

Anticipated acquisition by LN-Gaiety Holdings Limited of MCD Productions Unlimited Company

Decision to refer

ME/6808/18

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges for reasons of commercial confidentiality.

Introduction

1. LN-Gaiety Holdings Limited (**LN-Gaiety**), via its wholly-owned subsidiary, LN-Gaiety Holdings Ireland Ltd, has agreed to acquire MCD Productions Unlimited Company (**MCD**) (the **Merger**). LN-Gaiety together with its parent company Live Nation Entertainment, Inc., and MCD are together referred to as the **Parties** and, for statements referring to the future, the **Merged Entity**. Live Nation Entertainment, Inc. supplies ticketing services through its subsidiary Ticketmaster [✂].
2. On 11 July 2019, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).¹
3. On the date of the SLC Decision, the CMA gave notice of the SLC Decision to the Parties pursuant to section 34ZA(1)(b) of the Act. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of

¹ See <https://www.gov.uk/cma-cases/ln-gaiety-holdings-mcd-productions-merger-inquiry>.

the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 18 July 2019); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.

6. On 18 July 2019, Live Nation (Music) UK Limited (**Live Nation**²) and Ticket Shop (NI) Limited (**Ticketmaster**³) offered a behavioural undertaking to the CMA for the purposes of section 73(2) of the Act (the **Proposed Undertaking**).
7. Ticketmaster offered an undertaking not to terminate the current contract it has in place with [REDACTED] (**Aiken**) and, if requested by Aiken, to renew the contract no later than when it expires on the same financial and non-financial terms or, upon agreement between Ticketmaster and Aiken, on changed terms that are not less favourable to Aiken.
8. With regard to the financial terms of the contract, Ticketmaster offers the following terms:
 - (a) [REDACTED] granted to Aiken would not be lower than [REDACTED] and [REDACTED] in the current contract with Aiken;
 - (b) The [REDACTED] paid to Aiken would continue to be based on Aiken's [REDACTED] over the duration of the new contract, and [REDACTED] would remain the same or better as under the current contract. Aiken's [REDACTED] would not be lower than [REDACTED] under the current contract, unless otherwise agreed by Ticketmaster and Aiken. If Aiken requests [REDACTED] to Ticketmaster in the new contract, Aiken's [REDACTED] would be adjusted [REDACTED];
 - (c) [REDACTED] would not be increased for Aiken's events unless it is also increased for other events ticketed by Ticketmaster on the island of Ireland; and

² Live Nation (Music) UK Limited is a subsidiary of Live Nation Entertainment Inc. In the Proposed Undertakings and for the purposes of this decision, reference to Live Nation includes its successors and assigns, and Live Nation Affiliates. Live Nation Affiliates are all undertakings or persons which, directly or indirectly, control Live Nation (Music) UK Limited, undertakings directly or indirectly controlled by Live Nation (Music) UK Limited and/or by the ultimate parents of Live Nation (Music) UK Limited, including MCD.

³ Ticket Shop NI is a subsidiary of Ticketmaster [REDACTED]. In the Proposed Undertakings and for the purposes of this decision, reference to Ticketmaster includes its successors and assigns, and Ticketmaster Affiliates. Ticketmaster Affiliates are all undertakings or persons which, directly or indirectly, control Ticket Shop (NI) Ltd up to Ticketmaster [REDACTED], undertakings directly or indirectly controlled by Ticket Shop (NI) Ltd and/or by Ticketmaster [REDACTED].

- (d) [X] would not be higher than the [X] in the current contract.
9. Ticketmaster offered to comply with the terms of this new contract and to renew the contract as many times as requested by Aiken during a ten-year period, subject to applicable laws.⁴
10. The undertaking described in paragraphs 7 to 9 is referred to as the **Access Undertaking**.
11. To reinforce the Access Undertaking, Live Nation and Ticketmaster offered an undertaking that, for a ten-year period, any contract or other negotiations in respect of the supply of primary ticketing services to promoters would be conducted on an arm's length basis.⁵ Specific measures associated with the performance of this undertaking are set out below.
12. Live Nation and Ticketmaster offered that:
- (a) A decision to approve the conclusion by Ticketmaster of an agreement with a promoter and the terms of that agreement would be taken solely by Ticketmaster without any direct or indirect involvement of Live Nation or its personnel;
 - (b) Ticketmaster and its personnel would not disclose to Live Nation or its personnel information about past, current or future agreements or other negotiations with promoters;
 - (c) Live Nation or its personnel would not solicit information from Ticketmaster about past, current or future agreements or other negotiations with promoters;
 - (d) The finance and accounting departments of Live Nation and Ticketmaster would remain distinct with no overlap in personnel; and
 - (e) Access to Ticketmaster's IT systems would remain prohibited to Live Nation and its personnel, with the exception of the legal, HR and IT departments.
13. The undertakings described in paragraphs 11 and 12 are referred to collectively as the **Arm's Length Undertaking**.

⁴ The term would commence on the date on which undertakings would be accepted by the CMA.

⁵ "Arm's Length Basis" is defined in the Proposed Undertaking as meaning Ticketmaster acting independently and in its own interest at an arm's length on the basis of normal commercial conditions and in compliance with paragraph 12, including offering financial and non-financial terms that are at least as favourable as those offered prior to these undertakings.

14. The Proposed Undertaking also provides for a dispute resolution procedure to settle disputes between a promoter and Ticketmaster in relation to: (i) the Access Undertaking; and (ii) the undertaking to supply primary ticketing services to promoters on an arm's length basis described in paragraph 11 (the **Dispute Resolution Procedure**).
15. In addition, Live Nation and Ticketmaster offered certain measures to ensure compliance by their personnel with the Proposed Undertaking (referred to as the **Compliance Measures**) including: (i) written guidelines to relevant Live Nation and Ticketmaster personnel regarding their obligations under the Proposed Undertaking; (ii) a written protocol implementing the Arm's Length Undertaking; and (iii) procedures pertaining to the Dispute Resolution Procedure. The guidelines and protocol would be subject to CMA approval.
16. Live Nation and Ticketmaster further offered to send, each year and until the end of the ten-year period, a report to the CMA explaining how the Proposed Undertaking has been implemented in the previous calendar year.

Assessment of the Proposed Undertaking

17. In the SLC Decision, the CMA concluded that it is or may be the case that the Merger may be expected to result in an SLC as a result of vertical effects in relation to the promotion of live music events with a capacity of over 1,000 tickets on the island of Ireland, including in Northern Ireland. In its SLC Decision, the CMA found that the Merged Entity has the ability and may have the incentive to foreclose rival promoters using Ticketmaster, and the strategy would have the effect of reducing competition in the UK (**Identified SLC**).⁶
18. The SLC Decision states that if, pursuant to section 73A(2) of the Act, the CMA decides that there are no reasonable grounds for believing that it might accept any undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.
19. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting undertakings in lieu of a reference (**UILs**), to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies proposed must be clear-cut and capable of ready implementation.⁷ This means, amongst other things, that the

⁶ SLC Decision, paragraphs 137 to 190.

⁷ CMA Guidance, [Merger Remedies of 13 December 2018 \(CMA 87\)](#), paragraph 3.27.

CMA must be confident that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and that all potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.⁸

20. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).⁹
21. At phase 1, the CMA is generally unlikely to consider that behavioural undertakings will be sufficiently clear-cut to address the identified competition concerns, as behavioural undertakings bring a number of risks which can reduce their effectiveness or create competition concerns elsewhere, and can be difficult to monitor and enforce.¹⁰ Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural UIL offers. In particular, the CMA will consider behavioural undertakings where it considers that divestment would be clearly impractical or is otherwise unavailable. Mergers raising vertical concerns are potentially more suitable to some form of behavioural undertaking, as are mergers in markets in which there already exists a significant degree of regulation.¹¹
22. The design of behavioural remedies should seek to avoid four particular risks:
 - (a) Risks that the conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance, and thus may be insufficiently specific to allow effective enforcement (**specification risk**);
 - (b) As behavioural remedies generally do not deal with the source of an SLC, risks that other adverse forms of behaviour may arise if particular forms of behaviour are restricted (**circumvention risk**);
 - (c) Risks that the remedy may create market distortions that reduce the effectiveness of the measures and/or increase their effective costs (**distortion risk**);

⁸ CMA 87, paragraph 3.27.

⁹ CMA 87, paragraphs 3.30 and 3.31.

¹⁰ CMA 87, paragraphs 3.32 and 7.4.

¹¹ CMA 87, paragraph 3.32.

(d) Risks that the remedy may be ineffectively monitored or enforced, for example, as a result of the complexity of information required to monitor compliance; limitations in monitoring resources; and asymmetry of information between the monitoring agency and the business concerned (**monitoring and enforcement risk**).¹²

23. In the present case, the CMA assessed: (i) the effectiveness of the Proposed Undertaking to address the Identified SLC; and (ii) whether the Proposed Undertaking is capable of ready implementation. Having carefully considered the Proposed Undertaking, the CMA does not believe that it is a comprehensive and clear-cut solution to the concerns identified in the SLC Decision, including on the basis of the specification, circumvention and monitoring and enforcement risks set out below.

Effectiveness of the Proposed Undertaking to address the Identified SLC

24. For a remedy to be comprehensive and clear-cut, there must be no material doubts about the overall effectiveness of the remedy in relation to the substantive competition assessment.¹³

Access Undertaking

25. The CMA is not confident that the Access Undertaking would comprehensively address the Identified SLC, as it has the following material doubts about its scope and effectiveness.

(a) Although the Access Undertaking specifically refers to financial and non-financial terms of the contract, it focuses to a significant degree on the financial terms. Accordingly, the CMA has doubts as to whether the Access Undertaking would sufficiently and comprehensively address the entirety of the CMA's concern in relation to the Identified SLC.

(b) The CMA also has doubts as to whether the non-financial terms or the delivery of the contract, for example relating to the relevant service level and quality, could be set out with sufficient clarity and without the need for further investigation before its acceptance to ensure the effectiveness of the Proposed Undertaking to address the Identified SLC. The CMA therefore has not been able to rule out potential specification and circumvention risks in relation to non-financial terms.

¹² CMA 87, paragraph 7.4.

¹³ CMA 87, paragraph 3.28 (a).

- (c) While the Access Undertaking aims to address concerns regarding the potential worsening of financial terms of a renewed contract with Aiken, there remain a number of uncertainties. For example, the Access Undertaking does not sufficiently regulate what happens if payments are not made on time or which amounts may be offset. The CMA therefore has doubts as to whether it comprehensively addresses the entirety of the Identified SLC and has not been able to rule out circumvention risks.
- (d) The Access Undertaking sets out that if Aiken's contract with Ticketmaster, on agreement of Ticketmaster and Aiken, is renewed on changed terms, the terms of the new contract should be "not less favourable to Aiken". The CMA notes that a future contract between Ticketmaster and Aiken would be the result of negotiations with concessions likely being made on either side. In order to establish whether the contract terms are "no less favourable", a thorough assessment of the contract would likely be required. The CMA observes the inherent uncertainty involved in the future assessment of a complex package of negotiated commercial terms. The CMA therefore has doubts as to the effectiveness of the remedy and has not been able to rule out specification risks.

26. Based on the above, the CMA has material doubts about the comprehensiveness and effectiveness of the Access Undertaking with regard to Aiken's current and proposed new contract.

Arm's Length Undertaking

27. The CMA is not confident that the Arm's Length Undertaking would be effective in reinforcing the Access Undertaking as it has the following material doubts about the scope and effectiveness of the Arm's Length Undertaking:
- (a) While the Arm's Length Undertaking makes provision for communication, "involvement" and information barriers, the CMA considers that it may not prevent Ticketmaster from taking into account Live Nation's wider interest in its commercial activities with promoters in Northern Ireland. The CMA therefore has doubts as to its effectiveness and has not been able to rule out circumvention risks.
 - (b) While the Compliance Measures provide for a protocol and guidelines to support compliance with the Arm's Length Undertaking, the CMA considers that it would be difficult to be specific enough in such documents to prevent Ticketmaster from taking into account Live Nation's wider interest. The CMA therefore has doubts as to the effectiveness of

the Arm's Length Undertaking and has not been able to rule out specification and circumvention risks.

Whether the Proposed Undertaking is capable of ready implementation

28. In order for the Proposed Undertaking to be acceptable it must also be capable of ready implementation.¹⁴ Behavioural remedies typically require ongoing monitoring and enforcement, which can give rise to risks.

Access Undertaking

29. The CMA considers that the specification and circumvention risks described at paragraphs 25(b) to 25(d) above also raise significant doubts in relation to the implementation of the Access Undertaking.
30. The Access Undertaking relies, following an initial 15 working day period, on the Dispute Resolution Procedure for monitoring and enforcement, which the CMA notes may be costly and cumbersome for promoters (even using the "fast-track" procedure). The CMA considers that arbitration, even if conducted on a fast-track procedure, is typically time and resource consuming and may be perceived as an option of last resort for promoters. Therefore, the CMA has some concerns as to the risks of ineffective monitoring and enforcement.
31. In addition to the concerns identified above, while the Dispute Resolution Procedure provides for participation by the CMA in the procedure, the CMA does not believe that this resolves the monitoring and enforcement risks associated with the Access Undertaking, owing to the complexity of information required for the CMA to monitor compliance and the asymmetry of information between the CMA and the business concerned.
32. Finally, for the same reasons as set out in paragraph 27(b) above, relating to specification risks, the CMA has material doubts about whether the Compliance Measures would effectively ensure compliance with the Access Undertaking and has not been able to rule out monitoring and enforcement risks.

Arm's Length Undertaking

33. The CMA considers that effective monitoring of the Arm's Length Undertaking requires an understanding of the internal considerations taken into account by Ticketmaster when negotiating with a promoter. The CMA considers it likely to be very difficult for a promoter to have the requisite knowledge to be able to

¹⁴ CMA 87, paragraph 3.27.

monitor compliance or effectively enforce non-compliance. Therefore, the CMA has material doubts about the appropriateness of the Dispute Resolution Procedure to effectively support the monitoring and enforcement of the Arm's Length Undertaking.

34. In addition, the shortcomings of the Dispute Resolution Procedure outlined at paragraph 30 above (ie it being cumbersome, time and resource consuming and potentially perceived as an option of last resort) also apply with regard to its application to the Arm's Length Undertaking. The CMA also notes that the Dispute Resolution Procedure only applies to the first limb of the Arm's Length Undertaking summarised at paragraph 11 above, and is therefore limited in scope.
35. Notwithstanding the inclusion of Compliance Measures, the CMA has doubts as to whether: (i) yearly compliance statements provided to the CMA would be sufficient to effectively monitor compliance given the specification and circumvention risks identified; (ii) the Compliance Measures comprehensively identify all possible breaches of the Arm's Length Undertaking; and (iii) any potential breach would be identified in a timely manner.
36. For all the reasons set out above, and in the light of the requirement for an undertaking at phase 1 to be clear-cut, the CMA has material doubts about the effective implementation, monitoring and enforcement of the Proposed Undertaking. The CMA also notes that the Dispute Resolution Procedure and Compliance Measures would not relieve the CMA of its statutory duties under section 92 of the Act¹⁵, with the resultant potential difficulties in monitoring and enforcement that this may create, particularly in relation to asymmetry of information between the CMA and the business concerned.

Decision

37. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to address the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
38. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
39. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under

¹⁵ CMA 87, paragraph 7.6.

Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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