

## **LIVE NATION/HAMSARD RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES**

### **INTRODUCTION**

1. The parties contest the Competition Commission's (*CC*) provisional findings that Hamsard's acquisition of a controlling interest in Academy may be expected to lead to a substantial lessening of competition (*SLC*) as a result of a loss of rivalry between Hammersmith Apollo/Brixton Academy and SBE/Astoria/Forum. In particular, the evidence on which the CC has relied is insufficient to substantiate a provisional finding of SLC. Please refer to the parties' separate submission to the CC on the CC's Provisional Findings report (*PFs*) (*PF Response*).
2. Live Nation's/Hamsard's comments on possible remedies should be read in the light of the parties' PF Response.
3. Furthermore, if (which is denied), a Hamsard/Academy merger would result in an SLC, each of Options 1 or 2 outlined in the CC's Notice of possible remedies (*Remedies Notice*) would be disproportionate, particularly in light of the constantly evolving venue landscape and the likely competitive situation in the short to medium term.
4. This submission therefore concentrates principally upon those behavioural remedies which would remedy the CC's competitive concerns and which would, in all the circumstances, be reasonable, practicable and proportionate.

### **BEHAVIOURAL REMEDIES**

5. The CC's primary concern about a Hamsard/Academy merger is that it might result in venue rental increases or deterioration in service quality.
6. The CC's reservations as to adequacy of behavioural remedies appear to be that:
  - (a) "venue rental prices are charged in a number of different ways...creating difficulties for effective control and monitoring";
  - (b) similar difficulties arise with a behavioural remedy regarding continuing provision of facilities/infrastructure and service quality; and
  - (c) "behavioural remedies would not maintain effective competition and could only address the adverse effects expected to result from the SLC".

We address each of these reservations below.

### **FRAMING/MONITORING A VENUE RENTAL PRICING REMEDY**

7. While venue hire pricing can differ substantially as between different venues, the pricing at each individual venue (whether the venue's chosen venue pricing structure is flat fee, percentage of box office with option to cap rental etc.) is relatively straightforward and unchanging as compared with many products and

services supplied in the UK. This is so, in particular, as regards the venue rental pricing at each of the Hammersmith Apollo, Brixton Academy, SBE, Astoria and Forum (*the five venues*):

- (a) The CC has recognised that the venue hire charges at the five venues have been relatively **stable** over the past three years<sup>1</sup>. This is because promoters need certainty as regards venue rental prices when planning tours.
- (b) For the same reason (i.e. that promoters need to know with certainty what rates particular venues charge), venue rental prices are also highly **transparent**. The Hammersmith Apollo uses a standard rate card and the venue rental prices of Brixton Academy, SBE, Astoria and Forum are communicated to promoters and so are well known.
- (c) The five venues almost always charge venue rental prices at the then prevailing rate, with very few exceptions (e.g. very occasionally, the venue may give a reduction to a promoter whose ticket sales have been very poor).

8. Furthermore, Hamsard has previously indicated to the OFT and to the CC that its intention is to offer equal terms to all promoters, which will simplify the venue rental pricing at the Brixton Academy and SBE, compared to the current pricing (which offers volume discounts to certain high-usage promoters).

9. Therefore, even if current venue rental pricing structures at each of the five venues (which no-one has suggested are at other than competitive levels) comprise a number of options (e.g. minimum price; option to pay a capped rental) and some additional components (security etc), these are **known** and **transparent** for each of the five venues. Furthermore, any increase in the venue rental prices at any of the five venues would be immediately apparent to agents/promoters<sup>2</sup>.

10. For the above reasons, Live Nation/Hamsard do **not** accept that there are real difficulties in effectively monitoring and enforcing a remedy comprising:

- (a) publication of ratecards for each of the five venues, covering all price components with sufficient specificity to permit the price for any given booking to be established without further discussion;
- (b) ratecard prices (including percentages of box office, level of venue rental cap, discounts for multiple nights etc.) to be no higher than those prevailing on 1 November 2006;
- (c) increases in the venue rental prices at each of the five venues to be no more frequent than annual and to be applicable only to pencils made after publication of the increases;

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<sup>1</sup> See paragraph 6.9 of the PFs. See also paragraph 2.23 of the parties' submission of 26 October 2006.

<sup>2</sup> Since agents/promoters hire the same venue repeatedly during the year and their number is smaller than the number of buyers in many retail or service markets in the UK, they would easily detect any increase in the venue rental prices at any of the venues.

- (d) increases in the venue rental prices at each of the five venues not to exceed RPI. While some input costs of the venues, such as utilities, security, statutory employment costs, are effectively outside Live Nation's and Hamsard's control, Live Nation/Hamsard recognise the need for simplicity and so are not requesting the ability to reflect supra-inflationary increases in those items; and
- (e) the ability for the parties to request the OFT to consider whether this remedy remains necessary in light of prevailing market conditions but not before the expiry of a three year period. Even if the CC eventually concludes that a Hamsard/Academy merger may be expected to give rise to an SLC there is every reasonable expectation of effective competition within that period given recent/expected entry (Roundhouse, O2 Dome, Royal Festival Hall) and expected expansion (Alexandra Palace, Coronet, Hammersmith Palais).

### SERVICE QUALITY

11. In light of the parties' (self-evident) statements that the success of any venue depends on the venue operator consistently meeting the needs of artists, agents, promoters and audience as regards all relevant non-price factors (including backstage facilities, security levels, bar facilities and so on), the PFs disclose that the CC has no firm expectation of any adverse effect as regards any particular non-price factors (paragraph 6.31).

12. Nevertheless, the CC has provisionally concluded that the merger "would give the merged group an incentive to reduce its **discretionary expenditure where this does not significantly impact upon attendance, ancillary sales and artist's willingness to appear at its venues.**"

13. The parties are at a loss to understand how this issue (which even by the terms in which it is expressed, has no significance) can be given any sensible weight. All investments in venue facilities and infrastructure by Live Nation and Hamsard are clearly aimed at significantly enhancing the attractiveness of the venue from the viewpoint of one or other of these customer sets. The CC appears to have accepted that the parties' would have no incentive to reduce the level of such investments.

14. Furthermore, if the CC could concretely identify any such discretionary expenditure which does not have an impact on audience attendance or artist/agent/promoter choice of the venue, then such expenditure is clearly not competitively significant (in that it could not have any impact on the extent to which the five venues compete for bookings or ticket sales) and so any such reduction could not be characterised as an adverse effect "resulting from the SLC" (as required by section 41 of the Enterprise Act).

15. Nevertheless, Live Nation and Hamsard have every intention of continuing to invest in the facilities, infrastructure and service quality at the five venues. For instance, Live Nation's capital expenditure on venues in other regions where there is little or no competition from competing venues (e.g. Liverpool; Sunderland) shows that **Live Nation continues to invest in its venues for their own sake irrespective of the presence or absence of third party venues.** Further, Live Nation is

recognised as a leader in terms of customer service (e.g. Live Nation won an award at the 2005 National Customer Service Awards for its customer care training program).

16. Specifically as regards the target venues, one of the main commercial drivers for the proposed transaction is to expand the merged group's venues "footprint" to attract marketing partners<sup>3</sup> – such strategy will require additional investments in the Academy venues rather than a reduction in expenditure.

17. While the parties would expect the CC, on further reflection, to lay aside its concerns in this area, the parties are nevertheless prepared to discuss a straightforward commitment to: (i) maintain current projected levels of investment at each of the Hammersmith Apollo, Astoria and Forum in facilities, infrastructure, maintenance and so on – consistent with Live Nation/Hamsard's current detailed investment intentions; and (ii) ensure equivalent investment levels in the Brixton Academy and SBE (including applying Live Nation/Hamsard's existing procedures for reviewing investment needs and executing investment decisions to the Brixton Academy and SBE).

#### **ADDRESSING SLC/ADVERSE EFFECTS**

18. Sections 36(3) and 41(2) of the Enterprise Act require the CC to take such action as is "reasonable and practical" to "remedy, mitigate or prevent" as comprehensively as possible the SLC and any likely resulting adverse effects. The Act therefore requires the CC to have regard in particular to the proportionality of a proposed remedy as well as to its effectiveness.

19. Therefore, the Enterprise Act does not preclude the CC from accepting the behavioural remedies outlined above, where, as in this case, any adverse effects resulting from the merger would be transitory at most. In fact, given the transitory nature of such adverse effects, it would certainly be disproportionate for the CC to require the divestment of venues.

20. There is every reason to expect that the impact on the market of known recent entrants, known imminent entrants and known imminent venue expansions will remove any suggestion of SLC within the short to medium term, even if (which the parties dispute), the impact of these developments cannot be sure to achieve this within two years (which is the time frame which the CC has focused on).

21. The market developments which will ensure such an outcome include<sup>4</sup>:

- (a) the entrenchment of the Roundhouse's position as a favoured venue for live music performances, competing with the five venues: even if it limits its live music output in line with the policy reported by the CC, it will very rapidly be offering 84 shows a year;

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<sup>3</sup> See paragraphs 3.3 – 3.4 of the parties' Statement of Case.

<sup>4</sup> Not to mention more distant market developments (but already on the horizon), such as the facilities being put in place at the London Olympic Village in East London which will include venues (such as the Velodrome) which could be used for live music events.

- (b) the establishment of the “short” O2 Arena and the Live Music Club (opening in July 2007 and already taking bookings), as venues competing with the five venues. There has also been speculation in the industry of the O2 Dome complex including an additional 3,500 capacity live music venue, although the parties’ are not aware of any announcements confirming this;
- (c) the announcement in the latest brochure issued by the O2 Dome that its 1,800 capacity theatre will have Cirque du Soleil as one of its resident shows. Cirque du Soleil is currently resident at the Royal Albert Hall (showing from 5 January – 4 February 2007), so this development will free up additional available capacity at the Royal Albert Hall;
- (d) the imminent investments in the necessary infrastructure (e.g. drapes, staging and lighting trusses) at the Alexandra Palace to facilitate live music event bookings for single/multiple nights; and
- (e) the plans by the Hammersmith Palais and the Coronet to target more aggressively live music bookings.

Please refer to paragraphs 3.6 – 3.8 and 4.1 – 4.9 of the parties’ PF Response for a more detailed explanation of why these developments mean that there is every reason to think that within 2 – 3 years, the fact that Brixton Academy and SBE are owned by the same group that owns Hammersmith Apollo, Astoria and Forum will not confer any ability on the merged group to increase rental prices at the five venues above competitive levels.

#### **OPTION 1 – OUTRIGHT PROHIBITION**

22. Sections 36(3) and 41(2) of the Enterprise Act requires the CC to take only such remedial action as is “reasonable and practical” to remedy, mitigate or prevent the SLC and the resulting adverse effects.

23. The SLC identified by the CC in its PFs arise only by virtue of Hamsard acquiring control of the Brixton Academy and SBE. There are no issues arising from Hamsard’s acquisition of control of the other Academy venues.

24. Therefore, it would be disproportionate for the CC to prohibit Hamsard from acquiring the controlling stake in Academy, as this would prevent Hamsard from acquiring control of many venues in respect of which no SLC arises. This is particularly the case given that there are less intrusive remedies open to the CC which would comprehensively remedy the CC’s competition concerns - in particular, the behavioural remedies outlined above in relation to the London venues.

#### **OPTION 2 – PARTIAL DIVESTITURE**

*The behavioural remedies outlined above are an effective and more proportionate remedy than partial divestment and would secure customer benefits*

25. For the reasons outlined in paragraphs 8 – 22 above, the behavioural remedies which Live Nation and Hamsard are proposing would remedy the CC’s competition

concerns, would be straightforward to control and monitor and would be limited in duration. Therefore, these remedies would be equally effective to partial divestment in terms of remedying the CC's competition concerns. In such circumstances, it is incumbent on the CC to "choose the remedy that imposes the least cost or that is least restrictive"<sup>5</sup>, in this case the behavioural remedies outlined above.

26. Furthermore, there are a number of customer benefits which will arise by virtue of Hamsard's acquisition of control of the Academy venues (including Brixton Academy and SBE):

- (a) Live Nation/Hamsard will make **increased investments in venue facilities and infrastructure**, compared to current investment levels at the Academy venues. These are benefits which will specifically accrue to the users of the Brixton Academy and SBE (as well as users of the other Academy venues), and to the extent that a particular Academy venue is required to be divested, this benefit will not accrue to users of the divested venue;
- (b) the combination of Live Nation's and Hamsard's existing venues with those of Academy (including Brixton Academy and SBE) will enable the parties to offer **more attractive marketing partnerships to prospective partners**, which is in itself a merger-dependent customer benefit. It is true that some of the incremental revenues derived from such marketing partnerships would likely be reinvested in the parties' venues (although such investments in the target venues are not dependent on this);
- (c) Academy has pursued for the past few years a strategy of seeking to open new venues in cities which are not currently served (at all or adequately) with "city hall" live music venues (most recently Newcastle and Oxford). The acquisition of control of Academy by Hamsard **will permit Live Nation/Hamsard to fund a more aggressive strategy of opening new venues in such cities**, i.e. it can be expected that the roll-out of such strategy will happen more quickly and so will secure the advantages of a local "city hall" live music venue to more people in the UK more quickly. Again, this is a merger-dependent customer benefit which will not accrue if the transaction is abandoned because the CC insists on the divestment of Brixton Academy.

*Partial divestment by means of venue lease would be a more proportionate and more effective remedy than partial divestment by outright sale of venue*

27. The CC is considering whether divestment by means of a lease (rather than an outright sale) would be an effective remedy.

28. In the Remedies Notice, the CC appears to contemplate only a long-term lease. However, in light of the likelihood of market forces removing any competition concerns as regards the proposed transaction within the short to medium term, it would be appropriate (and proportionate) for the CC to permit Live Nation/Hamsard a

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<sup>5</sup> CC Merger Reference Guidelines (CC2), at paragraph 4.9.

break clause in any such lease (say, from year 5 onwards<sup>6</sup>), which would enable Live Nation/Hamsard, with OFT consent, to bring the venue back within the group as soon as market developments have removed regulatory concerns.

29. The CC is concerned that the lease holder would retain a degree of influence over the venue, thereby compromising the operator's independence and that such a solution would be overly complex.

30. In the parties' view, the CC's concerns are unfounded. Venue operators generally regard arms-length leases on standard commercial terms as perfectly acceptable – in fact, most of the Live Nation and Hamsard venues are leased rather than owned (see Live Nation's and Hamsard's responses to Question 50 of the Market Questionnaire). In particular, a lease with the following characteristics should not give rise to any concerns as regards the venue operator's independence:

- (a) rent at market rates, unaffected by trading performance;
- (b) standard tenant covenants;
- (c) no ability for the lessor to forfeit and itself re-occupy; and
- (d) no lessor influence over the leased venue as a business.

31. The risk of the venue operator either changing the use of the venue or going out of business would not be increased by the venue operator leasing (under the above terms) rather than owning the venue. Indeed, where the venue is leased, in the event of tenant failure Live Nation/Hamsard can be obliged to find another tenant willing to take on the venue as a live music venue (a safeguard which would be lost in the event of outright sale).

#### *Divestment of individual venues to individual lessees*

32. As regards whether different venues may be leased to different lessees, as each of the venues are already effectively operated as stand-alone businesses<sup>7</sup>, there is no reason why prospective purchasers would be dissuaded from buying venues as separate stand-alone businesses.

33. Further, the extent to which the parties venues currently compete with each other (and so a purchaser's ability to maintain the competitive presence of an individual venue) is not impacted by whether they are owned by a firm with other venue interests. For instance, the Royal Albert Hall, the Roundhouse and KoKo are effective competing venues although not part of a wider venue portfolio.

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<sup>6</sup> Although there is every reason to expect that market developments will have removed the CC's competition concerns in the next two – three years, the parties recognise that prospective lessees would probably prefer a slightly longer lease term of five years.

<sup>7</sup> The Academy venues do not operate central booking. Neither do the Forum and Astoria. Most of Hammersmith Apollo's bookings are made directly with the venue.

*No need for up-front lessees*

34. The venues in question are existing stand-alone profitable on-going concerns and there is no reason to suppose that it will be difficult to generate interest from prospective lessees (with experience of operating live music venues) within a fairly short time-frame (such as a six-month period which the CC's guidelines<sup>8</sup> indicate would be acceptable).

35. Further, the venues are not likely to deteriorate as going concerns during the divestiture period. In particular, as Live Nation/Hamsard will be leasing venues that they hope to reacquire (with OFT consent) once market developments have removed the CC's competition concerns, Live Nation and Hamsard would have no incentive to take any steps to reduce the competitiveness of a venue pending its lease.

36. In short, this is not a case where the CC should have any concerns about the need for an up-front lessee.

**CONCLUSION**

37. In conclusion, and while the parties continue to dispute the provisional SLC finding, they firmly believe that, in a case where only 2 out of 11 acquired venues are thought to create transitory concerns, behavioural remedies are by far the most reasonable and proportionate response.

38. As regards partial divestiture, while such a remedy would be disproportionate to the CC's concerns, a requirement for Live Nation/Hamsard to lease one or more venues on the terms indicated above would be more proportionate (and more effective) than to require the outright sale of one or more venues.

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<sup>8</sup> CC's Guidelines on the Application of Divestiture Remedies in Merger Inquiries (CC8), at paragraph 5.5.