

Anticipated joint venture between Phonographic Performance Limited and PRS for Music Limited

Decision on relevant merger situation and substantial lessening of competition

ME/6600-16

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 18 August 2016. Full text of the decision published on 7 September 2016.

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. Phonographic Performance Limited (**PPL**) and PRS for Music Limited (**PRS**) have agreed to establish a 50/50 joint venture as a newly formed company into which they will each transfer their current public performance licensing operations in the UK (the **JV**, or the **Merger**). PPL and PRS are together referred to as the **Parties**.
2. The Parties intend to transfer into the JV various back-office functions, including the administration, collection and invoicing of licences, which will be provided to PPL and PRS as well as to third parties by virtue of their existing agreements with PPL and PRS, and various front-office functions including joint sales and marketing, which will be provided to PPL and PRS only [see end note 1]. The JV as notified to the CMA does not include any joint price setting. Each of PPL and PRS will continue to set tariffs independently of one another following the JV's establishment.
3. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that certain businesses, comprising the public performance licensing operations of the Parties in the UK, will cease to be distinct as a result of the JV, that the turnover test is met and that, accordingly, it may be the case that

arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

4. The CMA found that the Parties operate in different relevant product markets. PRS licences the use of copyright in musical works (ie composition and lyrics) on behalf of songwriters, composers and publishers whereas PPL licences the use of copyright in sound recordings on behalf of record company and performer members.
5. The CMA found that the collection of royalties from the use of copyright in musical works and in sound recordings are complementary activities since, for example, anyone engaged in the public performance of recorded music in the UK will usually be required to pay for both (ie to obtain licences from both PPL and PRS).
6. The CMA found there to be:
 - (a) no demand side substitution between the different rights licensed by the Parties. This view was supported by third parties that responded to the CMA.
 - (b) no supply side substitution. There are high barriers to PPL entering into the supply of licences for the use of copyright in composition and lyrics (PRS's activity) and vice versa.
7. The relevant geographic market is the UK as this is where the JV will gain the rights to administer and license public performance rights.
8. The CMA has therefore assessed the impact of the JV in the following frames of reference in the UK:
 - (a) licensing the use of copyright in composition and lyrics, owned by writers/composers and publishers; and
 - (b) licensing the use of copyright in sound recordings, owned by record companies and performers.
9. PRS and PPL also provide services to the holders of copyright of each of composition and lyrics and sound recordings. Therefore, the CMA has also investigated any effects on copyright holders.
10. The CMA found that the Parties operate in separate markets and do not overlap. There are therefore no direct horizontal unilateral effects arising from the JV.

11. On a cautious basis, the CMA also considered the extent to which the Parties could place some indirect constraint on one another either (a) because music users could use the price negotiated with one to influence the price negotiated with the other, or (b) because music users appealing to the Copyright Tribunal (the **Tribunal**) could use one or other's tariffs as a benchmark.
12. Responses from third parties suggested that the Parties do not currently place a constraint on each other. The costs of purchasing licences from PPL and PRS are set out in published tariff lists and customers of both parties indicated that they are not able to use the pricing of one of the Parties to influence the pricing of the other.
13. In the event of a dispute over pricing, a music user has recourse to the Tribunal (where legal disputes with either PPL or PRS can be commenced). The CMA investigated whether, as a result of the JV, the ability of the Tribunal to make rulings on pricing levels might be impeded because of the loss of the ability to benchmark prices of PPL and PRS against one another, and whether, as a result of this, the Parties might be able to raise prices. The Tribunal confirmed that other methods of determining pricing levels would remain open to it. The Tribunal told the CMA that it did not believe that the JV would significantly impact its ability to resolve issues over licence fees.
14. On this basis of this evidence, the CMA does not believe that there is a realistic prospect that the JV will result in a substantial lessening of competition (**SLC**) as a result of indirect horizontal unilateral effects.
15. For these reasons, the Merger will **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

16. PPL is a collecting society that manages certain aspects of the copyright in sound recordings, including the right to play sound recordings in public. It does so on behalf of its members, which are record companies who own or control the copyright in those sound recordings and performers who have a statutory right to equitable remuneration in respect of those sound recordings. PPL issues licences to businesses and organisations across the UK playing recorded music in public, including bars, nightclubs, pubs, factories and schools. The turnover of PPL in 2015 was approximately £197 million in the UK.

17. PRS is the operating subsidiary company of the collecting society Performing Right Society Limited. PRS manages licences to use the performing right in musical works and provides operational services to its parent company. The members of PRS are songwriters, composers and music publishers in the UK. The turnover of PRS in 2015 was approximately £333 million in the UK.

Background and rationale

18. PPL and PRS both operate as 'collecting societies', which are also known as 'collective management organisations' (**CMOs**). There are many different CMOs operating in the UK that manage and license different rights in a range of creative works. CMOs are typically member organisations, acting for their members (who are the businesses or individuals who own or control the rights in the creative works) on a not for profit basis. A CMO allows users of creative works to obtain a licence across multiple works rather than having to obtain a licence from every single right holder separately.
19. The rationale of the transaction, according to the Parties, is to simplify public performance licensing for the benefit of music users and the Parties' members. The Parties submitted that the JV will enable a joint, single licence for public performance music users.

Transaction

20. PPL has agreed to combine its public performance licensing business (**PPL-PP**) with PRS's public performance licensing business (**PRS-PP**) in a JV to be controlled by PPL and PRS. The Parties agreed a term sheet on 26 January 2016. Under the term sheet, the Parties set out their intention to enter into a shareholders' agreement in relation to the JV on or before 30 June 2016 and to incorporate the JV by 31 July 2016.
21. As of 18 August 2016 the JV shareholders' agreement has yet to be signed. On 11 August, the Parties informed the CMA that the shareholders' agreement would be signed by the end of August 2016. The Parties also confirmed that the final signed shareholders' agreement in relation to the JV will be consistent with the scope of the JV as described in the merger notice. In particular, the JV will not be permitted to set or negotiate any tariff for UK public performance licences (which shall remain under the control of PPL and PRS in respect of their separate licences).¹

¹ Signed letter from each of PRS and PPL received by the CMA on 11 August 2016.

Jurisdiction

22. A relevant merger situation arises where two or more enterprises cease to be distinct within the timeframe prescribed by the Act and either the turnover test or the share of supply test is met.

Enterprises

23. 'Enterprise' is defined in section 129 of the Act as 'the activities, or part of the activities, of a business.' A 'business' includes 'any ... undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'. The test for an enterprise may be satisfied even if the transferred activities are not conducted for profit.²
24. Each of PPL-PP and PRS-PP provide services otherwise than free of charge. In particular, each provides a service both to copyright holders and to users of public performance licences by obviating the need to negotiate a separate licence between each copyright-holder/licence-user pair. They retain a proportion of the amount collected to cover their costs.
25. Factors indicating the transfer of an enterprise include the transfer of customer records, employees and goodwill (existing customer relationships). The Parties intend to transfer to the JV the following:
- (a) customer records: including (but not limited to) customer data, premises/licensable item data, contact details, historic music usage/licensing details, historic invoice and payment receipt details, historic communications, and information relating to unlicensed premises; and
 - (b) employees: the Parties submitted that the JV will require approximately 200 employees, a material proportion of which will transfer from the Parties. The JV will also have support functions, including legal, business and marketing support, which will provide it with, amongst other things, general and contract-specific advice on the application of tariffs and terms, licensing frameworks, complaints and external market communications. It will also have its own HR, IT and finance functions.
26. The Parties also intend to transfer to the JV the right or authority to collect royalties from licensees on behalf of the Parties, to process invoices, carry out

² See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 4.6 and the cases cited there.

debt collection and manage legal enforcement actions (including copyright infringement claims where appropriate) and to interact with the Tribunal where necessary.

27. The assets and employees transferred to the JV are transferred for an indefinite period and can provide services to a party other than their original employer, ie through the JV to the other parent entity.³
28. It is intended that the JV will also collect fees for Video Performance Limited (**VPL**). VPL is constituted as a separate company to collect fees directly from users for the licensing of music videos when they are played in public (or broadcast). However, VPL does not have its own staff or premises, and instead currently receives licensing and distribution services from PPL, with the cost of such services being recharged by PPL to VPL. Following the creation of the JV, it is intended that VPL public performance licensing will be carried out on behalf of VPL by the JV and, following the deduction of costs, the JV will distribute the net licensing revenues to VPL.
29. PRS currently collects fees on behalf of the Mechanical-Copyright Protection Society (**MCPS**), pursuant to a service level agreement between MCPS and the Performing Right Society Limited. It is also intended that the JV will assume the role of collecting such fees under that agreement [see end note 2].
30. Other opportunities, requests or proposals for the JV to collect fees for other collecting societies might arise over the longer-term.
31. Accordingly, the CMA believes that the activities being transferred into the JV are enterprises.

Ceasing to be distinct

32. Enterprises cease to be distinct if they are brought under common ownership or common control.⁴ Control includes not only a controlling interest, but also de facto control or material influence over the policy of the acquired enterprise relevant to its behaviour in the marketplace, including its strategic direction and its ability to define and achieve its commercial objectives.⁵

³ It is the intention of the Parties that the JV generates only such profit as necessary to meet its working capital requirements, return the investment made by the Parties and to be compliant with transfer pricing rules. Any surplus profits will be returned to the Parties.

⁴ Section 26(1) of the Act. See also [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 4.12.

⁵ Section 26(2) of the Act and paragraph 4.14 of CMA2. See also the CMA decision of 14 November 2014 on [Acquisition by Keolis Amey Docklands Limited of the Docklands Light Railway Franchise](#).

33. PRS will have ceased to be distinct from PPL-PP and PPL will have ceased to be distinct from PRS-PP if, as a result of the Merger, each parent entity gains the ability to exercise material influence over the policy of the enterprise which the other parent entity has contributed to the JV.
34. Since, under the terms of the JV notified to the CMA, each of PPL and PRS will have a 50 per cent shareholding in the JV, each may be expected to have material influence over the policy of the JV. However, the CMA has considered the extent to which key commercial decisions might continue to be taken by the individual parent entities rather than by the JV.
35. The CMA noted that the JV will grant joint public performance licences to music users, collect licence fees from licensees, process any music reporting in relation to those licences, and distribute the net revenues to the Parties, together with accompanying data, for them to distribute onwards to their members and affiliate CMOs that they represent. The JV will also be responsible for managing legal and enforcement actions (including the management of copyright infringement claims) in the event music users have not obtained the appropriate licences, recovering payment for past usage and interacting with the Tribunal where necessary. The JV will handle all general licensee enquiries, complaints and feedback, and will update account information, contact preferences and payment methods on behalf of all customers.
36. Each of the Parties will retain control of its pricing policy for its area of responsibility and will set tariffs for its own rights. The prices for public performance licences are set independently from the setting of prices for other types of licences (eg broadcast, online, or mobile use). Under the terms of the JV notified to the CMA, there is no co-dependency or direct relationship between the prices for the different public performance licences. Accordingly, the Parties will continue to set prices independently.⁶ The prices of other types of licences operated by the parents do not fall under the JV structure.
37. The JV's service fee (the proportion of the licensing fee which is retained by the JV to cover its expenses) will be determined as part of its annual business plan, which will be approved by the JV board, which is comprised of directors appointed by the Parties, and ultimately by the Parties as the JV's shareholders.⁷

⁶ This was confirmed by letters from each of the Parties to the CMA on 11 August 2016.

⁷ It is the intention of the Parties that the JV generates only such profit as necessary to meet its working capital requirements, return the investment made by the Parties and to be compliant with transfer pricing rules. Any surplus profits will be returned to the Parties.

38. The recruitment of copyright holders is not one of the functions of the JV as this activity will remain with the Parties separately. However, the JV will have strategic and commercial objectives and will be expected to build and manage relationships with new and existing licensees.
39. The CMA noted that the assets and employees transferred to the JV by each party are transferred for an indefinite period to come under the common control of the other party.
40. Overall, the CMA believes that PPL and PRS may gain the ability to exercise material influence over the policy of the JV, and that the JV will have the ability and responsibility to take some key commercial decisions which will affect the competitive behaviour of both the businesses being transferred into the JV. In particular, under the terms of the JV notified to the CMA, the JV will (i) control its own fee setting, (ii) build and manage relationships with new and existing licensees, (iii) have an annual business plan setting out its strategic and business objectives; and (iv) control significant assets transferred indefinitely from each of PPL-PP and PRS-PP.
41. The CMA believes that, accordingly, it may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the businesses being transferred into the JV ceasing to be distinct from their parent entities and ceasing to be distinct from each other.

Turnover test

42. The turnover of PPL-PP in 2015 was approximately £76 million in the UK; and the turnover of PRS-PP in 2015 was approximately £175 million in the UK.
43. The turnover test in section 23(1)(b) of the Act, read with section 28(1)(b) of the Act, is therefore met.

Conclusion

44. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
45. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 23 June 2016 and the statutory 40 working day deadline for a decision is therefore 18 August 2016.

Counterfactual

46. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.⁸
47. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

48. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.⁹

Product scope

49. The Parties each provide services to both music users and copyright holders and the CMA has considered product scope separately with regard to each.

⁸ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

⁹ [Merger Assessment Guidelines](#), paragraph 5.2.2.

The supply of copyright licences for the public performance of recorded music to music users

50. When a recorded piece of music is played in public, royalties are generally payable by the music user in relation to two types of copyright and to two copyright holders:
 - (a) Copyright of the composition and lyrics (ie the musical work), owned by writers/composers and publishers; and
 - (b) Copyright of the sound recording, owned by record companies and performers.
51. The Parties submitted that most music users active in the public performance of recorded music require a licence from both PRS and PPL.
52. The CMA found that the Parties operate in different relevant product markets. PRS licences the use of copyright in musical works (ie composition and lyrics) on behalf of songwriters, composers and publishers whereas PPL licences the use of copyright in sound recordings on behalf of record company and performer members.
53. The CMA found that the collection of royalties from the use of copyright in musical works and in sound recordings are complementary activities since, for example, anyone engaged in the public performance of recorded music in the UK will usually be required to pay for both (ie to obtain licences from both PPL and PRS).
54. The CMA found there to be:
 - (a) no demand side substitution between the different rights licensed by the Parties. This view was supported by third parties that responded to the CMA; and
 - (b) no supply side substitution. There are high barriers to PPL entering into the supply of licences for the use of copyright in composition and lyrics (PRS's activity) and vice versa.
55. The CMA considered whether any alternatives exist for music users to each of the Parties' licences that would justify widening either product frame of reference.
56. The Parties stated that potential alternatives, such as royalty free music, have a very limited repertoire of music, indicating that they would be a poor alternative for many music users. While one music user told the CMA that it may be possible to play cover versions that are not part of the PPL-PP

repertoire, several others indicated that no viable alternatives exist to each of the Parties' licences.

57. The CMA has therefore assessed the impact of the JV in the following product frames of reference:
- (a) licensing the use of copyright in composition and lyrics, owned by writers/composers and publishers; and
 - (b) licensing the use of copyright in sound recordings, owned by record companies and performers.

The supply of licensing services to copyright holders for rights relating to the public performance of recorded music

58. Copyright holders stated that the licences and services of the businesses being transferred into the JV (ie PPL-PP and PRS-PP) are not substitutable.
59. The CMA considered whether any alternatives exist for copyright holders to the licensing services provided by PPL-PP and PRS-PP that would justify widening either product frame of reference.
60. The large majority of copyright holders told the CMA that no other organisation could credibly administer and licence their copyrights. This was because either PPL-PP or PRS-PP (as relevant) was best placed to administer and license their copyright, and/or it would be uneconomic or impractical for another organisation to do so.
61. On the basis of this evidence, the CMA has assessed the impact of the JV on copyright holders in the same product frames of reference as set out in paragraph 57.

Geographic scope

62. The relevant geographic market is the UK as this is where the JV will gain the rights to administer and license public performance rights.

Conclusion on frame of reference

63. For the reasons set out above, the CMA has assessed the impact of the Merger in the following frames of reference in the UK:
- (a) licensing the use of copyright in composition and lyrics, owned by writers/composers and publishers; and

(b) licensing the use of copyright in sound recordings, owned by record companies and performers.

64. The CMA has also investigated any effects on copyright holders.

Competitive assessment

Horizontal unilateral effects

65. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.¹⁰ Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects.

66. With respect to both the services provided to music users and to copyright holders, the CMA found that the Parties operate in separate markets and do not overlap. There are therefore no direct horizontal unilateral effects arising from the JV.

67. The CMA nevertheless considered whether and to what extent the Parties may constrain each other and whether this constraint might be lost as a result of the JV. The CMA considered separately whether the JV may give rise to harm to music users and to copyright holders.

Music users

68. The CMA considered whether the JV could result in higher tariffs for music users as a result of:

(a) a reduction in the ability of the Tribunal to resolve tariff disputes raised by music users; or

(b) the JV leveraging any market power in the supply of PRS-PP licences to the supply of PPL-PP licences.

The ability of the Tribunal to resolve disputes

69. The Parties' licences are not substitutes so the JV will not reduce the bargaining power of music users by removing an option for them to switch (or

¹⁰ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

threaten to switch) from one party to the other. This was confirmed by third parties who told the CMA that the Parties do not currently place a constraint on each another. The costs of purchasing licences from PPL and PRS are set out in published tariff lists and customers of both parties indicated that they are not able to use the pricing of one of the Parties to influence the pricing of the other.

70. Music users are, however, able to take disputes with the Parties to the Tribunal. The CMA considered whether, and to what extent, the Tribunal may compare the Parties when resolving disputes and setting tariffs. To the extent that it does benchmark the Parties' tariffs, one Party may constrain the tariff setting behaviour of the other.¹¹
71. The CMA noted that, for example, in *PPL v BHA, BRC (2009)* the Tribunal took into account a comparison of the Parties' tariffs (although it noted that a direct comparison between PPL-PP and PRS-PP tariffs was difficult). However, the Tribunal concluded in that case that previously negotiated tariffs were a closer comparator.
72. During the CMA's market investigation, the Tribunal did not raise any specific concerns regarding the JV. The Tribunal told the CMA that, if it were unable to compare the Parties' tariffs, this would not significantly affect its ability to determine fair compensation. This is because as it has to look at the market overall and to take account of all relevant considerations.
73. On the basis of this evidence, the CMA believes that the JV will not significantly affect the Tribunal's ability to resolve disputes. Similarly, it will not weaken any music user's bargaining power derived from the threat of referring a dispute over tariffs to the Tribunal.

The JV leveraging any market power in the supply of PRS-PP licences to the supply of PPL-PP licences

74. Several music users expressed concern that PRS tariffs are higher than PPL tariffs and that the JV could therefore result in higher tariffs. Several also noted that their relationship with PRS is more difficult than with PPL and they expressed concern over how the JV may alter their relationship with the Parties.

¹¹ The CMA considered it appropriate to assess the impact of any possible lessening of ability to benchmark the Parties against one another. The CMA acknowledges that the Parties have stated that they will continue to set tariffs for each type of licence independently (although tariff metrics may be aligned).

75. While the nature of the relationship between music users and the Parties may change as a consequence of the JV, the CMA noted that the Parties will continue to be bound by EU Regulation,¹² that they will remain subject to oversight by the Tribunal and that music users will continue to have recourse to the Tribunal in the event of disputes over tariffs. Moreover, as the Parties do not overlap, the CMA found no reason to believe that the JV would increase the Parties' market power in any market.

Copyright holders

76. All of the Parties' members who responded to the CMA's merger investigation said that the licences/services of the Parties are not substitutes. Many said that if either Party tried to raise their fees/commission the member would look to the respective boards to resist such changes. The boards of PPL and PRS are made up of prominent members who act in the best interests of all members. All members who responded were supportive of the JV (many strongly supportive) with several pointing to the prospect of efficiencies.

Conclusion on horizontal unilateral effects

77. For the reasons set out above, the CMA believes that music users' ability to negotiate prices for their licences will be unaffected by the JV as the Parties do not compete and there is limited benchmarking between their pricing. In the event of a dispute over pricing levels, the Tribunal remains able to intervene. The CMA also found no concerns arising for copyright holders. Accordingly, the CMA found that the JV does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to any frame of reference.

Barriers to entry and expansion

78. Given that the CMA has found that the Merger does not give rise to competition concerns on any basis, it has not had to consider barriers to entry or expansion.

Third Parties

79. Third party comments have been taken into account where appropriate in the competitive assessment above.

¹² Collective Management of Copyright (EU Directive) Regulations 2016

Decision

80. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the UK.
81. The Merger will therefore **not be referred** under section 33(1) of the Act.

Andrew Wright
Director, Mergers
Competition and Markets Authority
18 August 2016

End note 1: the CMA notes that front-office functions will be provided to third parties (as well as the JV partners).

End note 2: the Parties requested that the CMA note that in relation to the service level agreement between MCPS and the Performing Right Society Limited, the JV will collect fees for MCPS relevant to public performance.