

Final decision on the CMA’s review of the Performing Right Society Limited undertakings

24 May 2016

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Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Summary

1. The Performing Right Society Limited (PRS)¹ gave undertakings in February 1997 following an investigation by the Monopolies and Mergers Commission (MMC).² The aim of the undertakings was to address the specific adverse effects the MMC identified as arising from its market position and were designed to help the PRS become more efficient, transparent and equitable in its operations. Amongst other requirements, the undertakings involved making significant changes to the governance structure of the PRS, amendments to the PRS’s conditions of membership so that members could withdraw certain

¹ Now known as PRS for Music.

² CM 3147, February 1996.

categories of rights and improvements in the transparency of the PRS's operations.

2. The CMA undertook this review under its statutory duty to keep the undertakings under review and to consider whether the undertakings remain appropriate, or need to be varied, superseded or released, by reason of a change in circumstances.³ Of particular focus in this case were market developments and legislative changes since the undertakings were given and the extent to which these act as effective constraints on the activity of the PRS. The scope of this review of undertakings was necessarily limited to considering the extent of any changes in circumstances relating to the adverse effects identified by the MMC. The review did not therefore consider any additional concerns beyond those identified by the MMC.
3. The PRS has taken action to comply with all the recommendations imposed through the undertakings, with a number of specific reforms having taken place shortly after the undertakings were given in 1997. While a small number of recommendations were for one-off changes within the PRS, most recommendations have involved the Office of Fair Trading (OFT) and subsequently the CMA in following ongoing progress, with annual reporting by the PRS to the OFT, now the CMA.
4. The CMA published an issues statement to which it received 12 responses.⁴ Respondents made comments on a wide range of subjects. Some covered issues that were outside the scope of the review but the main themes raised which were within the scope of the review involved the following:
 - (a) the PRS's lack of transparency and consultation with its members;
 - (b) the PRS's information technology (IT) strategy and data;
 - (c) cost allocation;
 - (d) governance; and
 - (e) the withdrawal of rights.
5. The CMA analysed all responses together with all other evidence in its possession leading to its provisional decision which was published on 23 March 2016.

³ Paragraph 16 of Schedule 24 to the Enterprise Act 2002 by virtue of SI 2004 No. 2181 (The Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004).

⁴ The CMA received two other responses concerning matters that were outside the scope of this review. These responses have not been published.

6. The evidence in the provisional decision indicated that the PRS's market position in the supply in the UK of the services of administering performing rights had not changed significantly. However, the CMA had identified changes in circumstances that it considered would address the adverse findings identified by the MMC and attributable to its monopoly position.
7. The main change in circumstances identified by the CMA was the introduction of a new legislative regime that deals with the type of issues identified by the MMC. At the time the undertakings were agreed, there was no legislative regime specifically addressing the conduct of collective management organisations (CMOs) such as the PRS. The Directive on the collective management of copyright 2014/26/EU (the Directive),⁵ introduced a number of requirements that a CMO, such as the PRS, must meet and various protections for the members of a CMO. One of its key objectives is to modernise and improve, across the EU, CMO governance, financial management and transparency; in particular ensuring that right holders have more say in the decision making process and receive royalty payments that are accurate and on time.
8. As noted in the recitals to the Directive:

There are significant differences in the national rules governing the functioning of collective management organisations, in particular as regards their transparency and accountability to their members and rightholders. This has led...to poor financial management of the revenues collected. Problems with the functioning of collective management organisations lead to inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members of collective management organisations, rightholders and users.

The need to improve the functioning of collective management organisations has already been identified in Commission Recommendation 2005/737EC... It called on collective management organisations to provide users with sufficient information on tariffs and repertoire in advance of negotiations between them. It also contained recommendations on accountability, rightholder representation in the decision-making bodies of collective management organisations and dispute

⁵ Directive 2014/26/EU of the European Parliament and 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.

resolution. However, the Recommendation has been unevenly followed.

The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework...

The aim of this Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting.⁶

9. The Directive had to be transposed into the national law of each member state by 10 April 2016 and the Collective Management of Copyright (EU Directive) Regulations 2016 (the Regulations) came into force on that date having been laid before Parliament on 25 February 2016.⁷
10. The CMA also analysed the current market position of the PRS and the extent to which it is still in a significant market position, such that it may not be incentivised, in full, to respond effectively and efficiently to the requirements of the full range of its members.
11. In its provisional decision, the CMA found that the music sector had undergone significant change since the undertakings came into force in 1997, with the administration of some categories of performing rights now more international in scope than was previously the case. The PRS had also evolved over this period, entering into a joint venture with CMOs in Germany and Sweden. It provisionally found that these changes, while substantial in scope, did not appear to have eroded the market position of the PRS in the UK to a significant extent, and it appeared to continue to hold a significant market position.
12. The CMA considered that the Directive and the Regulations cover the same broad aims as the undertakings, as both address the potential failings in efficiency, management, transparency and other issues that can arise in CMOs.
13. The CMA recognised that some of the detailed obligations in the undertakings are not specifically addressed in the Regulations. In particular, the obligations concerning IT strategy to take account of the need to streamline processes

⁶ Recitals 5, 6, 8, and 9 of the Directive.

⁷ SI 2016 No. 221.

and integrate major systems are not directly addressed by the Regulations. However, the Regulations place an obligation on CMOs to distribute payments to its members in a timely and transparent manner. Moreover, the growth, advances and ubiquity in the use of IT since 1997 make the undertakings in this area no longer appropriate. The CMA therefore considered that the provisions of the Directive provide an appropriate framework for regulating the PRS's activities on an ongoing basis.

14. The CMA considered that the undertakings were no longer appropriate, and consequently, its provisional decision was to release the PRS from these undertakings.

Consultation on the provisional decision

15. On 23 March 2016, the CMA published its provisional decision, and consulted publicly on this until 22 April 2016. The CMA received six responses to its consultation. Of the responses, one was from the PRS, while five were from music industry stakeholders. The CMA has published, separately to this final decision, [non-confidential responses received](#).
16. Two of the responses from music industry stakeholders covered matters relating to transparency and the withdrawal of rights, and sought either more stringent undertakings or a variation of the existing undertakings. Two responses noted that the Regulations did not cover all obligations in the undertakings and the MMC's recommendations. One sought a further undertaking on the Performing Right Society Limited and PRS for Music Limited, while another sought further undertakings to 'hold the PRS to higher standards than set out in the EU Directive' while a further one proposed additional undertakings covering transparency and splitting mono- and multi-territorial digital rights. One further response sought clarification concerning the text concerning non-disclosure agreements, while another sought the delay of the CMA's final decision until after the EU referendum in June 2016.
17. In its response, the PRS agreed with the provisional decision and made a number of comments concerning the analysis and views set out by the CMA in its provisional decision. Following the responses from stakeholders to the provisional decision, the CMA sought additional information from the PRS concerning the subject of some of the responses. Details of the consultation comments and the CMA's response can be found in paragraphs 115 to 136 below.

Final decision

18. The CMA has concluded that, based on the evidence available to it following the consultation on its provisional decision, its final decision is that the undertakings given by the PRS are no longer appropriate, and consequently, the undertakings should be released.

CMA's duty

19. Responsibility for deciding on variation or termination of these undertakings lies with the CMA under the Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013.⁸ The CMA has a duty to keep under review undertakings made under section 88 of the Fair Trading Act 1973. From time to time, the CMA must consider whether, by reason of any change of circumstances:
 - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
 - (b) an order is no longer appropriate and needs to be varied or revoked.

Background

20. The PRS is one of the main collecting societies for royalties in respect of music performance in the UK and it also qualifies as a CMO under relevant EU legislation.⁹ The PRS is a member organisation with over 100,000 songwriter, composer and publisher members. The PRS grants licences to users of musical works, such as broadcasters, radio stations and live music venues. Royalties become due to the authors of such works when they are played in public or broadcast on the radio or television. The PRS collects the royalties and then makes a distribution to the authors after the PRS has deducted a commission. The PRS's turnover in 2014 was £513.5 million, with a net distributable income of £457.2 million.¹⁰
21. Following a reference from the Deputy Director General of Fair Trading in November 1994, the MMC investigated whether a monopoly situation existed in relation to the supply of services of administering performing rights and film

⁸ Paragraph 16 of Schedule 24 to the Enterprise Act 2002 by virtue of SI 2004 No. 2181 (The Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004).

⁹ The PRS and other collecting societies operate internationally through a network of reciprocal agreements which provide access to their respective repertoires.

¹⁰ Report and Financial Statements, Performing Right Society Limited, April 2015.

synchronisation rights. The MMC delivered its report in February 1996 and the PRS agreed undertakings in February 1997.

The MMC's 1997 report into the PRS

22. In making its reference to the MMC, the OFT drew attention to concerns that the revenue distribution policies of the PRS were not equitable, misgivings about the PRS's requirement that members assign their rights to it exclusively, and claims of managerial inefficiency.
23. The MMC found that a monopoly situation existed in favour of the PRS concerning the supply of the services of administering performing rights and film synchronisation rights. The MMC also investigated whether any action or omission on the part of the PRS was attributable to the monopoly situation and whether any facts found in the course of its investigation operated against the public interest. The MMC identified various issues which led to a number of adverse findings.
 - (a) The MMC found that there were tensions within the PRS between writers and publishers and between those who were involved in different musical genres. These tensions contributed to the development of a corporate organisation and a way of working which was cumbersome.
 - (b) The MMC found evidence of deficiencies in the corporate structure and management practices. It found there to be too many sub-committees and found the lack of clearly defined objectives and a long-term strategy by the executive was leading to poor policy decisions. Further, the PRS had not appointed a chief executive for almost two years which had a prejudicial effect on the way in which the PRS was managed.
 - (c) The MMC also found considerable deficiencies in IT at PRS. Management of the PRS, while aware of this issue, had been too slow to link business strategy and IT strategy and little progress had been made in remedying deficiencies in essential databases identified several years previously.
 - (d) The MMC found that PRS failed to consult the membership adequately and policies and procedures were not sufficiently transparent. As well as making substantial cross subsidisation of costs across its activities it had failed to adopt an appropriate cost allocation system and to make clear to members how costs were allocated. Nor did it have in place adequate systems for ensuring that the distribution of royalties was carried out equitably and for assessing the consequences to the membership of changes in its distribution policies. There was no mechanism by which members could appeal against decisions, particularly those regarding the

distribution of royalties, where members considered such decisions to be unfair.

- (e) The PRS refused to allow members to self-administer their own live performance rights. The PRS acknowledged that its members were entitled to self-administer entire categories of rights listed in the *GEMA* decisions including public performance and broadcasting. But these were not necessarily the only categories of rights which members wished to self-administer.¹¹
- (f) The MMC concluded that if members considered they could administer live performances themselves at least as effectively as the PRS then they should be free to do so, but should bear any reasonable additional costs caused to the PRS.
- (g) The MMC found that PRS's refusal to allow members to self-administer their own live performance rights were acts or omissions of the PRS which were attributable to the monopoly situation and which operated against the public interest.
- (h) In the light of the adverse findings, the MMC made 44 recommendations. In making the recommendations the MMC stated that it was seeking to promote efficiency, equity and transparency.

24. The MMC's findings and its recommendations covered the following five areas:¹²

- (a) corporate governance and management practices;
- (b) management and distribution practices;
- (c) lack of transparency;
- (d) lack of right of appeal in matters of dispute; and
- (e) exclusivity in relation to rights administration.

The PRS undertakings

25. The undertakings given by the PRS in February 1997 included the following obligations:

¹¹ European Commission decisions in *Re GEMA (No 1)* CMLR D35 and *Re GEMA (No 2)* 24 CMLR D115

¹² See the Annex for details of the individual recommendations.

- (a) The PRS undertook not to make changes to its Memorandum and Articles of Association (and Rules and Regulations made under them) which would:
- (i) prevent or inhibit members from self-administering their own live performing rights or other categories of performing rights;
 - (ii) prevent writers from sending representatives that are not members of the PRS to speak or vote for them at general meetings of the PRS;
 - (iii) significantly alter the structure or operation of its appeals board; or
 - (iv) be contrary to any recommendation in the MMC's report.
- (b) The PRS also undertook to notify the OFT (now CMA) of proposals to make amendments that would affect the above obligations.
- (c) In relation to corporate governance, the PRS undertook to keep separate:
- (i) its chairman and chief executive roles; and
 - (ii) its board on the one hand, and its Chief Executive Committee and Executive Committee on the other.
- (d) The PRS undertook to provide the OFT (now CMA) with an annual report specifying the measures taken to comply with the recommendations made by the MMC.
- (e) The PRS undertook to provide the OFT (now the CMA) with a copy of each of the following documents within seven days of publication:
- (i) its PRS News publication; and
 - (ii) the PRS Yearbook containing the PRS's annual report and accounts which would set out a simplified description of the cost allocation scheme and aggregated details of the overseas earnings of members.
- (f) The PRS also undertook to provide the OFT (now CMA) with the text of any amendment to its member's handbook within seven days after amendment.
- (g) The PRS also agreed to provide the OFT with such other information as it may reasonably require from time to time to monitor compliance with the undertakings.

26. Details of the MMC's 44 recommendations referred to in the undertakings can be found in the Annex.

Decision to review the undertakings

27. The CMA's annual plan for 2015/2016 committed the CMA to a systematic review of existing merger and market/monopoly remedies, which may lead to the removal of measures that are no longer necessary and/or may be restricting or distorting competition.¹³
28. In July 2015, the CMA commenced a consultation which sought views on whether to carry out reviews of 13 sets of market and monopoly remedies that had been put in place by the CMA's predecessors prior to 2005.¹⁴ Following that consultation, on 20 November 2015 the CMA commenced a review of the PRS undertakings.
29. The CMA decided to conduct this review of the undertakings because it considered there was a realistic prospect of finding a material change in circumstances since the undertakings were given.
30. The remainder of this document is structured as follows:
- (a) examining the views and concerns of respondents that are related to the areas of concern set out by the MMC, the undertakings and MMC's recommendations;
 - (b) considering the extent to which there are other constraints, including legislative and competitive, on the activities of the PRS in the areas covered by the undertakings; and
 - (c) identifying whether there are changes of circumstances relevant to the undertakings such that they should be varied, superseded or released.

Responses to the issues statement

31. The issues statement was published on 9 December 2015 with a response deadline of 15 January 2016. The CMA received 12 responses from third parties. In addition, the CMA liaised directly with the PRS and the Intellectual Property Office (IPO, the official UK government body responsible for intellectual property rights) concerning this review.

¹³ [CMA annual plan 2015/16](#) (CMA34, March 2015), paragraphs 4.12 & 4.17.

¹⁴ Review of monopoly remedies put in place before 1 January 2005: Invitation to comment, July 2015.

The PRS

32. The PRS considered that there had been extensive changes both internally and externally over the last 20 years which meant that the undertakings were no longer appropriate and should be revoked. The PRS pointed out that the advent of online exploitation had fundamentally changed the music industry and cross border markets. In addition, the PRS had invested considerable resources to comply with relevant obligations imposed by the European authorities.¹⁵ This was following an in-depth examination by the European authorities of market developments and the impact on CMO operations.
33. The PRS stated that the adverse findings by the MMC no longer applied because:
 - (a) it had implemented changes to address the concerns of the MMC; and
 - (b) it had no ability and/or incentive to reverse efficiency enhancing changes because it now operated in a much more regulated and competitive environment.

The Intellectual Property Office

34. The IPO provided information concerning the Directive, which sets minimum standards of behaviour for CMOs established in EU member states. It noted that the definition of CMO in the Directive included most organisations generally described as collecting societies in the UK, which included the PRS.
35. The IPO noted that the Directive placed requirements on CMOs across their operations, including several areas with significant overlap with some of the undertakings given by the PRS in response to the 1997 MMC investigation. It considered relevant areas to include:
 - (a) Granting and withdrawal of mandates: The Directive establishes an explicit right for right holders to grant mandates for their rights to any relevant CMO established in a member state, and allows right holders to withdraw their rights from a CMO within specific timeframes.
 - (b) Governance: The Directive codifies the rights of a CMO's membership to participate in decision-making processes, and also requires CMOs to operate a supervisory function in relation to the activities of management.

¹⁵ The legislation referred to is the Directive and the implementing UK Regulations.

- (c) Distribution: The Directive requires CMOs to distribute rights revenue accurately and diligently.
 - (d) Complaints: The Directive requires CMOs to operate an effective complaints process which can deal with complaints from members.
36. The IPO stated that the Directive would be implemented in the UK by The Collective Management of Copyright (EU Directive) Regulations 2016, which were laid before Parliament on 25 February 2016 and came into force on 10 April 2016.¹⁶ It clarified that the Regulations created a duty on the Secretary of State for Business, Innovation and Skills to monitor compliance with their provisions – fulfilling the role of National Competent Authority as set out in the Directive. In practice, this monitoring function will be carried out for the Secretary of State in the UK by officials at the IPO. The Regulations enabled enforcement of the obligations on CMOs through powers to: request information; to issue compliance notices requesting a person to take particular actions; and to impose financial penalties.
37. The IPO has published guidance on the Regulations and has also published separate guidance on how it will carry out its investigation and enforcement activities. Details of [the IPO's role](#) and its [investigation and enforcement guidance](#) can be found on its website.¹⁷

Views of third parties on the CMA's issues statement

38. The CMA received responses from 12 third parties that were either linked with, or members of, the PRS. A number of concerns were raised on a broad spectrum of issues including withdrawal rights, cost allocation, transparency and data processing. Some views also highlighted the significant improvements made by the PRS to its governance structure that now reflects an improvement in its consultation with members and transparency. However, the majority of views expressed a preference for the undertakings to be retained citing a number of reasons including transparency, governance and concerns around the withdrawal of rights. The detailed comments are explored further below.
39. In addition, some concerns were raised concerning specific competition issues that are not within the scope of this review.¹⁸

¹⁶ [The Collective Management of Copyright \(EU Directive\) Regulations 2016](#) (SI 2016 No. 221).

¹⁷ IPO (2016), [Guidance on the UK Regulations implementing the Collective Rights Management \(CRM\) Directive](#).

¹⁸ These concerns were allegations of breaches of both the Chapter I and Chapter II prohibitions of the Competition Act 1998. Where appropriate, these matters might be considered separately by the CMA.

40. The following analysis sets out how the CMA explored whether there has been a change of circumstances such that the undertakings are no longer appropriate and considers whether they should be superseded, varied or released. The following section provides a summary of the main comments considered relevant to the review. The comments fall under the following broad categories:

(a) limited transparency and consultations;

(b) IT strategy and data;

(c) cost allocation;

(d) governance; and

(e) the withdrawal of rights.

Limited transparency and consultations

41. The CMA received some allegations that the PRS might not be providing details of its policy approach or consulting its members to ensure they were able to influence decisions made in committees or at PRS board level. One stakeholder noted that members often found out about a new policy or a change of policy after the PRS had made its decision, while another noted that the PRS had not consulted members on policies in important areas. The CMA considered these comments to be related to the MMC's recommendation 40.¹⁹

42. A number of stakeholders also raised concerns around the lack of transparency in licence agreements with digital service providers (DSPs). Some attributed this to the PRS's use of non-disclosure agreements (NDAs), in contrast with other areas where the PRS was more transparent in the information supplied to members.

43. The PRS submitted that licence agreements had contained non-disclosure obligations for many years and that this applied to licences agreed at the time the undertakings were given. It noted that, for example, the total fee paid by a broadcaster was not typically disclosed as this amount was part of an individual negotiation. The PRS noted that individual members were able to work out an effective distribution rate for a given service over a given time period from detailed distribution statements it provided its members.

¹⁹ The PRS to introduce a formal consultative process to take members' views on proposed changes in policy or strategy.

44. Furthermore, the PRS noted that there appeared to be a general misconception among some of its members that multi-territory online licensees imposed unreasonable non-disclosure obligations on the PRS. The PRS stated that these obligations arose from the fact that the licences covered calculations which were based on commercially sensitive information relating to each licensee. Accordingly, the PRS stated that these non-disclosure obligations were, in fact, both reasonable and necessary and stemmed from the need for compliance with competition law.
45. The CMA has reviewed various documents and materials such as annual general meeting (AGM) communications and other information sent by the PRS to its members which provides some indication of how the PRS engages with and consults its membership on key policies. In relation to the use of NDAs, the CMA recognises that the ability to protect some information in DSP licences might be appropriate in certain circumstances for bodies such as the PRS, in order to prevent information exchange between the PRS's licensees that may dampen competition.

IT strategy and data

46. A number of stakeholders raised concerns that the PRS had not invested sufficiently in IT or sought to improve its data systems. These comments included: allegations that the PRS was continuing to use legacy IT systems for processing royalties; that there were improvements to data processing that could be made; that the PRS had failed to invest in music recognition technology and was overly reliant on sampling; and that it had failed to deal with data backlogs that had not been processed or paid to members. The CMA notes that these comments related to recommendations in category B (management and distribution practices) in the Annex, concerning some of recommendations 11 to 34.
47. The CMA received details from the PRS that indicate that it has made significant investments in IT. These included the PRS's technology gap analysis showing the extent of obsolescence in end user services between 2013 versus 2016 and upgrades made. The PRS stated that IT was at the heart of its operations and its business strategy was constantly requiring decisions to be made about IT investment. The PRS also submitted that it had taken significant steps to improve, modernise and streamline its systems and processes in recent years.

48. The PRS stated that it had invested in many upgrades to its IT systems including the ICE joint venture²⁰ copyright database, Lion/Max (and relevant support systems) for online processing and matching systems used for online multi-territorial licensing, allowing for transactional based invoicing; and Bifrost, an IT system mainly used for recorded media processing. The PRS also noted that there were a number of further upgrades planned and that it continually assessed its systems to guide its business strategy. In relation to sampling, the PRS submitted that it considered using new technologies to replace this on a cost-benefit basis, and was trialling music recognition software [X] in order to more accurately record music usages.
49. Concerning data and processing, the PRS acknowledged that there were some occasions where it might not receive data within the expected timeframes because of delays with the DSPs providing the data, and some data may be reported incorrectly or in unloadable formats. In such situations the PRS submitted that it worked with the DSP to support them in being able to deliver the required usage reporting.
50. The CMA notes that at the time of the original MMC investigation, IT used in the PRS was piecemeal and required substantial manual intervention.²¹ The MMC noted that, 'Best practice in the use of IT is, therefore, the key to the efficient operation of the PRS.' The MMC's recommendations therefore showed a particular focus on IT and data systems with a baseline of the previous piecemeal position. The MMC provided eight recommendations covering improvements to IT and/or data to some extent.
51. Since the MMC's investigation, IT and data use in the UK, both in relation to the numbers of individuals, businesses and others that make significant use of computing technology,²² or have access to and use the internet, has grown substantially to the point where the use of IT has become ubiquitous both for businesses and consumers, and data has become a valuable and often traded item.²³
52. This development makes it difficult for the PRS to be able to operate effectively and make payments to its members without investing in appropriate IT, data and sampling technology, and the CMA notes that the Regulations stipulate how and when right holders are to be paid which

²⁰ ICE is a joint venture among the PRS and its Swedish and German counterparts, STIM and GEMA.

²¹ The MMC attributed this to the failure of the PRS's IT project PROMS, started in 1987 and abandoned in 1992. Paragraph 2.53 MMC report.

²² See for example [ONS statistics](#) on daily computer use in 2006 and 2015 as well as daily internet use 2006 and 2015.

²³ See for example the CMA's [report on its call for information on consumer data](#), June 2015 (CMA38 June 2015).

provides an indirect constraint on the PRS in this area.²⁴ Consequently, the CMA considers that the PRS now has incentives to maintain and develop these technologies in the absence of the undertakings.

53. The CMA is satisfied that it has seen evidence that the PRS is investing in improving IT and data to the benefit of its membership. The CMA considers that the PRS would still be incentivised to invest appropriately in this area in the absence of the undertakings.

Cost allocation

54. A small number of respondents raised concerns regarding the allocation of costs within the PRS. Specifically, they were concerned that the costs of the ICE hub joint venture should be borne purely by those using its services. Respondents linked this issue to recommendations 18 to 20 which concern equitable cost allocation.
55. The PRS has told the CMA that there is an activity-based cost allocation model in the PRS, and that this is separate to any cost allocation analysis conducted by the ICE hub joint venture for itself.
56. The CMA notes that the MMC recommendations in this area do not extend to the ICE joint venture which is considered and accounted for separately by the PRS and funded through various loan arrangements. Indeed, the joint venture was established several years after the undertakings were given. The CMA notes that the transparency report specified in the Regulations²⁵ will provide members with comprehensive information on the costs of the PRS how common costs are allocated in addition to other information about the PRS. The CMA notes that the extent of the controls as regards transparency would appear, in many respects, to be greater under the Regulations than the undertakings.

Governance

57. Respondent comments in relation to the governance of the PRS were mixed. A number of respondents recognised the very positive effect of the undertakings on the PRS, with significant internal changes having taken place since the undertakings were given, noting that the senior management were now more willing to engage with the concerns of writers and their representatives. Others raised concerns that the PRS might seek to reverse the changes made in the absence of the undertakings, while one respondent

²⁴ Regulation 12.

²⁵ Regulation 21.

sought to restrict the power of publishers at board meetings and adopt external controls to ensure more equitable distributions. The CMA notes that some concerns related to the MMC's recommendation 40, while others referred more generally to the changes made and the extent of the PRS's ability to reverse such changes in future.

58. The CMA notes the positive comments made by a number of stakeholders concerning significant improvements made by the PRS in this area. The CMA evaluates the extent of different constraints on the PRS in the following section (market developments) to explore the extent to which concerns may arise about the PRS seeking to reverse the change put in place since 1997 in the absence of the undertakings.

The withdrawal of rights

59. A number of respondents commented on the possibility of withdrawing rights from the PRS. Some noted that they had found the process of withdrawal to be difficult, with descriptions of a complex, cumbersome, and clunky process, while one respondent noted that it had received inaccurate information concerning withdrawal. A small number raised questions on the need for exclusivity in favour of the PRS, while others noted that they had not found much information on the possibility of withdrawal of rights on the PRS's website. The CMA notes that these issues concern the main area of the MMC's report about the ability to withdraw rights, as well as recommendation 44 concerning publicising changes to Article 7 of the PRS's Articles of Association.
60. The PRS submitted that the process of withdrawal of rights required the consent of those members whose rights were being withdrawn, and it did not allow third parties to make decisions on the withdrawal of such rights. The PRS explained that it did not consider the fact that a member had to implement a withdrawal request in favour of a new administrator or for self-administration in writing to be an unreasonable barrier. It also pointed out that since the PRS takes a direct assignment from members, the only person's instructions it can follow are those of its member (or his/her validly authorised attorney).
61. In relation to information about the possibility of withdrawal, the PRS submitted that members were made aware of the ability to exclude categories of rights when they joined the PRS as part of the membership application, and on an ongoing basis in the PRS Code of Conduct. It also stated that the categories of rights were set out in Article 7(cA) of its Articles of Association, which were highlighted to members at the most recent AGM. It also stated

that it has a team dedicated to answering questions about rights withdrawals from members.

62. The CMA is aware that the process for withdrawing rights may be complex insofar as the request must be made directly by the member and in writing. However, it has considered the points made about how the procedures are intended to ensure that PRS complies with its obligations to its members. The CMA considers that, as explained by the PRS, there are a number of ways in which new and existing members can become informed of the possibility of withdrawing rights as a member of the PRS, in the event that they were not already aware of this.
63. The CMA considers that both existing and new members have information available to them from the PRS (as discussed in paragraph 61 above) on the possibility of withdrawal of categories of rights.

Market developments and constraints on the PRS

64. This section analyses the main developments that have taken place in this sector in recent years that are relevant to the undertakings and assesses the nature and extent of the constraints on the PRS other than the undertakings. This section considers:
 - (a) legislative changes including the extent to which the Regulations provide an ongoing constraint on the activities of the PRS; and
 - (b) the extent to which there is a greater competitive constraint on the PRS than was the case at the time of the MMC's investigation.

Legislative changes

65. At the time of the MMC's inquiry into the PRS, there was no sector-specific legislation governing CMOs. Instead, the main constraints were general company, contract and competition law in operation at the time.
66. While there have been a number of developments in the intervening years that relate to CMOs, the focus of this analysis is on the Directive,²⁶ which was implemented in the UK by the Regulations which came into force on 10 April 2016. The implementation of the Directive in the UK and the detail of the

²⁶ 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.

Regulations have been consulted upon by the IPO, which has responsibility for monitoring and enforcing compliance with the Regulations.

67. The main aim of the Directive (and hence the Regulations) is to ensure that CMOs in the EU act in the best interests of the right holders they represent.²⁷ This overlaps with the aims of the undertakings, as both address the management, transparency and other issues that can arise in CMOs due to relatively few competitive constraints from the significant market position of some CMOs.
68. The following section considers the specific requirements of the Regulations and considers whether they would represent an ongoing constraint on the behaviour of the PRS in the areas of concern identified by the MMC, in the absence of the current undertakings. This section also considers the extent to which the concerns raised by stakeholders could be addressed by the Regulations and their enforcement.

Corporate governance and management practices

69. The high-level requirements of the MMC recommendations in this category are addressed in general terms by the Regulations, as the Regulations are concerned with ensuring governance procedures are appropriate and that CMOs are well run organisations. We note that the Regulations require CMOs to:
- (a) have a body which exercises a supervisory function for continuously monitoring the performance of the persons who manage the business of the CMO;²⁸ and
 - (b) 'ensure that each CMO takes all necessary measures so that the persons who manage the business do so in a sound, prudent and appropriate manner, using sound administrative and accounting procedures'.²⁹
70. The CMA considers that the Regulations provide similar constraints on the PRS as those imposed by the undertakings in this area, and as such, the CMA considers that the Regulations are sufficient to constrain the activities of the PRS in this area in the absence of the undertakings.

²⁷ This is described in more detail in paragraph 8 above.

²⁸ Directive Article 9 and Regulation 8.

²⁹ Directive Article 10 and Regulation 9.

Management and distribution practices

71. There are a number of safeguards against the potential for future inefficiency of the PRS in the Regulations as they require the management of the business operations of CMOs to be closely overseen. This is specifically set out in the Regulations in that CMOs must now have in place a supervisory function for monitoring the persons managing the business and must also take measures so they do so in a sound, prudent and appropriate manner using sound administrative and accounting procedures.³⁰ Moreover, the Regulations stipulate how and when right holders are to be paid; the arrangements a CMO must put in place to try and locate absent right holders; and what must happen if they are unknown or cannot be found.³¹ The punctuality and accuracy of distribution payments in particular, as required by the Regulations, are reliant on CMOs having effective IT systems.
72. The CMA has considered the degree of constraint provided by the Regulations given the concerns raised by respondents to its issues statement. Given the developments in IT highlighted in paragraphs 50 and 51, and the requirements in the Regulations for how and when rights holders are to be paid, the CMA considers that the PRS would still be incentivised to invest in efficient IT and data technologies in the absence of the undertakings. Therefore, concerning the management and practices of the PRS, the CMA concludes the Regulations should be sufficient to constrain the activities of the PRS in this area in the absence of the undertakings.

Lack of transparency

73. The Regulations include the following requirements in this area:
- (a) rights holders' rights must be set out in the statute and membership terms of a CMO;³²
 - (b) CMOs must provide for fair and balanced representation of members in their decision-making processes;³³
 - (c) the publication by a CMO of an annual transparency report (no later than eight months following the end of that financial year) showing, for example, financial information on the costs of rights management and

³⁰ Directive Article 9 and 10 and Regulations 8 and 9.

³¹ Directive Article 13 and Regulation 12.

³² Directive Article 5 and Regulation 4.

³³ Directive Article 6 and Regulation 6.

other services provided, with a comprehensive description of costs by category of right;³⁴

(d) the general distribution policy must be approved at the AGM of a CMO and published on the CMO's website;³⁵ and

(e) members can appoint another person or proxy holder to participate and vote at the AGM of a CMO.³⁶

74. The CMA considers that the Regulations and the undertakings provide broadly similar coverage in relation to imposing obligations on CMOs around members' rights, decision making, cost allocation and transparency. In the annual transparency report required by the Regulations, the requirements go further than the detailed MMC recommendations and will provide members and others with significant and detailed information about the organisation of CMOs. The CMA considers that the constraint from the Regulations should be sufficient to constrain the activities of the PRS in this area in the absence of the undertakings and to address the concerns raised by respondents to the issues statement in this area.

Lack of right of appeal in matters of dispute

75. The undertakings impose a number of specific requirements on the PRS concerning appeals and the operation of the PRS's appeals board. The Directive takes a principles-based approach to addressing complaints and disputes involving members of a CMO. The Regulations provide that:

(a) a CMO must make available to its members effective and timely procedures for dealing with complaints, in particular, relating to matters such as deductions and distributions; and

(b) a CMO must also ensure that disputes between it and one of its members concerning compliance with the Regulations can be submitted to an independent and impartial dispute resolution procedure.³⁷

76. The CMA considers that the Regulations provide an effective constraint on the PRS and should be sufficient to constrain the activities of the PRS in this area in the absence of the undertakings.

³⁴ Directive Article 22 and Regulation 21.

³⁵ Directive Articles 8 and 21 and Regulations 7 and 20.

³⁶ Directive Article 8 and Regulation 7.

³⁷ The Directive Article 34 and Regulation 32.

Exclusivity in relation to rights administration

77. The need to balance different interests, including those of individuals and those of CMOs is acknowledged in the Directive:

It is important that the rights and categories of rights be determined in a manner that maintains a balance between the freedom of rights holders to dispose of their works and other subject matter and the ability of the organization to manage the rights effectively, taking into account in particular the category of rights managed by the organization and the creative sector in which it operates. Taking due account of that balance, right holders should be able easily to withdraw such rights individually or to entrust or transfer the management of all or part of them to another CMO or another entity.³⁸

78. More specifically, the Regulations stipulate that rights holders must be able to 'authorise their chosen CMO to manage some or all of their rights; decide in which territory those rights should be managed; withdraw all or some of those rights; and be fairly represented in the decision-making process'.³⁹ Although the Regulations have not sought to specify the rights that can be withdrawn, the nature of those rights and the underlying principles governing withdrawal if rights can be inferred from the *GEMA* decisions.
79. Given that the Regulations addresses the area of withdrawal of rights directly, the CMA considers that this, together with the categories of rights and principles set out in the *GEMA* decisions should be sufficient to constrain the activities of the PRS in this area in the absence of the undertakings.⁴⁰

Enforcement of the Regulations

80. The CMA has also considered how members may enforce their rights under the Regulations and has drawn a comparison with the obligations of the PRS pursuant to the undertakings.
81. There are various provisions of the Regulations concerning enforcement:
- (a) A breach of the requirement that a member should be able to withdraw relevant rights which causes that right holder to sustain loss or damage is actionable by the right holder. In other words, if PRS was to prevent a

³⁸ The Directive Recital 19.

³⁹ The Directive Article 5 and Regulation 4.

⁴⁰ European Commission decisions in *Re GEMA (No 1)* CMLR D35 and *Re GEMA (No 2)* 24 CMLR D115.

member from administering their live performing rights, withdrawal could be directly enforced by the right holder against PRS.⁴¹

- (b) The Secretary of State must monitor compliance of CMOs with the Regulations⁴² and must have regard to evidence which is notified to him/her of breach of the Regulations.⁴³
- (c) The Secretary of State has information gathering powers and may require information and documents from a CMO for the purpose of ascertaining whether the Regulations have been complied with.⁴⁴
- (d) The Secretary of State may impose a financial penalty on a CMO or the director or member of a CMO who manages its affairs. The financial penalty is up to £50,000.⁴⁵

82. The CMA is satisfied that the Regulations should give PRS members an effective mechanism to enforce their rights, irrespective of whether the undertakings are in place. The enforcement regime should be sufficient to constrain the activities of the PRS in this area in the absence of the undertakings.
83. Furthermore, the CMA notes that the Regulations are designed to regulate the obligations owed by a CMO to its members, while the detailed wording of the undertakings is largely concerned with the PRS's reporting requirements to the OFT (now CMA), following the initial changes the PRS was required to make.

The competitive constraint on the PRS

84. In addition to considering legislative changes, the CMA has also considered whether there is evidence of a significant change in the competitive constraint faced by the PRS. We have not carried out a full analysis of the relevant market. Instead we have considered evidence in four specific areas:
- (a) whether the possibility of members withdrawing rights acts as an effective constraint on the PRS;
 - (b) whether the development of online music is increasing or decreasing the competitive constraint on the PRS;

⁴¹ Regulation 33.

⁴² Regulation 34.

⁴³ Regulation 35.

⁴⁴ Regulation 36.

⁴⁵ Regulation 38.

- (c) whether the share of supply of the PRS has declined significantly such that the PRS is facing increased competition from alternative suppliers; and
- (d) whether the possibility of entry might be expected to constrain the PRS.

Withdrawal of rights

- 85. The CMA has considered whether members being able to withdraw certain categories of rights has generated a significant competitive constraint on the PRS since the undertakings were given. In considering this, the CMA examined the extent of rights withdrawals in practice, and any remaining barriers to withdrawal of rights.
- 86. The PRS submitted that relatively few members opted to withdraw rights and self-administer them. With the exception of the withdrawal of repertoires by a number of Welsh-language members, the PRS implemented the withdrawal of rights for only a small proportion of its membership.
- 87. Most rights withdrawals related to theatrical productions. The PRS submitted that generally it received [redacted] requests per year in this area. A further area was other live performances where, in 2015, the PRS had received and agreed [redacted] requests to withdraw live public performance rights.⁴⁶ The PRS submitted that, on average, it received [redacted] or [redacted] requests annually in this area, generally in respect of overseas touring.⁴⁷ The PRS also submitted that technological changes in the online sector had not had a material impact on the withdrawal of rights. However the PRS submitted that it may expect to see an increase in demand for rights withdrawals due to awareness of the relevant provisions in the Directive and Regulations.⁴⁸
- 88. The PRS clarified that, as required in the MMC's recommendations, the ability to withdraw rights was set out in its Memorandum and Articles of Association and Code of Conduct which were available on its website. The PRS told the CMA that it explained to new members that they could withdraw their repertoire in respect of certain categories of rights as part of the joining process and also had a team dedicated to answering questions about rights withdrawals from members.⁴⁹

⁴⁶ [redacted] of which were requests from new members joining the PRS and [redacted] of which were from existing members.

⁴⁷ PRS response to CMA questions.

⁴⁸ The CMA does not consider this to be relevant to its assessment, particularly for the non-online music segment. This is because publishers hold the mechanical right rather than the performing right.

⁴⁹ PRS response to CMA questions.

89. Written comments from third parties suggested that some members may not be aware that they could opt to withdraw certain categories of rights and that information on the rights of members to withdraw certain rights was limited and may not be easy to find. One third party considered that the PRS did little to publicise and make members aware that they had the option to withdraw rights, while others referred to complexities in the process of rights withdrawal as described above in paragraph 62.
90. On the basis of the evidence obtained by the CMA, it considers that the current extent of rights withdrawal from the PRS is low. Therefore, although in principle, members are able to withdraw categories of rights, the CMA considers that this option does not, at present, create a significant competitive constraint on the activities of the PRS.

The impact of online music

91. The PRS submitted that the online market for at least the multi-territorial online exploitation may be considered as a possible distinct market segment from a supply-side perspective. Not all CMOs have the operational capability to deliver these services, and many would require significant investment in processing systems and staff to cope with the complexity of multi-territorial licensing. The PRS submitted that there was pressure on commission rates caused by right holders and licensee expectations of transactional distribution and invoicing statements for each work used.⁵⁰ The PRS identified the American Music Rights Association,⁵¹ and Armonia Online⁵² as examples of competitors in this segment.⁵³
92. The PRS considered that most of the demand-side constraint was from larger 'option three publishers'⁵⁴ and other CMOs.⁵⁵ The PRS submitted that large members had a higher degree of buyer power and were more likely to shop around, for example, appointing panels of CMOs and inviting CMOs to bid for business.⁵⁶

⁵⁰ Transactional refers to a line by line invoice/distribution statement for each work used. Source: PRS response to CMA questions.

⁵¹ Details available on the [American Music Rights Association's website](#).

⁵² Details available on [Armonia Online's website](#).

⁵³ Source: PRS response to CMA questions.

⁵⁴ In option three, collecting societies license the repertoire they hold across the whole of Europe for online and mobile, competing with each other for business on administration and commission rates and on the levels of service provided to members. See [details on the PRS website](#).

⁵⁵ Where the PRS acts on behalf of another CMO.

⁵⁶ Source: PRS response to CMA questions.

93. The CMA notes that writers may exert less competitive pressure on the PRS than publishers.⁵⁷ The PRS submitted that writers look to CMOs to provide a fair and transparent approach to splitting the revenues between performing and mechanical rights.
94. The PRS submitted that the geographic scope of competition for online administration was increasingly wider than the UK and, as such, the PRS held only a moderate share in the online segment. The PRS highlighted the estimate from the European Commission's decision in respect of the PRS/STIM/GEMA ICE joint venture⁵⁸ where the PRS's share of supply ranged from [0–10]% to [10–20]%, depending on whether the EEA total online or multi-territorial online licensing sector was considered.
95. There were mixed views from third parties as to whether there is greater competition in the online sector. One third party submitted that the PRS had a monopoly in the UK for mono-territorial digital licensing, however noting that competition was emerging in multi-territorial digital licensing.⁵⁹
96. Other third parties submitted that the PRS should allow members to withdraw their multi-territorial digital rights and provide them to third parties to administer, the implication being that this would increase the competitive pressure on the PRS in the online sector.⁶⁰ Others considered competition in multi-territorial licensing to be limited as there were few entities capable of providing these services.⁶¹
97. The PRS submitted that publishers were unable to reorganise a writer's performing rights without the member's consent and noted that it believed that some writers may not wish to switch away from CMOs as they trusted them to deliver a fair split between writer and publisher royalties.⁶²
98. The CMA does not have sufficient evidence to suggest that the possibility of self-supply on the part of major publishers, in relation to mechanical rights, exerts significant competitive pressure on the PRS regarding administering performing rights in relation to UK only mono-territorial online licensing and non-online music performances in the UK.

⁵⁷ Mainly because online revenues have not been sufficiently significant for individual writers (in absolute terms and relative to other revenue sources) and they may not wish to switch from regulated CMOs.

⁵⁸ Case M.6800-PRStM/ STIM/ GEMA/ JV, Commission Decision of 16 June 2015.

⁵⁹ This was qualified as follows - despite the increase in multi-territorial licensing, many writers' royalties from offline exploitation still represent important revenue sources.

⁶⁰ The PRS already unbundles the rights for mono- and multi-territorial digital licensing in its grants to overseas CMOs.

⁶¹ The PRS, through its ICE JV, only has one competitor, namely SACEM (the French CMO).

⁶² PRS response to CMA questions.

99. While there appears to be global competition for multi-territorial licensing for online music, which was in its infancy at the time the undertakings were given in 1997, on the basis of the evidence available to the CMA, this appears to have had little impact on the PRS’s position in relation to mono-territorial licensing or on other offline segments.

Shares of supply

100. The CMA has considered the PRS’s share of supply of the services of administering performing rights in the UK. In its report, the MMC describes the PRS as, ‘administering performing rights and film synchronisation rights by licensing bodies on behalf of the composers and authors of musical works or the owners or publishers of or persons being otherwise entitled to the benefit of or interested in the copyright of such works’ and being the ‘sole supplier currently of such services’.⁶³ The table below sets out PRS’s estimated share of supply for 2013 to 2015.

Table 1: PRS share of performing right income from UK exploitation

	2013	2014	2015
PRS direct revenues (£m)	[X]	[X]	[X]
Estimated total market size (£m)	[X]	[X]	[X]
Market share estimate (%)	[65–75]	[65–75]	[65–75]

Source: PRS.

Note (1): Shares based on gross distribution to members.

Note (2): Range replaces excised figures supplied by the PRS.

101. It can be seen from the share of supply estimates from the PRS that it retains a substantial share of supply with little change in the last three years. For the purposes of this review of undertakings, the CMA has not found it necessary to conclude on the appropriate frame of reference or market definition. However, it notes that the shares of supply presented are generally consistent with the overall approach taken by the MMC in its original report. The CMA notes that the constraint from wider activities is considered elsewhere in its assessment. The CMA also notes that the PRS does not agree with the frame of reference presented above.

Potential entry

102. Evidence available to the CMA suggests that entry is not impossible for multi-territorial licensing of online music but that there appear to be barriers to entry for other parts of the market including UK mono-territorial licensing and other offline parts of the music market.

⁶³ MMC report Chapter 2, paragraph 2.11 & 2.12.

103. The CMA has identified four potential barriers to entry as being relevant in the UK. These are:
- (a) the presence of scale economies, resulting in the need to amass a critical volume of the relevant rights in order to enter at a reasonable cost;
 - (b) the need for adequate IT and staff operational capacity for the complex data processing for online music licensing;
 - (c) potential concerns on the part of writers about being adequately represented at board level; and
 - (d) constraints around the withdrawal of multi-territorial rights for online music may be a barrier to entry.
104. The evidence received by the CMA suggests that there are currently few entities offering direct licensing of the live performance right on behalf of writers and publishers.⁶⁴
105. In relation to IT infrastructure and staff capacity for multi-territorial licensing of online music, the PRS submitted that not all CMOs have the operational capability to deliver administration services in this area, and new entrants would need to make significant investments in processing systems and staff to undertake this work. However, the PRS noted that these reasons would not prevent an independent organisation with sufficient funding from establishing itself as a CMO. The PRS submitted that the online market for multi-territorial online exploitation may be considered as a possible distinct market segment from a supply-side perspective.⁶⁵
106. The PRS also submitted that there was increasing self-administration by major publishers – where some publishers had sought to use their own administration vehicles for online music.⁶⁶ However, it is unclear whether this would have an impact on the PRS’s operations in the UK as the PRS submitted it did not expect that technological changes and the growth of online music would have any significant impact on rights withdrawals.⁶⁷
107. In relation to the concerns of writers about not being adequately represented, it may be difficult for new entrants to enter should members have divergent

⁶⁴ There was also no suggestion that market entry in this segment within the UK was likely within the next few years.

⁶⁵ ‘Transactional’ refers to a line by line invoice/distribution statement for each work used. Source: PRS response to CMA questions.

⁶⁶ PRS response to CMA questions.

⁶⁷ PRS response to CMA questions.

interests over sharing royalties and be reluctant to switch to other administrators that are perceived to represent other interests.⁶⁸

108. The CMA notes that historic differences in the interests of writers and publishers were highlighted by the MMC in its report. The MMC noted that there had always been tension about the way in which royalties from musical performances were divided and that publishers might seek to give too little weight to writers' interests. The CMA received some evidence during this review that these differences persist at least to some degree and received comments from stakeholders and the PRS in response to the provisional decision, as described in paragraph 128 below, concerning different views of expectations in this area.

Change of circumstances

109. In its review, the CMA has sought to establish whether there are changes of circumstances relevant to the undertakings. In exploring this, it has examined whether there is evidence that market developments provide additional and ongoing controls in the same areas as those set out by the undertakings, and whether such controls may be sufficient, in the absence of the undertakings to constrain the activities of the PRS in the absence of the undertakings, and prevent the PRS reversing the changes made since it gave the undertakings in 1997.
110. The CMA considers that there is now some degree of competitive constraint on the PRS in relation to multi-territorial licensing of digital rights. However, it notes that it has not seen clear evidence to suggest that there is significant competition for mono-territorial licensing of rights in the UK. Overall, the CMA considers that the competition faced by the PRS may be insufficient, of itself, to act as a constraint on its activities in the absence of the undertakings.
111. The CMA has also explored the protections afforded by the Directive and the Regulations in the UK which came into force on 10 April 2016. The CMA has found that the Regulations provide broad principles-based coverage of the areas covered in the undertakings and the MMC's recommendations and have the same broad aims and objectives, with the exception of MMC recommendations concerning the use of IT.

⁶⁸ The PRS submitted that songwriters, lyricists and publishers had divergent interests to performers and record labels and therefore would require separate representation to act in their best interests and without potential conflict.

112. Concerning the recommendations relating to the use of IT by the PRS, the CMA has found that the growth, advances and ubiquity in the use of IT since 1997 make the undertakings in this area no longer appropriate.
113. In conclusion, the CMA considers that there are changes of circumstances relevant to the undertakings, most notably, the Regulations, as well the changes in the use of IT. The CMA considers that these changes of circumstances are relevant to the undertakings in that these changes will prevent a return to the practices highlighted in the MMC's report.

Provisional decision and consultation

114. Following the changes of circumstances identified above, on 23 March 2016, the CMA announced that, given the coverage of the Regulations described above, and additionally, the changes in the use of IT highlighted in paragraphs 50 and 51, it found, provisionally, that the undertakings were no longer appropriate for the purposes of constraining the activities of the PRS. The CMA's provisional decision was to release the undertakings.

Consultation on the provisional decision

115. On 23 March 2016, the CMA published its provisional decision, and consulted publicly on this until 22 April 2016. The CMA received six responses to its consultation. Of the responses, one was from the PRS, while five were from music industry stakeholders. The CMA has published, separately to this final decision, [the non-confidential responses received](#).
116. Two of the responses from music industry stakeholders covered matters relating to transparency and the withdrawal of rights, and sought either more stringent undertakings or a variation of the existing undertakings. Two responses noted that the Regulations did not cover all obligations in the undertakings and the MMC's recommendations. One sought a further undertaking to the effect that Performing Right Society Limited and PRS for Music Limited should each comply with the Regulations, while another sought further undertakings to 'hold the PRS to higher standards than set out in the EU Directive' while a further one proposed additional undertakings covering transparency and splitting mono- and multi-territorial digital rights. One further response sought clarification on the text concerning NDAs, while another sought the delay of the CMA's final decision until after the EU referendum in June 2016.
117. In its response, the PRS agreed with the provisional decision and made a number of comments concerning the analysis and views set out by the CMA in its provisional decision.

118. Following the responses from stakeholders to the provisional decision, the CMA sought additional information from the PRS concerning the subject of some of the responses. Where appropriate, the CMA provides some additional information in the section below, in which it considers the consultation responses.

Transparency

119. One respondent noted concerns around a lack of transparency, specifically a difficulty in calculating an effective distribution rate for a given service, stating that, 'Members should be given this information as a matter of course'. In addition this respondent noted that details allowing for effective distribution rates were not provided by the PRS in relation to international income.
120. Another respondent highlighted one area in which it stated there was no transparency, with this being the basis under which the PRS would agree to sub-license digital performing rights to other third party entities. It noted that the Directive did not specifically address the policy that the PRS should apply when determining how, when and to whom it would sub-license digital rights.
121. The CMA highlights that a lack of transparency in some DSP licences was considered in its provisional decision and is covered in paragraphs 41 to 45 of this final decision. In relation to the use of NDAs, the CMA recognises that the ability to protect some information in DSP licences might be appropriate in certain circumstances for bodies such as the PRS, in order to prevent information exchange between the PRS's licensees that may dampen competition.
122. The CMA notes that the Regulations set out the information to be provided to CMO members to whom it has attributed rights revenue or made payments.⁶⁹ It also notes that in its provisional decision, and at paragraph 74 above, it highlights that the requirements of the Regulations concerning the annual transparency report go further than the MMC's recommendations and the undertakings.⁷⁰ Consequently, the CMA does not consider that the consultation response on this matter alters the validity of its assessment in this area.
123. In relation to the concern about the lack of transparency concerning the PRS's policy relating to sub-licensing rights to third parties, the CMA notes that there is an obligation in the MMC's recommendations concerning the PRS's policies, specifically recommendation 40, that concerns a formal consultative

⁶⁹ Regulation 17.

⁷⁰ Regulation 21.

process to seek members' views on policy and strategy. The CMA does not consider that it is appropriate for it to stipulate which specific policies the PRS should consult upon and how the consultation should take place. However, it notes that the Regulations contain a general obligation for CMOs to ensure that their statutes provides for appropriate and effective mechanisms for the participation of its members in the decision making process.⁷¹

124. The CMA also notes that the increased transparency from the annual transparency report provided for in the Regulations may, to some extent, provide additional relevant information for members and address some of the American Music Rights Association's concerns.

Withdrawal of rights

125. One respondent provided comments concerning awareness of the ability to withdraw rights from the PRS. The response raised a number of queries in relation to the awareness among the PRS membership of the possibility of withdrawing categories of rights, and concerning the information provided by the PRS to its members about this matter.
126. Another response noted that the ability to withdraw rights in theory and in practice can be different, particularly for digital exploitation, which was considered to be one of the most important rights for a PRS member to be able to withdraw. The respondent stated that, 'the current PRS practice of insisting that mono-territorial and multi-territorial licensing and collection services are bundled together unduly ties writers and their publishers to PRS, thereby preventing competition from emerging in relation to multi-territorial digital services'.
127. The CMA notes that the PRS set out a number of ways in which its members may become aware of the right to withdraw categories of rights, and these are described in the CMA's provisional decision and in paragraph 61 of this final decision. The CMA sought clarification from the PRS concerning its staff available to respond to requests concerning rights withdrawal and the PRS provided details of its Member Services team of around 55 staff.⁷² The CMA also notes that the PRS's 2015 AGM included a presentation of Special Resolution 8, where changes and simplification of the GEMA categories of

⁷¹ Regulation 6.

⁷² The PRS stated that its Member Services team (approximately 55 staff contactable by email and telephone) were able to deal with member queries – however if they were not able to answer the query then they would escalate this behind the scenes to the relevant staff member in the Membership & Rights team (where there were two staff members with specialist knowledge) and/or Legal team (where there were 2-3 staff members with specialist knowledge).

rights that can be withdrawn were presented, and material on this matter was provided to members in the Formal AGM Notice in 2015.⁷³

128. In relation to the comments concerning mono-and multi-territorial licensing, the CMA sought clarification from the PRS, which stated that

[It had] never received a request from a writer member (who would be the party exercising a withdrawal of a category of rights) to do so or consider this. If this were to be the case (or at least for a request(s) representing a not insignificant amount of rights) we would conduct further analysis to ascertain if it would be in the best interests of the PRS membership as a whole to change the online category under our constitution.

The PRS, in its response to the provisional decision, considers that making this split, 'would significantly drive up costs and inefficiencies both for PRS and users'.

129. The CMA has not reached a conclusion on this specific scenario, however it notes that one objective of the Directive in Recital 19, as set out in paragraph 77 above, is the need to balance the freedom of rights holders to dispose of their works with the ability of a CMO to manage the rights it holds effectively. The CMA considers that the Regulations and their enforcement provide mechanisms to seek to resolve such differences in the first instance. The enforcement of the Regulations is discussed in paragraphs 80 to 83 above.

Requests for additional undertakings

130. A further response noted that the Directive and Regulations did not cover all of the undertakings. It also noted that PRS members could only rely on their membership agreements with PRS Limited to ensure compliance and had no direct contractual relationship at all with its subsidiary PRS For Music Limited. The respondent requested an additional undertaking to ensure that both Performing Right Society Limited and PRS For Music Limited would comply with the Regulations and all other commitments given to the membership.
131. The CMA notes that Regulation 2 concerns the applicability of the Regulations to CMOs. Specifically, given the scope of Regulation 2(4), the CMA does not consider that there is a need for a further undertaking in this area given the safeguards in the Regulations and the fact that Regulation 2(4) states, 'Where a person who is directly or indirectly owned or controlled, wholly or in part, by a copyright management organisation carries on an activity which, if carried

⁷³ Information provided by the PRS to the CMA.

on by the copyright management organisation, would be subject to the provisions of these Regulations then those provisions apply to that person.’

132. The CMA also notes that two respondents sought changes to the existing undertakings or new undertakings to address their concerns. The CMA does not consider the concerns raised by these two responses are sufficient to alter its analysis for the reasons set out above, and consequently, the CMA does not consider it either appropriate or necessary to seek to vary the undertakings or to seek to accept new undertakings from the PRS at this time.

Non-disclosure agreements

133. One further response raised concerns about the wider implications of the issue concerning non-disclosure agreements. It sought additional clarifications in subsequent text. The CMA has amended the text to ensure the meaning of this section is clear.

The EU referendum

134. Another respondent to the CMA’s provisional decision stated that it considered that no decision should be taken on this review until after the EU referendum on 23 June 2016. The CMA notes that it has a statutory duty to carry out its work and considers it reasonable to publish this decision on the basis of the law as it now stands. It is not aware of any plans to repeal the Regulations. Moreover, the CMA will continue to carry out its responsibilities as the UK’s primary independent competition and consumer authority, regardless of the outcome of the EU referendum.

PRS views

135. The PRS noted in its response that it supported the CMA’s provisional decision, however it made a number of comments on the CMA’s analysis concerning in particular:
- (a) The CMA’s analysis of its market position. The PRS noted that it did not agree with the CMA’s frame of reference, and it considered that it had a more moderate share when considering a market with a wider geographic reference.
 - (b) The withdrawal of rights, where the PRS noted that it disagreed with the CMA’s view that due to low levels of withdrawal, this possibility was not a competitive constraint.

- (c) The CMA's analysis of the impact of online music, where the PRS noted that it did not consider that the CMA had captured the extent of the competitive constraint in this area.
- (d) The extent of barriers to entry, where the PRS did not consider most of the reasons given by the CMA to be credible barriers to entry for an independent organisation with sufficient funding to establish itself as a CMO.

136. The CMA has given careful consideration to the views of the PRS in relation to the analysis in its provisional decision. The CMA has reflected some of the specific points raised by the PRS in the above discussion of market developments and constraints on the PRS. Overall, the CMA considers that the PRS has not provided sufficient or compelling new evidence or reasoning to warrant significantly changing the analysis in the provisional decision. The CMA notes that the aim of the review was seeking evidence of a change of circumstances rather than to carry out a detailed assessment of the market.

Final decision

137. The CMA does not consider that the arguments and evidence presented in the consultation responses justify any significant changes to the analysis in its provisional decision. While some members of the PRS have raised particular concerns with specific aspects of the PRS, this review has been focused on whether the obligations imposed on the PRS within the undertakings remain appropriate given recent developments, most relevant of which are the Regulations. As noted in the provisional decision, the CMA considers that the Directive and the Regulations cover the same broad aims as the original undertakings, albeit with one exception in relation to IT, where the CMA considers that changes in the use of IT mean the undertakings in this area are no longer appropriate.
138. Consequently, the CMA has concluded that, based on the evidence available, its final decision is that the undertakings given by the PRS are no longer appropriate, and consequently, the undertakings should be released.

Annex: MMC's recommendations to the PRS

A. Corporate governance and management practices

1. The PRS's General Council to step back from the day-to-day management of the Society to concentrate on key policy issues and supervision of the development of the PRS's future strategy.
2. Reduce the number of meetings of the full Council.
3. Formal delegation by the General Council of responsibility for the day-to-day management of the Society to a new Executive Committee comprising the Chief Executive, Chairman, both external directors, the second executive director and no more than two other director members of the General Council.
4. Disband the existing Executive Committee.
5. Reduce the number of committees and groups.
6. Clear differentiation between the roles of the Chairman and Chief Executive.
7. General Council to define objectives of the PRS within three months of publication of this report.
8. General Council to agree a five-year strategy for the PRS within three months of publication of this report.
9. Evaluate, using a cost-benefit analysis, all major proposals for change.
10. Increase the amount of formal management representation on the remaining committees and groups.

B. Management and distribution practices

11. Set out, with target dates for completion, all key steps necessary to improve efficiency.
12. High priority to be given to the improvement of data.
13. Link consideration of IT strategy to the consideration of the overall five-year strategy. Ensure the objectives of the two programmes are consistent and the timing is synchronized.
14. IT strategy to take into account the need to streamline processes and integrate all major administrative systems.
15. Adopt international standard work code numbers as soon as practicable.

16. Encourage or even require members to adopt these standard work code numbers too.
17. Improve cost appraisal to determine which costs are direct and which are indirect.
18. Implement systems to provide the necessary information for more equitable cost allocations to be made.
19. Publish details of the new cost allocation system within 12 months of publication of this report.
20. Publish sufficient accounting information within 12 months of publication of this report for members to be able to see where costs lie.
21. Targets to be published within two months of publication of this report for reducing administrative costs.
22. Modify the targets described in 21 above as soon as the new cost allocation system is in place.
23. Impose separate annual membership fees for writers and publishers of around £25 plus VAT a year and £125 plus VAT a year respectively.
25. The PRS to work towards accreditation under an approved quality standard.
29. The PRS to take professional advice about the measurement and sampling of public performances and to distribute this advice to the membership.
30. Initial bench-marks for all major areas of public performance to be drawn up within six months of publication of this report.
31. Regular and statistically valid sampling to take place thereafter.
32. Review the LMDP within nine months of publication of this report in the light of the findings at 30 above and amend where necessary.
33. Establish a special committee, including representatives of a range of minority musical genres, to oversee all sampling work.
34. Put in place a financial model which can assess rapidly the effect of changes in distribution policies.

C. Lack of transparency

24. The PRS formally to set out in the Members' Handbook the responsibilities it has to members and the standards of service it aims to achieve.

26. Amend the rules relating to termination of membership to reflect the flexibility inherent in current practices and set out the changes clearly for members in the published Rules and Members' Handbook.

27. State the limitations of the distribution policy in the Society's literature and bring these to the attention of current and prospective members.

28. Published accounting information to include details relating to members' overseas earnings.

40. The PRS to introduce a formal consultative process to take members' views on proposed changes in policy or strategy.

41. Voting rules to be amended to allow writer members to send representatives who are not themselves members of the PRS to speak and vote for them at all general meetings.

D. Lack of right of appeal in matters of dispute

35. Establish an Appeals Board to resolve the disputes which members may have from time to time with the Society about their personal rights.

36. Members to pay an initial deposit to the Appeals Board, which would be non-returnable for trivial or frivolous cases.

37. Appeals Board to have right of access to relevant papers.

38. Appeals Board to have a specialist accountant if required to deal with disputes concerning self-administration of performing rights.

39. Appeals Board's findings to be binding on all the parties involved.

E. Exclusivity in relation to rights administration

42. Article 7 of the Articles of Association to be amended to allow self-administration of the live performance right.

43. Article 7 of the Articles of Association to be amended to make it clear that members already have the right to self-administer the categories of performing rights specified in the GEMA decisions.

44. The PRS to publicise the changes to Article 7.