁸⁵ This asymmetry could potentially lead to platforms exercising power over rightholders regardless of the platforms’ market share.

In digital markets, some of the traditional tools to define markets in order to establish the market share of an undertaking have proven difficult to use. The so-called ‘SSNIP test’, used to define product or service markets, relies on measuring cross-price elasticities and imagining a hypothetical monopolist to establish the relevant market. The basic question is one of demand and supply-side substitutability in case of a small, but significant, non-transitory increase in price (short SSNIP). Without having to go into depth, it becomes clear that a price-based test becomes difficult to apply in markets where services are provided for “free” (in monetary terms), or can be consumed in a “freemium” fashion. This is the case both for users of social media and for music streaming services, as for example recognised in the European Electronic Communications Code Directive.²⁸⁶ In such a case, dominance

²⁸¹ Case 27/76 United Brands ECLI:EU:C:1978:22.

²⁸² C-62/86 AKZO Chemie BV v Commission EU:C:1991:286, para. 60.

²⁸³ Or Brook and Magali Eben, ‘Abuse Without Dominance and Monopolisation Without Monopoly’ in Pinar Akman, Or Brook and Konstantinos Stylianou (eds.), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing 2023), 262-63.

²⁸⁴ Ibid 263-64.

²⁸⁵ Interview with a collecting society, Interview with an academic.

²⁸⁶ See Recital 16 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).



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can be established by other non-price parameters, including product (and service) functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching, data portability and licensing features.²⁸⁷ Alternatives to the SSNIP test, such as the SSNDQ test (examining switching behaviour of customers in response to a small but significant non-transitory decrease in quality, e.g. by increasing the frequency of ads) can be used, too.²⁸⁸

With regard to the music sector, the EU Commission has defined physical and digital music distribution as two separate relevant markets.²⁸⁹ In digital music distribution, it has held in past merger decisions that the market for music downloads and for streaming constitute the same relevant market,²⁹⁰ but has noted that there is a strong trend away from downloads to streaming music online.²⁹¹ In the recent decision against Apple for its app store practices, the EU Commission found the music streaming market to be a separate relevant market.²⁹² The EU Commission considers the relevant geographic market for music streaming services to be EEA-wide, due to, e.g., its cross-border nature and the global basis according to which licensing deals are often concluded.²⁹³

When it comes to establishing a dominant position in platform markets with “free” services, the EU Commission and national competition authorities have used the number of monthly active users as an indicator of dominance.²⁹⁴ Similarly, in its Music and Streaming Market Study, the UK CMA found that the music streaming services market is concentrated. It based its analysis on the number of monthly active users. According to the CMA study, Spotify has the largest share of monthly active users in the market (50-60%), followed by Amazon (20-30%), Apple Music (10-20%) and Soundcloud (5-10%).²⁹⁵ If these shares were used as decisive factors to establish dominance, it becomes clear that, if at all, only Spotify could be considered dominant. At the same time, the question of market definition is a matter of case-by-case evaluation, and competition authorities have been willing to define very narrow markets in the digital economy in the past.²⁹⁶

Additional important factors to take into account when analysing the market definition, according to the EU Commission Notice on the Definition of the Relevant Market (‘The Commission Notice’) are adaptation costs and barriers to switch to another product or

²⁸⁷ EU Commission Notice on the Definition of the Relevant Market (C/2024/1645), para. 98.

²⁸⁸ EU Commission Notice on the Definition of the Relevant Market (C/2024/1645), para. 98.

²⁸⁹ Case M.3333 – Sony/BMG (2007), paragraph 27.

²⁹⁰ Case M.7290 – Apple/Beats (2014), paragraph 18; Case M.8788 – Apple/Shazam (2018), paragraph 94.

²⁹¹ Commission *Apple* Decision (n 40), paragraph 319.

²⁹² *Ibid*, paragraph 328.

²⁹³ *Ibid*, paragraph 324-27.

²⁹⁴ Commission *Apple* Decision (n 40); German Federal Cartel Office Decision in B6-22/16 Facebook (2019).

²⁹⁵ CMA (2022) (n 6) 18.

²⁹⁶ See e.g., discussions around market definition in *Google Shopping* in Sébastien Broos and Jorge Marcos Ramos, ‘Google, Google Shopping and Amazon: The Importance of Competing Business Models and Two-Sided Intermediaries in Defining Relevant Markets’ (2017), 62 (2) The Antitrust Bulletin; Interview with a practitioner. The same argument was raised in relation to the Commission *Apple* Decision (n 40); see Beata Mäihäniemi, ‘(The Big) Apple’s “Walled Garden”: CASE AT.40437 – Apple – App Store Practices (music streaming)’ (23 July 2024), <<https://competitionlawblog.kluwercompetitionlaw.com/2024/07/23/the-big-apples-walled-garden-case-at-40437-apple-app-store-practices-music-streaming/>>, accessed 25 February 2025.



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service, as well as network effects.²⁹⁷ Other factors are product differentiation, when there are significant differences between substitutes, and secondary products or services, known as ‘after-markets.’²⁹⁸ This is particularly important in the context of digital music platforms, as each platform usually provides a different user experience. For instance, Spotify provides its paying subscribers an algorithmic-based personal recommendation experience, as well as access to playlists curated by multiple users, that are arguably after-markets and a distinctive feature with network effects. This could likely be another factor in the market definition analysis. Furthermore, when multi-sided platforms are involved, factors that are not related to the price can be more easily taken into consideration, including the functioning of the platforms, interoperability, data portability and switching costs.²⁹⁹

The Commission Notice further highlights that the market definition may vary according to factors such as the involved undertakings and the relevant competition concerns.³⁰⁰ An accurate conclusion on the market’s scope is not necessary, if it will not make a difference in terms of the arising concerns.³⁰¹ It has been further suggested that the determination of the market’s breadth may involve political considerations, influenced by the objectives of competition law and the relevant competition authority.³⁰² In this instance, those objectives might include offering enhanced protection to rightholders in the music sector. Nevertheless, the establishment of a dominant position of any streaming platform would not be a clear-cut case, and would thus pose a challenge to applying competition law provisions to these companies. As we explain below, national economic dependency rules and national competition rules adopted for competition enforcement in digital markets might offer a solution to the problem of establishing dominance.

With regard to social media platforms, too, the question of dominance is not clear-cut. The first question would be whether user-uploaded content (UGC) platforms would be considered part of the relevant market when it comes to music streaming. The CMA, for example, treated YouTube Music as a streaming service, but excluded the much larger UGC YouTube service from this market definition. If UGC platforms (for good reasons) were to be considered a separate relevant market (e.g. the market for Short Video Sharing Platforms), it would still not be clear whether any of the relevant UGC platforms would have a clear dominant position compared to the other platforms.

As authors and performers need to be present across most or all platforms, however, it might raise the question whether the platforms hold a position of collective dominance. From the outset, it is clear that the requirements for establishing collective dominance are strict.³⁰³ According to the case law of the CJEU and the General Court, collective dominance means that legally independent entities are acting as a collective entity on a market.³⁰⁴ In principle,

²⁹⁷ EU Commission Notice on the Definition of the Relevant Market (C/2024/1645), paras. 57-58.

²⁹⁸ Ibid, paras. 85-86, 99.

²⁹⁹ Ibid, para. 95-98.

³⁰⁰ Ibid, para. 18.

³⁰¹ Ibid, para. 20.

³⁰² Or Brook and Magali Eben (n 283) 264-65; Interview with a practitioner.

³⁰³ Ronny Gjendemsjøl, Erling J. Hjelmeng, Lars Sørsgard. ‘Abuse of Collective Dominance: The Need for a New Approach’ (2013) 36(3) World Competition, 355 – 371.

³⁰⁴ Joined Cases C-395/96 P and 396/96 P, *Compagnie Maritime Belge Transports and Others v Commission*, 36.



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three elements need to be shown in order to prove a position of collective dominance: market conditions enable the undertakings in question to tacitly coordinate, the undertakings in question can monitor the coordination, and there exists a credible deterrence mechanism in order to punish any of the undertakings that deviates from the coordination.³⁰⁵ Overall, a high level of transparency in the market is required to establish a position of collective dominance. Digital music markets are oligopolistic, with just a few players controlling the majority of market share.³⁰⁶ While oligopolistic market structures can be conducive to tacit coordination, it would be difficult to establish that UGC platforms or streaming platforms hold a position of collective dominance. This is due to the fact that, while platforms might be able to find out how each of them prices end users, they have no information about the amount of licensing fees paid to various recording labels, CMOs or individual artists. Given that there is such opacity regarding the remuneration of rightholders by platforms will help platforms to shield themselves from allegations of collective dominance.

EU competition law lacks a concept like the German legislator introduced in its national Act against Restraints of Competition, which allows the German FCO to impose specific obligations on Undertakings of Paramount Significance for Competition Across Markets.³⁰⁷ After determining that Alphabet was an 'Undertaking of Paramount Significance for Competition Across Markets', this allowed the FCO, for example, to impose obligations on various of Alphabet's platforms, such as Google News, Google Maps Automotive Services etc. This is one of the reasons why this report considers that national competition rules might be more apt to challenge conduct by online platforms in digital music markets in order to enhance the rights of authors and performers.³⁰⁸

3.1.1.2 The CMA Final Report on Music and Streaming - No competition problems in digital music markets?

The study conducted by the CMA highlighted several key competition concerns related to the operation of online music streaming platforms. One major issue is the potential impact of future mergers or acquisitions, particularly if they affect the bargaining power of music companies or streaming services. Such changes could harm consumers, in the form of higher prices, lower quality or lower choice, with the CMA closely monitoring any merger activity to determine if it could lead to a substantial lessening of competition.

Additionally, shifts in consumer behaviour, such as the growing use of smart speakers, could create barriers for streaming services that lack their own smart speaker ecosystems, thereby limiting competition and consumer choice.³⁰⁹ Connected devices and software, such as smart speakers, also present a problem from the perspective of transparency and data

³⁰⁵ Case T-342/99 *Airtours v Commission*. See also EU Commission draft Guidelines on Article 102 TFEU, para. 38-42.

³⁰⁶ Bostoen & Vanherpe (n 155) 31-32.

³⁰⁷ Section 19a German Act against Restraints of Competition.

³⁰⁸ For a broader plea to introduce economic dependency rules in EU competition law based on national experiences, see Qian Li, Caroline Cauffman, 'Abuse of Relative Dominance by Digital Platforms: A Law and Economics Perspective', (2025) GRUR International (forthcoming).

³⁰⁹ CMA (2022) (n 6) 98.



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access: smart speakers like Amazon's Alexa,³¹⁰ offer the feature of automatically-generated playlists based on voice commands, which could more likely lead to discrimination against certain rightholders compared to platform-curated playlists. This is due to the greater lack of transparency in how streaming services are integrated with smart devices. Such potentially anticompetitive practices could only be identified if platforms offer enough data for rightholders to know if their music is being included in playlists curated by these smart devices.

The report also raises concerns about the transparency and fairness of algorithms used by streaming platforms, especially in relation to playlists, autoplay, and music recommendations. In this regard, it concludes that if these systems are not transparent, they could cause uncertainty and disadvantage to both consumers and rightholders. Furthermore, difficulties in switching between streaming services could weaken competition, especially as the market matures and no longer experiences significant growth. Lastly, the CMA expressed concern about the potential decrease in innovation within the music streaming industry, which could harm consumers — either through the elimination of beneficial innovations or the imposition of higher prices by music streaming services and labels.

Ultimately, the evaluation of the CMA also raises the question of whether competition law should be enforced with the aim of fostering consumer welfare, or whether a broader approach to the goals of competition law is required. While lower prices and more choice for consumers is certainly always a relevant factor in competition law enforcement, other goals such as protecting the competitive process, market structure, and fairness, are also relevant factors.³¹¹ Furthermore, the protection of labour interests is recently becoming a focus of competition enforcement.³¹² The CMA might have had a rather narrow outlook in terms of goals of competition enforcement in its study. A broader, polycentric vision of the goals of competition law might have led to different conclusions.³¹³ We therefore take the CMA Report as one piece of evidence in our analysis, but not as the only source of truth as to whether competition enforcement could bring about a change in the dynamics of digital music markets to the benefit of authors and performers.

3.1.2 How does music fit into the DSA framework?

The scope of the platform regulation, and the DSA more specifically, raises significant challenges for the music sector, primarily due to: 1) ambiguity in key definitions and, 2) the asymmetry of obligations imposed on UGC platforms versus music streaming, non-UGC, platforms.

³¹⁰ Ibid. A Report for Ofcom by Community Research also showed that smart speaker users are often not sure about the source of music played by their smart speakers, e.g. whether they come from streaming platforms or live radio, indicating a clear lack of transparency. See Community Research, 'Smart speakers research with the public' (December 2022), <<https://www.ofcom.org.uk/siteassets/resources/documents/research-and-data/multi-sector/general-communications-research/smart-speakers-research.pdf?v=328937>> accessed 25 February 2025.

³¹¹ Stylianou and Iacovides (n 111). See also Chapter 2.2 above.

³¹² See Chapter 5.2.3 below.

³¹³ On the concept of polycentric competition law see, Ioannis Lianos, 'Polycentric Competition Law, Current Legal Problems' (2018) 71(1) Current Legal Problems, 161–213.



3.1.2.1. *Music streaming platforms and the DSA's ethos*

The DSA was conceived as a broad framework to regulate platforms at the forefront of Big Tech and, in particular, to address systemic risks and enhance transparency and accountability in the online ecosystem. Therefore, while copyrighted content removal requests have been further proceduralised with the DSA, its primary focus lies on UGC platforms and intermediary services rather than on the business model of music streaming platforms. Music streaming platforms like Spotify and Deezer operate under business models that differ significantly from those of social media or e-commerce platforms, which makes the application of the DSA to the music sector particularly challenging.

The DSA primarily regulates online platforms that facilitate the storage and dissemination of UGC (Article 3(i)). Music streaming platforms, however, operate on a model centred on the licensed distribution of content. Consequently, obligations under the DSA, such as content moderation (Articles 16-18) or systemic risk mitigation (Article 35), can be seen, in principle, as less relevant to music streaming services. The disconnect between the DSA's objectives and the operational realities of music streaming platforms makes their inclusion under certain provisions of the regulation an uneasy fit. For instance, Spotify's role in managing illegal content can be limited due to its reliance on pre-cleared licenses, which arguably reduces the relevance of notice-and-action mechanisms designed for UGC platforms.

Transparency obligations, particularly under Articles 13-15 and 27 DSA, are another area where the DSA's broad framework creates challenges for music platforms. The requirement for recommender system transparency (Article 27 DSA) primarily targets social media algorithms, which curate user-uploaded content to maximise engagement, in an attempt to mitigate risks like misinformation. In the music sector, and for the purposes of music exploitation, however, algorithms are used to enhance the user experience by promoting music discovery, not necessarily to pose societal risks. As argued by music streaming platforms, mandating disclosures that are designed for social media algorithms risks imposing requirements on these platforms that would fall outside of the objectives of the DSA. Further, at first glance, the transparency obligations under Article 15 DSA, which requires detailed reporting on content moderation, do not appear to completely align with the operational model of music platforms. Notwithstanding this, in this study, we consider that DSA's transparency obligations can complement copyright compliance mechanisms and, in particular, royalty reporting obligations under Article 19 DSM Directive. Thus, dedicated transparency duties on copyright-infringing practices and on financial structures and revenue streams for platforms exploiting musical works should be considered.

Another key aspect to consider is that the DSA defines 'recipients of the service' broadly to include individuals and entities using online platforms, encompassing both end users and business users. Yet, the specific treatment of rightholders, or in this case authors and performers, under such a definition is ambiguous. Accordingly, although the DSA mandates transparency and reporting requirements for content moderation and removal, these provisions are generally directed at 'users' in the context of content management and moderation, often without distinguishing between general platform users and those with specific economic and legal interests in the content, such as music creators and



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rightholders. Arguably, this ambiguity should not prevent music creators and rightholders from receiving detailed exploitation data from platforms.

3.1.2.2 VLOPs and music streaming

Similarly, the DSA's provisions primarily target Very Large Online Platforms (VLOPs) and very large search engines (VLOSEs). The designation of VLOPs under the DSA as those that reach at least 45 million monthly active users in the EU (Article 33), further complicates the problem related to the asymmetry of regulatory obligations for UGC and non-UGC platforms. While major UGC platforms such as TikTok, YouTube, and Instagram are officially recognised as VLOPs, none of the main and most popular music streaming platforms has been designated (yet). This means that these platforms may not be subject to the same level of scrutiny and transparency requirements, which leaves a gap in addressing the specific issues faced by music creators.

Upon designation, VLOPs face additional obligations beyond those imposed on other online platforms due to their significant impact on the digital economy and societal risks. These obligations include conducting comprehensive systemic risk assessments to identify and mitigate risks such as the dissemination of illegal content, the spread of disinformation, and threats to public health or security (Article 34). VLOPs must also implement effective risk mitigation measures (Article 35), undergo independent audits (Article 37) to ensure compliance, and provide enhanced transparency reports (Article 42). Furthermore, VLOPs are required to offer users access to recommender system controls (Article 38) and maintain data access frameworks (Article 40) to facilitate regulatory oversight.

Unlike traditional music streaming services, UGC platforms were not originally considered to be exploiting music themselves; rather, it was the users who were seen as the exploiters. However, Article 17 of the DSM Directive introduced a legal fiction that shifts this responsibility onto the platforms themselves, making them legally accountable for the exploitation of copyrighted works shared by their users. This distinction may arguably explain why UGC platforms, but not streaming services, fall within the scope of VLOP designation. In this regard, the European Commission has indicated its intent to strictly enforce compliance and has explicitly expressed concerns over platforms that have not fully disclosed user numbers as required by the new legislative framework. Advocacy groups, such as Access Now, have stressed the importance of revising the designation of VLOPs, to include Spotify, to protect users' rights effectively. They argue that platforms with significant user bases should be subject to the DSA's stringent requirements to ensure transparency and accountability in their operations. However, the eventual designation of music streaming services as VLOPs would also demand a more dedicated approach that considers their specific business models and the nature of their services. Thus, although music streaming platforms possess large user bases, the content they distribute is predominantly licensed, differing from the user-generated content typical of other VLOPs. Therefore, the application of the DSA's provisions to music platforms, including the recommendations made in this study, if and when they are designated as VLOPs, should consider these distinctions to ensure that the additional requirements lead to tangible benefits for the music sector, particularly for authors and performers, who are disproportionately affected by unfair platform practices.



3.1.2.3 *The role of authors and performers in light of platform regulation*

Notwithstanding the problems of ambiguity of definitions and the asymmetry of regulatory obligations for UGC and music streaming platforms, the interplay between the DSA and the DSM Directive presents opportunities to enhance the protection and empowerment of authors and performers.

The DSM Directive introduced measures designed to remedy imbalances in the digital era by granting creators greater insights into and control over the exploitation of their works. The DSA, while not explicitly focused on authors' and performers' rights, complements these through its emphasis on transparency and accountability of online platforms. For example, as it is further examined below, the DSA's provisions on transparency can provide creators with a better understanding of how their content is recommended and monetised, and thus those provisions can arguably complement the DSM Directive's obligations regarding royalty reporting.

However, the effective realisation of the complementary tools offered by the DSA would require a careful consideration of the specific dynamics of the music sector. For example, the lack of definition within Article 3 DSA of 'business users' to cover individuals acting in a commercial capacity to reach end users but instead equating individual and business users under the definition of 'recipient of the services' (Article 3(b)) creates ambiguity, especially for authors and performers as business users. Artists self-releasing music on platforms, be it YouTube, TikTok or Spotify, could fall under the category of business users. However, the way in which they engage with these platforms—primarily to distribute and promote their work—differs significantly from traditional business-to-consumer (B2C) transactions facilitated by platforms like Amazon or eBay.

This lack of clarity also complicates the implementation of obligations aimed at fostering fair treatment of business users, such as transparency in ranking systems under the P2B Regulation (Article 5), even though the DSA is without prejudice of the latter. For instance, Article 27 DSA mandates transparency in recommender systems. While this could, in theory, provide authors and performers with insights into how their works are promoted, the practical implementation of this provision on music streaming platforms is unclear. Unlike UGC platforms, where creators can engage directly with their audience through comments, live streams, and personalised content curation, music streaming platforms offer only limited forms of interaction, such as following an artist, or algorithmic recommendations. This distinction is relevant to transparency obligations because, on UGC platforms, creators have more visibility into how their content is presented and engaged with—through analytics, direct audience feedback, or monetisation insights. In contrast, music streaming platforms typically do not provide detailed, real-time data to artists about how their music is promoted, how playlists are curated, or how algorithmic rankings influence visibility, making it harder for creators to assess and challenge potential biases or unfair practices.

Moreover, beyond transparency provisions, the DSA does not explicitly address the contractual imbalance between creators and platforms, an issue that the DSM Directive was specifically designed to remedy. This regulatory gap raises concerns about how authors and performers can enforce their rights under the DSM in a landscape dominated by large platforms. Without an explicit alignment between the DSA and the DSM Directive, there is a



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risk that the rights of authors and performers may be overlooked in the broader effort to control systemic risks and ensure platform accountability.

The lack of clarity in the regulatory interplay also affects the role of collective management organisations (CMOs) and other intermediaries in asserting rights on behalf of authors and performers. While the DSM Directive recognises the importance of CMOs in ensuring fair remuneration and transparency, the DSA lacks a corresponding framework that reinforces these mechanisms within the broader landscape of platform regulation. This gap is particularly significant in relation to platforms that rely on algorithmic content curation, data-driven monetisation models, and non-negotiable licensing agreements, where individual creators often lack bargaining power. Against this background, CMOs, acting as collective representatives, are in a better position to demand transparency regarding how works are surfaced, ranked, and monetised across digital platforms. However, the DSA's transparency obligations are primarily designed for content moderation and systemic risk mitigation rather than for addressing contractual asymmetries between platforms and rightholders. Moreover, the DSA does not provide explicit provisions that would empower CMOs or similar organisations to demand greater access to platform-held data regarding content exploitation and monetisation –information that is critical for enforcing fair licensing practices and ensuring compliance with the DSM Directive's remuneration and transparency requirements. This omission weakens the effectiveness of the DSM Directive, as CMOs depend on accurate and detailed platform data to monitor revenue flows, negotiate fairer terms, and safeguard authors' and performers' economic interests.

Additionally, the inconsistent treatment of CMOs under different regulatory instruments also leads to challenges in enforcement. While the DSM Directive grants CMOs a crucial role in representing authors and performers, the DSA and the DMA primarily define their obligations in relation to business users and platform consumers, rather than as intermediaries acting on behalf of creators. This distinction is problematic because it fails to recognise the collective nature of copyright management and the specific challenges faced by CMOs in securing fairer conditions in digital markets.

In sum, the lack of clarity on how these two regulatory frameworks (DSM and the DSA) interact creates significant uncertainty regarding their capacity to effectively address the specific challenges faced by authors and performers in the digital music ecosystem. This ambiguity not only complicates the implementation of key DSM provisions but also risks undermining the intended protections for rightholders, particularly in ensuring fair remuneration, transparency, and meaningful enforcement of their rights across different platform environments.



3.1.3 The DMA and digital music - a good fit?

3.1.3.1 Music-relevant Gatekeepers and Core Platform Services

The DMA regulates solely large and economically powerful³¹⁴ digital undertakings that have been designated by the European Commission³¹⁵ as ‘gatekeepers’ in the meaning of Article 2(1) DMA. Gatekeeper status prerequisites are (Article 3 DMA): i) the provision of a specific CPS from those listed exhaustively in Article 2(2) DMA which are ‘gateways’ for business users and end users to connect, ii) having a significant impact on the internal market and iii) having an entrenched, durable position in the market. In Article 3(2), the DMA provides quantitative thresholds³¹⁶ which, when met, signal that these prerequisites are presumed as satisfied.

Among the currently designated gatekeepers and CPSs, those relevant for the digital music market and for this study are the ones hosting copyright-protected music content: Meta for Facebook and Instagram as social networking CPSs, Alphabet for YouTube as video-sharing CPS and ByteDance for TikTok as social networking CPS. Also, Apple’s App Store (online intermediation CPS) practices have a spillover effect on the digital music landscape and on music streaming in particular, as evidenced from the complaint that triggered and the implications of the *Apple* decision (taken following a competition enforcement procedure) but also from the subsequent, relevant DMA non-compliance investigation³¹⁷ concerning the same anti-steering practices that were at the centre of the competition decision and beyond.

DMA rules do not apply to companies without gatekeeper status or to gatekeepers for services other than their delineated and designated CPSs. Therefore, despite Apple’s gatekeeper status, the DMA does not apply to Apple Music. Other music streaming service providers, such as Spotify and Deezer, were also not designated as gatekeepers and, thus, are not bound to comply with the DMA obligations. Such DSPs can, at the moment, assume the role of business user under the Regulation.

Is it possible that we see a music streaming DSP as a gatekeeper in the future? Interviews with stakeholders suggest the answer is ‘no’, unless the text of the Regulation is revised. Stakeholders³¹⁸ expressed their assessment that music streaming platforms, as opposed to UGC platforms, do not connect business users with end users, as Article 3(1)(b) DMA requires, in a way that enables their direct interactions or transactions. In one stakeholder’s point of view,³¹⁹ the music streaming market was seen as rather competitive, with multiple important players including Spotify, Apple Music and Amazon Music, therefore possibly

³¹⁴ In theory, micro, small or medium-sized enterprises providing CPSs could also fall under the DMA by being designated as gatekeepers after a market investigation (Article 3(8) DMA) if they satisfy the qualitative criteria of Article 3(1) but not the quantitative criteria of Article 3(2) DMA.

³¹⁵ The European Commission enjoys exclusive competence in designating gatekeepers, see below Chapter 6.1.2.

³¹⁶ Those are linked to the company’s annual EU turnover or market value, monthly active users and business users of the CPS and the number of financial years these numbers of users have been achieved.

³¹⁷ Above Chapter 2.4.2.3.

³¹⁸ With a Legal Expert and representatives of a CMO.

³¹⁹ Representatives of a CMO.



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preventing a single platform from achieving an ‘entrenched and durable position’, as Article 3(1)(c) DMA requires.

Could music streaming be regarded as falling under one of the listed CPSs within the definition provided by the DMA? Similarly here, information gathered from empirical research suggests that music streaming could not be considered a CPS under the current version of the Regulation. An interviewed expert³²⁰ expressed the view that the European Commission does not consider (video or music) streaming services as intermediation services falling within the scope of the P2B Regulation or under the online intermediation CPS of Article 2(2) DMA. The rationale behind this is likely that such platforms clear the rights to the content they host through licenses and, therefore, in that sense, they cannot be seen as intermediaries between the music content providers and the platform users. Representatives of a music streaming service invoked the same reasoning as to why their services cannot be categorised as online intermediation services and further maintained that they do not fall under any other CPS listed in the DMA.

3.1.3.2 Music authors and performers as users under the DMA

Articles 5,6 and 7 DMA contain a set of behavioural obligations for gatekeeper platforms which predominantly aim to protect and benefit the users of those platforms, be it business users or end users. As seen in Chapter 2.2, business users are the focal point of DMA’s protection compared to end users that assume, in comparison, a secondary role.

Business users are broadly defined in Article 2(21) DMA, as any “natural or legal person acting in a commercial capacity using core platform services for the purpose of or in the course of providing goods or services to end users”. The definition for end users provided by Article 2(20) DMA is even broader, encompassing any user of core platform services that does not fall under the definition of a business user. Part E of the Annex to the DMA provides ‘specific definitions’ for active end users and active business users. The focus of these specifications is on the notion of ‘active’, however, with regard to active business users of online social networking services, it has been further specified that these users must have a “business listing or business account”.

The Decision designating TikTok,³²¹ together with the recent *Bytedance v Commission* judgment of the General Court,³²² provide further detail as regards the types of users included in the category of business users, thus, offer some further guidance and clarification on the delimitation of the notion. In the designation Decision, the Commission included in the calculation of TikTok’s yearly active business users not only those that had business accounts ‘registered’ through ByteDance’s registration function but also the broader category of all those that ‘self-identified’ in the application as business accounts. These users had access to tools and information such as performance insights.³²³ In the

³²⁰ Practitioner specialising in competition and digital regulation.

³²¹ *ByteDance – Online social networking services* (n 92).

³²² *Bytedance v Commission* (n 92).

³²³ Paras 77-88. Interestingly, to make a case for counting only the registered users, ByteDance had invoked a 2022 survey showing that a (redacted) percentage of SME users were unaware of having set up a TikTok business account.



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Decision, the Commission also underlined the need to take into account in calculating business users (in the context of rebutting the Article 3(2) presumption) not only advertisers but any other business user that “may still rely on TikTok to gain visibility for their activity”.³²⁴ The General Court, in *Bytedance v Commission*, confirmed the Commission’s broad interpretation of the types of business users that were taken into account in the designation calculations.³²⁵

Furthermore, in the Decision designating Meta,³²⁶ although the sections regarding the way the company defines end users and business users are confidential,³²⁷ it is stated that business users use Facebook and Instagram “for the purpose of reaching and engaging with different target user bases”.³²⁸

In spite of the DMA’s obligations having been drafted in a way that predominantly points to (and protects) a different profile of business user than music authors and performers, such as app developers or advertisers,³²⁹ the aforementioned approach to the notion of business user from the Commission and the General Court offers a broad interpretation of the category. Arguably, authors and performers could, in essence, decide to set up a business user account and use it to reach and engage their audience, which would suffice to place them in the business user category for the purposes of the DMA.³³⁰ Similarly, other rightholders or representatives of rightholders, namely publishers, labels or CMOs, could potentially also assume the role of business user or, depending on the agreement with the artists, the role of authorised representative and, thus, exercise the rights that the DMA recognises to business users.

The notion of ‘end user’ in Article 2(20) DMA, “any natural or legal person using core platform services other than as a business user”, also works as a broad net that can bring within the scope of the DMA any CPS user that could not be interpreted as belonging to the business user category. In this context, even artists that did not set up a business account on the gatekeeper’s CPS could benefit from DMA’s rights for end users, such as the right to data portability (Article 6(9) DMA).

These considerations notwithstanding, the issue remains that, at present, it is largely unspecified which music creation players are captured under the notions of business user and end user, which in itself constitutes an obstacle for the materialisation and exercise of any DMA data access rights by their respective holders.³³¹

³²⁴ Para 148.

³²⁵ In particular, paras 269-278.

³²⁶ *Meta - online social networking services* (n 94).

³²⁷ Paragraphs 81 and 82.

³²⁸ Paragraph 50.

³²⁹ See Carmelo Cennamo and Juan Santalo, ‘Value in Digital Platforms: The Choice of Tradeoffs in the Digital Markets Act’ (2022) available at <<https://ssrn.com/abstract=4152113>>.

³³⁰ To that effect see also Konstantina Bania, ‘The DMA’s applicability to business-to-consumer services (and how content creators can lead to DMA designation) (*The Platform Law Blog*, 19 December 2024) <<https://theplatformlaw.blog/2024/12/19/the-dmas-applicability-to-business-to-consumer-services-and-how-content-creators-can-lead-to-dma-designation/>>.

³³¹ Perspective expressed by representatives of a CMO.



3.1.3.3 *Do gatekeepers' obligations confer rights upon business/end users?*

The issue of whether the DMA provisions establishing obligations for gatekeepers also establishes relevant rights for the various user groups has been raised and discussed. It has been presented as a matter requiring clarification from the Commission³³² or, even, as a question to which the answer can be in the negative: the obligations do not automatically mean that users are entitled to 'demand' a certain conduct by gatekeepers.³³³ On the other hand, other scholarly works studying DMA obligations seem to take the automatic emergence of users' rights from the respective provisions as a given.³³⁴

The European Commission itself can be seen as a proponent of the position that rights are, indeed, created from gatekeepers' obligations. Recital 104 DMA states that "Consumers should be entitled to enforce their rights in relation to the obligations imposed on gatekeepers under this Regulation through representative actions...". What is more, in the recently published Fitness Check of EU consumer law on digital fairness,³³⁵ it is stated that "Article 6 DMA lays down certain obligations and prohibitions including on consumer choice, barriers to contract termination, switching and portability of data, which also apply to gatekeepers' T&Cs. Any infringement or restriction of consumer rights stemming from this provision by way of contract terms could also be challenged under the UCTD."

For the purposes of this study, we will also work on the premise that rights are established and conferred upon end and business users alongside gatekeepers' obligations.

3.2 Lack of awareness

Empirical data available and several music industry stakeholder expert opinions gathered in preparation of this research point to authors' and performers' unsatisfactory levels of awareness not only as regards their rights established under the DSM Directive, but also of other benefits they may draw by, for instance, assigning their rights for collective management or of the overall complexities and intricacies of the music industry.³³⁶

³³² Björn Lundqvist, 'An access and transfer right to data— from a competition law perspective' (2023) *Journal of Antitrust Enforcement* 11 i65, i67.

³³³ See Oles Andriychuk, 'Do DMA obligations for gatekeepers create entitlements for business users?' *Journal of Antitrust Enforcement* (2023) 11 123–132

³³⁴ For instance, Schweitzer and Matzger (n 252) 343, where it is stated as regards the data portability and access obligations of the DMA: "In the future, designated gatekeepers within the meaning of Art. 3 DMA will have to grant end users a right to port the data provided or generated through their activity in the context of the relevant core platform service (Art. 6(9) DMA), and business users will enjoy a comparable right to access and use data provided or generated by them or their end users (Art. 6(10) DMA)".

³³⁵ Commission Staff Working Document - Fitness Check of EU consumer law on digital fairness SWD(2024) 230 final 192.

³³⁶ Daniel Johansson, 'Streams and Dreams Part 2, 2024 - The impact of the DSM Directive on Artists and Musicians' Report published by the International Artist Organisation 6, confirmed by several interviewed stakeholders.



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With regard to platform regulation, the Study on Evaluation of the P2B Regulation³³⁷ concluded that, two years after it became applicable, a significant number of platforms, especially smaller ones, and the majority of business users remained largely unaware of its existence, as well as of the obligations or rights it confers upon them. Such lack of awareness was considered as leading to suboptimal implementation.³³⁸ The findings of that study pointed to the need for more readily available information online and highlighted that the European Commission, Member States and stakeholder associations must intensify their efforts to raise awareness.

At the time of writing, dedicated evaluations of the DMA do not exist yet concerning its on digital music platforms. This instrument is still in the initial stages of implementation and enforcement, and it will take considerable time before legal certainty and a satisfactory level of awareness are achieved regarding the full scope of obligations and rights for platforms (passive subjects) and users (active subjects).

As regards the DMA, in particular, the mechanisms it establishes, most notably the designation process and compliance reporting,³³⁹ do not leave much room for doubt as to who the gatekeepers bound by the Regulation are. These few regulated companies may, however, face uncertainty as to the concrete measures they need to adopt in order to be compliant with their obligations, which may require a specification process or entering into regulatory dialogue with the European Commission.³⁴⁰ When it comes to platform users, though, and especially categories of users that do not belong to the obvious groups of business users of the DMA,³⁴¹ as are authors, performers or other music rightholders and their representatives, uncertainty or complete lack of awareness seem to be fundamental issues facing them. This is brought forward by several interviewed stakeholders that confirm that the Regulation is not yet being counted among the tools used to improve artists' position towards DSP and UGC platforms.

Similar to the DMA, a lack of awareness persists regarding the DSA and its potential implications for the music sector. While the DSA introduces a dedicated regulatory framework for online platforms, including detailed obligations related to transparency that can be useful to creators and other rightholders, its relevance remains largely unexplored by many within the industry.

Awareness of newly introduced legislative frameworks takes time to develop. Empirical data from stakeholders engaged in this research indicate that many music creators, CMOs, and industry representatives remain unfamiliar with the DSA's scope and its potential to enhance

³³⁷ European Commission, *Study on Evaluation of the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the P2B Regulation)* (Publications Office of the European Union 2023) available at <https://op.europa.eu/en/publication-detail/-/publication/d6a287b5-5116-11ee-9220-01aa75ed71a1/language-en/%0AThe%20Commission%E2%80%99s%20review%20of%20the%20P2B%20Regulation%20is%20available%20at:%20https://digital-strategy.ec.europa.eu/en/library/report-commission-first-preliminary-review-p2b-regulation> 199.

³³⁸ Ibid 197.

³³⁹ Articles 3 and 11 DMA respectively.

³⁴⁰ Article 8 DMA.

³⁴¹ See Chapter 3.1.3.2.



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transparency in digital music exploitation. This is particularly significant in light of the recommender system transparency obligations under Article 27 and the notice-and-action mechanisms in Articles 16-18, which could provide music rightholders with greater insight into how their works are promoted, moderated, or removed across digital platforms.

At the time of writing, there are no dedicated studies assessing the level of awareness of the DSA in the music sector, similar to what was observed for the DMA. However, preliminary insights suggest that platform users in the music industry, particularly artists and smaller rightholders, are not actively engaging with the DSA as a tool for improving their position vis-à-vis online platforms. Several interviewed stakeholders confirmed that the DSA is not yet being integrated into the broader conversation about platform accountability in music markets.

Ultimately, the effectiveness of the DSA in addressing structural power imbalances in the digital music economy depends not only on enforcement but also on raising awareness among creators, CMOs, and industry representatives. Similar to the P2B Regulation's implementation challenges, proactive measures by the European Commission, Member States, and dedicated authorities are necessary to ensure that rightholders fully understand and exercise their rights under the DSA. Without such efforts, the potential benefits of the regulation, particularly in addressing algorithmic opacity and content governance in music platforms, may remain underutilised.

To improve this situation, action on various fronts would be required. It will take further implementation and interpretation of the newest platform regulations through the development of administrative and decisional practice of the European Commission and case law from the CJEU and national courts. The dual and circular role of awareness of and confidence in rights established by platform regulation is important to note here, as they can be both a result of and a prerequisite for the private enforcement of any rights established. Other players representing authors and performers, such as unions, CMOs or civil society bodies, can also assume an awareness-raising role for the benefit of authors and performers, although this would imply that more clarity as regards the scope of the rights will have been achieved for them as well.



4 Access to data related to the exploitation of musical works

4.1 Copyright data infrastructures and the persistent problem of lack of data transparency in the music sector

Online platforms play a central role in the distribution and monetisation of music. For example, music streaming platforms like Spotify typically operate on a model where revenues from subscriptions or advertisements are pooled and then distributed based on streaming metrics. On the other hand, UGC platforms like YouTube and TikTok operate under a model where content virality and visibility, largely controlled by their own algorithms, can significantly impact potential earnings for rightholders. These platforms benefit economically from the sharing of music by drawing vast audiences, which in turn attracts advertisers. Although the platforms receive substantial revenues generated from ads placed alongside music content, artists receive only a fraction of these earnings due to lack of transparency in how profits are allocated.

The issue of lack of data transparency is a ‘legacy’ problem in the music sector and dates back to the pre-digital era. Historically, artists have encountered difficulties to obtain complete and reliable information regarding the exploitation of works and performances, the revenues generated, and remuneration owed to them, both from record labels and their CMOs.³⁴² Despite the DSM Directive’s transparency requirements, licensees often do not disclose exploitation data, creating a significant gap between what authors and performers need and what they receive. This lack of transparency is aggravated by the characteristics of music consumption through online platforms, including social media. Interviewed industry stakeholders highlight the lack of auditing within the music sector, and the reliance on information provided by licensees regarding usage and the calculation of remuneration.³⁴³ This opacity makes it difficult for authors and performers to verify revenue and ensure fair compensation. Three key issues are contributing to this problem. First, platforms frequently do not share detailed data about the exploitation of copyrighted works with authors and performers directly but with labels, CMOs and independent management entities (IMEs), who have the bargaining power and an established business relationship to request it and potentially prevent unfair unilateral platform practices. Second, algorithms that govern content visibility can influence the distribution and revenue generation from musical works, but platforms do not usually disclose details on how these algorithms impact visibility and thus remuneration. And third, online platforms implement content moderation practices that can result in the removal of musical works. Such removals may prevent the collection of royalties, further complicating revenue-tracking for rightholders.

Recent trends indicate increased monitoring of the commercial performance of musical works within DSPs, social media platforms, etc., often through the use of advanced analytics

³⁴² Interview with legal practitioner; Hans-Jurgen Homann, *Praxishandbuch Musikrecht* (Springer 2006), 270.

³⁴³ Interview with IME representative.



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tools and services.³⁴⁴ Nevertheless, rightholders continue to express concerns about the incompleteness of comprehensive data provided by those platforms, which makes it challenging for them to fully assess the commercial value of their rights.³⁴⁵

These persistent data-related challenges also pose significant obstacles to the effective enforcement of rights under the DSM Directive. Articles 18 and 19 DSM Directive were introduced to address some of these issues by enhancing the rights of authors and performers to fair remuneration and transparency regarding the exploitation of their works.³⁴⁶ However, the lack of consistent implementation across Member States coupled with the complexities of the digital ecosystem, particularly on social media platforms, have limited the effectiveness of these provisions.³⁴⁷

Article 18 DSM Directive establishes the principle that authors and performers are entitled to appropriate and proportionate remuneration when licensing or transferring their rights for the exploitation of their works. This provision can be used to address, among other things, the systemic imbalance in bargaining power between creators and platforms, to ensure that creators receive a fair share of the revenues generated from their works. However, achieving this goal requires access to detailed exploitation data, including usage metrics, revenue breakdowns, and metadata. Without this data, creators cannot accurately verify whether they are receiving fair remuneration, leaving the principle of Article 18 largely aspirational.

Article 19 DSM Directive complements Article 18 by imposing transparency obligations on licensees and sub-licensees. It mandates that authors and performers receive regular, up-to-date, and comprehensive information on the exploitation of their works. This includes details about the modes of exploitation and revenues generated. While this provision aims to provide creators with the tools necessary to monitor and enforce their rights, its implementation across Member States has been inconsistent. Some countries, like Belgium, have integrated Article 19 with Article 18 to create a more robust enforcement mechanism, while others have adopted fragmented approaches that dilute its effectiveness.

Article 17(8) DSM Directive adds to the transparency requirements towards platforms, by imposing the obligation on OCSSPs to, among others, provide access to information on the use of content covered by licensing agreements concluded with rightholders.³⁴⁸

The persistent lack of data transparency is further exacerbated by the characteristics of digital music markets. Both music-on-demand DSPs and UGC platforms where music is exploited hold large amounts of real-time data about their users and their music content consumption, about how their algorithms rank and make works discoverable, and thus,

³⁴⁴ Bill Rosenblatt, 'Music Rights & Data Collaboration - The Key to the Next Level of Revenue in the Music Industry' [2023] Verifi Media available at <https://static1.squarespace.com/static/5ff6e081512cb41da450d998/t/652965dbd246a7460066bd0a/1697211879341/MusicRightsAndDataCollaborationWhitePaper.pdf> > 12.

³⁴⁵ Interview with a representative from a recording company.

³⁴⁶ Eleonora Rosati, 'Article 19—Transparency Obligation' in Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021).

³⁴⁷ See Chapter 9.1.4 of Fair MusE D2.2 Deliverable.

³⁴⁸ See Chapter 8.4.2.2. of Fair MusE D2.2. Deliverable.



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ultimately, online music revenues.³⁴⁹ Arguably, platforms hold much more information and data about the exploitation of individual musical works than record labels or CMOs. Stakeholders claim that platforms have the tendency to keep some critical information they generate and possess to themselves, however, and argue that it constitutes trade secrets.³⁵⁰ They also mention competition concerns as a reason for not sharing data more extensively.³⁵¹

The dynamics of music sharing on social media platforms such as TikTok, YouTube, and Instagram from both professional and amateur artists are of particular interest in this regard. These platforms operate with opaque algorithms and limited disclosure about how content is exploited and monetised, with varying levels of data transparency and different available rights management tools among platforms.³⁵² Accordingly, there are differences in the ways different platforms indicate music usage data in terms of factors such as territory, tier, period, etc.³⁵³ Another significant issue is that of mismatches in the metadata or inconsistent metadata practices and inaccuracies in (or absence of) the inclusion of standardised identifiers like the International Standard Recording Codes (ISRCs), which results in rightholders struggling to properly trace the use of their works on these platforms in order to receive proportionate remuneration. This undermines both the transparency obligation set out in Article 19 DSM Directive and the fair remuneration principle of Article 18 DSM Directive.³⁵⁴ Moreover, social media platforms generate substantial revenues from advertising placed alongside music content, while creators receive a disproportionate share of these earnings and may not receive detailed relevant information.³⁵⁵ This disparity is compounded by the difficulty in tracing how specific works contribute to platform revenues as algorithms prioritise content based on engagement metrics rather than transparent licensing agreements. For instance, a viral music clip on TikTok may drive significant user engagement and advertising income, but the underlying rightholders may have no access to data on the clip's reach, audience demographics, or the revenues it generated.

Efforts to address these challenges include initiatives that advocate for the creation of centralised repositories for copyright data as public goods.³⁵⁶ Such repositories could harmonise metadata practices, standardise identifiers, and ensure that all stakeholders have access to reliable and comprehensive data.

Competition law and platform regulation also play a crucial role in this context. Recent legislative initiatives in the area of platform governance, and particularly their focus on increasing transparency in the platform economy, can arguably contribute to improving access to data related to the exploitation of works. The DSA and the DMA impose transparency obligations on platforms, which could be leveraged to enhance data access

³⁴⁹ Mazziotti (n 16).

³⁵⁰ Ibid; Interview with music industry stakeholder..

³⁵¹ Interview with music industry stakeholder.

³⁵² Interview with music industry stakeholder. See also Chapter 8.3.2 of Fair MusE D2.2. Deliverable.

³⁵³ Interview with music industry stakeholder.

³⁵⁴ Chapters 8.3.2 and 8.5.1 of Fair MusE D2.2. Deliverable.

³⁵⁵ See also Chapter 5.1. where the issue of transparency is discussed in connection with the lump sum payment approach by some UGC platforms.

³⁵⁶ See EU-funded Project Open Music Europe ('OpenMusE' Grant No. 101095295) <<https://www.openmuse.eu/>>. See also Chapters 8.3 and 8.5 of Fair MusE D2.2. Deliverable.



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for music creators. Similarly, competition law offers critical tools that could be used to address the systemic lack of data transparency in the music industry and to challenge anti-competitive practices by dominant platforms that withhold essential exploitation data. In turn, data transparency can often serve as a way of tracing anticompetitive behaviours in platforms, e.g., discrimination. Under Article 102 TFEU, the withholding of essential exploitation data by dominant platforms could constitute an abuse of dominance. For instance, platforms that refuse to share data necessary for authors and performers to enforce their rights may face enforcement actions. Cases like *Google Shopping*³⁵⁷ illustrate how competition law can address discriminatory practices, which could similarly apply to situations where platforms prioritise their interests over fair access to exploitation data. Furthermore, competition law can incentivise platforms to develop fairer licensing agreements by addressing imbalances in bargaining power. Competition law could reinforce the objectives of Articles 18 and 19 DSM Directive by mandating access to data as an essential facility and, thus, bridging gaps in transparency and accountability.

4.2 Access to data and competition law enforcement in digital markets

4.2.1 Withholding access to data as an abuse under Article 102 TFEU - the first hurdle: dominance

For rightholders wishing to obtain access to music exploitation data there seem to be three stakeholders that have a privileged position in terms of holding or having access to the data held by streaming and UGC platforms. These are the platforms themselves, certain CMOs and licensing hubs, and some record labels.³⁵⁸

The first hurdle for rightholders to get access to music data would be to establish that the entity from which they demand access to data holds a dominant position. The first and obvious addressee of a request for access to data or a claim of refusal of supplying data or restricting access to data would be music streaming and UGC platforms. After all, they provide the digital infrastructure on which the data is generated and analysed. Proving dominance of a music streaming platform or UGC platform would, however, pose the first significant hurdle to warrant intervention under competition law. When it comes to streaming platforms, as explained above,³⁵⁹ the only platform that could likely be found dominant in the music streaming market would be Spotify, if dominance is indeed based on the share of monthly active users. Amazon and Apple Music would seem to have too low a market share to cross the threshold of dominance. The situation would be similarly unclear for UGC platforms.

Alternatively, authors and performers could try to obtain access to data from players in the digital music ecosystem that have privileged access to data. Various interviewees indicated that such players are in particular major record labels and licensing hubs.³⁶⁰ Establishing

³⁵⁷ See the Commission Decision (n 102) and judgment by the General Court (n 71)

³⁵⁸ Interview with music industry stakeholder.

³⁵⁹ Chapter 3.1.3.

³⁶⁰ Interviews with a representative of a recording company, and two interviews with a CMO.



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dominance for record labels may prove challenging once again, especially considering the Commission's minimal intervention in previous cases that involved record labels.³⁶¹ Licensing hubs, on the other hand, are more likely to be found dominant in light of the established case law with regard to dominance among CMOs, and the much narrower market of licensing hubs.³⁶² Given that online platforms still hold the most complete dataset on the exploitation of musical works in the form of music streaming, we will focus in the following analysis only on how competition law could complement the rights to data transparency under the DSM Directive vis-à-vis online platforms.

4.2.2 Withholding access to data as an abuse under Article 102 TFEU - the second hurdle: abuse

When it comes to abuse by a dominant undertaking under Article 102 TFEU, denying access to data can constitute an abuse under certain circumstances. As a consequence, access obligations can be imposed under the so-called essential facilities doctrine.³⁶³ The doctrine initially developed in the area of infrastructures and was later extended to determine access obligations to IP-protected information, as well as information protected by trade secrets, held by dominant undertakings.³⁶⁴ As the remedy of imposing access obligations is draconian, and infringes on the dominant undertaking's freedom of contract as well as its property rights, it has been used sparingly, and mostly within the network industries.

In order to oblige a dominant undertaking to grant access to its assets to competitors under the essential facilities doctrine, the requested asset needs to be indispensable to compete in a downstream or adjacent market, and not granting access must lead to market foreclosure. Only under these circumstances does a refusal to give access constitute abuse. In the case law of the EU Court of Justice, these criteria have been applied in a strict manner. In *Oscar Bronner*, for example, the Court of Justice found that access to a particularly speedy national distribution network for newspapers was not indispensable, given that individual newspaper publishers could use less advantageous means to distribute their newspapers, or could establish their own distribution network (despite the significant cost of it).³⁶⁵

Due to indispensability being a determining factor in establishing an abuse, the question around the substitutability of data becomes crucial. According to the Report on Competition in the Digital Era commissioned by the Directorate General for Competition,³⁶⁶ substitutability will very much depend on the type of data. Volunteered data, for example,

³⁶¹ Bostoen & Vanherpe (n 155) 31-32.

³⁶² See Drexler (n 277) 38-43, 49-51.

³⁶³ Inge Graef, EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (PhD Thesis, KU Leuven 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635378> accessed 26 February 2025.

³⁶⁴ In particular in Case C-241/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, EU:C:1995:98 and Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health*, EU:C:2004:257.

³⁶⁵ Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569.

³⁶⁶ Jacques Crémer, Yves Alexandre De Montjoye & Heike Schweizer, Competition Policy for The Digital Era 15 (Publications Office of the European Union 2019) at <<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>> accessed 26 February 2025.



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can probably be volunteered repeatedly (e.g. a user can give her name, e-mail address, or age to several service providers). It is thus often substitutable. When it comes to inferred data, the undertaking in question has put considerable effort into analysing raw data to generate unique insights. Even if not substitutable, the authors of the Report argue that inferred data should not be subject to an access obligation, as it would chill investment incentives considerably and would probably entail a sharing of business secrets. The type of data that is not easily substitutable and could be subject to access obligations is observed data, as well as volunteered data that is very costly or impossible to collect again.

Even if it could be conceivable to mandate access to observable data, such as on the exploitation of a musical work in terms of the number of streams, streaming location etc. this data would still need to be considered “indispensable” to compete for authors and performers (or their labels) in order to establish that a refusal of access constitutes an abuse. It is difficult to see how the requirement of indispensability could be fulfilled here. After all, most platforms appear to share some data with labels, artists, and CMOs. As the *Oscar Bronner* case indicates, requiring access to a “perfect” dataset from the best of worlds is not a remedy that EU competition law would be willing to offer. Therefore, reliance on the older case law on essential facilities would probably not be successful in establishing an abuse by streaming or social media platforms.

Given how the EU Commission’s enforcement practice has evolved, however, and how national competition authorities are enforcing Article 102 TFEU, there seem to be new legal standards developing to establish abuse next to those established in the existing case law on essential facilities, especially when it comes to the indispensability requirement.³⁶⁷

On the one hand, we might see the indispensability requirement be dropped altogether when it comes to refusals of access to digital platforms. In the pending case C-233/23 *Google Auto*, AG Medina suggests in her Opinion that the *Bronner* criteria be dropped in “so far as a dominant undertaking puts at the disposal of third-party operators a platform which is conceived and designed to be nourished by apps developed by those operators”.³⁶⁸ This applies in particular to the indispensability requirement and the elimination of competition in a neighbouring market. She argues instead that “the examination should be focused, for that same purpose, on whether the dominant undertaking which owns that platform excludes, obstructs or delays the requested access of an app developed by a third party, provided that that behaviour gives rise to anticompetitive effects to the detriment of consumers and cannot be objectively justified”.³⁶⁹

A softening of the conditions of the *Bronner* criteria when it comes to digital platforms could be beneficial for rightholders seeking access to exploitation data, too. Other precedents in the platform economy might be helpful, too, as for example *Google Shopping* and its focus on discriminatory abuse.

³⁶⁷ Pablo Ibanez Colomo. *Google Shopping: A Major Landmark in EU Competition Law and Policy*. (2022) JECLAP 13(2), 61-62.

³⁶⁸ Opinion AG Medina in Case C-233/23 *Android Auto*, 45.

³⁶⁹ *Ibid.* 46.



4.2.3 The Impact of Google Shopping - Discrimination as an Abuse

The EU Commission Decision in *Google Shopping* and its confirmation by the General Court, can be considered as an indication that the legal standard in refusal to access cases is shifting. The case concerned a case of self-preferencing in which Google was found to be abusing its dominant position in the market for Internet Search by placing its own shopping services in the search window design in a more favourable way than those of other shopping-comparison sites. The General Court framed Google's abuse as abuse based on discrimination.³⁷⁰ Google had abused its dominant position by treating its own shopping-comparison services in a more favourable manner compared to the services of its competitors.

Discrimination as a form of abuse is directly mentioned in the wording of Article 102(c) TFEU. The provision states that abuse may consist of “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”. There exists earlier case law by the EU courts where discrimination was found to be the core element of an abuse.³⁷¹ While these often involved vertically integrated firms that could have an incentive to distort downstream competition, some of these cases did not concern conduct by a vertically integrated firm, like *Aéroports de Paris* (Joined Cases T-128/98 and C-82/01 P).

When it comes to music streaming and social media platforms and the question of access to data, it might thus be a possible option to inquire into whether a dominant platform that shares different amounts of data with different rightholders might be engaging in an abuse of dominance. For this argument to succeed, we would first need to know whether there is indeed an unjustified difference in treatment between various rightholders. Some empirical data suggests this may be the case, when it comes to major versus indie labels. According to the 2024 Streams and Dreams report, artists signed to smaller independent labels have reported that they tend to face more challenges in accessing detailed and transparent information, as compared to artists signed by major and larger independent labels that seem to enjoy more advanced systems and analytical tools.³⁷² The CMA Study, too, mentions that some contracts between majors and streaming platforms contain some non-price MFN clauses that require the platform to provide the best level of data to a certain major, and not to provide data at any higher level to other majors or recording companies.³⁷³

In addition, there must be a competitive disadvantage resulting from such differential treatment. While it might be relatively easy to show a difference in treatment (i.e. dissimilar conditions to equivalent transactions), the concept of competitive disadvantage sets a threshold that might be more difficult to meet.³⁷⁴ This is also the case since the concept of competitive disadvantage would require the showing of a distortion of competition in the

³⁷⁰ Bostoen (2022) (n 180).

³⁷¹ “[A]buse may take the form of an unjustified difference in treatment” as cited by the General Court in *Google Shopping* at 155 (“see, to that effect, judgments of 17 July 1997, *GT-Link*, C-242/95, EU:C:1997:376, paragraph 41; of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617, paragraph 114; and of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 140”).

³⁷² IAO Study (2024) Streams and Dreams Report (n 336) 25.

³⁷³ CMA (2022) (n 6) 69.

³⁷⁴ On this point see also Bostoen (2022) (n 180).



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form of an effects-based analysis.³⁷⁵ In national case law, plaintiffs have repeatedly not been able to show these effects in discrimination cases under Article 102 TFEU or its national equivalents.

In the UK *Streetmaps* case from 2016,³⁷⁶ the factual scenario was very similar to *Google Shopping*: the plaintiff (Streetmap) alleged an abuse by the placing of Google Maps in the Google Search window. The judge in the case did not find an abuse since Streetmap could not show that the placing of Google Maps in the search window had actually diverted a significant number of customers away from Streetmap. In addition, the judge found that there was an objective justification for the differential treatment (technological efficiency).

In a recent judgment by the Dutch Supreme Court from March 2024,³⁷⁷ the Court reversed the appeal court for failing to include a proper analysis of “competitive disadvantage”. The plaintiff in the case was a Dutch association of background music providers (ABMD) who claimed that the collecting societies Buma/Stemra were abusing their dominant position under Article 102(c) TFEU by charging streaming platforms (whose services were often illegally used as commercial background music) much lower license fees than ABMD members. The Supreme Court found that the court of appeal had failed to take “all circumstances” into account, as required by the case law of the EU Court of Justice, in order to establish that there was a competitive disadvantage by this price disparity. The court of appeal had in particular failed to consider evidence that background music licenses only made up a very small share of the prices charged by ABMD members for their services, and that in many cases ABMD members pay less when they purchase background music licenses than if they were to purchase streaming licenses.

4.2.4 The Commission’s New Draft Guidelines on Article 102 TFEU

The Draft Guidelines on Exclusionary Abuses of Dominance published by the EU Commission in August 2024 reflect some of the shifting ground in Article 102 TFEU enforcement cases. In contrast to their predecessor, the 2009 Guidance, the Draft Guidelines contain two separate abuse sections that are relevant. Under the section of “Conducts subject to specific legal tests” there is a section on refusal to supply. When a refusal to give access to data constitutes a refusal to supply, the criteria to establish an abuse remain stringent: the criterion of indispensability applies and exclusionary effects need to be shown.³⁷⁸ Under the section of “Conduct with no specific legal test” there is the category of “access restrictions”, which would apply when the fact of not making data accessible does not amount to a refusal to supply. Here, the indispensability requirement is dropped.

In principle, the guidelines only confirm what has been explained above. The challenge is to establish whether the conduct of music streaming and social media platforms is to be categorised, legally speaking, as a refusal to supply or an access restriction. In the case of

³⁷⁵ Ibid.

³⁷⁶ [2016] EWHC 253 (Ch).

³⁷⁷ *Vereniging Buma, Stichting Stemra v Associated Business Music Distributors (ABMD) and others* (Hoge Raad, judgment from 1 March 2024, 22/03167).

³⁷⁸ Para 96 ff.



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the former, establishing an abuse will be very difficult. In the case of the latter, establishing an abuse might be easier but the Draft Guidelines fail to give any clear criteria for how an access restriction will be analysed in practice. The overall rationale is that the “need to protect the undertaking’s freedom of contract and incentives to invest does not apply to the same extent as in a refusal to supply setting. However, the importance of the input for the access seeker will increase the likelihood that access restrictions will lead to exclusionary effects.” Interestingly, one of the examples the Commission gives for an abusive access restriction is “where the dominant undertaking fails to comply with a regulatory obligation to give access.”³⁷⁹ This example could be of interest in light of Article 19 DSM Directive.

4.2.5 Lessons from the Spotify v Apple Saga

The Commission acknowledged in the *Apple* decision that conduct on the P2B side of the music streaming market can potentially harm consumers, particularly the end users of streaming platforms. Specifically, Apple’s conduct was found to involve the concealment of access to information from consumers. This finding may have broader implications for future cases, where platforms could be found to withhold data that should be disclosed under Article 19 of the DSM Directive. The Commission also noted that even small variations in the way platforms provide information can affect costs, which could ultimately harm consumers.³⁸⁰

A central takeaway from the case is the Commission’s recognition of the importance of platforms providing essential information to end users, enabling them to make informed decisions within the streaming market. This principle could extend beyond this specific case to other instances involving data flows, underscoring the broader importance of transparent data sharing for the effective functioning of markets. Additionally, the Commission’s approach to analysing markets involving ecosystems is significant, as it highlights the need for a “holistic” analysis. Such an approach is crucial to fully understanding market dynamics and assessing the impact of market practices.

4.2.6 The interplay of obligations on online platforms under the DSM Directive and Competition Law

The idea that a dominant undertaking abuses its dominance when it violates another statutory obligation is not without precedent. In Germany, the Federal Supreme Court has a longstanding judicial practice that confirms that there is a violation of Section 19 Act against Restraints of Competition (the 102 TFEU equivalent in German law) when a dominant undertaking breaches a statutory duty.³⁸¹ The latest example of such a case is the Facebook decision by the FCO, which found that Meta had abused its dominant position inter alia by violating the GDPR.³⁸² The EU Court of Justice, upon a preliminary reference by the Higher

³⁷⁹ Para 166 b).

³⁸⁰ *Apple* decision (n 40) para. 789.

³⁸¹ See, e.g. German Federal Supreme Court, Judgment of 24 January 2017, KZR 47/14 *VBL-Gegenwert* (ECLI:DE:BGH:2017:240117UKZR47.14.0).

³⁸² Decision B6-22/16 of 6 February 2019.



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Regional Court of Dusseldorf in the appeal proceedings against the FCO's Facebook decision, confirmed this approach.³⁸³

A similar situation has arisen in the context of the DSM Directive and the press publishers' right enshrined in Article 15. When the press publishers' right was transposed and entered into force in France in 2019, Google made clear that it would no longer publish text, videos or photos from press outlets unless they permitted Google to do so for free. The French Competition Authority (FCA) intervened and held that this conduct constituted an abuse of dominance by Google.³⁸⁴ It ordered Google to enter into negotiations with press publishers and news agencies. In 2022, the FCA accepted Google's commitments and closed the proceedings.³⁸⁵ The commitments entailed *inter alia*:

- An obligation for Google to conduct negotiations on the basis of transparent, objective and non-discriminatory criteria within 3 months from the request to open negotiations from a press publisher or a news agency.
- Google should provide the press publishers and news agencies with a set of pre-defined information needed to negotiate an appropriate remuneration.
- Neither the indexing, nor the classification, nor the presentation of the protected content used by Google on its services should be affected by the negotiations.
- Any other economic relations between Google and the press publishers and news agencies shall not be affected by the negotiations.

In March 2024, the FCA found that Google failed to comply with several commitments due to its new Bard / Gemini service.³⁸⁶ It found that the significant lack of transparency regarding the use made by Google of press content for Google's generative AI services was in breach of its commitment to negotiate based on transparent, objective and non-discriminatory criteria. Furthermore, Google violated the obligation to keep negotiations regarding the press publishers' right separate, since it linked the use of press agencies' and publishers' content by its artificial intelligence service to the display of protected content on services such as Search, Discover and News. The FCA imposed a fine of 250 million Euro on Google for breaching its commitments.

The rationale of the unorthodox competition law enforcement of the DSM Directive could be transferred to the data transparency obligations under Article 19 CDMS Directive. Even more so, it could be used both to ensure access to data regarding the exploitation of works, but also as to whether OCSSPs are complying with their obligations under Article 17 DSM Directive.

³⁸³ Case C-252/21 Meta Platforms and Others, ECLI:EU:C:2023:537, para 48 ("In the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR")

³⁸⁴ Decision no. 20-MC-01

³⁸⁵ Decision no. 22-D-13

³⁸⁶ Decision no. 24-D-03.



4.2.7 Limitations

While competition law seems to offer possible avenues in enhancing transparency for authors and performers by enabling access to data, there are also limitations to competition law as a tool for fostering access to data. Apart from the general problems of scope discussed in Chapter 3, the two main limitations are the vagueness of competition provisions and a lack of precedent, and the problem with competition law remedies, that might not be adequate to increase industry-wide access to data.

4.2.7.1 Lack of precedent

Given the inherent vagueness of Article 102 TFEU, the actual potential of the deployment of EU competition rules remains uncertain until they have been applied by a competition enforcer in a specific case or successfully invoked by a private litigant. As the discussion shows, there is no precedent of an Article 102 TFEU case to obtain access to data against a streaming platform or UGC platform. Furthermore, prior case law of the Court of Justice of the EU on accessing (IP-protected) data like in the *Magill* case or *IMS Health* discussed above,³⁸⁷ establish a rather stringent standard to enable plaintiffs to access data held by dominant undertakings. As also explained above, we can potentially see a shift coming in the EU Commission Draft Guidelines and in the Advocate General Opinions in pending cases.³⁸⁸ They seem to lower the standard to bring cases under Article 102 TFEU against access restrictions. Furthermore, the enforcement against Google by the French Competition Authority could have precedential value, as the authority imposed data disclosure in the negotiations as one of the remedies against Google. Nonetheless, there is not yet an EU judicial precedent that could provide full legal certainty as to whether a claim for abusive access restrictions of music platforms by authors and performers would succeed.

Last, it should be noted that the *Apple* Decision of the EU Commission, while being related to music streaming, does not provide a clear precedent for the type of abuses discussed here. After all, this case is about access to an app store by an app developer. It does not directly affect music streaming markets beyond access conditions by streaming and other apps to app stores.³⁸⁹ Therefore, the *Apple* decision by the Commission cannot be understood as clear evidence that competition enforcers are eying digital music markets for future enforcement action, or that digital music markets have become a priority of competition enforcers.

4.2.7.2 Adequacy of remedies

Overall, competition enforcement in digital markets has regularly been criticised for not providing adequate remedies for the competition problems identified in enforcement decisions.³⁹⁰ There are indeed limitations as to the remedies that competition law can offer,

³⁸⁷ See Chapter 4.2.2.

³⁸⁸ Ibid.

³⁸⁹ Interview with representatives of a music streaming platform.

³⁹⁰ Filippo Lancieri, Caio Mario S Pereira Neto, 'Designing Remedies for Digital Markets: The Interplay Between Antitrust and Regulation', (2022) 18 (3) Journal of Competition Law & Economics, 613–669



even if an access restriction to data was found to be abusive. This is the case on the one hand, due to the remedy only being imposed against one specific platform that is subject to the competition proceedings, while other platforms will remain unaffected. Second, behavioural remedies like mandating access to data are generally criticised for being expensive to enforce since it requires monitoring and supervision by competition enforcers.³⁹¹ Even worse, the remedies that have been imposed have often had little or no impact on digital markets.³⁹² On the other hand, a competition investigation revealing a widespread problem of data access might trigger the development of more regulation in this area, as can be seen by the various provisions of the DMA, which are inspired by prior competition enforcement actions by the EU Commission against digital gatekeepers. It might also enhance more access to data by the industry, by way of self-regulatory measures taken by the platform to avoid further enforcement and competition law scrutiny.

4.3 Role of platform regulation in promoting and enhancing data access rights

The DSA represents a significant regulatory effort to increase transparency and accountability by online platforms. In the context of authors' and performers' remuneration, DSA transparency provisions may provide additional tools to address the issues associated with the lack of available exploitation data to effectively calculate the revenues generated by the online exploitation of a work or performance. The following analysis explores how specific provisions of the DSA, particularly Articles 14, 15 and 27, interact with the transparency obligations under the DSM Directive (in particular, Article 19) and assesses the potential benefits and limitations of these provisions.

Additional legal bases and further opportunities for access to information and data to the benefit of authors and performers are presented through the DMA. Certain transparency obligations imposed on tech companies with gatekeeper status will be examined for their role towards improving the position of music rightholders and their representatives, with particular focus on Article 6(9) and, most importantly 6(10) DMA.

4.3.1 Data Transparency Requirements in the DSA

4.3.1.1 DSA transparency obligations

i. Information related to platforms' policies

Article 14 DSA mandates that online platforms communicate their terms and conditions to users in a clear manner, including any restrictions on content use and the reasons for these restrictions. This provision can contribute to materialising the right of authors and performers to receive 'up to date, relevant and comprehensive information on the exploitation of their works and performances [...] in particular as regards modes of exploitation, all revenues generated and remuneration due' (Article 19 DSM Directive). In short, this provision can

³⁹¹ Ibid.

³⁹² Michal S. Gal & Nicolas Petit, 'Radical Restorative Remedies for Digital Markets' (2021) 36 Berkeley Tech LJ 617



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help to ensure that music authors and performers are better informed about how their works will be used and monetised within and by online platforms. Moreover, it can also help them to make more informed decisions when entering agreements with platforms, ensuring that they understand the implications of the platform's policies on their rights and revenues. At the same time, the clarity provided by these terms might also reduce potential disputes between authors and performers and platforms, as expectations are set out clearly from the outset.

Additionally, the transparency mandated by Article 14 DSA can promote fairness by ensuring that rightholders are aware of how their content may be moderated or restricted, which would allow them to challenge or appeal moderation decisions more effectively. Under this provision, and together with the obligation to provide reasons in Article 17 DSA examined below, platforms are required to provide clear information to users regarding the reasons for content removal or restriction, including the procedural steps to challenge those decisions, and whether they have been made automatically (i.e. through algorithmic decision making) or not. Similarly, Article 15 DSA mandates that platforms must disclose their content moderation policies, including details on how content is flagged, reviewed, and moderated. These provisions aim to make moderation practices more transparent, thereby providing rights holders with better insights into how their content is managed and potentially restricted. Understanding these processes can help both creators and CMOs ensure that content removals do not affect remuneration by clarifying why their content might be restricted or removed and providing a basis to challenge decisions that impact royalty collection.³⁹³ This is especially important in an industry where the balance of power often favours large platforms over individual creators,³⁹⁴ as it helps to level the playing field by providing authors and performers with the information they need to protect their interests.

ii. Information related to platforms' *practices*.

Algorithmic curation and recommender systems

Platforms' practices regarding content curation have a profound impact on both visibility and revenue potential for artists. At the same time, algorithms are central to how online platforms manage and distribute music content. These algorithms, employed by platforms such as Spotify, YouTube, or Apple Music, dictate which songs appear in users' recommendations, search results, and curated playlists. For example, Spotify's "Discover Weekly" playlist, or "AI DJ" and YouTube's "Up Next" recommendations are driven by algorithms that assess user behaviour and preferences to suggest new music.

The impact of these algorithms on remuneration is important, and the lack of transparency raises broader concerns about fairness and potential biases in algorithmic curation.³⁹⁵ A track that is featured prominently in a playlist or recommendation engine can see a dramatic

³⁹³ Blake Hallinan, CJ Reynolds and Omer Rothenstein, 'Copyright Callouts and the Promise of Creator-Driven Platform Governance' (2024) 13 Internet Policy Review <<https://policyreview.info/articles/analysis/copyright-callouts-and-creator-driven-platform-governance>> accessed 14 February 2025.

³⁹⁴ Cf. Robyn Caplan and Tarleton Gillespie, 'Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy' (2020) 6 Social Media + Society 2056305120936636;

³⁹⁵ Tamas Tofalvy and Júlia Koltai, "Splendid Isolation": The reproduction of music industry inequalities in Spotify's recommendation system' (2023) 25 *New Media & Society* 7, 1580–1604.



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increase in streams and, consequently, revenue. Conversely, a track with lower visibility may struggle to gain traction, affecting its earning potential and overall reach. For instance, independent artists or emerging musicians who lack a substantial following might find their music less likely to appear in recommended playlists or search results.³⁹⁶ This so-called ‘popularity bias’ would limit their exposure and revenue opportunities compared to more established artists.³⁹⁷ However, the mechanisms governing these algorithms are often treated as proprietary trade secrets, which can allow platforms to withhold critical information about the criteria and weighting used to determine content placement. Due to this, it is not easy for artists to understand how their music is being promoted or why certain tracks perform better than others, whether it is due to commercial agreements, user engagement metrics, or other undisclosed factors. Consider the case of Spotify’s “Release Radar” playlist, which curates new music from artists the user follows or has shown interest in. But most importantly, outside the music streaming business, social media platforms, and especially short-form video (SFV) platforms such as Instagram or TikTok, are becoming the new sources for music discoverability and users’ engagement with music. Similarly, on YouTube, the recommendation algorithm can significantly affect a video’s view count. Accordingly, algorithmic decisions on which new releases to include on playlists or to feature on users’ feeds can significantly impact an artist’s visibility. This opacity extends to revenue generation as well. For example, higher visibility can lead to increased ad revenue or streaming royalties.³⁹⁸ Yet, these platforms do not reveal the specific factors that influence these decisions. As a result, artists do not have the knowledge about how to optimise their music for better placement, which can lead to missed opportunities for appropriate remuneration.³⁹⁹

Here is where Article 27 DSA can play an important role. This provision deals with the transparency of recommender systems. It requires that providers disclose the main parameters influencing how content is suggested to users and provide options for users to modify these parameters. As such, this provision could potentially benefit music creators by shedding light on how their works are ranked and recommended, and thus addressing a critical aspect of content visibility that affects their reach and revenue. The requirement for platforms to set out their recommender system parameters in their T&Cs in ‘plain and intelligible language’ (Article 27(1)) can complement the right to information under Article 19 DSM Directive by enabling artists to better understand the factors determining their content’s visibility—or at least whether or not to place their music in a particular platform where they do not agree with the platform’s practices. For instance, platforms must disclose the criteria that significantly affect music recommendations. This could include factors such as user engagement metrics, genre preferences, or previous listening habits.⁴⁰⁰ Therefore, if

³⁹⁶ Christine Bauer, Marta Kholodylo, and Christine Strauss. ‘Music recommender systems: challenges and opportunities for non-superstar artists’, in (2017) 30th Bled eConference, 21–32; Christine Bauer, ‘Allowing for equal opportunities for artists in music recommendation’, in (2019) Proceedings of the 1st Workshop on Designing Human-Centric Music Information Research Systems, ser. wsHCMIR ’19, Delft, The Netherlands..

³⁹⁷ Luis Aguiar and Joel Waldfogel ‘Platforms, power, and promotion: Evidence from spotify playlists’ (2021) 69 *The Journal of Industrial Economics*, 3,653–691.

³⁹⁸ Mazziotti, ‘Remuneration of Content Creators in the Digital Space’ (n 29).

³⁹⁹ Marcus O’Dair and Andrew Fry, ‘Beyond the Black Box in Music Streaming: The Impact of Recommendation Systems upon Artists’ [2020] 18 *Popular Communication* 1, 65.

⁴⁰⁰ O’Dair and Fry (n 398).



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properly observed, this provision can provide music authors and performers with insights into why their works might be promoted or demoted within the platform's ecosystem.

Moreover, Article 27 DSA mandates that platforms explain the relative importance of these parameters (Article 27(2)). For music creators, this means understanding not just what factors influence content recommendations, but also which factors are prioritised. This can help artists tailor their content or marketing strategies to align with the parameters that platforms value most, potentially enhancing their visibility and reach. The provision also requires platforms to offer functionalities that allow users to modify or select their preferred recommender system options (Article 27(3) DSA). In practice, this could mean that authors and performers have some degree of control over how their content is presented to users. For instance, artists might be able to influence whether their new releases are prioritised in recommendations or how their existing catalogue/repertoire is displayed. This feature could empower authors and performers, and rightholders at large, to manage their content more effectively and improve engagement with their target audience.

Content moderation decisions

In addition to the above, Article 17 DSA introduces an obligation for online platforms to provide a statement of reasons to users whenever they remove or restrict access to content, disable accounts, or impose any other restrictive measures. This provision builds upon the transparency obligations of Articles 14 and 15 DSA by requiring platforms to go beyond disclosing their content moderation policies to actively justify enforcement actions on a case-by-case basis. For music authors and performers, this obligation has direct implications for copyright enforcement, monetisation, and disputes over content moderation decisions. Platforms often engage in automatic or semi-automated content moderation, removing or demonetising music content due to alleged copyright infringements, violations of platform policies, or algorithmic content detection errors. The requirement to provide a detailed statement of reasons ensures that affected rightholders receive clear, actionable information on why their content was restricted, which allows them to challenge wrongful removals and protect their financial interests.⁴⁰¹

⁴⁰¹ Interview with representatives of a CMO.



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Table 1: Contribution of the DSA to existing authors' and performers' rights

	Article 19 DSM Directive	DSA
Subjects/Scope	Authors and performers	Recipients of the service (Article 14)
Frequency of Access	Regular, at least once per year	Real-time/ad-hoc for content moderation (Article 15) and for content removal (Article 17); periodic transparency reports (Article 15, 'at least once a year'); ongoing for recommender system parameters? (Article 27)
Type of Data	Information on exploitation of works, including modes of exploitation, revenues, and remuneration due	Information on content moderation actions (Article 14); reasons for content removal (Article 15 and 17); transparency of terms and conditions (Article 14); recommender system parameters (Article 27)
Quality of Access / Information	Up-to-date, relevant, and comprehensive information	Effective access to information about moderation and removal, but does not mandate detailed exploitation data; Article 27 requires clear, intelligible explanations of recommender system parameters
Procedure	Regularly provided by parties to whom rights are licensed or transferred (may vary by national implementation)	Platforms must notify users about content removal and moderation policies (Article 14 & 17); transparency reports provided periodically (Article 15); recommender system parameters must be disclosed and modifiable (Article 27)
Cost	No	No, but amplification (e.g. in Spotify in exchange for less remuneration), compatible with Article 27(2) DSA? *This would be considering amplification as a measure that would also provide further information on ranking etc
Additional Notes	Focuses on detailed exploitation and financial reporting for individual works	Focuses on procedural transparency regarding content removal and moderation, as well as transparency of platform policies and recommender system parameters; less emphasis on exploitation data for content creators



4.3.1.2 *Limitations of the DSA in enhancing data transparency*

Despite the potential of the provisions analysed above, there are several challenges and limitations in applying the DSA to enhance transparency in the music sector:

i. Gaps in data transparency

The use of the DSA's transparency provisions to reinforce authors' and performers' right to exploitation data may not fully include the level of detailed information required by Article 19 DSM Directive. Similarly to the limited enforcement of Article 19 DSM Directive, the DSA transparency provisions may not be fully observed. Also, the DSA primarily addresses content moderation and removal, which, while relevant, may not cover all aspects of exploitation data.

While Article 19 DSM Directive requires that authors and performers receive regular, detailed information about how their works are used, the revenues generated, and the remuneration due, it is not often clear what the type of information to be provided is or how it should be provided. Given the horizontal nature of the DSA, however, the DSA does not mandate platforms to provide this level of granularity. This limits the DSA's effectiveness in addressing the needs of rightholders for transparency regarding income and content usage. Moreover, the DSA's focus on content moderation and procedural transparency does not bridge the gap left by the lack of detailed reporting. Even with improved procedural transparency, rightholders may still struggle to access the specific exploitation data needed to verify and reconcile their earnings from digital platforms.

ii. Insufficient enforcement of transparency provisions

The effectiveness of transparency provisions heavily depends on the implementation practices of individual platforms. While the DSA mandates transparency, the actual disclosure and modification options provided by platforms might be partial or inadequately communicated. This may limit the practical utility of transparency provisions for music creators. For instance, platforms might provide general information without detailed insights into specific algorithmic decisions or fail to offer effective tools for disclosing recommender system parameters. Furthermore, Article 27 DSA focuses primarily on the visibility of content rather than on financial transparency. Although it may contribute to improving understanding of how content is recommended, it does not address the need for detailed exploitation data or revenue reporting required under Article 19 DSM Directive. Moreover, as seen in the table above, the frequency of reporting varies depending on whether the information relates to platform policies or practices. Accordingly, without dedicated or targeted rules on the exploitation of musical works and additional measures specifying granularity, music creators will still face challenges in accessing comprehensive financial information about how their works are monetised and exploited.

iii. DSA does not address power imbalances and information asymmetries

In light of the above, unlike Articles 18ff DSM Directive, the horizontal nature of the DSA does not fully contribute to addressing the contractual position of authors and performers vis-à-vis online platforms. While there are provisions, such as Article 10 DSA, that aim to



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address the opacity often associated with platform policies and that exacerbate power imbalances. In practice, the provisions related to transparency in terms and conditions, such as Articles 14 and 15 DSA, mean that platforms must disclose their content management policies, including how content is moderated and how licensing terms are applied. For rightholders, clearer terms could lead to more equitable negotiations and better understanding of their rights and obligations. However, the impact of these provisions, rather designed for mitigating societal harms than for enhancing individual rights,⁴⁰² is contingent on the extent to which platforms comply with these transparency requirements and the clarity of the information provided. Thus, the underlying economic dynamics and bargaining power disparities often remain unchanged, meaning that while the DSA can improve some aspects of transparency and accountability, it does not fully address the root causes of power imbalances.

iv. Elusive concepts for content moderation

A key challenge in applying the DSA to the music sector arises from the ambiguity surrounding content moderation obligations, particularly regarding illegal content and copyright-protected material. While the DSA establishes a structured approach to content moderation, it does not always provide clear operational guidance on how platforms should handle non-authorised uses of copyrighted works, nor does it specify how enforcement mechanisms should align with the DSM Directive.⁴⁰³

Recital 12 DSA recognises copyright-infringing content as a form of illegal content, but its practical application to music exploitation remains uncertain. Unlike other forms of illegal content (e.g., hate speech, disinformation, or terrorist content), copyright violations require a more nuanced regulatory approach, as they involve economic rights, licensing agreements, and contractual disputes rather than outright unlawful activity. This distinction raises critical questions regarding how platforms should handle allegedly infringing content, which procedural safeguards should be in place, and how the DSA interacts with existing copyright enforcement frameworks.

First, the definition of non-authorised use remains vague under the DSA. The regulation does not specify whether all non-licensed uses of copyright-protected material automatically qualify as “illegal content”. Some uses may fall under exceptions, such as quotations, parody, or transformative works, while others may involve licensing disputes rather than outright infringements. This lack of clarity creates uncertainty for platforms when assessing takedown requests and leaves rightholders without clear mechanisms to assert their claims. Without a precise legal framework, platforms may take an overly cautious approach, erring on the side of removal to mitigate risk rather than carefully evaluating the legitimacy of flagged content.

Second, the reliance on automated enforcement mechanisms raises concerns about procedural fairness and due process. Many online platforms already deploy automated

⁴⁰² Folkert Wilman, ‘The Digital Services Act (DSA) - An Overview’ (December 16, 2022). Available at SSRN: <https://ssrn.com/abstract=4304586> or <http://dx.doi.org/10.2139/ssrn.4304586>; Niklas Eder, ‘Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation’ (2024) 25 *German Law Journal*, 1197.

⁴⁰³ Peukert and others (n 51); Quintais, De Gregorio and Magalhães (n 246).



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tools, such as YouTube's Content ID⁴⁰⁴ and Meta's Rights Manager,⁴⁰⁵ to detect and remove allegedly infringing content. However, the DSA's provisions requiring transparency in moderation decisions and a right to contest removals (Articles 14 and 17) may not be sufficient when these enforcement mechanisms operate without meaningful human oversight. The risk of over-removal is particularly high in the music industry, where algorithmic detection often misidentifies legitimate uses of music, such as live performances, remixes, or legally licensed samples. Platforms may remove content preemptively to avoid liability, leaving rightholders and users with limited recourse.

Third, the interaction between the DSA and the DSM Directive, particularly Article 17 DSM, remains underdeveloped. The DSM Directive introduced specific obligations for OCSSPs to ensure proper licensing agreements and implement effective copyright enforcement mechanisms. However, the DSA does not provide clear guidance on how these obligations align with its own content moderation framework. If the DSA's notice-and-action system is interpreted too broadly, it could undermine the more targeted copyright enforcement mechanisms under the DSM Directive, and create regulatory inconsistencies. This could leave both platforms and rightholders uncertain about their respective rights and obligations, resulting in either excessive removals or an ineffective copyright enforcement regime.

In conclusion, the lack of clarity in defining copyright violations within the DSA's content moderation framework leaves key questions unresolved. The Regulation does not explicitly state whether platforms must provide detailed decision-making criteria when removing or demonetising copyrighted content, nor does it clarify whether rightholders have a formal right to access the data that informs these decisions. These ambiguities could lead to fragmented enforcement across platforms, with some companies applying stricter removal policies while others take a more lenient approach.

v. Lack of enforcement experience

The effectiveness of the DSA in achieving transparency objectives requires empirical testing. Studies need to assess whether these provisions effectively lead to more transparent practices by online platforms and better enforcement of transparency.

While the DSA's transparency obligations mark a significant regulatory shift, their real-world impact remains largely theoretical, as there is a notable lack of empirical research assessing the effectiveness of these provisions in practice. Without empirical data, it remains unclear whether the DSA is genuinely improving transparency and fairness for authors and performers or whether platforms are merely complying with formal obligations without making substantive changes to their business practices.

For example, there is little evidence to assess whether authors and performers are actually benefiting from the DSA's requirements for recommender system transparency under Article 27. The provision mandates that platforms disclose the key parameters influencing content recommendations, but this does not necessarily mean that authors and performers can use this information to optimise their visibility or improve their bargaining position. If platforms

⁴⁰⁴ <https://support.google.com/youtube/answer/2797370?hl=en>.

⁴⁰⁵ https://creators.facebook.com/tools/rights-manager/?locale=en_US.



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comply only at a superficial level, e.g. by offering vague explanations of ranking mechanisms without disclosing commercially significant details, then the intended benefits of this provision may not materialise.

Also, the effectiveness of extrajudicial mechanisms for enforcement under Articles 20 and 21 DSA in the music sector remains untested. No studies currently assess whether these mechanisms are accessible, effective, or widely used by music creators.

Finally, the lack of sector-specific research makes it difficult to determine whether regulatory enforcement is effectively tailored to the needs of the music industry. The DSA applies broadly across digital platforms, from social media to e-commerce marketplaces, making it challenging to assess whether its implementation is benefiting music rightholders in particular. Without dedicated studies examining how platforms in the music sector are applying DSA provisions, policymakers may lack the necessary insights to refine the regulation in ways that effectively address industry-specific concerns.

4.3.2 Data Transparency Requirements in the DMA

Various provisions in the DMA establish obligations for gatekeepers to provide information and data to different user groups, all of them under Articles 5 and 6. Out of these, of interest for the purposes of this study are predominantly Article 6(9) and 6(10) DMA because of the music-relevant CPSs they encompass (social networking and video-sharing) and the fact that they could benefit authors and performers in their capacity as end or business users.⁴⁰⁶ The purpose of this chapter is to examine whether these provisions can meaningfully support the right authors and performers have under Article 19 of the DSM Directive to receive detailed relevant information on the exploitation of their works from their contractual counterparties.

4.3.2.1 DMA data access rights - Article 6(9) and (10)

Article 6(9) DMA provides end users with the right to effective portability of their platform data. The provision enables end users of any CPS and authorised third parties to request from the gatekeeper access to the data that they provide or generate by using a CPS and to have at their disposal tools to port such data. For the portability of their data to be 'effective', the tools provided by the gatekeeper need to be free of charge and the access to data continuous and real-time.

Article 6(10) DMA provides business users with the right to access their platform data. It enables business users of any CPS and authorised third parties to request access to personal and non-personal data that they - and their end users - provide or generate through their commercial activity on a CPS. The access to such data has to be "free of charge, (...) effective, high-quality, continuous and real-time".

Gatekeepers relevant for the purposes of this study, Alphabet, Meta and ByteDance, feature data access and portability options to users which predate the DMA but also options that

⁴⁰⁶ See Chapter 3.1.3.



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were adopted as a reaction to it, as stated in their first DMA compliance reports.⁴⁰⁷ From the tools presented in these reports, including TikTok Business Analytics, Meta's Insights and YouTube's Analytics for Artists, it becomes clear that users with business accounts can have access to more commercially strategic information, metrics and insights from their platform activity compared to end users.⁴⁰⁸ This information, for instance insights on audience demographics and location and other consumption patterns, mainly relates to end user reach and engagement with content and is closer to the granularity of information described under Article 19 DSM Directive.

Consequently, an author or performer assuming the role of business user may benefit from more granular information regarding the 'performance' or 'consumption' of their work on the platform such as, for instance, metrics about how an uploaded song performed in terms of audience demographics and geographical reach. In that sense, Article 6(10) DMA, conferring a right to data generated in the framework of the engagement of end users with the business user's services, grants wider access to information and is, therefore, closer to the detailed and comprehensive information of Article 19 DSM Directive than Article 6(9) DMA.

4.3.2.2 Contribution of the DMA to existing creators' transparency rights

The table below offers a comparative overview of the main elements of the main transparency and access to data provisions of both the DMA and the DSM Directive.

Table 2: Comparative overview of Articles 19 DSM Directive and 6(9) and (10) DMA

	Art. 19 DSM Directive	Art. 6(10) DMA	Art. 6(9) DMA
Active subjects	Authors and performers (or their representatives for Art.19(2))	(Authors, and performers or other rightholders who are) Business users of a CPS or their authorised representatives	(Authors and performers who are) End users of a CPS or their authorised representatives
Passive subjects	Art. 19(1): Authors' and performers' contractual counterparties: publishers, labels and OCSSPs that have obtained a license under Article 17 DSM Directive Art. 19(2): Sub-licensees directly or indirectly, depending	Platforms that have gatekeeper status for a specific CPS, of which authors and performers are business users	Platforms that have gatekeeper status for a specific CPS, of which authors and performers are end users

⁴⁰⁷ See Alphabet's EU Digital Markets Act (EU DMA) Compliance Report Non-Confidential Summary (7 March 2024) 26 ff., Meta's Compliance with the Digital Markets Act Non-confidential public summary of Meta's Compliance Report (6 March 2024) 41 ff. and ByteDance's Compliance Report (Non-confidential Version) 25 ff, all available at <<https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports>>.

⁴⁰⁸ ByteDance's compliance report (n 406) 31, Meta's compliance report (n 406) 43-44, Alphabet's compliance report (n 406) 56-58.



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	on the national transposition ⁴⁰⁹		
Frequency of access	Regular, minimum once per year ⁴¹⁰	Continuous	Continuous
Type of data	Information on the exploitation of works and performances. Modes of exploitation, generated revenue and remuneration due	Aggregated or non-aggregated data (including personal data). Data provided for or generated from the use of the CPS by the business user or its end users	Data provided by the end user or generated in the context of their activity on the CPS
Quality of access and information	Up-to-date, relevant and comprehensive information (depends on the contractual counterparty and on the sub-licensee)	Real-time, effective, high-quality access to data	Real-time access. Effective portability enabled by the provision of appropriate tools
Procedure	Automatically. Authors' and performers' counterparties should provide the information proactively. Action (request) from authors and performers is needed in the case of additional information from sub-licensees (Art.19(2)).	Upon request by the author or performer or authorised third party.	Upon request.
Cost	No	No	No

a) Continuous access

The comparison shows that the DMA could strengthen authors' and performers' transparency rights under Article 19 DSM Directive in terms of frequency of access to their data. Contrary to the annual, in principle, provision of information mandated by Article 19 DSM Directive, the DMA refers to continuous access to information. This means that authors and performers are entitled to constant access to their information and the data generated by their activity.

b) Real-time access

⁴⁰⁹ Data gathered during desk research conducted for Fair MusE show that, for instance, in Estonia, information can be requested by authors and performers only from their contractual counterparties and not from sub-licensees. In Denmark, authors' and performers' direct contact with sub-licensees is allowed by the transposing law only for compelling reasons. See also Annex III of Fair MusE D2.2 Deliverable.

⁴¹⁰ The "minimum once per year" frequency for the provision of information to authors and performers was adopted by the majority of the Fair MusE consortium countries in their transpositions of Article 19 DSM Directive, except for Italy which legislated for provision of information once every six months and for Estonia which did not specify frequency in the transposing provision. See also Annex III of Fair MusE D2.2 Deliverable.



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Article 19 DSM Directive calls for the provision of up to date exploitation information to authors and performers. However, in light of the annual, in principle, character of the provision of this information, the *updatedness* of the information that artists are entitled to under this provision is weaker compared to the real-time access mandated by the DMA. Continuous access to real time information under the Regulation means that authors and performers can have access to constantly updated data.

c) Active subjects

Whereas under Article 19 DSM Directive authors and performers are the only ones entitled to receive (and request) information on the exploitation of their works, the respective possibility under the DMA data access provisions in question extends to business and end users. As mentioned in Chapter 3.1.3, the role of business user is sufficiently broad and could, arguably, be undertaken by other music rightholders, such as record labels, that could use Article 6(10) DMA to request data from UGC platforms.

4.3.2.3 Limitations

From the analysis above, it became clear that Article 6(10) DMA would be best placed among the DMA's data access provisions to assist music creators in their attempts to gather granular exploitation information. Yet, a number of limitations discussed below, limit the practical usefulness of the provision to serve this purpose.

a) Users' own data

In terms of the classic categorisation of data depending on the way they were acquired from the user into i) volunteered (disclosed by the user), ii) observed (obtained from the usage of a product, service etc), and iii) inferred data (derived through analysis and combination of other datasets),⁴¹¹ the first two categories are considered 'raw' data originating from the user(s) and the third category is data derived from raw data and originating from the gatekeeper and its business model.⁴¹²

Under Article 6(10) DMA authors and performers could request access to aggregated or non-aggregated data that "...is provided for or generated in the context of the use of the relevant core platform services ... by those business users and the end users engaging with the products or services provided by those business users" (emphasis added). At first glance, the wording of the provision limits access of business users only to data that originate from them and their end users, hence to volunteered and observed data, whereas data originating from the platform, inferred data, seem to be excluded.⁴¹³

⁴¹¹ See also de Streel, Kraemer and Senellart (n 256) 50-51.

⁴¹² Ibid 51, Lundqvist (n 332) i62 and European Data Protection Board (EDPB) Guidelines 8/2020 on the targeting of social media users (13 April 2021) para 79.

⁴¹³ The initial text of the proposal for the DMA (n 259), in Recital 55, referred to access not only to data provided and generated by business users but also to data that the gatekeeper inferred from the use of the CPS. This mention, however, was subsequently eliminated in the legislative process and does not appear in the final version of that recital (Recital 60 DMA).



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This reading of Article 6(10) DMA results in creators as business users being entitled to information only on consumption of and audience interactions with musical works that they themselves upload on the UGC platform. However, the issue of access to comprehensive information on (value generated by) music content uploaded on the social media or video sharing platforms by a third user remains unresolved.

This limitation could be mitigated if the provision, and the term “provided” more specifically, was to be interpreted broadly. An interviewed practitioner expressed the view that “provided” data in Article 6(10) DMA could well be interpreted to mean “created”. Under such an approach, authors and performers as business users could, for example, be entitled to receive information about the engagement of end users on the platform with a song they have created and which adds commercial value to the platform, regardless of whether they themselves have uploaded the song.

b) Specificity and granularity of data

Unlike Article 19 DSM Directive that gives artists the right to receive specific information regarding concretely the exploitation of their music, including revenue and remuneration information, the DMA provision does not mandate that the gatekeeper, the UGC platform, share detailed music exploitation and relevant generated revenue data. The tools gatekeepers make available on the CPS allow the user access to volunteered and observed data. The extent to which this data is specific to music exploitation, analytical and detailed as regards music usage depends on the tools made available by the gatekeeper. Data connected with platform-generated revenues from the exploitation of music content of the business user and the remuneration due, require combination of datasets and information available only to the platform and, therefore, could be considered as falling outside the categories of data covered by the text of the data access obligation at issue.

Consequently, in this regard, Article 6(10) DMA does not seem able to fully support the “relevant and comprehensive” information aspect of Article 19 of the DSM Directive.

c) Data access tools and access processes depend on the CPS and the gatekeeper

Similarly to the lack of industry standards for information-sharing formats on the exploitation of works and performances discussed above,⁴¹⁴ there is no uniformity of format or standardisation of the type of information provided when users exercise their rights to access data vis-a-vis gatekeepers. In Article 6(10) DMA, the access to data that gatekeepers are obliged to offer to enable for their business users is described as ‘high-quality’, without, however, further specification about what this entails. Whether the process to request the data is straightforward or easy to follow, and whether the data received upon request is in an easy to understand or rather ‘raw’ format, seems to ultimately depend on the gatekeeper.

d) Upon request

Unlike Article 19(1) DSM Directive, according to which authors and performers should, in principle, receive the information automatically, Article 6(10) DMA requires action before the

⁴¹⁴ Chapter 2.4.1.



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information can be received. Artists need to use the CPS tools available to them to access their data on the gatekeeper platform.⁴¹⁵ This type of initiative expected on behalf of artists can be a thorny issue when considered in combination with the issue of lack of awareness prevalent among creators in the sector.⁴¹⁶

4.3.2.4 *Advertisement transparency in the DMA*

The importance of sharing advertising revenue information with licensing partners with the ultimate goal of factoring it in fair remuneration calculations will be discussed in Chapter 5. Despite the DMA containing ad transparency provisions, Articles 5(9), 5(10) and 6(8), the text of these does not, in its current version, seem apt to assist authors and performers to access more data from platforms. Even the more - hypothetically - suitable provision of the three, Article 5(10) DMA, presents obstacles that do not help entertain the prospect of its application in the music sector.

First, the provision reserves the right to ad-related information for publishers, not business users in general. In the social media context, it is foremost the platform itself that is considered to be the publisher. In addition, the Regulation did not offer a definition for the term ‘publisher’ and it is uncertain whether, for instance, business users with accounts where music content is uploaded can also be considered as publishers. Secondly, the provision currently catches only online advertising services⁴¹⁷ and, thus, only Meta’s Facebook and Instagram are caught but not the other music-exploiting platforms under the DMA, TikTok and YouTube. Furthermore, the provision describes a situation where the gatekeeper has an official relationship with the publisher for the supply of advertising services to them in exchange for a fee, which is not usually the case with artists as platform users.

Against this background, at present, the DMA’s ad transparency provisions cannot be considered as offering substantial assistance to the need of authors and performers for access to data on ad revenues connected with the exploitation of music on gatekeeper platforms.

⁴¹⁵ However, the DMA provisions at issue are, in this regard, similar to the process stipulated under Article 19(2) DSM Directive.

⁴¹⁶ Chapter 3.2.

⁴¹⁷ Article 2(2)(j) DMA.



5 Licensing and remuneration opportunities across platforms

The governance of copyright-protected content on digital platforms significantly impacts the licensing and remuneration opportunities for authors and performers. Although not all authors and performers encounter the same issues, the contractual relationships between authors and performers, on one hand, and platforms—both music streaming services and UGC platforms—on the other, are often characterised by a prominent imbalance of power rooted, among others, in the unequal bargaining positions of the parties. What is more, negotiations and the eventual (contractual) relationship between other players, like record labels, CMOs, IMEs, publishers and platforms can and do also directly impact the remuneration received by authors and performers as a result of sub-licensing and the exploitation of their music by those platforms.

Against this background, platforms wield significant leverage to impose terms that may inadequately reflect the economic value generated by authors' and performers' works.⁴¹⁸ They often impose standard ToS that grant them extensive rights to exploit copyright-protected content, which can leave authors and performers with limited or inexistent avenues for negotiation. Such power asymmetry can result in unfair contractual practices, disproportionately low remuneration, and a diminished agency for music creators to obtain fair and proper remuneration from the exploitations of their works.⁴¹⁹

With variations, a generalised contractual imbalance does not stem only from the limited negotiating power of authors and performers but also from further, systemic advantages that platforms, especially UGC ones but also DSPs, enjoy through their dominance in distribution channels and the nature of their data-driven practices.⁴²⁰ Online platforms, including music-exploiting ones,⁴²¹ also obtain a significant part of their revenues from advertisements that may be displayed in connection with music content, such as ads on professional artists' accounts on social media.⁴²² Interviewed stakeholders from the CMO and publishing sides as well as legal experts have confirmed that information on platforms' ad revenues linked to music consumption is crucial for the attainment of meaningful music exploitation transparency and towards the more exact and fairer calculation of the remuneration due to authors and performers. Yet that information is not being (adequately) shared with licensors by social media platforms. For instance, a song that goes viral on social media platforms like TikTok or Instagram may generate significant advertising revenues for the platform while providing only negligible returns to its creator, who often does not have the necessary tools and information to track how the platform has economically exploited such a song.

⁴¹⁸ Donato Cutolo and Martin Kenney, 'Platform-Dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy' (2021) 35 *Academy of Management Perspectives* 584.

⁴¹⁹ Mazziotti, 'Remuneration of Content Creators in the Digital Space' (n 29).

⁴²⁰ Quintais, De Gregorio and Magalhães (n 246).

⁴²¹ See Chapter 1.3.

⁴²² Mazziotti (n 16) 2.



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Furthermore, online platforms, especially UGC ones that can be accessed for free in exchange for personal data exploitation, capitalise on music and other content through user profiling. They process detailed data, such as location, genres, listening habits and so on, from users-listeners and use them to target further product or service offerings to them and maximise their engagement inside the platform. As described above, algorithms play a crucial role to profile users and cater to their preferences. Information on revenue streams coming from such profiling activities are also, typically, not shared with the licensing contractual counterparty, at the expense of creators' fairer remuneration.⁴²³

Additionally, the presence of legacy contracts—preceding the streaming era—exacerbates the inequality, as these agreements frequently contain outdated royalty structures that fail to account for contemporary revenue models. For authors and performers, the imbalance manifests in opaque revenue-sharing practices, limited access to data, and inadequate and insufficient mechanisms for redress.⁴²⁴

Article 20 DSM Directive specifically addresses this imbalance by enabling authors and performers to seek additional and fair remuneration if the originally agreed terms prove disproportionately low relative to subsequent revenues. After a brief look into current licensing practices and royalty calculation and payment models and issues associated with those, the following chapters will analyse how competition law and various provisions of the DSA and the DMA may also contribute to alleviating this imbalance and materialising the rights of Articles 18-22 DSM Directive, with insights from the conducted empirical research in preparation for this Study. As a starting point, for the end users/welfare perspective of competition law to work, rightholders must know and understand the commercial value of their works. Therefore, it is important to note that, beyond transparency, there is also a need for effective remedies to level the playing field between the power of platforms and authors and creators.

5.1 Licensing practices and payment models - an overview

Empirical data show that there is a lack of uniformity or standard contractual practices in agreements between rightholders (such as artists, labels, or CMOs) and online platforms (such as streaming services or social media platforms) regarding the licensing of music. Several interviewed music industry stakeholders, including CMO and IME representatives, publishers and streaming platforms speak of the absence of uniformity or a fixed format applicable to licensing between different licensors on the one hand and DSPs and UGC platforms on the other.⁴²⁵ *Ad hoc* negotiations between each licensor and each such online platform are the cornerstone of digital music licensing agreements and every deal is different, with critical differentiating factors being the exploiter's business model (e.g. DSP vs UGC platform) and the licensor's position and negotiating power, which may stem from the type of rights and the repertoire being licensed, the licensor's market presence/power, its knowledge of the market and experience, its technical, technological and financial resources and so on.

⁴²³ Interview with legal expert.

⁴²⁴ Streams and Dreams Report (n 336).

⁴²⁵ Empirical research in preparation for this Study.



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Regardless of this uniqueness of agreements, there exist core payment models which are commonly used as the basis of how the platform will remunerate its contractual counterparts for the use of music.⁴²⁶ The first, used mainly in licensing with DSPs (music streaming or 'pure audio' services), is the **revenue sharing model** whereby the platform retains a share of its revenues (typically around or over 30%) and the remaining share (approximately 70% or less) is paid back as royalties to the music industry.⁴²⁷ Under this model, the recording side is reported as receiving the lion's share of that (around 55%) whereas the publishing side receives much less (around 15%). Accordingly, performing artists end up receiving considerably higher royalties compared to composers and authors.⁴²⁸

Different systems exist for the subsequent calculation and distribution of the payment due by DSPs to each involved rightsholder, the main ones in use being the pro-rata or market-centric system and the user-centric or fan-based system. Under the pro-rata system, the distributable DSP revenue (after taxes) is pooled and divided by the total number of streams in a certain period and geographic location and then rightholders are paid on the basis of their share of streams out of the total. Calculations take place separately for revenues coming from advertisement-supported free accounts and from (different types of) paid subscription accounts.⁴²⁹ The user-centric system, on the other hand, in principle connects each listener's subscription fee (and potentially other revenues) to the specific artists and songs the user streamed within a given period. For example, the monthly user fee is divided by the total number of streams of that user to give the price per song and then multiplied by the number of times the same song was streamed to give the royalties for that specific track.⁴³⁰ Further (variations of) payment systems exist, such as, for instance, the so called artist-centric system which endeavours to prioritise and accordingly remunerate music created by artists as opposed to AI-generated 'noise' tracks or fraudulently generated streams.⁴³¹

All in all, the revenue-sharing model is seen as more transparent as it is based on the provision of information by the licensor, namely revenue, the types of users (advertisement-

⁴²⁶ This process presupposes that musical content on the platform has been properly identified, see Chapter 7 of Fair MusE D2.2. Deliverable. On remuneration systems see also Chapter 3 of Fair MusE D3.3 Deliverable - Innovative business models in the music sector.

⁴²⁷ House of Commons Digital, Culture, Media and Sport Committee (DCMS), 'Economics of music streaming' Second Report of Session 2021-22 available at <<https://committees.parliament.uk/publications/6739/documents/72525/default/>> 17. These splits are corroborated by Fair MusE stakeholder interviews.

⁴²⁸ Ibid DCMS Report 17, Jozefien Vanherpe, 'Towards a Fair Balance in the Digitised Music Industry: Facing the Music' (PhD thesis, KU Leuven 2022) para 140. Overall similar figures are reported in the CMA Report (n 6) 125-129.

⁴²⁹ Music streaming DSP Spotify, for instance, follows the pro-rata model. It was, however, recently announced by the company that only tracks with over 1000 streams and a (undisclosed) minimum number of unique listeners will be included in the royalty pool
<<https://support.spotify.com/us/artists/article/track-monetization-eligibility/>>.

⁴³⁰ DCMS Report (n 426) 90-91; Legrand Network, (n 163) 33. See also information on how artists monetise through SoundCloud's "fan-powered royalties model" at
<<https://help.soundcloud.com/hc/en-us/articles/1260801306810-Fan-powered-Royalties-FAQs>>.

⁴³¹ Recently, DSP Deezer and French CMO SACEM announced their collaboration in the adoption of the artist-centric model
<<https://newsroom-deezer.com/2025/01/deezer-and-sacem-partner-for-fairer-remuneration-of-publishing-rights-with-the-artist-centric-streaming-model/>>.



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supported free accounts or paid subscription accounts) and the number of streams or plays. Indeed, several interviewed music industry stakeholders indicated that music streaming services provide sufficient data for the licensors to calculate and verify what is being used by the platform. On the other hand, the revenue splits are, as mentioned above, a legacy practice that has been “inherited” from the era of physical retailers of music.⁴³² The fairness of the continuation of this practice today has been questioned. While it is true that recordings are the key exploitable product in the platform era,⁴³³ it can be argued that several of the reasons for the publishing side receiving a smaller share (e.g. record labels bearing the financial weight of physical production and distribution of music) have ceased to exist in the digital world.⁴³⁴ In addition, concerns on the fairness of remuneration have been raised in connection with the pro-rata model since the pooling of royalties may favour more successful artists.⁴³⁵

Besides revenue-sharing, another reported payment model for the use of copyright-protected musical works is the **lump sum model**. Music industry stakeholders⁴³⁶ mention that this is a model typically adopted by some UGC platforms and other ‘non-pure audio’ services for the payment of licensors for the exploitation of music. When it comes to the remuneration of authors and performers, the DSM Directive finds lump sum payments acceptable, under the principle of appropriate and proportionate enshrined in Article 18.⁴³⁷ In the licensing practice with online platforms, however, this model is reported as closely connected to lack of transparency as regards, for instance, the licensor’s revenue and usage of music on the platform which does not allow for precise calculations of the royalties due as per music consumption.⁴³⁸

Beyond the licensing and payment models and practices discussed above, there are more elements in play that not only raise further issues of platform transparency on music exploitation but also directly impact artists’ remuneration opportunities from digital platforms. A notable example is “pitching music” features on music streaming services. Several DSPs offer the option for newly released songs to get featured in their playlists after the submission of pitches to that effect to the attention of platform’s playlist editors for inclusion in the editorial playlists or in algorithmic recommendations.⁴³⁹ The selection of the pitched songs that will eventually be featured in the playlists – thereby immediately influencing their discoverability, exposure and, ultimately, generated revenue – is an internal, not fully transparent platform process and it has been argued that major record labels may have the advantage in securing preferential promotion of their music.⁴⁴⁰ Another such feature is, for

⁴³² Interview with representatives of a music streaming platform.

⁴³³ Chapter 7.3.1 of Fair MusE D2.2 Deliverable.

⁴³⁴ Legrand Network (n 163) 27.

⁴³⁵ Chapter 3 of Fair MusE D3.3 Deliverable.

⁴³⁶ Representatives of a CMO and a music streaming platform.

⁴³⁷ Recital 73 DSM Directive, according to which lump sum payments should not be the rule and, wherever adopted, the particularities of the relevant sector should be taken into account.

⁴³⁸ See also Chapter 8.5.1 of Fair MusE D2.2 Deliverable.

⁴³⁹ For instance, on Spotify <<https://support.spotify.com/us/artists/article/pitching-music-to-playlist-editors/>> , on Deezer

<https://creatorsupport.deezer.com/hc/en-us/articles/14963453830045-Pitching-Tool#how_to_pitch_an_individual_track> and on Amazon Music <<https://artists.amazonmusic.com/pitch>>.

⁴⁴⁰ Henry and others (n 231) 387. Vanherpe (n 427) para 129.



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instance, Spotify's 'Discovery Mode' marketing tool which allows artists and labels to signal which of their songs they wish to prioritise for promotion and discovery through the platform's playlists in exchange for lower royalties.⁴⁴¹

5.2 Role of competition law

The question as to whether rightholders could rely on competition law to enhance their licensing and remuneration opportunities across platforms is tightly linked to the question of first having access to data as explored in Chapter 4. After all, rightholders could only understand whether they might have more bargaining power and potentially more exploitation opportunities if they have detailed knowledge and understanding of the data on the online exploitation of their works. Furthermore, enhanced data access may assist rightholders in identifying potential anticompetitive practices that harm them, e.g., discrimination in terms of their visibility and exposure on digital music platforms.

This chapter focuses on the possibility of establishing a self-standing abuse when it comes to music streaming and UGC platforms impeding additional licensing and remuneration opportunities, e.g. due to unjustifiably low royalty payments or due to exclusivity clauses in contracts with rightholders. It first addresses this issue through an EU competition law lens and subsequently through the perspective of national economic dependency rules. Lastly, the chapter explores whether the emerging field of labour antitrust might offer a fruitful ground for authors and performers to access licensing and remuneration opportunities across platforms.

5.2.1 Exploitative abuses under Article 102 (a) TFEU

In EU competition law, a distinction between exclusionary and exploitative types of abuse has emerged over time. Exclusionary abuses refer to abuses where dominant firms use their position to unjustifiably exclude rivals. These have been the main focus in the EU Commission's enforcement practice.⁴⁴² Exploitative abuses, on the other hand, refer to dominant firm's behaviour to extract benefits due to their dominance, in particular from consumers.⁴⁴³

If, indeed, the amount of streaming revenues and royalties paid by specific streaming and UGC platforms is too low, one might wonder whether such inappropriate or excessively low remuneration could constitute an "unfair trading condition" or an "unfair purchase price" under Article 102 (a) TFEU in their relationships with labels, CMOs, authors and performers.

There is very little precedent in competition law enforcement against exploitative conduct for unfair trading conditions or unfair purchase prices at EU level. The precedents stem,

⁴⁴¹ Spotify charges a commission on streams generated in Discovery mode contexts. More information at <<https://artists.spotify.com/discovery-mode>>. The tool has been subject to scrutiny and criticism, see, for instance, Legrand Network (n 163) 24.

⁴⁴² See also on this point Giorgio Monti and Alexandre de Streel, 'Exploitative Abuses: The Scope and the Limits of Article 102 TFEU' <https://cadmus.eui.eu/bitstream/handle/1814/76022/RSC_WP_2023_62.pdf?sequence=1&isAllowed=y>, accessed 25 February 2025.

⁴⁴³ Interview with a practitioner.



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however, from the music and TV sectors. In *BRT v SABAM*, the Court of Justice found that when a collecting society, which holds a dominant position, imposed on its members “obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member’s freedom to exercise his copyright”,⁴⁴⁴ this can constitute an abuse. As Monti and de Streel argue, the question here is one of the dominant undertaking exploiting an unequal bargaining position in a disproportionate manner.⁴⁴⁵ Furthermore, the Court explains that it is not only the “intrinsic individual effect of those clauses” but “their effect when combined” which should be taken into account.⁴⁴⁶

The other precedent stems from the area of TV stations (alleged to be collectively dominant) buying rights to show films at excessively low prices according to the filmmakers. The Commission decided not to take up the complaint by the filmmakers because it considered there was no abuse. This negative decision was then challenged before the EU Court of Justice.⁴⁴⁷ The Court made clear that such a complaint was unlikely to succeed given that it is not the responsibility of TV stations to ensure that filmmakers can recoup the costs of making a film. After all, the market price will depend on the popularity of a film, and this is a risk that is ultimately borne by the filmmakers themselves.

These precedents from the 1970s and 1980s would not be particularly helpful for rightholders. Nonetheless, as explained in Chapter 4.2.5 above, the Commission’s *Apple (App Store)* Decision might be pointing in a different direction. Furthermore, national competition laws, in particular those that have economic dependency rules, might provide more promising avenues for authors and performers.

Lastly, there is the possibility of considering whether the use of price-MFN clauses in agreements between platforms and major labels could be considered either an abuse under Article 102 TFEU or, alternatively, as an anti-competitive agreement under Article 101(1) TFEU. The UK CMA study found that some streaming platforms have agreements with some majors that contain MFN clauses which stipulate that the platform may not pay a higher rate for content from a third-party record company.⁴⁴⁸ In principle, such a clause would not be deemed problematic, as record companies can continue to compete on price - they are free to provide their content at lower rates.⁴⁴⁹ At the same time, this might make it more difficult for smaller record companies to enter the market, especially since their launch could not be supported by higher royalties than those paid to majors for a certain period.⁴⁵⁰ It might also make it more difficult for non-major artists to request higher royalties. In the 2012 *Universal/EMI* merger decision,⁴⁵¹ the EU Commission cleared the concentration subject to the condition that Universal no longer includes MFN clauses into any agreement with a digital customer in the EEA regarding the joint Universal/EMI repertoire. This offers some

⁴⁴⁴ Case 12/73 *BRT v SABAM*, ECLI:EU:C:1974:6, 15

⁴⁴⁵ Monti and De Streel (2023) (n 442) 10.

⁴⁴⁶ Case 12/73 *BRT v SABAM*, ECLI:EU:C:1974:6, 13.

⁴⁴⁷ Case 298/83 *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission* ECLI:EU:C:1985:150.

⁴⁴⁸ CMA (2022) 68.

⁴⁴⁹ Ibid, 79.

⁴⁵⁰ Ibid, 69.

⁴⁵¹ COMP/M.6458 - Universal Music Group/ EMI Music, p. 225-227.



indication that the use of MFN clauses, which limits the amount of royalties a platform may pay to any of its licensors, may distort competition.

5.2.2 National economic dependency rules

According to Article 3(2) of Regulation 1/2003,⁴⁵² EU Member States may apply prohibitions or sanctions on unilateral conducts in their national laws that are stricter than Article 102 TFEU. Accordingly, several national competition laws in the EU contain so-called economic dependency rules.⁴⁵³ These rules allow national competition authorities to scrutinise the conduct of undertakings that do not hold a dominant position in the sense of Article 102 TFEU, but that still possess economic power vis-a-vis dependent undertakings. In the case of Article 20 of the German Act Against Restraints of Competition, for example, a relationship of economic dependence exists when:

- other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on an undertaking in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power);
- in the case of undertakings acting as intermediaries on multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist.

Similarly, Italian law has introduced a presumption on economic dependence applicable to business users of digital platforms. According to the reformed Article 9 of Law of 18 June 1998, No. 192 (the Italian Law on Subcontracting):

- the condition of economic dependence is presumed, until proven otherwise, when an undertaking uses the intermediary services of a digital platform that plays a key role in reaching end users suppliers, including in terms of network effects or data availability

The national competition authority (the *Autorità Garante della Concorrenza e del Mercato* - hereafter AGCM) relied on this provision in order to issue a decision against Meta for its behaviour in its negotiations over licenses for rights collectively managed by the collecting society SIAE. SIAE had asked Meta for higher royalties due to the newly enacted Article 18 DSM Directive. As Meta and SIAE could not reach an agreement, Meta broke off negotiations and removed all SIAE-licensed content. The AGCM found that Meta had violated Article 9 of the Italian Law on Subcontracting in conjunction with Articles 18 and 19

⁴⁵² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (Regulation 1/2003).

⁴⁵³ See e.g. Article 20 of the German Act against Restraints of Competition, Art. IV.2/1 Belgian Code of Economic Law. In other legal systems, like Italy, provisions on economic dependency can be found in national contract law, see Article 9 of the Law of 18 July 1998, No. 192 (the Italian Law of Subcontracting). According to Article 9 para. 3-bis, the AGCM has the power to sanction undertakings that abuse a relationship of economic dependence whenever the conduct affects the functioning of competition on the market or where the conduct would also amount to an abuse of dominance under Article 102 TFEU.



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of the DSM Directive and imposed interim measures in the form of a duty to continue negotiations in a fair manner between SIAE and Meta.⁴⁵⁴ Furthermore, the AGCM imposed an obligation on Meta to reinstate the SIAE-licensed content on its social media platforms.

The Italian Council of State as second appeal court, however, annulled the AGCM's interim measures.⁴⁵⁵ It found that the AGCM had insufficiently shown that the agreement in question concerned an intermediation service provided by Meta, since it concerned rather the making available of the licensed works in Meta's Audio Library to users who wanted to enhance their videos posted on the platform. It did not hinder users from uploading content with background music of SIAE's repertoire, which would be the actual intermediation service. The Council of State also denied a relationship of economic dependence between SIAE and Meta, given that the license revenue generated from the agreement would have made up a less than 1% share of SIAE's total royalty income. The Council of State also denied the abusive nature of Meta abandoning the negotiation with SIAE. It considered that SIAE's claim to a 310% increase of the flat fee paid by Meta could be considered unreasonable, thus justifying Meta in walking away from the negotiation. Lastly, the Council of State also rejected the claim that Meta was abusively withholding data from SIAE. According to the documentation of the negotiation, Meta had indicated willingness to share relevant data, but had refused to share data relating to financial statements of the group's revenues. As neither the AGCM nor the first instance court had explained which concrete data had been omitted, the Council of State denied that there was an abuse. Lastly, the Council of State also denied that Meta's behaviour had caused competitive harm to the market of copyright intermediation, which had been the allegation by SIAE.

The Meta v SIAE case still needs to be concluded, as the AGCM still needs to publish its final decision on the merits of the case. The annulment of the interim decision, however, presents a cautionary tale that economic dependency rules can only be relied on if the evidence provided is well substantiated by the competition enforcer. One may wonder whether the case could have been brought more successfully by the authors themselves in a collective action. As the next chapter discusses, labour antitrust might offer at least some support when it comes to self-help by a collective organisation of authors and performers to claim their rights.

5.2.3 The potential of labour antitrust

Labour antitrust has become a buzzword in competition law circles recently. This is not only true for US antitrust law,⁴⁵⁶ but also for EU competition law. Several national competition authorities in the EU, for example, have imposed fines on sporting associations for collectively suppressing wages paid to athletes. The Polish competition authority brought an investigation against the Polish Automobile and Motorcycle Federation, speedway competition organisers and speedway clubs for suppressing the level of wages paid to

⁴⁵⁴ AGCM, 20 April 2023, No. 30606 (2023) 16 Bulletin Agcm, 52

⁴⁵⁵ Consiglio di Stato, judgment of 16 May 2024, n 5827/2024.

⁴⁵⁶ Promarket, 'The Trends and Cases That Will Define US Antitrust in 2024' <<https://www.promarket.org/2024/01/05/the-trends-and-cases-that-will-define-us-antitrust-in-2024/>> accessed 25 February 2025.



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riders.⁴⁵⁷ It also initiated an investigation against 16 basketball clubs and the Polish Basketball League for terminating contracts with players and suspending the payment of wages to basketball players.⁴⁵⁸ Both cases were brought under Article 101 TFEU and the procedures ended with fines against the sports leagues and clubs.⁴⁵⁹ Given that the sporting associations themselves could be considered dominant, or collectively dominant, these proceedings could possibly also have been brought under Article 102 TFEU. Due to the preconditions for the application of Article 102 TFEU being more cumbersome to establish, it might have also been for reasons of procedural economy that national competition authorities preferred to apply Article 101 TFEU to these cases.

When it comes to the EU level, the EU Commission has not yet brought any proceedings for abuses of monopsony power. In its Guidelines on collective agreements by solo self-employed,⁴⁶⁰ however, the Commission mentions that it will not enforce the prohibition of anti-competitive agreements where there is monopsony power on the counterparties' side. In such cases, the EU Commission notes that collective bargaining agreements "can be a legitimate means to correct the imbalance in bargaining power between the two sides". The EU Commission considers an imbalance in bargaining power can be presumed in two situations. If the solo self-employed negotiate with a counterparty that represents a whole sector or industry, or where the counterparty's size and profit exceeds a certain threshold.

For authors and performers, these developments would mean on the one hand, that they might try to plead their case as individual creators, and trying to show that the excessively low royalties coming from streaming and UGC platforms constitute an abuse of monopsony power. Due to the precedent at EU level discussed in Chapter 5.2.1 above on excessively low royalties, however, this might not be successful. National economic dependency rules might offer a more viable avenue in this respect.

On the other hand, there should be no obstacles stemming from EU competition law to the collective organisation of authors and performers to obtain more adequate and fair remuneration. The EU Commission explicitly states in its Guidelines on Solo Self-Employed that it will not enforce Article 101 TFEU against collective agreements concluded by self-employed persons pursuant to national or Union legislation. The Commission explicitly includes as an example the rights enshrined in Article 18 of the DSM Directive. The Commission states specifically:

"authors and performers are to be entitled to receive appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works and any other subject matter protected by copyright and related rights. Authors and performers tend to be in a weaker contractual position than their counterparty/-ies, and Directive (EU) 2019/790 provides for the possibility to strengthen their contractual position in order to ensure fair remuneration in contracts for the exploitation of their work. Directive

⁴⁵⁷ UOKiK, 'Speedway - explanatory proceedings of the president of UOKiK', <https://archiwum.uokik.gov.pl/aktualnosci.php?news_id=17814> accessed 25 February 2025.

⁴⁵⁸ UOKiK, 'Prezes UOKiK stawia zarzuty ograniczenia konkurencji klubom koszykarskim' <https://archiwum.uokik.gov.pl/aktualnosci.php?news_id=17402> accessed 25 February 2025.

⁴⁵⁹ The fining decisions are currently being appealed.

⁴⁶⁰ EU Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons of 29 September 2022, 2022/C 374/02.



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(EU) 2019/790 grants flexibility to Member States to implement this principle using different mechanisms (including collective bargaining), as long as they comply with Union law.

In line with the provisions of Directive (EU) 2019/790 that are referred to under point of these Guidelines, and without prejudice to the other provisions of that Directive, the Commission will not intervene against collective agreements entered into by solo self-employed authors or performers with their counterparty/-ies pursuant to national measures that have been adopted pursuant to that Directive.”⁴⁶¹

This should provide encouragement to authors and performers to seek collective opportunities to exercise their rights.

5.3 Role of platform regulation

5.3.1 The potential contribution (and limitations) of the DSA to addressing contractual imbalances

5.3.1.1 Reducing information asymmetries for better opportunities

The DSA’s reporting obligations can help to close the information gap that not only restricts authors’ and performers’ access to data needed to assess the proportionality of their remuneration but also weakens their position in contractual negotiations.⁴⁶² As examined above, Article 15 DSA requires online platforms to report annually on their content moderation practices and the measures taken to address illegal content, including copyright infringement. While this provision does not directly govern contractual terms, it may enhance the overall accountability of platforms by mandating transparency regarding their enforcement practices. This increased accountability can indirectly strengthen the position of authors and performers and ensure that platforms’ practices align with their obligations under copyright law. For example, platforms may be less likely to impose exploitative terms when their policies and practices are subject to public scrutiny and potential regulatory oversight.

Previous studies have illustrated the challenges faced by creators. For example, the ‘Streams and Dreams’ report finds widespread dissatisfaction among artists regarding the remuneration they receive from streaming platforms. A significant portion of respondents remain ‘very dissatisfied’ (43.5%) or ‘somewhat dissatisfied’ (25.6%), indicating that nearly 70% of artists find their earnings inadequate.⁴⁶³ While 25.8% report a ‘neutral’ stance, only a small minority (5.1%) express any level of satisfaction.⁴⁶⁴ This data highlights the ongoing concern that streaming revenues do not fairly compensate artists for their work.

In addition to transparency, Article 15 DSA encourages a culture of accountability that may indirectly influence licensing practices. This provision can be understood as an attempt to

⁴⁶¹ See points 38 and 39 of the Commission’s Guidelines on Solo Self-Employed (2022) (n 460).

⁴⁶² For instance, 64.7% of signed artists reported not having received the detailed transparency information mandated by Article 19 of the DSM Directive, highlighting the persistent asymmetry in data access and power (Streams and Dreams Report, n 336, 24).

⁴⁶³ Streams and Dreams Report (n 336) 16.

⁴⁶⁴ Ibid.



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require platforms to reveal how they handle copyright-protected content, which would provide rightholders with a clearer understanding of revenue flows and the possibility to advocate for more equitable terms.⁴⁶⁵ This accountability is particularly critical in addressing practices where platforms retain a disproportionate share of revenues generated through their services. Arguably, greater transparency into platform practices facilitates fairer contractual outcomes as it provides authors and performers and their representatives with the information needed to negotiate better terms or to invoke Article 20 DSM Directive when initial remuneration proves inadequate.

Additionally, Article 26 DSA introduces transparency obligations for online platforms regarding the display and operation of advertisements, in an attempt to ensure that users—including authors and performers—understand how advertising revenue is generated and how it affects content monetisation. The provision establishes three core obligations for online platforms: i) a duty to clearly identify advertisements and the entity on whose behalf they are displayed, ii) a requirement to disclose the main parameters used to determine the recipient of an advertisement, and iii) an obligation to provide meaningful information about whether and how users can influence the presentation of ads (Article 26(1) DSA).

Notwithstanding the spirit of this provision, Article 26 DSA does not mandate platforms to disclose the precise revenue-sharing arrangements between platforms, advertisers, and content creators. The absence of a direct obligation to provide financial transparency regarding how ad revenues are allocated limits the effectiveness of this provision in rectifying the systemic imbalances between platforms and rightholders. This is particularly relevant given that advertising-based revenue models play a critical role in monetising user-generated content.⁴⁶⁶ For example, platforms like YouTube, TikTok, and Spotify rely extensively on ad revenues but provide little to no information about how much revenue is generated by specific content or how much of this revenue is distributed to creators.

A crucial gap in Article 26 DSA is its failure to establish a direct mechanism for authors and performers to access detailed advertising revenue reports for their content. While the provision ensures that platforms must disclose the parameters used for targeting and content visibility in relation to advertising, it does not require them to provide individualised revenue data. For instance, YouTube's AdSense model generates revenue from pre-roll and mid-roll ads displayed on music content,⁴⁶⁷ yet artists and labels receive payments through opaque revenue-sharing mechanisms negotiated between YouTube and CMOs.⁴⁶⁸

By contrast, a stricter interpretation and enforcement of Article 26 DSA could help to address these issues by requiring platforms to provide disaggregated ad revenue data linked to individual pieces of content. Under such an approach, platforms would need to disclose the proportion of ad-generated revenues attributable to each uploaded work and the share allocated to rightholders. Such an obligation would align with the objectives of Article 18 of the DSM Directive. However, the current formulation of Article 26 DSA does not explicitly

⁴⁶⁵ João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13 European Journal of Risk Regulation 191.

⁴⁶⁶ Alexandr A Balayan and Leonid V Tomin, 'The Transformation of the Advertising Industry in the Age of "Platform Capitalism"', 2020 IEEE Communication Strategies in Digital Society Seminar (ComSDS) (2020).

⁴⁶⁷ <https://support.google.com/adsense/answer/1705822?hl=en>.

⁴⁶⁸ Streams and Dreams Report (n 336) 14.



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extend to the revenue-sharing details that would be required to effectively enforce Article 18 DSM. Furthermore, the relationship between Article 26 DSA and Article 19 DSM Directive remains underdeveloped in practice. While the latter requires platforms to provide transparency reports on how revenues are generated and allocated, enforcement mechanisms remain weak. Accordingly, a more robust implementation of Article 26 DSA, potentially reinforced by regulatory guidance or additional legislative measures, could improve the information available to creators regarding their financial stake in platform-generated revenues. This could be achieved by mandating periodic reports detailing the share of advertising revenues allocated to individual works, thereby bridging the transparency gap that currently limits the ability of authors and performers to negotiate fairer licensing terms.

5.3.1.2 Improving licensing opportunities across platforms

Social media platforms are now converging towards licensing models traditionally used by music streaming services, blurring the lines between the two types of platforms. This convergence amplifies existing challenges for authors and creators, particularly the imbalance of power in their contractual relationships with platforms. For instance, TikTok's ToS grant the platform broad rights to use uploaded content for monetisation purposes, often without adequately compensating creators.⁴⁶⁹

Figure 1: TikTok's Terms of Service⁴⁷⁰

4.9 Ownership of content and grant of licences

We don't own your content. If you are the owner of the intellectual property rights in the content that you make available on the Platform, then nothing in these Terms changes that.

To provide the Platform, we need certain rights from you (called a licence). The details of these licences are set out below.

By creating, posting or otherwise making content available on the Platform, you grant to TikTok a:

- non-exclusive (which means that you can licence your content to others),
- royalty-free (which means that we don't pay you for this licence),
- transferable (which means that we can give the rights you give us to someone else),
- sub-licensable (which means that we can licence your content to others, e.g. to service providers that help us to provide the Platform or to trusted third parties that have entered into agreements with us to operate, develop and provide the Platform) and
- worldwide (which means that the licence applies anywhere in the world) licence to use your content, including to reproduce (e.g. to copy), adapt or make derivative works (e.g. to translate and/or create captions), perform and communicate your content to the public (e.g. to display it), for the purposes of operating, developing and providing the Platform, subject to your Platform settings.

⁴⁶⁹ Cf. Camille Harris and others, "‘Honestly, I Think TikTok Has a Vendetta Against Black Creators’: Understanding Black Content Creator Experiences on TikTok" (2023) 7 Proc. ACM Hum.-Comput. Interact. 320:1.

⁴⁷⁰ <https://www.tiktok.com/legal/page/eea/terms-of-service/en> (Last updated: November 2024).



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The licence to your content that you grant to us extends to Affiliates as part of making the Platform available.

You also grant to each user of the Platform a non-exclusive, royalty-free, worldwide licence to access and use your content, including to reproduce (e.g. to copy, share or download), adapt or make derivative works (e.g. to include your content in their content) perform and communicate that content to the public (e.g. to display it) using the features and functions of the Platform for entertainment purposes, subject to your Platform settings.

Your licences to TikTok and to users end when you close your account or when you or we remove your content from the Platform in accordance with these Terms. However, due to the nature of the Platform and our legal obligations, the licence granted will continue after you have removed your content to the extent that:

you have allowed, via your Platform settings, other users of the Platform to use or reuse your content (e.g. by using Duet, Stitch, download or share functionalities); or
we are obliged to store or process your content for legal reasons.

Similarly, Spotify's licensing agreements have been criticised for opaque revenue-sharing practices that disproportionately benefit the platform and major record labels at the expense of independent artists.⁴⁷¹

Figure 2: Spotify's information on Royalties⁴⁷²

8 Rights you grant us

(...)

You grant Spotify a non-exclusive, transferable, sub-licensable, royalty-free, perpetual (or, in jurisdictions where this is not permitted, for a term equal to the duration of the Agreements plus twenty (20) years), irrevocable, fully paid, worldwide license to use, reproduce, make available to the public (e.g. perform or display), publish, translate, modify, create derivative works from, and distribute any of your User Content in connection with the Service through any medium, whether alone or in combination with other Content or materials, in any manner and by any means, method or technology, whether now known or hereafter created. Aside from the rights specifically granted herein, you retain ownership of all rights, including intellectual property rights, in the User Content. Where applicable and permitted under applicable law, you also agree to waive and not enforce any "moral rights" or equivalent rights, such as your right to be identified as the author of any User Content, including Feedback, and your right to object to derogatory treatment of such User Content.

Figure 3: Spotify's information on Royalties⁴⁷³

How we calculate and process royalties

We distribute the net revenue from Premium subscription fees and ads to rightsholders. To calculate net revenue, we subtract the money we collect but don't get to keep. This includes payments for things like taxes, credit card processing fees, and billing, along with some other

⁴⁷¹ Marshall (n 34).

⁴⁷² <https://support.spotify.com/us/artists/article/royalties/>

⁴⁷³ <https://support.spotify.com/us/artists/article/royalties/>



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things like sales commissions. From there, the rightsholder's share of net revenue is determined by streamshare.⁴⁷⁴

We calculate streamshare by tallying the total number of streams in a given month and determining what proportion of those streams were people listening to music owned or controlled by a particular rightsholder.

Contrary to what you might have heard, Spotify does not pay artist royalties according to a per-play or per-stream rate; the royalty payments that artists receive might vary according to differences in how their music is streamed or the agreements they have with labels or distributors.

In light, also, of the abovementioned remuneration models and their variations (Chapter 5.1) it is interesting to note that, under Spotify's policy, remuneration is not necessarily *proportionate* to the number of streams (see Figure 3). Against this background, it is not surprising that, as revealed by the 'Streams and Dreams' report, 87.6% of artists believe streaming revenues are unfairly distributed. Furthermore, only 22.4% of creators feel adequately compensated for the use of their content on major platforms.⁴⁷⁵

This disconnect between revenue distribution and actual content performance highlights the broader structural imbalances in the digital music ecosystem, where creators often lack meaningful agency over how their works are monetised and promoted. Moreover, while platforms increasingly rely on recommender systems to drive engagement and revenue, creators remain largely excluded from decisions regarding the visibility of their works. This exclusion exacerbates existing inequalities and underscores the need to align the practices of platforms that exploit musical works with the principles and rights of fairness under the DSM Directive under the new regulatory landscape devised in the DSA.

Some DSA provisions can be relevant to the governance of licensing and remuneration opportunities for authors and performers, as they aim to tackle the informational asymmetries and procedural shortcomings that have long favoured platforms over creators. However, as noted by copyright scholars like Mazziotti and Quintais et al., the effectiveness of these measures is tempered by their reliance on implementation by platforms themselves and the absence of direct remedies for specific economic imbalances.⁴⁷⁶ The following analysis explores how the DSA's provisions can mitigate these challenges while also acknowledging their inherent limitations.

Article 15 DSA has the potential to enhance the accountability of platforms by shedding light on their internal practices. For authors and performers, this transparency could serve as an important tool for understanding how platforms handle their works, particularly in relation to takedowns, monetisation, and revenue-sharing arrangements. However, as already mentioned above, the lack of granularity in the reporting requirements limits its effectiveness

⁴⁷⁴ Streamshare is defined by Spotify as "artist's share of overall streams across the platform", see <https://loudandclear.byspotify.com/process/>.

⁴⁷⁵ Streams and Dreams Report (n 336) 33.

⁴⁷⁶ Mazziotti, 'Remuneration of Content Creators in the Digital Space' (n 29); Mazziotti, 'Chapter 11' (n 16); Quintais, De Gregorio and Magalhães (n 246).



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for addressing deeper contractual imbalances. Platforms often aggregate their reporting data, providing generalised insights that obscure the nuances of individual cases. For example, while YouTube's transparency reports outline the volume of copyright claims processed, they do not provide data on how advertising revenues derived from these works are distributed.⁴⁷⁷ This omission may perpetuate the lack of clarity that creators face when negotiating fair remuneration for their contributions.

In relation to takedowns, as seen above, Article 17 DSA requires platforms to provide clear and specific statements of reasons when they impose restrictive measures, such as the removal of content deemed illegal or incompatible with their terms of service. This provision can prevent exploitative practices that predate on content by authors and performers, such as revenue misallocation, unauthorised use of their works, or non-transparent licensing practices as it allows to challenge unjustified removals that may prevent authors and performers from monetising their works. As such, this obligation is critical for ensuring that creators understand why their works are targeted and what steps they can take to resolve disputes. The provision strengthens procedural safeguards and promotes accountability by requiring platforms to explain their decisions in detail. For authors and performers, Article 17 DSA is an interesting pathway to contest unfair restrictions on their works.⁴⁷⁸ For example, independent musicians who face unjustified takedowns of their songs due to misidentification of copyright infringement can demand transparency from platforms like TikTok or Instagram. However, the provision's impact is limited by its dependence on compliance by the platform concerned.

In the context of musical works' monetisation, Article 26 of the DSA seeks to improve transparency in advertising practices by mandating platforms to disclose information on ad purchasers and targeting mechanisms. This provision is particularly significant for music creators whose works contribute to advertising revenues,⁴⁷⁹ particularly because understanding the financial flows associated with ad-based models can empower authors and performers to advocate for fairer remuneration.⁴⁸⁰ Yet, despite its potential, the provision does not go far enough in mandating disclosures that directly link specific content to advertising income. Platforms provide some transparency through tools that show ad targeting criteria,⁴⁸¹ but they stop short of detailing how user-generated content contributes to overall revenue. This gap limits creators' ability to quantify their contributions to platform income and negotiate fairer and more proportionate licensing terms.

The transparency of recommender systems under Article 27 DSA can also be useful to address visibility and revenue disparities. Platforms are required to explain how their algorithms rank and prioritise content and must offer users the ability to modify these settings. For creators, this can help to better understand how their works are surfaced and monetised within platform ecosystems. However, the provision does not mandate disclosures about the financial impact of algorithmic decisions, which again leaves creators

⁴⁷⁷ <https://transparencyreport.google.com/youtube-copyright/intro>.

⁴⁷⁸ Interview with a CMO representative.

⁴⁷⁹ Mazziotti, 'Remuneration of Content Creators in the Digital Space' (n 29).

⁴⁸⁰ Meyn and others (n 24).

⁴⁸¹ Platforms like Meta provide tools such as the Ad Library, which offers insights into active ads and their targeting criteria, but these tools often lack detailed disclosures linking specific user-generated content to the advertising income it generates.



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without a comprehensive understanding of how these systems affect their earnings. In this regard, it has been found that Spotify's curated playlists, for example, often prioritise tracks from major labels.⁴⁸² Additionally, concerns have been raised about the potential for 'pay-for-play' practices, where labels may pay for songs to be placed on popular playlists, potentially disadvantaging independent artists.⁴⁸³ Greater transparency under Article 27 DSA could reveal the extent to which these practices shape revenue distributions, providing a foundation for more equitable treatment. Also, a stricter implementation of Article 27 DSA could help to uncover whether algorithmic preferences and promotional arrangements systematically disadvantage independent artists.

The table below summarises how the different provisions under the DSA can contribute to address contractual imbalances between rightholders and platforms and the limitations of each provision.

Table 3: DSA provisions to address contractual imbalances

DSA Article	Provision focus	Impact on contractual imbalances	Limitations
Art 15	Transparency and annual reporting on content moderation practices, including copyright infringement.	Allows scrutiny of platforms' handling of content moderation practices that impact copyrighted content, ensuring fairer revenue-sharing by increasing accountability for illegal content actions.	Gaps in reporting practices, including lack of data on how copyright infringement is handled. Also, it does not provide creators with direct access to detailed information on revenue-sharing mechanisms.
Art 17	Mandates platforms to provide specific reasons for restrictive measures such as removal of copyrighted content	It can allow creators to understand and challenge unfair content removals or limitations to their content.	Statements of reasons are often vague or generalised, making it difficult for creators to effectively challenge platform decisions.
Art 23	Introduces measures and protections against the misuse of content moderation systems, including suspension of users submitting manifestly illegal content or unfounded notices.	It can prevent misuse of complaints and notice systems, potentially ensuring that legitimate creator grievances are not ignored.	Risk of misuse by platforms themselves in defining what constitutes 'manifestly unfounded' potentially invalidating legitimate claims by authors and performers.
Art 24	Requires online platforms to report data on misuse of notice-and-action and complaint mechanisms to supervisory authorities.	It enables regulatory oversight by requiring platforms to report how misuse of mechanisms impacts creators' ability to resolve disputes, levelling the playing field.	It focuses on reporting to authorities rather than providing creators with actionable insights or tools to address misuse directly.
Art 26	Obliges online platforms to provide clear disclosures about advertising practices,	It provides transparency in advertising practices to ensure that creators understand the monetisation of their works. It	It fails to ensure that disclosed advertising data includes granular details linking specific content to revenue, limiting

⁴⁸² Dmitry Pastukhov, *The Sounds of Indie? The Power of Major Labels and Niche Spaces in Spotify Recommendations* (2023), Blog post. Available at https://hmc.chartmetric.com/indie-major-labels-spotify-recommendations/?utm_source=chatgpt.com.

⁴⁸³ Larry Wayne, *Pay for Play: How the Music Industry Works, Where the Money Goes, and Why* (2023) <<https://opentext.uoregon.edu/payforplay/>> University of Oregon.



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	particularly regarding who pays for ads and their targeting criteria.	also requires clear disclosures about who pays for ads and targeting criteria and, therefore, can prevent platforms from unfairly exploiting creators' content without appropriate remuneration. <u>This increases bargaining power for authors and performers by clarifying how their works generate income for platforms.</u>	creators' ability to track their contributions to ad income in ad-based revenue models.
Art 27	Mandates transparency in recommender systems, requiring platforms to explain how content is ranked and offering users the choice to modify algorithmic prioritisation.	It allows creators to challenge and influence how their content is presented and, therefore, it impacts visibility and revenue disparities caused by opaque algorithms.	Transparency requirements for recommender systems do not mandate disclosures about how prioritisation decisions impact revenue streams.

5.3.2 The potential of DMA provisions

5.3.2.1 Article 6(12) DMA

As presented in Chapter 2.4.2.2, Article 6(12) is another DMA provision seeking to achieve a greater level playing field between gatekeepers and their business users. It mandates the publishing and application of FRAND conditions for access to app stores, search engines and, most relevantly for this study, social networks.

The principles surrounding FRAND licensing have been developing for many years, most notably in the context of licensing of standard essential patents.⁴⁸⁴ In collective rights management, fair and non-discriminatory terms in licensing between CMOs and (online) exploiters of music, including reasonable licensing fees as well as negotiations in good faith are also the standard set by Directive 2014/26/EU.⁴⁸⁵

Under the DMA, the European Commission will have the role of overseeing the implementation of FRAND terms of access by gatekeepers. Depending on the interpretation and application in practice of Article 6(12) DMA, authors and performers as business users of social media platforms might be able to obtain some benefits.

One of the dimensions of the Article 6(12) DMA obligation is the requirement for “non-discriminatory conditions of access” to social networking services. In the digital music sector this would mean unfettered access, equal treatment and equal general terms for business users, be it authors, performers, record labels or other.⁴⁸⁶

⁴⁸⁴ Note the landmark judgment in C-170/13 Huawei Technologies Ltd. v. ZTE Corp., EU:C:2015:477.

⁴⁸⁵ Recital 31 and Article 16 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 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.

⁴⁸⁶ Some categories of users may, justifiably, require different terms than other categories, see Mantzari (n 148) 8.



The other dimension is the fairness of pricing and other terms with the aim of bringing more balance in the gatekeeper - user relationship. The text of the Regulation reveals that, to that end, gatekeepers are prohibited from setting conditions that result in a) an imbalance of rights and obligations to the business user, b) a disproportionate advantage for the gatekeeper compared to the service offered, or c) in a disadvantage for business users competing with the gatekeeper by providing the same or a similar service.⁴⁸⁷

Several questions and avenues to explore arise in this context. Can Article 6(12) DMA actually create room for negotiation of access terms between music creators and social networking platforms exploiting music? Can music rights licensors use this obligation to steer away from take-it-or-leave-it, bundled licensing access terms with UGC platforms? Could the difference between the value of music for social media platforms and the level of remuneration that creators receive for the exploitation of musical works by these platforms⁴⁸⁸ be regarded as conferring an advantage on the gatekeeper which is disproportionate to the service provided in the sense of Recital 62 DMA? Does Article 6(12) DMA, ultimately, create an entitlement for music rightholders to access social media platforms in exchange for more transparent and higher remuneration for the exploitation of their rights?

It remains unspecified, as of yet, what FRAND access means under the DMA and, even more so, as regards access to social networking platforms, for which the fairness benchmarks provided in Recital 62 DMA do not apply. It is also uncertain concretely how pre-existing FRAND principles will be translated to apply in the field of business users' access to social media platforms and how (if at all) Article 6(12) DMA could benefit music creators and other rightholders holding business user accounts vis-a-vis such platforms that derive value from the exploitation of music. It is evident that further guidance and specification from the Commission would be necessary here, as to how to assess FRAND access to social media platforms in a way that could meaningfully assist creators as business users.

5.3.2.2 *Anti-steering and beyond*

Further DMA provisions, even if they do not directly create rights for authors and performers as platform users, may still prove to have an impact on the music sector because of the way they can be enforced in practice.

The anti-steering practice prohibition of Article 5(4) of the DMA, as presented above in Chapter 2.4.2.3, could benefit the relationship between streaming services and their users and play a role in lowering the prices paid by consumers for music streaming subscriptions by introducing more choice and opportunity for comparison of available offers. More importantly for this study, though, it can be argued that, indirectly, it could strengthen artists' prospects for increased remuneration by platforms. That is because streaming services use steering to boost adherence to their paid subscription offers and the ensuing increased revenue can mean that there is more money to be distributed down the music industry value chain, also in the form of royalty payments.⁴⁸⁹ What is more, reaching and retaining those

⁴⁸⁷ Recital 62 DMA.

⁴⁸⁸ See analysis of 'music value gaps' in Chapter 4.1.1 of Fair MusE D2.2 Deliverable.

⁴⁸⁹ Interview with representatives of a music streaming platform.



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‘profitable users’ with paid subscriptions (including through steering) also seems to have a more existential significance for music streaming services like Spotify, as it is one of the suggested strategies for tackling the reported profitability issues it faces.⁴⁹⁰

Similar to the kind of indirect impact of the anti-steering prohibition on the music sector and (ultimately) on artists’ remuneration can be said to be the impact of the enforcement of the obligation to effectively open operating systems to third-party apps and app stores of Article 6(4) DMA, which is considered as falling under the provisions tackling gatekeeper self-preferencing in the broader sense.⁴⁹¹ The Commission is currently investigating whether Apple’s so-called Core Technology Fee⁴⁹² targeting such (large) third parties, for instance streaming services’ or video streaming services’ apps, is in line with the provision.⁴⁹³ This charge of €0.50 per each first annual app installation (triggered after one million installations) comes with the acceptance of a specific set of business terms and can place a heavy burden on popular apps outside the Apple ecosystem.⁴⁹⁴ Arguably, again, the more costs music-exploiting platforms have to pay, the less money finds its way back to the music industry and, ultimately, to artists.

⁴⁹⁰ Chapter 2.4.4. of Fair MusE D3.3. Deliverable.

⁴⁹¹ Martin Peitz, ‘The Prohibition of Self-Preferencing in the DMA’ CERRE (2022) available at <https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf> 8.

⁴⁹² <<https://developer.apple.com/support/core-technology-fee/>>

⁴⁹³ Press release IP/24/3433 (n 204).

⁴⁹⁴ Damien Geradin, ‘When Apple takes the European Commission for fools: An initial overview for Apple’s new terms and conditions for iOS app distribution in the EU’ (*The Platform Law Blog*, 26 January 2024) <<https://theplatformlaw.blog/2024/01/26/when-apple-takes-the-european-commission-for-fools-an-initial-overview-of-apples-new-terms-and-conditions-for-ios-app-distribution-in-the-eu/>>; Alba Ribera Martinez, ‘Apple’s DMA Compliance Workshop – The Power of No: Breaking Apart the Bundle?’ (*Kluwer Competition Law Blog*, 19 March 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/03/19/apples-dma-compliance-workshop-the-power-of-no-breaking-apart-the-bundle/>>. In a letter to the European Commission, Spotify, Deezer, Digital Music Europe joined by EU companies and associations active in a range of other digital sectors have presented their stance on Apple’s shortcomings in its DMA compliance and their impact, available at <<https://newsroom.spotify.com/2024-03-01/a-letter-to-the-european-commission-on-apples-lack-of-dma-compliance/>>.



6 Routes towards enforcing creators' rights

6.1 Public enforcement

Effective enforcement is key for any piece of legislation to achieve its objectives. In this chapter we will examine the role of the European Commission and that of national competition authorities in the enforcement of competition law and of the main instruments and institutional apparatus of platform regulation and, ultimately, their significance for and impact on the successful exercise of authors' and performers' rights.

6.1.1 Enforcement of EU competition law

Under Regulation 1/2003⁴⁹⁵ the EU Commission, national competition authorities and national courts are all equally competent to enforce Articles 101 and 102 TFEU.⁴⁹⁶ The EU Commission has powers to investigate alleged competition infringements, and it can impose interim measures, commitments and sanctions for the violations of EU competition rules.⁴⁹⁷ In order to ensure that the national competition authorities have comparable investigation and sanctioning powers, The ECN+ Directive specified that national competition authorities should have the same powers as the EU Commission.⁴⁹⁸

Overall, both the EU Commission as well as national competition authorities have regularly intervened in digital markets.⁴⁹⁹ The EU Commission has been most notorious for its three large enforcement actions against Google in which it imposed a total of 8,5 billion Euros of fines on Alphabet,⁵⁰⁰ and for the proceedings against Apple discussed above. National competition authorities have brought several cases against large online platforms, like Google,⁵⁰¹ Amazon,⁵⁰² and Meta.⁵⁰³ Overall, the EU and national competition authorities

⁴⁹⁵ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003).

⁴⁹⁶ Articles 4 and 5 Regulation 1/2003.

⁴⁹⁷ Articles 7-24 Regulation 1/2003.

⁴⁹⁸ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] L 11/3 (ECN+ Directive).

⁴⁹⁹ Joseph Antel, Ciara Barbu-O'Connor, John Carroll, Katie Daw & Robert Klotz, 'Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US' (2022) 6 Eur Competition & Reg L Rev 35.

⁵⁰⁰ Google Shopping (n 102); Google Android (Case AT.40099) Commission Decision of 18 July 2018. Google AdSense (Case AT.40411) Commission Decision of 20 March 2019.

⁵⁰¹ See, e.g. Google Press Publishers case by the French Competition Authority discussed in Chapter 4.2.6.

⁵⁰² The German Competition Authority has brought several proceedings against Amazon over the past years, and it has published an overview over its enforcement actions against Amazon, which is available via https://www.bundeskartellamt.de/EN/Digital_economy/proceedings_against_large_digital_companies/Amazon/Amazon_node.html

⁵⁰³ See the Meta v SIAE case discussed in Chapter 5.2.2 above.



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thus seem to be prepared to intervene in online platform markets and can build on significant prior practice. Yet, the EU and national competition authorities have discretion to set their enforcement priorities and it will ultimately depend on these priorities whether they will launch any investigations into music streaming markets.⁵⁰⁴

6.1.2 Enforcement of the DMA

The European Commission's enforcement powers under the DMA's Chapter V are strongly reminiscent of those enjoyed in the framework of competition enforcement under Regulation 1/2003.⁵⁰⁵ Still, the overall DMA public enforcement system is very different to the one of competition law⁵⁰⁶ not only because of its *ex ante* and supervisory character⁵⁰⁷ but also in that it is 'centralised'; the Commission's role is central and the role of the national competition authorities (NCAs) is, by comparison, limited.⁵⁰⁸

The European Commission is the only authority responsible for enforcing the Regulation.⁵⁰⁹ All in all, the procedural regime of the DMA has been described as favouring informal dialogue and outcomes over formal decisions which, in turn, leaves less room for challenges against those decisions and ensuing judicial review.⁵¹⁰ This becomes evident through Article 8 DMA, for instance, under which the Commission may or may not engage in adopting specifying measures regarding the positive obligations of the DMA (Article 8(2) DMA) or engage in regulatory dialogue with a gatekeeper (Article 8(3) DMA). Any specification measures may be adopted by the European Commission *ex officio* or upon request by a gatekeeper.

Article 8 is just one of the manifestations of discretion that the Commission enjoys with regard to taking action or refraining from doing so under the Regulation. Another one is

⁵⁰⁴ On the setting of enforcement priorities by the EU Commission and national competition authorities more broadly, see Or Brook and Kati Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' (September 28, 2021). Available at SSRN: <<https://ssrn.com/abstract=3930189> or <http://dx.doi.org/10.2139/ssrn.3930189>>

⁵⁰⁵ N 460.

⁵⁰⁶ Regulation 1/2003 (n 494) as complemented by the ECN+ Directive (n 497).

⁵⁰⁷ More on the supervisory structure of the DMA in Giorgio Monti, 'Procedures and Institutions in the DMA' [2022] CERRE Issue Paper 6 ff available here <https://cerre.eu/wp-content/uploads/2022/12/DMA_Institutions_and_Procedures.pdf>.

⁵⁰⁸ NCAs may be involved directly as Article 38 DMA describes or in assisting the Commission with its market investigation (Article 16(5) DMA) and with 'dawn-raids' (Article 23(3) DMA). See also Alba Ribera Martínez, 'The Decentralisation of the DMA's Enforcement System' [2024] 73(12) GRUR International 1111 1112 and Lena Hornkohl and Alba Ribera Martínez, 'Collective Actions and the Digital Markets Act: A Bird Without Wings' [2024] forthcoming in The Antitrust Bulletin 8.

⁵⁰⁹ Article 38(7) and Recital 91 DMA. On the Commission's DMA homepage, available at <https://digital-markets-act.ec.europa.eu/index_en> it is explained that teams from the Directorates-General for Competition (DG COMP) and Communications Networks, Content and Technology (DG CONNECT) are jointly in charge of the implementation and enforcement of the Regulation.

⁵¹⁰ Mantzari (n 148) 8-9.



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found in Article 27(2) DMA and allows the Commission freedom to act upon or ‘ignore’ information brought to its attention as regards possible infringing gatekeeper conduct.⁵¹¹

Included in the enforcement arsenal of the Commission are acts imposing interim measures, acts making gatekeeper commitments binding, adopting decisions for non-compliance and imposing fines.⁵¹² In case the Commission decides to act with the view of adopting a decision for non-compliance with the behavioural obligations of Articles 5 to 7, it will open formal proceedings pursuant to Article 20 DMA.⁵¹³ In this context, the Commission also enjoys flexibility as regards the deadline for adopting a decision, although it “shall endeavour” to do so within 12 months from initiating proceedings.⁵¹⁴

6.2 Opportunities for authors and performers to obtain redress

As shown by the empirical analysis conducted in preparation of this research, the majority of disputes between rightholders representing authors and performers and platforms are resolved extrajudicially, through direct contacts and commercial negotiations. This common practice stresses the importance of more formalised and effective dispute resolution procedures, as they can provide structured avenues for addressing conflicts that may not be amicably settled through informal means.

In the digital age, the right to an effective remedy⁵¹⁵ must account for the challenges posed by platform governance, most notably the complexity of algorithmic decision-making and the transnational nature of disputes. Platform regulation, including the P2B Regulation, has established rules to harmonise and proceduralise extrajudicial mechanisms for the resolution of disputes with and within online platforms.⁵¹⁶ Arguably, the emphasis on *proceduralisation* may highlight the broader effectiveness of remedies under platform regulation. In particular, the right to access an effective internal complaint-handling system (Article 20 DSA and Article 11 P2B Regulation) and the right to choose a certified out-of-court dispute settlement (ODS) body (Article 21 DSA and Articles 12-13 P2B Regulation) can serve as essential tools for both platform users and business users in disputes with digital intermediaries.

Internal complaint-handling mechanisms provide a first line of recourse, while out-of-court dispute resolution mechanisms offer an alternative to litigation. However, as will be explained in more detail below, concerns about the enforceability of remedies persist,

⁵¹¹ For more on the different types of discretion the European Commission enjoys in its capacity as ‘sole enforcer’ of the DMA see Inês Neves, ‘A Reorientation of the European Commission’s Discretion in the Digital Markets Act: Solutions From Digital Constitutionalism’ (*Kluwer Competition Law Blog*, 18 December 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/12/18/a-reorientation-of-the-european-commissions-discretion-in-the-digital-markets-act-solutions-from-digital-constitutionalism/>>.

⁵¹² Chapter V DMA.

⁵¹³ Other instances that may trigger a non-compliance decision are listed in Article 29(1) DMA.

⁵¹⁴ Article 29(2) DMA.

⁵¹⁵ Article 47 of the Charter of Fundamental Rights of the EU.

⁵¹⁶ Pietro Ortolani, ‘If You Build It, They Will Come: The DSA’s “Procedure Before Substance” Approach’ (*Verfassungsblog*, 7 November 2022) <<https://verfassungsblog.de/dsa-build-it/>>.



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particularly in cases where platforms fail to comply with decisions rendered by dispute resolution bodies and where these processes are seen as an unnecessary duplication of the existing court system with private mechanisms.⁵¹⁷ The role of Digital Services Coordinators (DSCs) is instrumental to addressing these challenges as they must ensure that remedies are not only available but also effective.⁵¹⁸

6.2.1 Availability and access to platform dispute resolution procedures

6.2.1.1 DSA

Private enforcement under the DSA is contingent upon the availability and accessibility of robust dispute resolution mechanisms. Article 20(1) DSA mandates that online platforms establish internal complaint-handling systems to allow users to challenge decisions such as content removal or account suspension. These systems must comply with clear procedural requirements. Platforms are required to provide users with detailed information about the reasons for their decisions that would enable them to understand the basis for actions such as content removals. Complaints must be handled promptly, with defined timeframes to ensure that disputes are not unnecessarily prolonged (Article 20(4) DSA). Accessibility and user-friendliness are also emphasised, as platforms are required to make their systems easy to use, with clear instructions on how to file complaints and follow their status (Article 20(3) DSA). Additionally, providers of online platforms must inform complainants without undue delay of their reasoned decision (Article 20(5) DSA), and decisions should not be made solely by automated means (Article 20(6) DSA).

Article 20 DSA can empower authors and labels to challenge revenue-sharing discrepancies or removal of content by platforms. However, this provision relies heavily on platforms' implementation and does not mandate specific remedies or financial compensations for creators in cases of systemic underpayment.

Insights from the DSA Observatory emphasise the importance of ensuring that these mechanisms are not merely procedural but result in meaningful outcomes. The Observatory has raised concerns about whether current practices sufficiently address the power imbalances between platforms and rightholders.⁵¹⁹ For example, the absence of harmonised procedures across platforms can lead to inconsistent outcomes, which can undermine trust in these mechanisms. Moreover, the lack of robust monitoring mechanisms by DSCs can exacerbate these shortcomings as it may allow systemic inefficiencies to persist unchecked.

⁵¹⁷ Jorg Wimmers, 'The Out-of-Court Dispute Settlement Mechanism in the Digital Services Act: A Disservice to Its Own Goals' (2021) 12 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 381.

⁵¹⁸ See Article 51 DSA.

⁵¹⁹ DSA Observatory, 'Practical Considerations for Out-of-Court Dispute Settlement (ODS) Under Article 21', February 2024, available at <https://dsa-observatory.eu/2024/02/08/practical-considerations-for-out-of-court-dispute-settlement-ods-under-article-21-of-the-eu-digital-services-act-dsa/>.



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Article 21 DSA complements the internal mechanisms of Article 20 by providing for the criteria of certified independent bodies to mediate disputes between users and platforms.⁵²⁰ These bodies must meet specific criteria set out by Member States to meet standards of independence, impartiality, and competence set out in Article 21(3) DSA. They must also operate free from platform influence to make fair and unbiased decisions. ODS mechanisms must also be cost-effective and accessible to all users. Moreover, decisions made by ODS bodies should be transparent and reasoned, providing clarity on how disputes were resolved. These criteria are to be complemented with the criteria already established by the ADR Directive (Article 21(9) DSA).⁵²¹

Despite these procedural requirements, certain practical limitations undermine the effectiveness of ODS mechanisms. Concerns about the independence and impartiality of dispute resolution bodies arise, particularly when their funding or structure creates a perception of bias.⁵²² The affordability of ODS services remains a critical issue, as creators with limited financial resources may find these mechanisms inaccessible. Also, the voluntary nature of platform participation diminishes the enforceability of outcomes, as platforms can choose whether to engage with the process.⁵²³

In the music sector, these limitations can be particularly pronounced. For example, many disputes between authors and performers (or other rightholders that act as recipients of the service) and platforms involve disagreements about revenue sharing, the application of licensing agreements, or even the interpretation of transparency obligations under Articles 18-22 of the DSM Directive. Given the significant reliance on platforms for distribution and visibility, music creators often face significant challenges when seeking redress, particularly when platforms refuse to participate in ODS mechanisms. Fragmentation in the national implementation of the rules also exacerbates this issue, as creators working across multiple jurisdictions encounter varying levels of procedural safeguards and enforcement capabilities. This can leave independent artists, in particular, without effective remedies to address grievances, which may thereby reinforce the existing power imbalance between platforms and creators. Therefore, in line with the suggestions from the DSA Observatory, a stronger oversight by DSCs, along with tailored procedural safeguards specific to the music industry, could help address these sector-specific challenges.

Notwithstanding the potential benefits brought about by platform regulation in terms of procedural remedies, it is still early to assess their effectiveness and Member States are currently concluding the specific procedural frameworks for dispute resolution procedures within national institutional and procedural structures.⁵²⁴

⁵²⁰ Martin Husovec, 'Certification of Out-of-court Dispute Settlement Bodies under the Digital Services Act' (2023) available at <https://husovec.eu/wp-content/uploads/2023/07/f-xADR-Paper.pdf>.

⁵²¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165/63.

⁵²² Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016) 24 European Review of Private Law
<<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\ERPL\ERPL2016005.pdf>>
accessed 12 November 2024.

⁵²³ Wimmers (n 515).

⁵²⁴ Interview with representatives of a CMO.



6.2.1.2 DMA

Article 6(12) DMA 2nd subparagraph mandates that gatekeepers provide for an alternative dispute settlement mechanism along with their general conditions of access. This is not a general obligation but catches only designated app stores, search engines and social networks and connects to the requirement of providing FRAND access terms to business users of these three CPSs.⁵²⁵ The DMA further specifies that such mechanisms should be based in the EU, be “easily accessible, impartial, independent and free of charge for the business user” and bear no prejudice to judicial redress.⁵²⁶

According to ByteDance’s first compliance report,⁵²⁷ TikTok users with business accounts can, besides the platform’s internal mechanism, opt for mediation with the International Chamber of Commerce in Paris. Meta’s business users of Facebook and Instagram have access to an internal mechanism whereby users’ complaints are first reviewed by an internal team and assessed by a Review Board supervised by the gatekeeper’s DMA compliance department.⁵²⁸ The conformity of these mechanisms with the criteria laid down by Article 6(12) and Recital 62 DMA is for the European Commission to assess but, at the moment, these are the gatekeeper-provided ADR avenues to music creators.

With the exception of Article 6(12), the DMA does not generally mandate the use of ADR mechanisms when obligations are not adequately met by a gatekeeper. Therefore, in the video-sharing space, YouTube is not equally bound by the DMA to publish and apply FRAND access terms that include an alternative dispute settlement mechanism. Similarly, the ADR avenue is not binding on gatekeepers for lack of (proper) compliance with other obligations, such as provision of data to business users under Article 6(10) DMA.

Music creators and gatekeepers are, in any case, free to include in their individual agreements the specifics of procedures on the processing and resolution of potential complaints, as provided in Article 5(6) DMA. Still, in light of the relationship dynamics between platforms and users, the establishment of internal complaint-handling mechanisms seems to remain up to each gatekeeper. When it comes to independent authors and performers, in particular, their need to be present on all possible platforms for their content to have maximum visibility and reach in combination with their weak negotiating position vis-a-vis platforms, very little room seems to be left for them to request the inclusion of or negotiate the terms of such mechanisms, if these are not already (properly) in place.

6.2.2 Complaints

6.2.2.1 DSA

Article 53 DSA grants recipients of intermediary services, as well as bodies, organisations, or associations acting on their behalf, the right to file complaints against providers of intermediary services alleging infringements of the Regulation. The complaint shall be submitted in the Member State where the recipient of the service is located. The DSC is

⁵²⁵ See Chapters 2.4.2.2 and 5.2.2.

⁵²⁶ Recital 62 DMA.

⁵²⁷ N 406 paras 92 - 93.

⁵²⁸ Meta’s first compliance report (n 406) paras 147 - 149.



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required to assess the complaint and, where appropriate, transmit it to the DSC of the Member State of establishment, accompanied by an opinion if deemed necessary. If the complaint falls under the purview of another competent authority within the Member State, the receiving DSC must transmit the complaint to that authority. In terms of procedural guarantees, both parties—the complainant and the provider of intermediary services—are entitled to be heard and to receive timely and relevant information about the status of the complaint.

In the context of the music sector, Article 53 can offer a significant avenue for authors and performers to challenge non-compliance by platforms, particularly in areas such as transparency obligations or algorithmic decisions affecting content visibility. Moreover, the right to lodge complaints through the DSC provides creators with a formal mechanism to seek redress without immediately resorting to costly litigation. However, the effectiveness of this process relies on the capacity of DSCs to handle complaints efficiently.

DSCs' responsibilities encompass monitoring compliance, certifying dispute resolution bodies, and facilitating cooperation among Member States. The role of DSCs also extends to addressing systemic issues arising from platform practices.⁵²⁹ For instance, DSCs are empowered to investigate recurring patterns of complaints against platforms and, where necessary, impose corrective measures.⁵³⁰ DSCs also play a crucial role in coordinating cross-border disputes, which are increasingly common in the digital environment. Despite shortcomings in the implementation of the institutional framework devised by the DSA,⁵³¹ DSCs are a critical piece for promoting cross-border cooperation between national authorities.⁵³² In this manner, DSCs ensure that enforcement actions are consistent across the EU, thereby reducing jurisdictional fragmentation. Besides, the supervisory function of DSCs that transpires from the wording of Article 53 DSA enhances the procedural fairness of private enforcement mechanisms. Accordingly, by ensuring that platforms adhere to procedural obligations, DSCs bridge the gap between private enforcement and public oversight.

6.2.2.2 DMA

Private parties can provide information on gatekeeper non-compliance with the DMA. Business users, end users, competitors or other third parties can submit this information to national competition authorities of their respective Member State or directly to the European Commission's, pursuant to Article 27 DMA.

⁵²⁹ Article 51 DSA.

⁵³⁰ Article 51(2) and (3) DSA.

⁵³¹ Pieter Van Cleynebreugel and Pietro Mattioli, 'Digital Services Coordinators and Other Competent Authorities in the Digital Services Act: Streamlined Enforcement Coordination Lost?' (*European Law Blog*, 30 November 2023)

<<https://www.europeanlawblog.eu/pub/digital-services-coordinators-and-other-competent-authorities-in-the-digital-services-act-streamlined-enforcement-coordination-lost/release/1>> accessed 14 January 2025.

⁵³² Article 58 DSA.



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For the purposes of informing the European Commission about gatekeepers' conduct that infringes on their DMA obligations, a 'Whistleblower Tool'⁵³³ has also been made available not only to business or end users but to any individual in possession of "inside information" and willing to report it anonymously or not. This tool is therefore available to anyone able to come forward with information in case a gatekeeper would be in breach of their obligations. The provision of information on gatekeeper non-compliance does not, however, place the informant party in the position of complainant nor does it set in motion a formal complaints-handling procedure, as happens with the enforcement of competition law.⁵³⁴ As seen above (6.1.2), the Commission enjoys complete discretion on if and how to act upon third party information regarding non-compliance.⁵³⁵ Consequently, authors and performers affected by UGC platform conduct infringing the DMA may bring this to the attention of the Commission but without guarantees that the latter will follow-up.

6.2.3 Enforcement of rights before national courts and actions for damages

6.2.3.1 Private enforcement of EU competition law

The private enforcement of EU competition law has been specifically encouraged by a tailor-made Directive on damages actions.⁵³⁶ Under the Antitrust Damages Directive, any victims of violations of competition rules have a right to full compensation. The Directive also provides specific rules for private plaintiffs in terms of access to evidence.

The impact of the Directive has mostly been as a follow-on instrument, i.e. to encourage litigation by victims of breaches of competition rules, once a competition enforcer has found an undertaking or a group of undertakings liable under competition law.⁵³⁷ For authors and performers, it would thus be of great benefit if a competition enforcer moves first, before bringing proceedings themselves, as the decision by an enforcer has precedential value and a lot of evidence will already be available through the enforcer's investigation. This is also true given the ambiguities in the application of the Directive.⁵³⁸

⁵³³ Available at <https://digital-markets-act.ec.europa.eu/whistleblower-tool_en>.

⁵³⁴ Chapter IV of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18. Hornkohl/Ribera Martínez (n 507) 5-6.

⁵³⁵ Article 27(2) DMA.

⁵³⁶ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

⁵³⁷ ICN (2021). Development of Private Enforcement of Competition Law in ICN Jurisdictions, https://competition-policy.ec.europa.eu/system/files/2021-04/ICN-working-group_private_enforcement_chapter_en.pdf

⁵³⁸ Katri Havu. Private Enforcement of Competition law: Notes Regarding the Roles of EU and National Law on the Basis of Recent Preliminary Rulings. *Europarättslig tidskrift* 2020, also available via <https://helda.helsinki.fi/server/api/core/bitstreams/1f596197-0f19-4be7-b9b4-97f6c27ed1e1/content>



6.2.3.2 DSA & P2B Regulation

Despite the availability of mandatory mechanisms for extrajudicial settlement, national courts remain an important forum for creators to assert their rights against platforms when disputes cannot be resolved in a commercial manner. Under the DSA, creators can pursue damages for breaches of transparency obligations and Article 54 DSA explicitly reinforces this by granting recipients of intermediary services the right to seek compensation for any damage or loss caused by providers' non-compliance with their obligations under the Regulation. Accordingly, this provision creates a direct pathway that can be used by authors and performers to hold platforms accountable for regulatory infringements that result in financial harm or other losses.

The P2B Regulation complements the procedural framework of the DSA by addressing transparency and fairness in platform-to-business relationships. Article 14 P2B Regulation empowers representative associations, organisations, and public bodies to bring actions against platforms for non-compliance with the Regulation such as injunctions against non-compliance with the transparency and fairness obligations. In doing so, this provision broadens the scope of private enforcement by enabling collective representation of business users' interests.⁵³⁹ Yet, a notable distinction between the DSA and the P2B Regulation lies in the legal basis for enforcement actions. While the DSA relies on certified dispute resolution bodies and DSC oversight, the P2B Regulation allows Member States to designate public bodies or associations to act on behalf of business users.

For the music sector, the inclusion of Article 54 DSA provides an additional layer of protection that can enable music creators to recover damages directly tied to platforms' failure to meet their regulatory obligations. However, despite specific remedies under the DSM Directive and the right to compensation under the DSA, the cost and complexity of litigation can deter creators from utilising this avenue.⁵⁴⁰ Enforcing rights through national courts is especially challenging due to the inherent complexity of royalty structures and licensing agreements. Creators may struggle to substantiate claims related to underpayment or lack of transparency, given the opaque nature of platform operations. Accordingly, enhancing the availability of collective action mechanisms, as provided under the P2B Regulation, could further mitigate the resource disparities that creators face when litigating against powerful platforms.

6.2.3.3 DMA

The application of the DMA by national courts is pointed at by Article 39 DMA, where the cooperation between national courts and the Commission is also foreseen.⁵⁴¹

Regardless of any explicit or implicit acknowledgment of private enforcement by the DMA, the latter applies generally and directly in all Member States in light of its status as an EU regulation.⁵⁴² Horizontal direct effect of regulations enables private parties - such as music

⁵³⁹ See Chapter 6.2.3.

⁵⁴⁰ Interviews with various stakeholders.

⁵⁴¹ See also Recital 92 DMA.

⁵⁴² Article 288 TFEU



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creators who are business and end users of CPSs - to seek the enforcement of their rights under the DMA before national courts. The direct effect test requires that the relevant provision conferring rights be sufficiently clear, precise and unconditional.⁵⁴³

The question arises, whether the rights under Articles 5, 6 and 7 DMA can fulfil the direct effect test.⁵⁴⁴ The negative obligations/prohibitions in Article 5 DMA likely enjoy direct effect, since prohibitions contained in EU law provisions are considered sufficiently precise and unconditional by the CJEU.⁵⁴⁵ The issue is more complex when it comes to positive obligations and especially those contained in Articles 6 and 7 DMA. These two provisions, besides being positive obligations, may also be subject to further specification by the European Commission, according to Article 8 DMA. This adds to the uncertainty as to whether, for instance, Article 6(9) and (10) DMA could be enforced, at present, before national courts. Komninos, however, maintains that the possibility of further specification does not put into question the direct effect of the respective DMA obligations because it concerns the compliance measures adopted by the gatekeepers and not the DMA provisions themselves.⁵⁴⁶ The European Commission has also stated that the DMA's "precise obligations and prohibitions" are directly enforceable and that, as a result, actions for damages for non-compliance with the Regulation can be an option for those harmed from it.⁵⁴⁷

Private enforcement is expected to play an important role in the overall enforcement of the Regulation, acting as a counterweight to potential limitations in its public enforcement posed by interrelated factors such as the European Commission's allocation of resources, setting of priorities and exercising of its discretion under the DMA and strengthening the deterrent effect of the Regulation.⁵⁴⁸ It is expected that both stand-alone and follow-on actions will, eventually, be brought before national courts.⁵⁴⁹

Against this background, authors and performers wishing to enforce their DMA rights in case of designated UGC platforms' non-compliance, can make use of different legal remedies depending on the case at issue. Such remedies and procedures include:

⁵⁴³ For instance, Case 9/70 *Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78, paragraph 9. See also Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Nicolas Charbit and Sébastien Gachot (eds) *Eleanor M. Fox Liber Amicorum: Antitrust Ambassador to the world* (Institute of Competition Law 2021) 428 available at <https://awards.concurrences.com/IMG/pdf/komninos_-_liber_amicorum_eleanor_fox.pdf?75048/cf8a7240f63d9f1eaae86972629ac1387de1c55a3a9389fcc6cbf1840b62bd26>.

⁵⁴⁴ Recently, this test has been applied mainly on Directives' provisions, see Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) *European Law Open* 1 576, 597.

⁵⁴⁵ Gallo (n 542) 598 and case law there cited.

⁵⁴⁶ Komninos (n 541) 430.

⁵⁴⁷ European Commission - Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets* (Brussels, 6 September 2023) QANDA/20/2349 available at <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_20_2349/QANDA_20_2349_EN.pdf>

⁵⁴⁸ Hornkohl/ Ribera Martínez (n 506) 7-8.

⁵⁴⁹ Ibid. See also Giulia Rurali and Martin Seegers, 'Private Enforcement of the EU Digital Markets Act: The Way Ahead After Going Live' (*Kluwer Competition Law Blog*, 20 June 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/06/20/private-enforcement-of-the-eu-digital-markets-act-the-way-ahead-after-going-live/>>.



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- ⇒ actions for damages seeking compensation for harm caused by the infringement;
- ⇒ injunctive relief seeking to cease and desist the infringing gatekeeper conduct;
- ⇒ interim measures;
- ⇒ restitutionary relief seeking to correct unjustified enrichment of the infringer; or
- ⇒ declaratory relief seeking a ruling on the (il)legality of the conduct.⁵⁵⁰

Gatekeepers are explicitly prohibited from hampering business or end users' recourse to national courts or other public authorities, such as national data protection or competition authorities, with respect to any gatekeeper conduct amounting to non-compliance with the DMA or other EU or national law, pursuant to Article 5(6) DMA. This prohibition safeguards business and end users from practices such as confidentiality clauses inserted in agreements with gatekeepers⁵⁵¹ that could result in 'silencing' them about unfair gatekeeper conduct.

The importance of the role of private enforcement in the regulation of gatekeepers and in competition in digital markets has been underlined.⁵⁵² At the same time, certain characteristics of private enforcement proceedings broadly and specifically of the private enforcement of the DMA are casting doubts over the potential to effectively assist users to protect their rights vis-a-vis large powerful companies. Litigation costs may require significant financial resources and act as a deterrent, especially for less powerful rightholders like independent labels or individual authors and performers. In addition, court decisions do not apply *erga omnes* but bind only the parties to the dispute.⁵⁵³ Artists may well be reticent to pursue the judicial resolution avenue against platforms and other players they are dependent on.⁵⁵⁴

Adding to those, the decentralised private enforcement of the DMA by national courts increases the risk of discrepancies in its application among EU Member States. The role of Article 39 DMA on the cooperation between national courts and the Commission is to help reduce this risk but only to a certain extent, since national courts *may* ask the Commission for information (Article 39(1) DMA) and the Commission *may* submit written observations to the courts (Article 39(3) DMA) and there is no obligation to do so. This issue is further exacerbated by the possible lack of specialisation of national judges to handle certain cases, which can vary from one country to another.

⁵⁵⁰ Komninos (n 541) 433. Notably, Germany introduced, through the 11th amendment to its Act against Restraints of Competition, rules to achieve a more effective private enforcement of the DMA. According to Sections 33(1) and 33a(1) of the German Act, breaches of gatekeepers' substantial obligations are grounds for bringing claims for rectification of harm and actions for damages respectively.

⁵⁵¹ Recital 42 DMA.

⁵⁵² See Rupperecht Podszun, 'Private Enforcement and Platform Regulation: Two GAFA-cases – and What They Tell Us About the Digital Markets Act' (2021) available at <https://ssrn.com/abstract=3862497> > drawing conclusions from the private enforcement in Germany of *Netdoktor* Case 37 O 15721/20 and *Amazon* Case 37 O 32/21, decided by the Munich I District Court.

⁵⁵³ Ibid.

⁵⁵⁴ Streams and Dreams Report (n 336) 28.



6.2.4 Collective action

6.2.4.1 Competition Law

The issue of collective action for the violation under competition law has been a hotly debated topic for more than a decade in competition law circles, but a specific provision on collective action was never included in Directive 2014/104 on Antitrust Damages Actions.⁵⁵⁵ While the EU Representative Actions Directive⁵⁵⁶ (RAD) also makes no specific reference to the violation of EU competition rules, some EU Member States have implemented the Directive so as to cover violations of competition law. After all, however, the Representative Actions Directive is an instrument of consumer law, and authors and performers would arguably not qualify as consumers.

Collective rights management bodies do have the possibility, however, of filing complaints at least before national and EU competition authorities as the Italian case between Meta and SIAE shows. Furthermore, thinking more from a labour perspective, as discussed above,⁵⁵⁷ any unions of authors and performers should have the option of bringing proceedings for their members collectively.

6.2.4.2 DSA & P2B Regulation

Collective action mechanisms, such as the one under Article 14 P2B regulation, would allow representative organisations such as CMOs to act on behalf of creators, pooling resources and reducing the individual burden of litigation. Recent rulings, such as the CJEU's interpretation in the *Kopioisto v TELIA* case,⁵⁵⁸ illustrate the importance of empowering CMOs to take collective action as they are better equipped, materially and financially to combat copyright infringements.⁵⁵⁹

Unlike individual enforcement, collective action in the online sphere has the potential to address structural imbalances by holding platforms accountable for systemic non-compliance. However, the effectiveness of collective mechanisms depends on Member States' willingness to support these actions through regulatory and financial incentives. Moreover, divergences in how Member States implement collective action mechanisms risks creating fragmentation.

CMOs, which already represent the interests of artists and performers, are well-positioned to take on platforms that fail to comply with regulatory obligations. However, for this to be effective, CMOs must have access to comprehensive data, strong legal frameworks, and

⁵⁵⁵ Franziska Weber, 'A Chain of Reaction or the necessity of collective actions for consumers in cartel cases', (2018) 25(2) Maastricht Journal of European and Comparative Law, 208-230; Lena Hornkohl, Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany), (2024) 15(5) Journal of European Competition Law & Practice, 311–317.

⁵⁵⁶ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers [2020] OJ L 409/1.

⁵⁵⁷ Chapter 5.2.3 above.

⁵⁵⁸ Judgment of the Court (Fifth Chamber) of 23 November 2023. Case C-201/22 - *Kopioisto ry v Telia Finland Oyj*. ECLI:EU:C:2023:914.

⁵⁵⁹ *ibid.* para 37.



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financial support from Member States. Moreover, promoting collaboration among CMOs across the EU could establish a cohesive approach and strengthen the collective voice of music creators in disputes with major platforms.

6.2.4.3 DMA

With regard to the DMA, representative actions can be brought against gatekeepers for breach of DMA provisions that can lead to the collective harm of consumers.⁵⁶⁰ To that end, the Regulation explicitly provides that the RAD⁵⁶¹ is applicable. However, in light of the definition of ‘consumer’ provided by the RAD which excludes anyone acting “...for purposes which are outside that person’s trade, business, craft or profession”,⁵⁶² authors and performers that have business user accounts on gatekeeper platforms are outside the scope of the DMA’s provision for collective actions.⁵⁶³ Arguably, the same can be deemed true for artists that, in spite of not having business accounts set up, they use the UGC platform for the purpose of promoting their music.⁵⁶⁴

Against this background, collective actions for DMA infringements for harm caused to the interests of music creators do not appear possible under Article 42 DMA read in conjunction with the RAD. Beyond this, it is a matter of national law of the EU Member States (implementing the RAD) or of instances of intersection of the DMA with other regulatory instruments that can dictate how representative actions can target DMA infringements.⁵⁶⁵

Table 4: Opportunities for authors and performers to obtain redress

Opportunity	Description	Challenges
Internal complaint-handling mechanisms (Article 20 DSA)	Allows authors and performers to challenge platform decisions such as content removals or revenue-sharing discrepancies.	Relies on platforms’ proper implementation; no specific remedies for insufficient remuneration.
Out-of-court dispute settlement (Article 21 DSA)	Provides an independent mediation process for disputes between creators and platforms; decisions are non-binding but subject to procedural guarantees.	Participation by platforms is voluntary, and accessibility may be limited for smaller creators.

⁵⁶⁰ Article 42 and Recital 104 DMA.

⁵⁶¹ N 554.

⁵⁶² Article 3(1) RAD.

⁵⁶³ Hornkohl/ Ribera Martínez (n 506) 32-33.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid 38 ff and 49 ff .



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Right to lodge a complaint with DSCs (Article 53 DSA)	Enables creators to file complaints through DSCs for platform non-compliance with DSA obligations to underpin public oversight.	Effectiveness depends on DSC capacity and resources; cross-border issues may complicate coordination.
Right to compensation for damages (Article 54 DSA)	Grants recipients of the service the right to seek compensation for financial harm caused by platforms' regulatory non-compliance.	Litigation is resource-intensive and complex, often deterring smaller creators from pursuing claims.
Collective action mechanisms (Article 14 P2B Regulation)	Empowers representative organisations (e.g. CMOs) to collectively address systemic platform non-compliance.	Fragmentation across Member States creates inconsistent enforcement; CMOs need sufficient data and financial support.
Right to raise non-compliance issues and agree on complaint-handling mechanisms (Article 5(6) DMA)	Prohibits gatekeepers from raising obstacles to non-compliance claims brought by creators/platform users and recognises freedom of gatekeepers and users to agree on complaints-handling (including ADR) mechanisms.	Internal and external complaint-handling mechanisms are not a general requirement in creator-gatekeeper agreements.
ADR mechanisms as part of FRAND conditions of access (Article 6(12) DMA)	Mandates inclusion of ADR as condition for FRAND access to app stores, search engines and social networks.	Does not apply to all CPSs (e.g. does not cover YouTube as video-sharing CPS) and applies only in connection to platform access terms.
Collective action (Article 42 DMA)	Enables collective actions to be brought for consumer harm	Does not seem to capture harm to authors and performers



Part III



7 Integration of findings on copyright-specific and general obligations of digital platforms

One of the major challenges in enforcing music creators' rights under the DSM Directive lies in the fragmentation of procedural remedies across Member States.⁵⁶⁶ While the DSM Directive introduced transparency and fairness mechanisms for creators (notably Articles 18-22), their national implementation has varied significantly. The result is an inconsistent enforcement landscape, which can be particularly problematic for authors and performers seeking redress against platforms, as the available remedies are often limited, insufficiently detailed, or practically ineffective in counteracting power imbalances.⁵⁶⁷

A central argument in this analysis is that the framework established by platform regulation, particularly under the DSA, and competition law provide procedural tools that could enhance the enforcement of rights enshrined by the DSM Directive. In contrast to the DSM Directive, which primarily focuses on substantive rights such as fair remuneration and transparency, platform regulation and competition law introduce additional remedies and harmonised procedural mechanisms that could facilitate redress. Thus, while these frameworks were not initially designed to address copyright enforcement, their harmonised procedural mechanisms can be leveraged to close existing enforcement gaps, in line with the principle of effectiveness in EU law. Furthermore, the principle of fairness provides a possible connecting function between copyright law and further regulatory frameworks under EU law, which could be fruitfully invoked to rely on the DSA, DMA, EU and national competition rules as supplementary instruments to foster the rights granted to authors and performers under the DSM Directive.⁵⁶⁸

7.1 Article 17 DSM as the foundation of EU Platform Regulation

The (controversial) adoption of Article 17 DSM Directive was the first significant intervention by the European legislator in the governance of digital platforms concerning copyright enforcement. It also marked an important departure from the safe harbour protection that digital platforms had long enjoyed. Through the imposition of direct obligations on OCSSPs to obtain licenses and prevent unauthorised content dissemination, Article 17 not only addressed structural issues of fair remuneration in online music but also set the regulatory precedent for the DSA and the DMA.⁵⁶⁹ In doing so, Article 17 DSM Directive embodied an

⁵⁶⁶ See Chapter 4 and 9.1.4 of Fair MusE D2.2. Deliverable.

⁵⁶⁷ *ibid.*

⁵⁶⁸ On this point see also Chapter 2.2. above.

⁵⁶⁹ Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgement and the AG's Opinion in C-401/19' (Social Science Research Network, 18 July 2021) <<https://papers.ssrn.com/abstract=3889049>> accessed 13 December 2024.



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early recognition of the systemic role played by online intermediaries in facilitating and structuring access to creative works, a premise that would subsequently inform the EU's broader regulatory interventions in digital markets.⁵⁷⁰

However, despite its aspiring objectives, the implementation and enforcement of the DSM Directive have been hindered by national divergences, which has resulted in significant fragmentation and inconsistent application of rights across the Member States. For example, while some jurisdictions, such as Italy, have adopted an enforcement-driven approach, others, including Germany, have incorporated restrictive conditions limiting the scope of licensing obligations.⁵⁷¹ Also, Spain expanded the notion of OCSSPs beyond the Directive's intent.⁵⁷² This has created interpretative tensions with the broader role of platform regulation.⁵⁷³ The result is that the lack of harmonisation undermines the practical enforceability of rights conferred upon creators.⁵⁷⁴ Hence, this situation demands a broader convergence among regulatory regimes that could remedy enforcement deficits by integrating platform regulation mechanisms to ensure enforceability and redress.

7.2 Intersections between Copyright, Platform Regulation and Competition Law

A close reading of the DSM Directive, the DSA, and the DMA reveals strong complementarities between their respective regulatory objectives, which, when considered together, offer a compelling route towards an integrated framework for copyright enforcement. These legislative instruments, despite their different scopes, collectively seek to correct structural imbalances in digital markets, promote transparency, and strengthen procedural rights for weaker market participants, which in our view also includes music creators.

Based on the foregoing analysis, we conclude that the DSA and the DMA, while primarily addressing content governance and competition in digital markets, provide a procedural framework that can supplement the DSM Directive's enforcement gaps. In addition to the transparency requirements that can enhance data access, the DSA's internal complaints mechanisms and external dispute resolution bodies introduce harmonised enforcement mechanisms, which, if properly adapted to the demands and particularities of the music sector, could serve as alternative venues for creators to challenge opaque licensing arrangements and contest unfair remuneration structures. Similarly, the DMA's data access

⁵⁷⁰ Martin Senftleben and others, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' (2022) 13 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 67.

⁵⁷¹ Chapter 4 of Fair MusE D2.2. Deliverable.

⁵⁷² Ibid.

⁵⁷³ Eleonora Rosati, 'The DSM Directive Five Years On' (Social Science Research Network, 19 October 2024) <<https://papers.ssrn.com/abstract=4992748>> accessed 13 January 2025; Martin Senftleben, 'Guardians of the UGC Galaxy - Human Rights Obligations of Online Platforms, Copyright Holders, Member States and the European Commission under the CDSM Directive and the Digital Services Act' (2023) 14 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 435.

⁵⁷⁴ Chapter 9.1.4 of Fair MusE D2.2 Deliverable.



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and transparency mandates for gatekeeper platforms could be leveraged to compel dominant platforms to make available on a continuous basis music usage data. Arguably, this can reinforce Article 19 DSM obligations at a structural level.

Similarly, EU and national competition rules could play an important role in rendering the rights under the DSM Directive more effective. The Google Press Publishers case by the French Competition Authority⁵⁷⁵ is a prime example how competition rules could be used to enforce the rights granted to rightholders under the DSM Directive. As peculiar as the use of competition law to enforce copyright may sound from a traditional antitrust point of view, this employment of competition rules to overcome missing enforcement mechanisms was highlighted in the literature as a practical ‘gap filler solution.’⁵⁷⁶ Synergies between competition law and the rights granted under the DSM Directive can also be seen by recent policy debates in relation to the new draft Commission Guidelines on the enforcement of Article 102 TFEU. The draft Guidelines link possible abuses of dominance to access restrictions in the case where access is mandated by EU legislation. Article 19 DSM Directive provides an example of such a mandated access obligation.⁵⁷⁷ Furthermore, potential synergies can be created by the enforcement of national economic dependency rules. The full potential is yet to be seen, once the case of *Meta v SIAE* comes to conclusion in Italy.⁵⁷⁸

7.3 Bridging copyright, platform regulation, and competition law through effectiveness

Despite the DSM Directive’s ambition to rebalance the bargaining power between creators and music exploiters, its practical enforcement has remained inconsistent across Member States. National variations in the interpretation of what constitutes appropriate and proportionate remuneration (Article 18) transparency obligations (Article 19), contract adjustment mechanisms (Article 20), and dispute resolution (Article 21) have left many music creators without effective remedies against unfair licensing practices and opaque revenue-sharing models.⁵⁷⁹

In EU law, the principle of effectiveness requires that substantive rights granted under Union law must be practically enforceable and not rendered illusory by procedural inadequacies.⁵⁸⁰ Given the deficiencies in the DSM Directive’s national transpositions, we believe that platform regulation can serve as a procedural bridge to ensure the materialisation of copyright enforcement objectives. Several Member States have already introduced synergies between copyright enforcement and platform regulation, albeit in an uncoordinated manner.⁵⁸¹ Spain’s broad liability regime, for example, which imposes

⁵⁷⁵ See Chapter 4 above.

⁵⁷⁶ Iaia, ‘The remodeled intersection’ (n 62) 190-194.

⁵⁷⁷ See Chapter 4 above.

⁵⁷⁸ See Chapter 5 above.

⁵⁷⁹ Chapter 4.3.2 of Fair MusE D2.2. Deliverable.

⁵⁸⁰ Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *The Modern Law Review* 19.

⁵⁸¹ Chapter 4 of Fair MusE D2.2. Deliverable.



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additional damages claims beyond the DSM Directive's scope, complicates the harmonisation of copyright enforcement with platform regulation at the EU level.

Arguably, the DSA's harmonised procedural remedies can offer an extension of the DSM Directive's dispute resolution framework, particularly where national implementations have failed to provide meaningful redress mechanisms for creators. For example, where Article 21 DSM provides for ADR mechanisms in copyright disputes, the DSA's external dispute resolution model could be used to standardise enforcement procedures across Member States that can become a more accessible route for copyright-related redress. Thus, although Article 21 DSM establishes ADR systems for copyright remuneration disputes, in practice, these mechanisms have proven ineffective due to inconsistencies in national implementation.⁵⁸² Different dispute resolution processes, such as mediation and arbitration, exist to that effect in the Fair MusE consortium countries, some of which did not explicitly transpose Article 21 DSM Directive in light of pre-existing mechanisms in their legal systems (e.g. France and Belgium) whereas others explicitly transposed this article or even laid down a new, dedicated dispute resolution for this purpose (e.g. Portugal).⁵⁸³ Accordingly, the DSA's structured dispute resolution process (Articles 20-21) could serve as a model for harmonising copyright-related dispute resolution procedures at the EU level to challenge exploitative practices such as unfair licensing terms or distorted content governance that may prevent the effectiveness of authors and performers rights under the DSM Directive.

The DMA, meanwhile, provides a complementary set of tools rooted in competition law that can be invoked to rebalance market conditions for music creators. The FRAND access obligation imposed on gatekeepers establishes a non-discriminatory licensing framework that, when read in conjunction with Article 18 DSM's fair remuneration principle, could be tested to support legal challenges against exploitative revenue-sharing practices. Given that the FRAND conditions and the characterisation of 'unfair' prices in Recital 62 have been drafted with app developers and app stores in mind, it still hinges much on future interpretation and specification by the EU Commission and the EU Courts whether this provision might provide an enforcement instrument to rightholders.

Judicial interpretation will also play a critical role in integrating these regulatory frameworks. Courts have already begun to recognise the interplay between platform obligations and copyright law. In Germany, national courts have interpreted the "best efforts" licensing requirement in Article 17 DSM in light of broader digital market fairness principles. In Italy, while final results are still pending, the AGCM's intervention in Meta's licensing negotiations with SIAE demonstrates how competition authorities can use competition law tools to compel platforms to engage in fair licensing practices, mirroring the DMA's approach to business user protections.⁵⁸⁴

⁵⁸² Chapter 4.3.2 of Fair MusE D2.2. Deliverable. Interviews with different stakeholders.

⁵⁸³ From data gathered through desk research for the Fair MusE project. See also Annex III of Fair MusE D2.2 Deliverable.

⁵⁸⁴ Giovanni Maria Riccio, 'The Italian Antitrust Authority Investigates Meta for Abuse of Economic Dependence' (*Kluwer Copyright Blog*, 30 May 2023) <<https://copyrightblog.kluweriplaw.com/2023/05/30/the-italian-antitrust-authority-investigates-meta-for-abuse-of-economic-dependence/>> accessed 23 January 2025; Vincenzo Iaia, 'The SIAE and Meta Tug-of-War: An Italian Affair of European Relevance' (*Kluwer Copyright Blog*, 18 April 2023) <<https://copyrightblog.kluweriplaw.com/2023/04/18/the-siae-and-meta-tug-of-war-an-italian-affair-of-european-relevance/>> accessed 23 January 2025.



7.4 Limitations in aligning copyright enforcement with platform regulation

While the integration of platform regulatory mechanisms into the enforcement framework of the DSM Directive offers significant advantages in terms of harmonisation, procedural safeguards, and redress, several limitations remain. These challenges stem from the complexities of platform business models, the tensions between copyright and broader regulatory objectives, and the inadequacy of current transparency mechanisms for VLOPs to meaningfully aid in copyright enforcement.

7.4.1 Conflicting licensing frameworks

One of the primary challenges in aligning the DSM Directive with platform regulation lies in the legal and administrative burdens resulting from overlapping licensing frameworks. Social media platforms often blur the lines between users and creators, leading to uncertainty regarding licensing obligations and remuneration structures. Users uploading content may unknowingly grant platforms extensive rights through the acceptance of ToS, even though the same content may also be subject to licensing agreements negotiated through CMOs. While, in practice, CMO agreements take precedence, the coexistence of these legal frameworks creates significant challenges for rightholders. CMOs, whose core function is to negotiate, collect, and distribute royalties, must now contend with licensing models that platforms impose through their own contractual arrangements with users.⁵⁸⁵ This creates significant inefficiencies, as platforms operate parallel licensing mechanisms, often without direct communication with CMOs. As a result, rightholders face delays in revenue collection, inconsistent remuneration models, and legal uncertainty regarding the scope of their rights. Moreover, this fragmentation weakens the enforcement of Articles 18-22 DSM Directive. If CMOs struggle to assert their agreements over platform-imposed licensing terms, the very foundation of collective bargaining and fair remuneration in the music sector risks erosion.

A further complexity is that social media platforms are increasingly adopting licensing models similar to those of traditional music streaming services. This shift reflects platforms' efforts to balance the interests of users, creators, and platform operators, yet it also introduces new gaps in enforcement.⁵⁸⁶ Many CMOs have yet to update their licensing agreements to account for the obligations introduced by the DSA, meaning that existing contractual templates often remain misaligned with new regulatory requirements. For example, licensing agreements may contain provisions for takedown requests but fail to incorporate mechanisms to challenge unauthorised removals or ensure transparency in how user-uploaded content is handled.⁵⁸⁷ This regulatory gap exacerbates enforcement inconsistencies that risk leaving many rightholders without effective procedural safeguards.

⁵⁸⁵ Interview with representatives of a CMO.

⁵⁸⁶ Interview with representatives of a CMO.

⁵⁸⁷ *ibid.*



7.4.2 Transparency obligations for VLOPs and their limited effectiveness for copyright enforcement

While the DSA introduces extensive transparency obligations for VLOPs, these requirements do not substantially aid in enforcing Article 17 DSM Directive beyond addressing issues related to illegal content (excluding copyright-specific concerns). As pointed out in the chapter dedicated to data access (Chapter 4), the transparency obligations imposed under Articles 15 and 27 DSA primarily serve as compliance measures rather than mechanisms facilitating rightholders' access to relevant data. These requirements include algorithmic transparency, risk assessment, and obligations related to systemic content moderation, but they do not provide meaningful access to data that would allow music rightholders to monitor the use and monetisation of their works on these platforms. Consequently, while these measures may improve general content governance, they fail to address the core issue of copyright exploitation transparency, which remains fragmented across different regulatory instruments.

A further conceptual challenge lies in determining what constitutes “illegal content” within the scope of the DSA. While non-copyrighted content is not automatically illegal, the distinction between copyrighted content, unlicensed but lawful content, and infringing content is often blurred. This issue traces back to the debates surrounding Article 17 DSM, which raised concerns about overblocking, censorship, and the potential chilling effects on freedom of expression.⁵⁸⁸ Therefore, from an enforcement perspective, the obligations imposed on VLOPs are unlikely to meaningfully support rightholders in identifying, tracking, and monetising content use, as they focus on ensuring compliance with platform policies rather than facilitating creator access to critical licensing data. While the DSA emphasises transparency at a structural level, it does not address the fundamental asymmetry in access to licensing and remuneration data – a crucial barrier for creators seeking to enforce their rights under the DSM Directive.

7.4.3 Fundamental rights considerations and the goals of the DSM Directive

When it comes to dispute resolution, the DSA explicitly prioritises the protection of fundamental rights as a core regulatory objective, particularly in relation to freedom of expression, non-discrimination, and due process. This objective, however, creates potential tensions with the copyright enforcement mechanisms established under the DSM Directive, which predominantly focus on protecting intellectual property rights and ensuring fair remuneration.

A significant challenge arises in determining how the fundamental rights protections embedded in the DSA interact with copyright governance under the DSM Directive. On one hand, content moderation and notice-and-take-down obligations under Article 17 DSM must be balanced with users' freedom of expression. On the other hand, rightholders seeking redress against platforms often lack adequate procedural guarantees since, as seen above, the DSM Directive's enforcement mechanisms remain highly fragmented and ineffective across different Member States.

⁵⁸⁸ See Chapter 2.



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A notable exception is Article 38 DSA, which may offer a potential pathway for reinforcing copyright enforcement. Article 38 requires VLOPs to provide access to their data for vetted researchers studying systemic risks associated with content governance. If interpreted broadly, this provision could support independent assessments of platform compliance with copyright obligations, facilitating greater accountability for licensing transparency and remuneration models. However, its utility in copyright governance remains largely unexplored and contingent on further regulatory action.

7.5 Towards a systemic enforcement around the DSM Directive

Ultimately, the DSM Directive must be understood as part of a broader platform governance framework, rather than as an isolated copyright law instrument. This approach will ensure that regulatory interventions remain effective in the face of evolving digital market dynamics and the persistent power imbalances between music creators and dominant platforms. A coherent legal framework where Article 17 DSM Directive is read in conjunction with more recent approaches to competition law enforcement and new procedural mechanisms in platform regulation can enhance the enforceability of creators' rights. This potential regulatory convergence can ensure that music creators, particularly independent and underrepresented rightholders, gain meaningful access to licensing opportunities, undistorted visibility, and fair remuneration in digital markets. Furthermore, a unified approach to the DSM Directive and broader platform regulation will ensure that these EU law instruments will be considered and enforced as a whole to address one of the social challenges faced by the EU, thus giving each of these frameworks their own added relevance and legitimacy.



8 Conclusions

8.1 Introduction

The conceptual division between copyright law and platform regulation is increasingly untenable. The evolution of digital music markets has transformed copyright enforcement into a structural issue that demands a convergence of regulatory approaches. Therefore, competition law and its enforcement in the digital sphere, the DSA's procedural architecture, DMA's transparency mandates, and the DSM Directive's substantive protections should be read as an integrated framework to ensure effective redress for music creators in the platform ecosystem. This convergence is particularly critical given the growing relevance of artificial intelligence in the sector, such as AI-generated music and algorithmic music curation, which further complicates the enforcement of copyright and remuneration rights.

The regulatory trajectory set by Article 17 DSM Directive already laid the groundwork for what has now become a broader framework of platform accountability in the EU. However, the challenge is to ensure that these regulatory strands do not remain isolated but are systematically integrated to enhance the bargaining power of music creators and to enhance their capabilities to enforce their rights. For example, the lack of clear procedural safeguards in the DSM Directive for addressing specific problems in platform-curated environments, including AI-generated music exploitation, could be mitigated by extending the DSA's algorithmic transparency requirements to copyright governance and vice versa. Similarly, the DMA's data access rights could be leveraged to ensure that creators can access real-time reports on the use of their works on a continuous basis, and thus closing some gaps left in the aftermath of the transposition of Article 19 DSM Directive. At the same time, competition law plays an indispensable role in addressing the imbalances in digital music markets. The dominance of a small number of platforms in content distribution and monetisation has led to a highly asymmetric bargaining environment, where creators and smaller rightholders face significant challenges in negotiating terms. Traditional competition law tools have proven difficult to apply in this sector due to the challenges of market definition and the changing nature of digital services. However, newer approaches, especially under national competition rules, demonstrate that competition law can complement the DSM Directive in addressing exploitative practices that do not necessarily require a finding of absolute dominance.

The problems facing music creators in the digital environment are not confined to the application of copyright law alone but require a cross-cutting regulatory approach. Accordingly, we suggest that only by integrating competition law, platform regulation, and copyright governance into a cohesive framework can EU law effectively address these challenges. The conclusions presented in this chapter reflect a comprehensive analysis of these regulatory intersections and demonstrate that the current legal instruments, if strategically coordinated, can be used to rebalance the digital music ecosystem in favour of music creators. However, we find that while significant progress has been made in strengthening the rights of rightholders in the platform economy several major problems remain. These include enforcement gaps, regulatory fragmentation, low awareness levels of available instruments, legal uncertainty and, ultimately, the strategic adaptability of



dominant platforms to new rules, which often seek to dilute new obligations to their advantage. Accordingly, this chapter outlines the key areas where intervention is most needed, providing a roadmap for future regulatory and policy developments to ensure a fairer and more transparent digital music landscape.

8.2 Transparency and data access

The digital music sector suffers from a chronic lack of transparency that undermines the ability of rightholders to monitor how their works are used and to negotiate fair remuneration. This opacity is particularly evident in streaming services, where data on revenues, user engagement, and algorithmic ranking remain largely inaccessible to authors and performers. Similarly, detailed data on the different revenue streams connected to music exploitation by UGC platforms are lacking. Article 19 of the DSM Directive was introduced to address these concerns by requiring authors' and performers' contractual counterparts to provide them with regular, up-to-date, and comprehensive information on the exploitation of their works, including revenue generation and royalty payments.

A significant problem faced by creators is the limited access to real-time and detailed performance data on streams, interactions, playlist placements, and revenue streams per territory. While platforms collect extensive user (engagement) data, rightholders—especially independent artists and smaller entities—are often denied access to this valuable information, preventing them from optimising their promotional strategies and contractual negotiations. The issue is further complicated by the role of algorithmic curation on platforms. The way in which music is promoted or demoted remains largely opaque, yet these decisions directly affect remuneration potential. While Articles 14, 15, 17, 26 and 27 of the DSA put in place a transparency framework on platforms' policies and practices, its effectiveness depends on whether music streaming services are explicitly required to disclose ranking methodologies and their financial impact on creators. A recurring issue is precisely the failure of platforms to provide granular insights into how algorithmic promotion affects monetisation and content visibility. As a result, many rightholders remain unable to verify whether their remuneration accurately reflects their works' contribution to platform revenues.

In addition, the interplay between the DMA and the DSM Directive offers potential solutions but also raises questions regarding the scope of data access rights. Article 6(10) DMA provides business users with the right to obtain data also from music-exploiting UGC gatekeeper platforms. Yet, it remains unclear i) whether authors and performers can rely on the provision to obtain access to data on music usage when music is uploaded by another user and ii) whether independent artists not holding a business user account could also leverage this right. Given the significant imbalance between creators and dominant platforms, it is considered imperative that the European Commission provide guidance, either through guidelines (Article 47 DMA) or via specification of obligations (Article 8 DMA), to clarify if and which music rightholders fall within the scope of this provision but also the extent of data that the provision gives them access to, before artists can properly reap the benefits from the DMA data access rights.



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Competition law also plays a role in the fight for data access. The control of music usage data by dominant platforms raises concerns under Article 102 TFEU, particularly regarding refusals to supply essential data to rightholders. While the essential facilities doctrine would not offer an easy solution, recent case law suggests a shift towards lowering the standard to show the indispensability of certain data assets. If streaming platforms are found to be leveraging their control over data to limit the ability of creators to monitor and enforce their rights, a more fairness-oriented competition enforcement could help in mandating access.

8.3 Competition law and its role in the digital music market

The effectiveness of competition law in the digital music sector depends largely on the priorities of national competition authorities and the EU Commission. Due to the potential difficulty of establishing dominance, national economic dependency rules may offer a more viable enforcement route than traditional dominance-based analyses under Article 102 TFEU. Certain Member States have begun adapting and applying economic dependency rules to digital markets. This would allow enforcement even when absolute dominance cannot be established. Music creators could leverage these frameworks to challenge exploitative contracts and unfair revenue-sharing models imposed by platforms. Furthermore, we suggest that a growing recognition of monopsony power in creative industries can provide another avenue for music creators to vindicate their rights. If music creators can be categorised as digital workers under EU competition law, then dominant platforms engaging in exploitative royalty suppression could be challenged under abuse of buyer power. This would be consistent with ongoing discussions regarding collective bargaining rights for gig economy workers, which can also offer new opportunities to foster fair remuneration in the music sector.

Challenges in the application of Article 102 TFEU

We find that one of the main challenges in applying Article 102 TFEU (abuse of dominance) to music streaming and UGC platforms is defining the relevant market and establishing dominance. Traditional tests for market dominance focus on high market shares but, in digital markets, dominance is often exerted through control over essential data, discoverability and contractual power over rightholders rather than sheer market share. The EU Commission has recognised this, and has identified some of these factors as entry barriers to expansion and entry, which can lead to a finding of dominance.⁵⁸⁹

Additionally, recent EU case law suggests that competition law might provide a mechanism to support the right to access exploitation data under Article 19 DSM Directive. In this regard, the evolving legal interpretation of ‘indispensability’ in refusal-to-supply cases could help creators argue that access to streaming data is necessary for fair competition and better conditions for remuneration.

Economic dependency and national competition law

⁵⁸⁹ EU Commission Draft Guidelines on the Application of Article 102 TFEU (2024) pt. 29-30.



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National experiences such as those in Germany, France or Italy offer an alternative to Article 102 TFEU in considering relative dominance, which does not require absolute market dominance but instead examines the dependence of one party on another, in particular in the constellation of business users and platforms. This approach could be fruitful to regulate unfair licensing conditions in music markets and to ensure that platforms do not exploit their negotiating advantage over individual creators and small rightholders.

A case study that illustrates the application of national economic dependency rules is *SIAE v Meta* in Italy, where Italy's antitrust authority examines Meta's leverage over rightholders in music licensing operations. However, although this case highlights the potential of national approaches, it also shows the complexity of proving economic dependency, which requires significant economic evidence and legal expertise. This is problematic in an environment characterised by gatekeepers having vast information advantages.

Collective bargaining and monopsony power

Another emerging area in competition law that could benefit music creators is the regulation of monopsony power, where a dominant buyer (e.g. a major platform) imposes unfair purchase terms on suppliers (e.g. in this case, artist or other rightholders). If artists are increasingly categorised as “digital workers”, they could eventually receive greater protection under labour and competition law, and thus opening the door for regulatory scrutiny of exploitative revenue-sharing models.

Additionally, recent EU and national competition law guidance clarifies that collective bargaining by self-employed workers, including artists, does not infringe Article 101 TFEU. This recognition allows creators to engage in collective negotiations for fairer remuneration without violating competition law, particularly when read in conjunction with Article 18 DSM Directive, which mandates fair and proportionate remuneration. This, however, only provides a shield from competition law scrutiny to music creators, not a sword to defend their rights. In this scenario, music creators still need to collectively organise through unions in order to improve their bargaining position.

8.4 The role of platform regulation in enforcing fairness

Platform regulation under the DSA and DMA offers new avenues to promote fairness in the digital music economy, particularly in a sector where asymmetries in bargaining power and opacity in commercial practices affect market outcomes. Based on the analysis conducted in preparation of this Study, we conclude that the DSA and the DMA can offer regulatory levers that, if properly refined and enforced, can create a more equitable digital music market. However, their effectiveness depends on how these instruments interact with existing copyright protections under the DSM Directive and whether they sufficiently address the specific characteristics of the music industry.

Platform liability, content governance, and the impact of Article 17 of the DSM Directive

The regulatory shift introduced by Article 17 DSM Directive sought to redefine the liability of OCSSPs and to move beyond the safe harbour protections under the e-Commerce



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Directive. This change forces platforms that store and provide access to large volumes of user-uploaded content to engage proactively in licensing and copyright enforcement. While the objective was to ensure that platforms contribute to a fairer remuneration framework for rightholders, its implementation across Member States revealed significant discrepancies. Some Member States have enacted strict procedural safeguards to protect users from wrongful content removals. Germany, for example, has implemented a detailed procedural mechanism that allows users to dispute automatic content takedowns before they are enforced. Other countries, however, have focused more on robust enforcement mechanisms, limiting users' ability to challenge removals. For instance, the French transposition of Article 17 DSM Directive does not include a strong mechanism for users to dispute wrongful removals before they occur.

Moreover, the interaction between the DSA and the DSM Directive remains unclear. The DSA's systemic risk provisions, particularly those for VLOPs, require them to mitigate risks related to illegal content, including copyright infringement. However, the absence of clear procedural guidance on how these obligations interact with copyright-specific frameworks, especially Article 17 DSM Directive, creates enforcement inconsistencies. This legal uncertainty benefits platforms, which can selectively apply compliance measures depending on national regulatory preferences.

To bridge these gaps, the European Commission should issue sector-specific guidelines clarifying the overlap between Article 17 DSM Directive and the DSA's systemic risks obligations. Additionally, enforcement authorities must ensure that platforms do not evade licensing obligations by shifting responsibility onto users through overly broad content moderation policies that disproportionately affect smaller rightholders and independent creators.

Licensing and remuneration

The DSA's transparency obligations and in particular Article 26 concerning online advertising could indirectly benefit rightholders as it can shed light on the economic flows underpinning platform revenues. However, these provisions remain general in nature and do not impose sector-specific disclosure requirements for the music sector. Moreover, Article 26 DSA does not mandate financial disclosures related to advertising revenue, likely for good reasons, but this omission limits rightholders' ability to fully understand how profits from advertising are generated and distributed across different content categories, including music.

From the DMA's arsenal of provisions, the most promising one to have an impact on the position of artists vis-a-vis platforms, Article 6(12), is riddled with uncertainty with regard to its application in the digital music sector. Guidance or specification of the obligation from the Commission, on the basis of Article 47 and 8 DMA respectively, on how FRAND access principles would apply in practice to social media platforms would be a good starting point. Should it be considered that the provision applies for the purposes of negotiating fairer licensing terms (including remuneration) between platforms and authors and performers, it would be important, in the event of a revision of the Regulation, to extend its scope to also include video-sharing platforms.



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A more targeted regulatory intervention would involve strengthening the bargaining power of rightholders through collective licensing mechanisms and negotiation frameworks that prevent platforms from imposing abusive unilateral contract terms. While the DSM Directive recognises the importance of collective management, it does not provide a harmonised approach for addressing licensing disputes. Therefore, the introduction of a sector-specific mechanism (e.g. a code of practice) that would require platforms, especially designated gatekeepers, to engage in good faith negotiations with rightholders could contribute to balancing this relationship.

Dispute resolution and redress mechanisms for rightholders

We find that one of the main shortcomings of current platform regulation is the limited availability of effective dispute resolution and redress mechanisms for rightholders. Article 20 DSA requires platforms to establish internal complaint systems, while Article 21 DSA provides for out-of-court dispute resolution bodies. However, these mechanisms are primarily designed for individual users rather than for systemic disputes involving licensing and remuneration issues in the music sector.

Additionally, under the DMA, adoption or adherence to complaint-handling mechanisms remain largely up to the gatekeepers (and their obligations under other regulatory instruments), authors and performers can only assume the role of informant of non-compliance with the DMA but not the role of complainant, while collective redress remains inaccessible to professional music creators. At the same time, enforcing DMA rights through legal actions before national courts requires important resources that make it unrealistic for individual authors and performers to seek redress. To mitigate these challenges and to instil legal certainty and clarity, specific guidance on the application of DMA provisions to the music sector would be required to empower rightholders and their representatives.

This lack of a sector-specific dispute resolution framework in the music industry means that licensing disagreements between rightholders and platforms often result in extended legal battles or private arbitration procedures that favour well-resourced players. We find that many disputes are solved privately, on a commercial relation basis. This can reproduce a setting that features the same power imbalance that may have possibly given rise to the dispute. Thus, the introduction of mandatory mediation mechanisms for copyright-related disputes, possibly under the supervision of an independent oversight body may provide a more accessible and efficient means of resolving conflicts.

Furthermore, we also find that enforcement remains a critical issue. The reliance on national regulators for DSA enforcement means that platforms can exploit jurisdictional inconsistencies to delay compliance. A more centralised enforcement approach at the EU level could enhance uniformity in regulatory oversight.



8.5 Some considerations on Artificial Intelligence (AI) and the future of music creators' rights

From AI-generated compositions to algorithmically curated music experiences, the role of AI in both creation and distribution raises critical questions about authorship, remuneration, and market power. Although AI presents opportunities for new forms of creativity, it also exacerbates existing inequities by concentrating power in the hands of platforms that control training data, licensing structures, and content recommendation algorithms. Also, while under current EU law, copyright protection is only granted to human authors, the growing practice of training AI models on copyrighted music without explicit consent from rightholders raises concerns about fair compensation.

Beyond copyright concerns, AI-generated content also impacts fair remuneration by flooding streaming platforms with synthetic music that competes with human-created works. The opaque role of recommendation algorithms in prioritising AI-generated content over human performances stands as a critical regulatory challenge. The DSA's provisions on algorithmic transparency should be extended to include specific obligations on the treatment of AI-generated music to prevent market distortions.

At the same time, the dominance of a few major platforms in AI-driven music distribution creates significant risks of market concentration. Companies that develop AI-driven recommendation systems or own proprietary AI music generators hold a competitive advantage over independent rightholders. If platforms prioritise AI-generated content in their recommendation algorithms, it could lead to a situation where human creators are systematically disadvantaged, reducing their share of streaming revenues. In this light, and although not examined in detail in this study, Article 102 TFEU may provide a tool to challenge discriminatory algorithmic practices if dominant platforms use AI to marginalise competitors.⁵⁹⁰ Furthermore, the DMA's prohibition on self-preferencing (Article 6(5)) could, for example, be invoked to prevent some UGCs designated as gatekeepers from unfairly promoting their own AI-generated music at the expense of independent artists.

Beyond that, a proactive regulatory approach should require platforms to clearly distinguish AI-generated content from human-created works⁵⁹¹ and disclose their treatment of AI music within recommendation algorithms. Additionally, licensing frameworks should be adapted to ensure that AI-generated music does not devalue human contributions by creating an oversaturated market with artificially low pricing structures.

A plea for greater awareness

A critical aspect of ensuring fairness in the digital music sector is raising awareness among rightholders about their legal protections and available enforcement mechanisms offered by

⁵⁹⁰ Friso Bostoen, 'Artificial Intelligence and Competition Law' in Nathalie A Smuha (ed), *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence* (Cambridge University Press 2025)

⁵⁹¹ This issue has already been discussed by legislators, with a suggested solution of labeling generative-AI productions. See, for instance European Parliament, 'Generative AI and Watermarking' (2023) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757583/EPRS_BRI%282023%29757583_EN.pdf>



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new paradigms in competition law and novel regulatory frameworks for platforms. Despite the existence of strong regulatory frameworks, many authors, performers, and independent rightholders remain unaware of their rights under the DSM Directive, DSA, DMA, and competition law.⁵⁹² A targeted awareness campaign, led by the European Commission in collaboration with CMOs, national (competition) authorities, and digital rights organisations, could help bridge this gap.

⁵⁹² For a detailed examination see Chapter 3.2.

