

PROVISIONAL FINDINGS

PARTIES' RESPONSE

1. SUMMARY

1.1 This submission constitutes the parties' response to the Commission's Provisional Findings report and the conclusions reached in that report. While we were encouraged to see that the Commission has now understood many aspects of the industry, there remain areas where we fundamentally disagree with the view reached by the Commission. This submission highlights the most important areas of disagreement that remain and that have a material effect on the conclusion that there could be a substantial lessening of competition as a result of the transaction.

1.2 In summary, we remain firmly of the view that the evidence supports a finding that there would be no lessening of competition:

- (a) The Commission's conclusion that, on the basis of characteristics and availability, there are no third party venues which are realistic substitutes for the parties' London venues, is simply not supported by the evidence. The Commission has misinterpreted key pieces of evidence to reach this conclusion. Moreover, the Commission has ignored basic facts relating to the live music events that are being hosted by third party venues today.
- (b) There are alternative third party venues for each of the parties' venues and the competitive constraints exerted by these venues will remain post-transaction.
- (c) Moreover, competitive constraints will increase considerably in the next year to 18 months as a result of the planned entry and expansion of at least six venues. The Commission refers to only three of these venues in its Provisional Findings, and draws erroneous conclusions about the availability of one.
- (d) Further entry in two years is neither difficult nor expensive and indeed would be expected given the nature of the industry and the desire of artists and fans to find new experiences. The example of the Roundhouse shows how easily a new venue can attract bookings and the fact that the venue is experiencing a "honeymoon period" is entirely beneficial to the venue, which can rapidly build its reputation as a result.
- (e) The competitive constraint arising from the considerable buyer power of agents will also remain post-transaction. Not only will there remain a set of credible alternative venues from which agents can choose, but agents can also exercise their buyer power through sponsoring entry and thereby restoring that choice (if one believed it had been diminished).
- (f) Finally, even if one were to doubt the evidence that points to a continuation of these competitive constraints post-transaction, the only possible merger effect would be in relation to prices. There are no dimensions in relation to the quality of venues or the service that they provide that could be influenced by the merger. The Commission presents no evidence to suggest otherwise.

1.3 We discuss each of these points in detail in the remainder of this document. We begin, however, by identifying the important points of agreement with the Commission.

2. AREAS OF AGREEMENT BETWEEN THE COMMISSION AND THE PARTIES

2.1 It would appear that there are now many areas of agreement between us and the Commission. In terms of the effects of the transaction, we agree that:

- There will be no lessening of competition in promotion services, either as a result of unilateral or co-ordinated horizontal effects.
- There will be no lessening of competition either in promotion services or venue operation as a result of vertical effects.
- There will be no effect on bar prices at the venues.
- There can be no expectation that the merger will adversely affect ticketing commission or merchandising commission levels.

2.2 While we do not agree with the conclusions that the Commission has reached in relation to competition between venues, there are issues relevant to the assessment on which we agree:

- Agents have considerable buying power over both promoters and venues such that agents have the ability today to constrain venue prices.
- Venues of different sizes are (within certain bounds) substitutable for one another for certain artists and agents.
- Venues of different types are substitutable for certain artists and agents, such that there are occasions on which theatres are an alternative to venues that predominantly stage live music events.¹
- Outdoor venues are substitutable for indoor venues at certain times of the year for certain artists and agents.

2.3 We return to the issue of both buyer power and venue substitutability below as these do not appear to have been fully taken into account in the Commission's assessment of the constraints that will remain on the merged parties post-transaction.

2.4 The remainder of this submission describes the areas of disagreement that remain.

¹ Theatres are specifically mentioned by promoters and agents as providing an alternative to booking the Hammersmith Apollo (see paragraph 43 of Appendix F of the Commission's Provisional Findings report).

3. EXISTING THIRD PARTY ALTERNATIVES TO THE PARTIES' VENUES

3.1 The Commission appears to have reached the view that the parties' venues are each other's closest competitors and "*in each case, there appears to be limited realistic scope for substitution of third party venues given their characteristics and availability*"². This conclusion is not supported by the evidence that is available. In reaching this view the Commission has therefore either: (a) misinterpreted the evidence; and/or (b) chosen to disregard valid evidence.

The Commission's conclusions on availability are not supported by the evidence

3.2 In relation to venue availability, the Commission has found that the Royal Albert Hall held 52 live rock and pop music events in 2005³ and has 15 nights available for bookings in the next 12 months⁴. The interpretation that the Commission has placed on the 15 available nights is unclear; it is possible that the Commission has interpreted this as the largest number of live music events that could be held in the Royal Albert Hall in the next 12 months. However, this would be entirely wrong.

3.3 There are three flaws in the Commission's interpretation of the available evidence in relation to the Royal Albert Hall:

- (i) the Commission has not taken into account any live rock and pop music events that are already booked in the Royal Albert Hall over the next 12 months - evidence which is directly relevant to whether the Royal Albert Hall can be and is booked for this type of event;
- (ii) there is every reason to believe that there will be a substantial number, since the Royal Albert Hall has staged close to 60 events per year in each of the last five years⁵ - a piece of evidence that the Commission appears to have ignored in reaching its conclusions on availability; and
- (iii) the Commission states that artists would find it difficult to book the Royal Albert Hall given limited availability if artists might not have sufficient flexibility in tour dates⁶ - no evidence is presented to support the view that artists do not have flexibility

3.4 The evidence clearly points to the fact that the Royal Albert Hall consistently has availability for up to 60 live rock and pop music events each year and probably considerably more. The evidence cannot be used to support the view that availability is limited.

3.5 All of the above points also relate to Earl's Court, which had 40 nights available over the next 12 months. Before making a statement that availability is

² Paragraph 5.10 of the Commission's Provisional Findings report.

³ Figure 2, Appendix F of the Commission's Provisional Findings report.

⁴ Table 4, Appendix F of the Commission's Provisional Findings report.

⁵ See the historic diaries for the Royal Albert Hall submitted to the Commission on 8 November 2006.

⁶ See paragraph 20 of Appendix F of the Commission's Provisional Findings report.

limited at Earl's Court, the Commission needs to be clear whether there are already bookings made for live music events over that period.

3.6 Similarly, the Commission's conclusions in relation to availability at the Roundhouse are not supported by the evidence. The Commission reports two pieces of evidence that suggest limited availability. First, one agent told the Commission that it perceived availability at the Roundhouse to be limited. This is entirely consistent with the immediate success that the Roundhouse has had, with 20 bookings for live music events to the end of January.⁷ The Commission cannot rule out this interpretation. Moreover, it is interesting that only one agent reported a lack of availability. If it were truly the case, one would have expected the same to be reported by other agents and promoters. Indeed, the fact that not more promoters and agents raised the issue of availability at the Roundhouse actually suggests that there is no lack of availability.

3.7 Second, the Commission refers to the Roundhouse business plan, which allows for 12 weeks of private bookings per year, including live music events. The interpretation given to this statement in the business plan is key. A first observation is that a statement in the business plan does not mean that 12 weeks of private bookings is fixed in stone. Second, can the Commission be certain that the 12 weeks represents the maximum and not the minimum number of bookings sought? The latter would be more consistent with the Commission's write up of the plan, specifically that the 12 weeks are "*dedicated to private hires, ... , in order to generate income to support other activities*"⁸. Moreover, even if only 12 weeks were to be allocated to live music over the course of a year, this would constitute 84 nights, which is approximately the same number as is typically held at the Forum.⁹

3.8 It is also worth being clear what the relevant benchmark should be when considering whether venues have limited availability. The test should be whether alternative venues have **sufficient** availability to impose a competitive constraint on the parties' venues post-transaction. Given the small number of shows that must be lost by a venue to make a price rise unprofitable (which has been accepted by the Commission¹⁰), a third party venue with only 10 nights available would individually be able to exert such a constraint. More importantly, collectively third party venues have far in excess of this level of availability. Any analysis of the degree of competitive constraints needs to be analysed for third party venues collectively, including the role played by alternative venues such as theatres and outdoor venues (see below).

The Commission's conclusions on costs do not match its analysis

3.9 In the main report, the Commission implies that the Royal Albert Hall might not be a good substitute for the Hammersmith Apollo because it has "*a higher venue cost (both in absolute terms and cost per person)*"¹¹. However, this conclusion does

⁷ See paragraph 5.13 of the Commission's Provisional Findings report.

⁸ *Op cit.*

⁹ There were 92 live music events held at the Forum in 2005 and 68 in 2004.

¹⁰ In its Horizontal Competitive Effects Working Paper (Table 4 and paragraph 34) the Commission calculates that it would be sufficient for the Brixton Academy to lose about two shows for a 5% price increase to be unprofitable.

¹¹ See paragraph 5.9(a) of the Commission's Provisional Findings report.

not match the discussion of the relevance of venue cost contained in Appendix F to the report, where the Commission states that “*We considered that examination of venue hire prices in terms of levels (either overall or on a per person basis) was not informative of the extent of substitutability between venues because of the number of other factors on which venues also compete*”¹². If venue cost does not inform the degree to which venues are substitutable (with which we would agree) then it cannot be that the Royal Albert Hall can be ruled out as a substitute venue on the basis of its venue hire cost.

3.10 Moreover, even if one thought that venue costs did matter in the choice of venue, then there would still be a differential in rents between Hammersmith Apollo (£3.03 per person seated) and Brixton Academy (£4.18 per person seated). The equivalent figure for the Royal Albert Hall is £4.60. The comparison of the venue rental per person between the Royal Albert Hall and Brixton Academy is the appropriate one when considering the degree to which these venues impose a constraint on Hammersmith. This comparison shows very little difference between the two.

Third party venues are alternatives given their characteristics and availability

3.11 Thus, on the basis of the characteristics and availability of third party venues, the evidence simply does not support a finding that there are no third party venues that are realistic substitutes for the parties’ venues.

3.12 Indeed, the evidence in relation to characteristics and availability actually points to the Royal Albert Hall being a closer substitute to the Hammersmith Apollo than Brixton is. The Royal Albert Hall is largely a seated venue attracting exactly the same type of rock and pop artists that tend to play the Hammersmith Apollo.

3.13 Moreover, the evidence clearly shows that there are alternative venues that artists use on a regular basis. Although the number of live rock and pop events held at third party venues may have historically been lower than the number held at the third party venues, all of the evidence in Appendix F shows that third party venues can be and are used regularly for the types of events in question. In addition, as noted above, it is the collective not individual use of these venues that matters.

Significant concerns remain regarding the third party questionnaire responses

3.14 While the Commission has provided responses to each of our many concerns relating to the third party questionnaires, we do not feel that the Commission has adequately recognised the fundamental problems with this analysis and why it should carry limited weight alongside the other evidence presented. It remains the case that:

- (i) The questions asked are simplistic and *do not* allow agents and promoters to give answers that genuinely reflect the choices open to them. The questions force agents and promoters to answer across the range of acts they promote or represent with the effect of identifying a set of substitutes applicable to only one type of act. How can this be appropriate when there are many different types of acts that are

¹² See paragraph 22, Appendix F of the Commission’s Provisional Findings report.

represented all with different preferences? We do not accept that one should sacrifice a proper understanding of alternative venues to obtain a better response rate.

- (ii) The promoters responding to the questionnaire *do not* constitute more than one third of third party promoters using Wembley Arena, Hammersmith Apollo and the Forum. It is not appropriate to artificially inflate these percentages to reflect the share of live music promotions at these venues, as the Commission has done for Wembley and Hammersmith¹³; these venues are multi-functional and their terms are set with respect to all users not just with live music in mind. Promoters responding account for a very small proportion of these events.
- (iii) It is not true that the questionnaire asks truly forward-looking questions as the Commission claims¹⁴. In relation to choices of alternative venues, the questionnaire asks only about the alternative choice of venue for an agent or promoter if the first choice of venue was unavailable. A truly forward-looking question might alternatively ask about the use that agents and promoters expect to make of the venues opening and/or expanding next year.

3.15 The Commission has no reason to believe that the responses received to the third party questionnaire are more reliable than the evidence on alternative venues that we have provided. Moreover, the Commission has not asked the appropriate questions that would allow it to determine whether this is the case, despite the fact that we have asked the Commission to do this.

The Commission cannot dismiss the evidence relating to Brixton's profits

3.16 The Commission raises a concern about evidence relating to the effect of the Hammersmith re-launch on the profitability of Brixton. In the ideal, one would wish to consider actual profits against some measure of profits in the counterfactual situation. Unfortunately, we are not in an ideal situation and do not have the evidence to suggest what the counterfactual should have been.

3.17 However, it is not clear to us why the Commission therefore thinks it appropriate to entirely dismiss the evidence that we have supplied, particularly when the other evidence on which it relies is itself imperfect (see comments above). The lack of an established counterfactual should not detract from the fact that the number of events hosted at Brixton rose by over a third at a time when one might have expected a fall (given the Commission's belief in relation to the closeness of competition between Brixton and Hammersmith).

3.18 In addition, we are confused by two additional points raised by the Commission¹⁵.

¹³ See Table 5, Appendix F of the Commission's Provisional Findings report.

¹⁴ See Paragraph 36(c), Appendix F of the Commission's Provisional Findings report.

¹⁵ See Paragraph 81(c) and (d), Appendix F of the Commission's Provisional Findings report.

- (i) What does the Commission mean when it says that “configuration is only one factor on which venues compete and other factors may also have had an impact on any change in these measures”? Is the Commission saying that, despite having the same configuration and capacity as Brixton following its refurbishment, Hammersmith was not viewed as a credible alternative to Brixton for “other reasons”?
- (ii) Why is the duration of the refurbishment of Hammersmith a relevant consideration? We do not understand this comment.

Summary

3.19 In the discussion above we have identified areas where we do not feel that Commission has adequately addressed our concerns and where the Commission has reached inappropriate conclusions on the basis of the available evidence. It is clear that the Commission cannot support its findings in relation to the closeness of competition using these arguments.

3.20 Moreover, the remaining evidence that is presented by the Commission in support of its view is entirely backward looking and its validity in relation to informing the closeness of competition looking forward must also be questioned. We discuss this below.

3.21 Finally, we note that the Commission takes no account in its analysis of competing venues of the constraining effect of the venues listed under paragraph 2.2 of this paper. The Commission has acknowledged that these venues do provide a constraint for some artists and events, but has failed to incorporate this effect in its analysis of competing venues and the competitive constraints that would continue to exist post-transaction.

4. OTHER CONSTRAINTS THAT WILL REMAIN POST TRANSACTION

4.1 We have argued that three constraints will remain on the parties post-transaction: recent and planned entry and expansion by venues; entry of brand new venues; and buyer power. The Commission’s analysis and evidence does not support a finding that these effects are insufficient to counter any attempted post-transaction price increases and the Commission’s view appears to be based on only a partial assessment of the information available to it. The gaps in the Commission’s analysis are highlighted below.

Recent and planned entry and expansion

4.2 The Commission correctly identifies that it is necessary to consider the effect of recent and planned entry and expansion on competition in the near future (one year to 18 months). However, the Commission’s analysis is partial in this regard.

4.3 First, the Commission only considers the effect of entry/expansion by three venues (the Roundhouse, Royal Festival Hall and the O2 Dome) when in fact we know of at least three additional venues that have the intention of hosting more live music events from next year. A full analysis would need to include:

- (i) Hammersmith Palais, which will be targeting a greater number of live music events in 2007.¹⁶
- (ii) The Coronet, which has recently been re-launched and also has the intention of hosting a larger number of live music events from next year onwards.¹⁷
- (iii) Alexandra Palace, which is being refurbished by its current owner with a view to having better infrastructure for live music events.

4.4 Second, the Commission's analysis of the three venues is flawed. In particular, as has been discussed above, it is not the case that availability is limited at the Roundhouse so as to weaken it as a competitive constraint.

4.5 We cannot provide any more concrete evidence on the role that will be played by the new and expanding venues in 2007 and 2008. However, it cannot be denied that there will be a substantial addition to London's capacity to host live music events brought about by third party operators next year, with six venues either entering or seeking to expand. The Commission has not reflected this fact in its thinking on future venue substitutability.

New entry in less than two years

4.6 The evidence relating to the ease of entry all points to entry being easy to achieve:

- (i) there are many examples of new entry that demonstrate this - five venues have opened in the last six years;
- (ii) the costs are low – between £1 million and £5 million to create a venue similar to those owned by the parties;
- (iii) marketing costs are low;
- (iv) the time taken need not be extensive – the physical conversion can be achieved within a year;
- (v) developing business relations can take time – but this can be reduced by “sponsorship” of new entry by agents and promoters as has been experience by the Roundhouse in its “honeymoon period”; and

¹⁶ See paragraphs 2.4 and 3.9 of the note on Venue Substitutability that we submitted on the 7th November 2006 in response to the Commission's analysis of the available evidence.

¹⁷ See paragraph 16(d) of the Commission's Addendum to the Horizontal Competitive Effects Working Paper, in which the Commission mentions that the Coronet is targeting (a redacted number of) live music shows in 2007.

- (vi) finding a suitable site can take a year – but given the number of recent entrants in the last six years, this is clearly not insurmountable.

4.7 Given this evidence, the Commission reaches the view that (unless circumstances are favourable) entry is not sufficiently likely to take place within two years such that entry can be relied on to provide a constraint on the merged parties.

4.8 However, given the discussion above in relation to recent and planned entry, the competitive landscape is **already** expected to change substantially in the next year to 18 months as a result of the entry and expansion of six venues for live music. This discussion regarding de novo entry suggests that one might expect competitive constraints to increase to an even greater degree beyond two years.

4.9 It is not clear, therefore, why the Commission remains uncertain about the degree to which the parties' venues will face competitive constraints in the future. There is a considerable volume of evidence that points to substantial increases in competition.

Buyer power will act to constrain the merged parties

4.10 The existence of the new and/or expanded venues described above will mean that there is no significant reduction in the choices of venues available to agents and promoters and consequently no reduction in the buyer power that agents possess.

4.11 However, if one were to argue that this would be the case, the power that agents wield over promoters and venues is so substantial that there would be limited scope for price increases even given a weakening in this buyer power. This source of continued power over venues results from two sources:

- (i) There is a sufficient number of acts represented by each agent for which there are choices of alternative venue (other than the merged parties' venues) and for which the costs of choosing that alternative venue are low. Agents will use these acts strategically to continue to obtain low venue rental prices from the parties' venues post-transaction.
- (ii) The power of agents is not constrained to choices of existing venues. As we have explained on many occasions, agents have the scope to support new entry in venues simply by providing a few acts to tour there. The merger has no effect on this important source of buyer power.

4.12 Neither of these effects is considered by the Commission in its rather cursory treatment of the diminution of agent power post-transaction¹⁸.

4.13 It would appear the agents themselves are not concerned about post-transaction price increases, which were mentioned by only two agents that the

¹⁸ See paragraph 6.17(b) of the Commission's Provisional Findings report.

Commission spoke to, one of which felt that on balance it would have sufficient weight with the venues to prevent this from happening¹⁹.

Summary

4.14 Were the Commission to take into account all of the above points in its analysis of competitive constraints looking forward, there is every reason to believe that sufficient competitive constraints will remain to constrain the merged parties. Moreover, these competitive constraints will increase.

5. ANY MERGER EFFECTS WOULD BE CONFINED TO PRICE EFFECTS

5.1 Notwithstanding all the arguments above, if the Commission were to take the view that there could be a merger effect, the Commission has presented no evidence to support the view that this could take the form of a reduction in service quality as opposed to a price effect.

5.2 First, the Commission has not been clear which non-price factors the parties invest in that do “*not significantly impact upon attendance, ancillary sales and artists’ willingness to appear at its venues*”²⁰. All of the factors that the Commission identifies²¹ – such as reputation, provision of facilities – are factors that impact on artists’ choices of venues, as recognised by the Commission earlier in its report²². The Commission therefore needs to tell us:

- (i) to which factors it is referring when it considers there might be a loss of service quality; and
- (ii) why the parties are investing in these factors now if it is not to improve attendance or the willingness of artists to play at the parties’ venues.

5.3 Second, if the Commission can identify such factors that do not impact on attendance, ancillary sales or artists’ willingness to play at a venue (which would be surprising), it is not clear why one would expect there to be a reduction in investment in these factors brought about by a reduction in competition between venues. By definition, the factors that have been identified are not related to the competitive process.

5.4 Third, since the total magnitude of these factors is (a) small and (b) does not by definition impact on customers or consumers, prohibiting the merger on the basis of concerns over service quality would be disproportionate.

¹⁹ See paragraph 5.24 of the Commission’s Provisional Findings report and the *Summary of hearing with an Agent* and *Summary of hearing with an artist’s agency* on the Commission’s website.

²⁰ See paragraph 6.31 of the Commission’s Provisional Findings report.

²¹ See paragraph 6.29 of the Commission’s Provisional Findings report.

²² See paragraph 6.4 of the Commission’s Provisional Findings report.