



Hamsard and Academy Music

A report on the proposed acquisition of a controlling interest in Academy Music Holdings Limited by Hamsard 2786 Limited

23 January 2007

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The Competition Commission has excluded from this report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂].

**Proposed acquisition of a controlling interest in Academy Music Holdings
Limited by Hamsard 2786 Limited**

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Summary

The reference

1. On 21 August 2006, the Office of Fair Trading (OFT) referred the proposed acquisition of a controlling interest in Academy Music Holdings Limited (Academy) by Hamsard 2786 Limited (Hamsard) a company jointly controlled by Live Nation Music (UK) Limited (Live Nation) and Gaiety Investments Limited (Gaiety) to the Competition Commission (CC) for investigation and report. The reference was made under section 33(1) of the Enterprise Act 2002 (the Act). We published our provisional findings on 5 December. We are required to publish our final report by 2 February 2007.

The parties and the transaction

2. Live Nation is a wholly-owned subsidiary of the US company Live Nation Inc. Live Nation owns a 50.1 per cent share in Hamsard and has interests in live music venues through ownership and/or management of 27 venues throughout the UK (including four in London); live music promotion, in its own and third party venues, and promotion of music festivals; provision of agency services; promotion of theatrical and arts performances. Its London venues are the Hammersmith Apollo, the Apollo Victoria, the Lyceum, and the Dominion Theatre.
3. Gaiety is an Irish company jointly owned by Dennis Desmond and Caroline Downey, which has a 12 per cent shareholding in Academy and a 49.9 per cent shareholding in Hamsard. It promotes live music indoor events and festivals in Scotland and festivals in England.
4. Hamsard acquired all of the Mean Fiddler Music Group in 2005. Hamsard has interests in concerts, festivals, touring, and venue management. Hamsard manages the Wembley Arena under contract. Mean Fiddler owns and manages seven venues in London (Forum, Astoria, Mean Fiddler, Jazz Café, Garage, Borderline, and Upstairs Garage).
5. Academy owns and manages 11 live music venues in the UK (including four in London) and has a small in-house promotions business, Academy Events. Academy's London venues are Carling Academy Brixton, Shepherd's Bush Empire (SBE), Carling Academy Islington, and Bar Academy Islington. Academy is 51 per cent owned by three private equity funds led by RJD Partners; 12 per cent each by Dennis Desmond, Robert Angus, and Simon Moran, the latter two owners of promotions businesses (Metropolis Music (Metropolis) and SJM Concerts (SJM), respectively) which are major users of Academy and Live Nation venues; and 13 per cent by Academy management.
6. In June 2006 RJD reached agreement on the sale of the private equity funds' shares and loan notes in Academy to Hamsard. We found that this arrangement, if carried into effect, would result in the creation of a merger situation qualifying for investigation on the basis that the acquisition of Academy by Hamsard would lead to the share of supply of live music venues in London of over 1,000 capacity under the control of Live Nation increasing, and amounting to more than one-quarter in total. The parties did not contest this.

The relevant markets

7. In this inquiry we focused on two separate services being supplied by the merging parties:
 - (a) live music venue management, provided by Live Nation, Gaiety (through Bar None Management Limited), Hamsard, and Academy at venues owned or operated by each company across Great Britain; and
 - (b) live music promotion services, provided by Live Nation, Gaiety (through DF Concerts), and Academy Events.

Venues

8. The parties and third parties told us that choice of a venue depended on location, availability, capacity, ambience and music genre, configuration between standing and seated, facilities, cost, service quality, and artist preference. The parties stated that there was no clear line defining the product market; and that it included those venues perceived by artists, agents, and promoters as offering comparable facilities and thus substitutable for the venues owned by the parties. The parties and third parties told us that London constituted a distinct geographic market for popular live music events.
9. We found that since the extent of substitutability of one venue for another depends upon a range of factors, the relative importance of which depends upon the event being staged, the extent of the competitive constraint of one venue on another will vary. In general there is limited substitution of outdoor venues for indoor venues, of venues used predominantly for other purposes for venues regularly used for popular live music, or between venues of significantly different capacities, although each of these may occur in particular circumstances. Similarly, there is limited substitution of venues outside of London for those within London. However, these are generalizations and rather than define the market in terms of them we considered each of the venues operated by the merging parties individually and examined the competitive constraints on that venue.

Promotion services

10. The parties suggested that the key factor in an agent choosing a promoter is the share of profits or guaranteed fee that the promoter is offering to the artist, and that promotion services can be carried out by any adequately financed promoter or even by an agent. They accordingly suggested that the product market covers the promotion of all live entertainment, and that the geographic market should be the UK. However, we were told by third parties that artists and agents have a preference to work with certain promoters and we saw very few examples of agents providing promotion services, possibly because promoters have to bear most of the risk of organizing a tour and so it is not an attractive option when the agent is already guaranteed a proportion of the artist's share of profits.
11. We concluded that the relevant market is no wider than live music promotion services in the UK and that it was unnecessary for the purposes of our inquiry for us to decide whether there are narrower product or geographic markets.

Venue by venue competition

Outside London

12. We examined four pieces of evidence—competing venues as ranked by the parties; ‘lost show’ reports identifying shows at other venues which Academy thought its venues could have staged; types of show at each venue; third party views on alternative venues. Our analysis shows that none of the merging parties’ venues outside London is in close competition with any other.

Inside London

13. A similar analysis of competition between venues in London indicated that the parties’ venues appeared to be competing. We therefore undertook a further analysis of the competitive interaction between these venues and third party venues, drawing in more detail on evidence on:
 - (a) factors on which venues compete;
 - (b) number of live music events;
 - (c) responses to our questionnaire to promoters and agents;
 - (d) overlap of artists between venues;
 - (e) usage of venues by promoter;
 - (f) Academy ‘lost show’ reports;
 - (g) the parties’ analysis of alternative venues for events held at the Hammersmith Apollo, the Brixton Academy and the SBE; and
 - (h) an assessment by the parties of the impact on the Brixton Academy of the re-opening of Hammersmith Apollo following its refurbishment and the installation of removable seating in 2003.
14. Our analysis shows that although the parties’ venues of up to 1,000 maximum capacity compete with one another in some cases (for example, Islington Academy with Mean Fiddler) there are a significant number of alternative third party venues with which the main party venues compete (including the Scala, ULU, Underworld, 100 Club, Bush Hall, Electric Ballroom, Metro, Cargo, and Kings College). We concluded that any impact of the merger on competition is therefore likely to be primarily in relation to the parties’ larger venues.
15. The parties own or operate six venues in London with a maximum capacity over 1,000—Wembley Arena, Brixton Academy, Hammersmith Apollo, SBE, Astoria, and the Forum. We considered 11 third party venues as possible alternatives—the O2 Dome, Earl’s Court, the Royal Albert Hall, Alexandra Palace, the Roundhouse, Hammersmith Palais, the Royal Festival Hall, Coronet, KoKo, Barbican and the London Palladium. Taking all the evidence together, on the basis of our analysis we concluded that substitutability is greater between Brixton Academy and Hammersmith Apollo than from either of those to any third party venue. Similarly, substitutability between SBE and the Astoria is greater than to any third party venue. The Forum is also a significant substitute for the SBE. In each case, there appears to be limited realistic scope for substitution of third party venues given their characteristics and availability.

16. The parties told us that, as a result of entry, venue choices are sufficiently different from those that existed in 2005 to render historic data of limited relevance. We consider that there is some prospect of increasing competition from third party venues, including from the Roundhouse, Royal Festival Hall, and O2 Music Club, but concluded that we cannot rely on future competition from these venues to provide a sufficient constraint to offset the impact of loss of rivalry between the parties' venues.

Competitive constraints on venues

Negotiating strength of agents and promoters

17. We considered carefully the negotiating strength of agents in relation to both promoters and venue operators. We consider it likely that agents representing extensive rosters of popular acts are in a strong position in relation to promoters. However, the ability of agents to constrain venue operators depends ultimately upon their ability to switch acts from one venue to another. Although it appears to us likely that leading agents representing extensive rosters of popular acts are currently in a position to constrain the ability of venue operators to increase venue prices, or reduce quality, the effect of the merger is to reduce the range of alternative venues not controlled by the parties. We concluded that, given the reduction in the range of alternative venues not under common control post merger, we cannot be confident that the buyer power of agents would be sufficient to ensure that the merger would not lead to adverse effects.

Entry and expansion

18. We also considered the extent of constraints arising from new entry and expansion. In the light of our earlier analysis, we focused on the prospects for entry or expansion of venues that might provide a competitive constraint to one or more of the Hammersmith Apollo, Brixton Academy, SBE, Astoria, and the Forum. We took the view that for this purpose we should give limited weight to entry or expansion expected beyond two years. Whilst our examination of recent entry suggested that under particularly favourable circumstances entry from a previously unidentified source within two years in response to a rise in venue hire prices (or a reduction in non-price competition) at one of the venues listed above could not be ruled out, we heard no evidence to lead us to believe that this was likely.
19. We concluded that the threat of entry or expansion (or actual entry or expansion) within a timescale relevant to our inquiry from venues not already under development (ie new entry in response to any increase in venue prices or worsening in non-price competition) is unlikely to provide a competitive constraint upon which we can rely.

Competition in provision of live music promotion services

20. We examined popular live music events promoted by the merging parties. This showed that Academy Events, which promotes events only at Academy's own venues and focuses on small acts, does not compete closely, if at all, with Live Nation.

Counterfactual

21. In deciding whether the proposed merger would be likely to give rise to a substantial lessening of competition (SLC), we needed to compare the competitive situation that we expect following it with that expected to prevail without the proposed merger. We

consider that in the absence of the merger, the most likely outcome would have been that RJD would have kept its investment until 2007 or 2008 and then sought an exit for its investment. We concluded that in the absence of the merger, Academy would remain independent.

Effects of the proposed merger

Horizontal effects in relation to venues

22. On the basis of our findings set out above, we explored in more detail the adverse effects we expect if the proposed merger were allowed to proceed.
23. The parties told us that it would be neither practicable nor economically rational for the merged group to lose agent/promoter goodwill by seeking to raise rents at their venues since any marginal advantage would be insignificant as compared with the inevitable future lost business. This is because only a small number of acts would need to switch to alternative venues to leave the merged group's venues in a less profitable position.
24. Having examined the constraints, we concluded that none was sufficient to ensure that the merged group would not be able to benefit from the loss of competition between the Hammersmith Apollo, the Brixton Academy, the SBE, the Astoria, and the Forum. We therefore concluded that the merger would lead to a worsening in the price and non-price factors on which the parties compete. Our expectation was that this would result in venue prices being higher than would otherwise be the case. We also expected some loss of service quality at the five venues in comparison with the situation that would prevail in the absence of the merger, although the precise nature and extent of this is difficult to assess. We also identified potential issues over ticketing commission and merchandising commission, but did not consider that we had sufficiently clear evidence to form an expectation that these would be adversely affected by the merger.

Portfolio effects

25. We considered third party concerns that the merged group may have the ability and incentive to tie the rental of one venue to another (portfolio effects). We concluded that any portfolio effect is dependent upon the horizontal effect in relation to venues, considered above. Accordingly, we concluded that we did not need to reach a separate judgment on whether the merger would lead to an SLC on the basis of portfolio effects.

Horizontal effects in relation to promotion services, coordinated effects in relation to promotion services and vertical effects

26. We also considered the possibility of horizontal effects in relation to promotion services, coordinated effects in relation to promotion services and vertical effects.
27. On the basis that Academy Events does not compete closely, if at all, with Live Nation and we do not expect them to do so in future, we concluded that we did not expect the merger to lead to an SLC as a result of horizontal effects in relation to promotion services.
28. In view of the limited impact of the merger on most of the factors against which coordinated effects are normally judged, and the competitive constraint that may

arise from the strong position of agents in relation to promoters, we could not reach an expectation that the merger would have a significant impact on the ability of Live Nation, SJM, and Metropolis to engage in coordinated behaviours.

29. We examined the incentives and constraints on the merged group restricting third party promoters from accessing its venues or providing access to its own promoters on favourable terms, using its promotions business to favour its own venues or tying appearances of acts at festivals linked to the merged group to appearances at its indoor venues. We concluded that, whilst the merger has the potential for vertical effects, any impact is likely to be too limited for us to find an SLC on the basis of vertical effects.

Efficiency gains

30. The parties suggested several efficiency gains that they believed would result from the merger and enhance competition in the provision of venues, including greater opportunities for sponsorship; opening of more new venues in 'underserved' cities; and extension of 'one stop' booking for more venues, to the benefit of promoters. We were not convinced that these were dependent on the merger or would provide a sufficient benefit to competition to outweigh or substantially offset the adverse effects we identified.

Conclusion

31. We concluded that the proposed acquisition of a controlling interest in Academy by Hamsard may be expected to lead to an SLC as a result of the loss of rivalry between the Hammersmith Apollo, Brixton Academy, SBE, the Astoria, and the Forum venues, and in particular between the Hammersmith Apollo and the Brixton Academy, between the SBE and the Astoria, and between the SBE and the Forum, leading to a worsening in the price and non-price factors on which the parties compete and, in particular, to rentals at those venues being higher than would otherwise have been the case.

Remedies

32. We considered a number of behavioural remedies proposed by the parties, but concluded that these would not constitute a comprehensive and effective remedy to the SLC we have identified. We concluded that the least cost, least intrusive effective remedy would be partial divestiture of two venues, comprising one of the Brixton Academy and the Hammersmith Apollo plus one of the SBE and the Forum. We were not convinced that partial divestiture through the parties leasing the venues to competitors would ensure effective competition. To avoid sale to a weak or otherwise inappropriate purchaser, the sale should be to a purchaser approved by the CC and according to a sale and purchase agreement approved by the CC. In order to ensure that the partial divestiture remedy was effective we consider that the divestiture would be likely to need to include venue management and booking teams, contracts with customers and suppliers, and the customer (and potential customer) information and contact lists associated with the venues concerned to the purchaser. In addition we consider that the vendors should be required to use their best endeavours to facilitate the transfer of any venue-specific sponsorship arrangements or venue-specific elements of such arrangements to the new owner or owners. We also consider that an 'up-front buyer' should be required.

Findings

1. The reference

- 1.1 On 21 August 2006 the OFT referred the proposed acquisition of a controlling interest in Academy by Hamsard, a Company jointly controlled by Live Nation and Gaiety, to the CC for investigation and report.¹ The reference was made under section 33(1) of the Act. Our terms of reference are set out in Appendix A. We published our provisional findings on 5 December. We are required to publish our final report by 2 February 2007.
- 1.2 In accordance with our terms of reference, if we find that a relevant merger situation has been created, we must decide whether it may be expected to result in an SLC. As explained in our guidelines,² competition is a process of rivalry between firms seeking to win customers' business over time. Our focus, therefore, is on the likely effect of the proposed merger on that process of rivalry.
- 1.3 This document, together with the appendices, constitutes our findings which we are required to notify to the parties under the CC's *Rules of Procedure*.³ Further information, including non-commercially sensitive versions of the parties' and third party written submissions can be found on our website. We cross-refer to these documents where appropriate.

2. Industry background and the companies

*The popular live music industry*⁴

- 2.1 We begin by providing some background information on the popular live music industry relevant to our subsequent discussion of the markets with which we are concerned in this inquiry and competition within them. In particular, we describe the principal actors in the supply chain and the steps involved in negotiating a tour, which are relevant to understanding our subsequent discussion of the participants' respective bargaining strengths in negotiations, and hence constraints arising from the existence of agents' buyer power.
- 2.2 According to the latest Mintel report on music concerts and festivals,⁵ the music concert and festival industry is growing, with rock and pop events being the most popular. Over half of all music events held by National Arenas Association (NAA) members were classified as rock or pop in 2005, totalling 458 concerts with a total attendance of over 3.2 million (average attendance of around 5,000). Over 27 per cent of a nationally representative sample of adults surveyed in Great Britain attended a pop/rock music festival in 2005, an increase of nearly 5 percentage points since 2001. Festivals are particularly buoyant, with the number of summer festivals growing yearly and many of the key events being staged at full capacity and selling out in record time. Attendance at pop concerts/festivals was highest among 25- to

¹In this report we use 'the parties' to refer to Live Nation, Gaiety, Hamsard, Academy, and all organizations with which they are under common ownership or control, 'third parties' to refer to all other organizations (including, for example, organizations that are controlled by shareholders in Academy such as SJM and Metropolis) and 'unrelated third parties' to refer to third parties that are not linked to the parties through share ownership. SJM is controlled by Simon Moran and Metropolis by Robert Angus.

²*Merger references: Competition Commission Guidelines (CC2)*, June 2003.

³*Competition Commission: Rules of Procedure (CC1)*, paragraph 10.3.

⁴In this report we use the term 'popular live music' to include pop, rock, R&B, Dance, MOR, AOR, and urban music—see glossary.

⁵Music Concerts and Festivals, Leisure Intelligence, August 2006.

44-year-olds, but high attendance at rock events was also recorded for 15- to 19-year-olds and 45- to 54-year-olds.

- 2.3 We were told that a notable feature of the live music industry over recent years, not confined to the UK, has been the increasing importance for artists of income from touring. Whereas at one time live music tours were undertaken in large part to promote records, with the artist's record company meeting a significant part of the costs, this no longer occurs and income from touring has become an increasingly important part of an artist's total earnings. There appears to be a widely held expectation that this trend will continue as developments in technology and associated changes within the music industry reduce earnings from sales of recorded music. In parallel with these developments, and possibly related to them, there has been an increase in popular artists' share of ticket revenues. The parties informed us that whereas some years ago it was not uncommon to offer guarantees of 75 per cent of net box office receipts to artists, the norm was now 85 per cent and deals at 90 per cent and above were not uncommon. A very recent development, that may have a significant impact on the price paid for tickets by concert-goers in the future, has been the introduction of Internet ticket auctioning by ticket agents.

The principal participants

- 2.4 The principal types of participant in the industry relevant to our inquiry are:

- artists;
- managers;
- agents;
- promoters;
- ticket agents; and
- venue operators.

Artists

- 2.5 Most artists are self-employed and smaller artists may be part-time. Estimates of the number of musicians active in the pop, rock, and related sectors vary widely depending on whether part-time musicians are included; in 2002, the National Music Council (NMC) estimated that there were about 26,000 professional rock and pop musicians in the UK in 2000.⁶ The NMC estimated that their total income in the 2000 to 2001 financial year amounted to about £364 million. For tours of indoor venues artists normally receive a share of ticket receipts, after expenses, or a guaranteed fee (whichever is higher), and will generally get additional revenue from merchandise sales at the event.

⁶See: *Counting the notes, the economic contribution of the UK music business*, NMC November 2002. Their estimate was based on the Musicians Union membership of 31,000 less an allowance of 5,000 for those active in the classical sector, and was the most recent available data that we identified.

Managers

2.6 Each artist typically has a long-term business relationship with a manager. Managers are responsible for managing the business affairs of the artist, and developing and advancing the artist's career, leaving the artist free to create, perform, and record. Their role usually includes acting as the interface between the artist and record companies, music publishers, agents, promoters, merchandisers, lawyers, and accountants. They generally advise on the appointment of an agent. Managers ensure that touring schedules fit in with the release of recordings and advise their artists on tour plans prepared by agents and promoters. The managers of small and emerging artists may also act as their agents. Managers normally receive a proportion of the artist's net revenue after deducting other fees and expenses. The Music Managers Forum (the MMF) estimated in 2002 that there were about 160 full-time managers that employed staff in the UK and a further 150 that were single-person businesses but still controlled significant acts.⁷ In total the MMF estimated that about 1,000 people were engaged in rock and pop management, including the personal staff of major artists.

Agents

2.7 The main role of agents⁸ is to maximize the income from touring of the artists on their roster. Their role includes planning concerts and tours, agreeing the venues where the artist will perform and appointing promoters. As individual agents generally have a strong personal relationship with managers but weak contractual protection, agency companies are vulnerable to losing business if managers change or their staff are recruited by rival agents. An artist's agent will usually receive a percentage of the payment to the artist for the tour or event (ie of the artist's agreed percentage of the net box office or guaranteed sum, if higher), typically between 10 to 15 per cent, in return for using his knowledge of the market to negotiate with promoters on the artist's behalf.

Promoters

2.8 Promoters can be hired by artists and agents for the promotion of single events or tours. Promoters take nearly all of the financial risk in organizing a tour or concert, usually guaranteeing artists a minimum income from events. Their role includes costing events and tours, and booking venues. Two or more promoters sometimes co-promote tours, thereby spreading the risk between them. Agents tend to have preferred promoters with whom they work regularly. The NMC estimated that about 300 people were employed in promotion in 2000.⁹ The parties informed us that major promoters of popular music included Live Nation, SJM, Metropolis, Marshall Arts Limited (Marshall Arts), Kennedy Street Enterprises Limited (Kennedy Street), 3a Entertainment Limited (3a), All Tomorrow's Parties (ATP), Anschutz Entertainment Group (AEG), CMP Entertainment (CMP), Flying Music Company Ltd (Flying Music), Harvey Goldsmith Productions Ltd (Harvey Goldsmith), and Straight Music Limited (Straight).¹⁰

⁷Ibid.

⁸Also known as booking agents.

⁹Ibid.

¹⁰See paragraphs 5.50 to 5.56 for discussion of the scale of operations of each promotion company.

Ticket agents

- 2.9 The tickets for an event are customarily split between the venue and the promoter.¹¹ Venues normally sell their share of tickets through a ticket agent. The promoter also usually allocates most of his or her share of tickets for sale through a ticket agent (often via a link between their respective websites) and retains a small number for distribution to business associates. Sometimes, when the promoter has sold all his ticket allocation, he may approach the venue for an increased quota (which will normally require a payment to the venue's ticket agent). Ticket agents charge customers a booking fee in addition to the ticket face value and may additionally charge a transaction charge. The majority of ticket sales are now made either by telephone or via the Internet. The OFT has estimated that ticket agents sold 8 million rock and pop concert tickets in 2003.¹² The most prominent ticket agents are Ticketmaster and See Tickets.¹³

Venue operators

- 2.10 Venue operators are generally responsible for the physical operation of all aspects of the venue, with the exception of a few areas, such as merchandising concessions, where space is provided for sales to be made by concessionaires. Some parts of the operation may be contracted out. For example, although many venues operate their own bars and food outlets, some prefer to appoint one or more catering concessionaires. The relative importance of different income streams to venue operators is discussed in paragraph 6.5. Rental charges usually provide for a number of security stewards, a basic box office service and dressing rooms. An additional facilities fee may be payable by the promoter if special security, box office, merchandising, rehearsal or back-of-stage assistance is required. The NMC estimated that about 11,000 people were employed in music venues and festivals in 2000.¹⁴
- 2.11 A diagram summarizing the flows of funds between the participants described above is in Appendix B.

The stages in negotiations between the main types of participant

- 2.12 Organizing a tour involves a number of stages that do not constitute a formalized procedure and may vary considerably from case to case.¹⁵ However, on the basis of the evidence we have received from the parties and from third parties, the following appears to be a reasonable summary of what commonly occurs.

Briefing the agent and initial discussions

- 2.13 The artist's manager first contacts the agent to say that the artist is available for a certain period for touring and asks the agent to seek offers from one or more promoters for a number of shows. Alternatively, the agent may suggest the outline of a tour to the manager, who then discusses it with the artist. The manager, the agent, and a promoter (usually the promoter who has most recently successfully promoted

¹¹See paragraph 6.11 and 6.12 and Table 4 for details of the parties' ticketing arrangements.

¹²*Ticket agents in the UK*, OFT January 2005.

¹³These are sometimes referred to as primary ticket agents. There are also secondary agents that obtain tickets from sources other than the venue for resale at any price the market will bear. This price can be substantially higher than face value.

¹⁴*Ibid.*

¹⁵In considering the interaction between the types of participant, it should be borne in mind that, as personal relationships are particularly important in the music industry, some steps may be less formal where there is a strong relationship between parties.

the artist—referred to below as the 'promoter of record') then meet to discuss possible plans for the tour.¹⁶ Having considered the artist's previous touring history (if any), the agent discusses this with the promoter and proposes the size of fee the artist is seeking; suggests that the tour should consist of, say, ten shows in the UK; sets out provisional dates; and specifies in general terms the type of venue to be used. This outline is then submitted to the manager and the artist and, after any adjustments have been made, is sent to the promoter of record for him to assess the outline in the light of the commercial experience of previous tours. The agent and the promoter then make any necessary modifications.

The promoter of record makes provisional bookings and costs the tour

- 2.14 Once he has agreed a tour outline with the manager and the agent, the promoter of record will be asked to cost the tour using their knowledge of venue rentals, and submits a tour plan and a budget to the agent. These include the route, the venues, and other costs. We received conflicting evidence on whether rival promoters will normally also be invited to cost the tour at this stage, generally without having determined availability of venues, or whether any invitation to alternative promoters is likely to be made later once the agent and promoter of record are negotiating payments to the artist. We also received conflicting evidence on whether several promoters would normally be asked to bid, or whether this occurs only in a minority of cases.
- 2.15 At some point the promoter or promoters will seek to determine the availability of suitable venues on the tour dates and make provisional bookings. The process of making provisional bookings is known as 'pencilling' dates. If a promoter is the first to seek the date concerned they are said to have the 'first pencil'. Subsequent provisional bookings are said to be 'second pencil', 'third pencil' and so forth. At this point the identity of the act may or may not be disclosed to the venue operator.

The agent and the promoter of record negotiate a guaranteed fee

- 2.16 Once the agent has approved the tour plan, he asks the promoter of record how much of the projected revenue he is prepared to offer to the artist, including the guaranteed fee. Negotiations may then take place. The agent will seek to maximize the guaranteed fee. The promoter may then suggest that the target can only be achieved by increasing ticket prices and/or reducing touring costs.
- 2.17 Where other promoters have been sounded out to find out what guaranteed fee they might be prepared to offer, given the proposed tour plan, and another promoter makes a higher bid, the agent is likely to go back to the promoter of record and ask them to match the higher bid. The promoter of record may then agree to match the alternative bid or suggest amendments to the tour plan that would enable them to do so. If no agreement can be reached the agent is likely to seek an agreement with the higher bidder.

The agent submits an offer for approval by the artist and the manager

- 2.18 Once the tour plan and the guaranteed fee have been agreed, the agent submits a recommended offer to the artist and his or her manager. The manager then approves

¹⁶Occasionally the agent may decide to split a tour between two or more promoters, with each promoter either covering a different territory or specializing in a particular aspect of organizing the tour.

the offer after consulting the artist and notifies the agent, who in turn notifies the chosen promoter that the tour is confirmed.

The promoter confirms bookings with the venues

- 2.19 The promoter next contacts the venues seeking to confirm the provisional bookings.
- 2.20 Each venue contacts any promoters who hold a higher pencil (see paragraph 2.15) for any proposed date and ask them whether they wish to confirm their booking. If they do not confirm, typically within 24 hours, their provisional booking is cancelled or moved to another date. The venue then issues a contract to the promoter confirming the date and rental terms.

The promoter starts marketing the performances

- 2.21 The chosen promoter will start marketing the performance and putting tickets on sale as soon as possible after being appointed. They will also firm up practical arrangements with any tour manager. Ticket sales are closely monitored and occasionally venues may be switched or ticket allocations altered.

The parties

- 2.22 We now briefly describe the parties involved in the proposed merger, before considering the history and details of the proposed transaction and the parties' stated rationale for it in the next section. Additional information on the parties is provided in Appendix C.

Live Nation

- 2.23 Live Nation is a wholly-owned subsidiary of Live Nation UK Holdings Limited, itself a wholly-owned subsidiary of the US company Live Nation Inc, which spun off from Clear Channel Communications Inc and listed on the New York Stock Exchange in December 2005. It has a current market capitalization of approximately \$1.4 billion and its global sales for the year to 31 December 2005 were \$2.9 billion.¹⁷
- 2.24 Live Nation owns a 50.1 per cent share in Hamsard.
- 2.25 Live Nation in the UK has interests in:
- (a) Live music venues, through its ownership and/or management of its portfolio of 27 venues throughout the UK. (See Table 1.)

¹⁷\$1.4 billion equates to £0.74 billion using an exchange rate as at 13 November 2006 of 0.52544 £ to \$US. \$2.9 billion equates to £1.62 billion using an average exchange rate for the year ended 31 December 2005 of 0.550368 £ to \$US.

TABLE 1 Summary of venues operated by Live Nation in UK

Venue	Capacity	Notes
<i>Venues in London</i>		
Hammersmith Apollo	5,039 (standing)	3,632 capacity all seated
Apollo Victoria (West End)	2,350	
Lyceum (West End)	2,107	
Dominion Theatre (West End)	2,071	33 per cent interest in 125 year lease
<i>Venues outside London</i>		
Donnington Park, Leicestershire	72,500	
Sheffield Arena	12,000	
International Arena, Cardiff	4,994/7,500	
Southampton Guildhall	1,290	
The Playhouse, Edinburgh	3,056	
Manchester Apollo Theatre	3,500 (standing)	2,634 capacity all seated
Empire, Liverpool	2,373	
Manchester Palace Theatre	2,000	
Hippodrome, Bristol	1,981	
Manchester Opera House	1,909	
Sunderland Empire	1,875	
The New Theatre, Oxford	1,826	
Southport Theatre	1,631	
Princess Theatre, Torbay	1,491	
Alexandra, Birmingham	1,376	
Tameside Hippodrome, Ashton-under-Lyne	1,262	
Grimsby Auditorium	1,224	
White Rock Theatre, Hastings	1,066	
Grand Opera House, York	1,028	
Leas Cliff Hall, Folkstone	1,000	
Spa Pavilion, Felixstowe	919	
Beck Theatre, Hays	600	
Old Fire Station, Oxford	183	

Source: Live Nation.

(b) Promotion services, covering:

- (i) promotion of popular live music tours and events, both in venues owned or managed by Live Nation and in third party venues;
- (ii) promotion of music festivals; and
- (iii) promotion of theatrical and arts performances, both in theatres owned or managed by Live Nation and others.

(c) Provision of agency services, through its ownership of International Talent Booking Limited (ITB)—see Appendix C.

2.26 In the year ended 31 December 2005, revenue and operating profits from the live music venues business were £53.5 million and £5.1 million respectively. In the same period the promotions business generated revenues and operating profits of £104.1 million and £3.1 million respectively.¹⁸

Gaiety

2.27 Gaiety is an Irish company owned jointly by Denis Desmond and his wife Caroline Downey. It holds a 12 per cent share in Academy and a 49.9 per cent share in Hamsard.

¹⁸See Appendix C.

2.28 In the UK it is active in the promotion of live music events in Scotland and the promotion and organization of a major outdoor music festival in Scotland. It owns a 67 per cent share of one company which manages a small live music venue in Glasgow (King Tut's Wah Wah Hut) and another company which operates a ticket agency. It owns a 34 per cent share in Roseclaim Limited and in Maztec Limited, which are involved in festivals.

Hamsard/Mean Fiddler

2.29 Hamsard was incorporated in December 2004 and acquired the Mean Fiddler Music Group PLC (Mean Fiddler) in February 2005. Its shares are owned by Live Nation (50.1 per cent) and Gaiety (49.9 per cent).

2.30 Hamsard has interests in concerts, festivals (including the Reading and Leeds festivals—see paragraph 6.62), touring, and venue management businesses. It has the contract to manage Wembley Arena, which was reopened after refurbishment in April 2006.

2.31 Mean Fiddler is owned 100 per cent by Hamsard, and owns and manages seven live music venues in London, as shown in Table 2. It also promotes the Glastonbury festival (see paragraph 6.62).

TABLE 2 Summary of venues operated by Hamsard in UK

<i>Venue and location</i>	<i>Capacity</i>	<i>Notes</i>
Forum (Kentish Town)	2,110	
Astoria (West End)	2,000	Site has been sold to Derwent Valley Central for redevelopment in 2008; Astoria includes G-A-Y club night
Mean Fiddler (West End)	1,000	
Jazz Café (Camden Town)	385	
Garage (Highbury and Islington)	350	The downstairs Garage closed for refurbishment in 2006
Borderline (West End)	275	
Upstairs Garage (Highbury and Islington)	150	

Source: Hamsard.

2.32 In the year ended 31 December 2006, the festivals business is forecast to generate revenues and operating profits of £[~~xxx~~] and £[~~xxx~~] respectively. In the same period the venues business is forecast to generate revenues and operating profits of £[~~xxx~~] and £[~~xxx~~] respectively.

Academy

2.33 Academy is an owner and manager of live music and club venues in the UK. It has a small in-house promotions business, Academy Events, which promotes events primarily at Academy's smaller venues.

2.34 Academy owns and operates 11 venues in the UK as shown in Table 3.

TABLE 3 Summary of venues operated by Academy in UK

Venue	Capacity	Notes
<i>Venues in London</i>		
Carling Academy Brixton	4,921	2,391 capacity all seated
SBE	2,000	1,278 capacity all seated
Carling Academy Islington	800	
Bar Academy Islington	250	
<i>Venues outside London</i>		
Carling Academy Birmingham	2,700	Also has a second room of 600 capacity
Carling Academy Glasgow	2,500	
Carling Academy Newcastle	2,000	Opened October 2005. Also has a second room of 400 capacity
Carling Academy Bristol	1,700	Also has a second room of 350 capacity
Carling Academy Liverpool	1,200	Also has a second room of 500 capacity
Oxford Zodiac	750	Acquired October 2006. Two floors— one of 500 capacity and one of 250 capacity.
Bar Academy Birmingham	200	

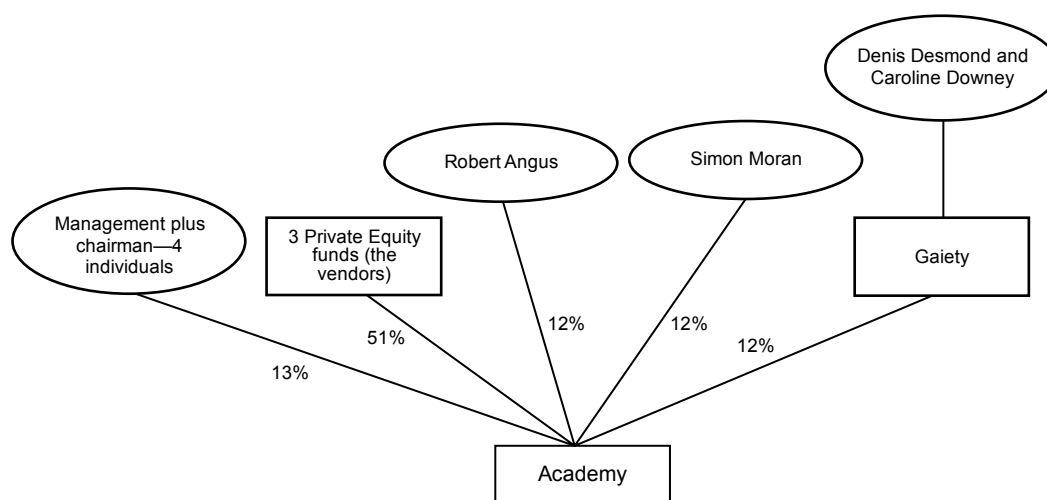
Source: Academy.

2.35 In the 13 months to 30 September 2005, Academy generated revenues of £18.5 million (of which the Carling Academy Brixton (Brixton Academy) generated [£X]) and operating profits of £[£X].¹⁹

2.36 Academy is currently owned by a mixture of private equity funds,²⁰ investors involved in the industry, and management. This is shown in Figure 1.

FIGURE 1

Academy shareholders



Source: Academy.

¹⁹See Appendix C.

²⁰See Appendix C for details.

3. The proposed merger

History of RJD's investment in Academy

- 3.1 In August 2004 RJD²¹ completed an investment totalling £8.2 million (£0.3 million ordinary shares and £7.9 million 11 per cent loan notes) in Academy in return for 52 per cent²² of Academy's equity. RJD considered it an attractive investment opportunity as there were good opportunities for growth in an industry where many venues were not run on a fully professional basis. It also considered that the link with the shareholder promoters (Robert Angus, Simon Moran, and Denis Desmond) had been highly successful for Academy, with the specific benefits including:
- (a) the promoters' direct interest in booking events at Academy venues;
 - (b) through their positions on the board, a direct and frequent dialogue with the Academy operations team, which ensured the venues were able to respond to artists' requirements effectively;
 - (c) Academy management's ability to discuss locations for new venues openly and proactively with their major customers, which facilitated feasibility planning; and
 - (d) Academy management working with the promoters prior to opening a new venue in order to ensure a strong launch programme, which accelerated maturity of the venue and built the customer base for club activity.

The transaction

- 3.2 In mid-December 2005 [X] made an initial, informal approach to RJD on behalf of Hamsard to purchase RJD's and F&C Private Equity Trust's shareholding. This was followed by a number of formal offers, the last of which, at £[X], was accepted. On 9 June 2006 heads of terms were signed, comprising a document giving Hamsard a period of exclusivity in order to carry out due diligence plus a non-binding statement of intent outlining key provisions for the deal (see paragraphs 3.3 to 3.7). The deal was announced on 29 June 2006 and referred to the CC on 21 August 2006.
- 3.3 Under the heads of terms, the purchaser agreed to pay £[X] for the vendors' 510,000 shares in Academy and the loan notes (principal and interest) as at 31 May 2006. The consideration of £[X] comprised £[X] for the loan notes, and £[X] for the shares. They provided for a further payment amounting to the additional accrued interest on the loan notes between 31 May 2006 and completion of the acquisition.
- 3.4 The remaining shareholders (Gaiety, Simon Moran, Robert Angus, John Northcote, Patrick Marling, Stephen Forster, and Brian Mattingley) would continue to hold their shareholdings post-acquisition, although the heads of terms indicated that there would be an option in place for John Northcote, Patrick Marling, Stephen Forster, and Brian Mattingley to sell at the same price as the 51 per cent stake for a period of up to three months after 31 August 2006.²³
- 3.5 The heads of terms provided for [X] directors on the Academy board, of which Hamsard would nominate [X]. The chairman would be Paul Latham (or other

²¹RJD Partners (formerly Royal London Private Equity) is an independent private equity fund management firm focused on providing capital to UK service sector businesses and acts on behalf of RL Private Equity Fund and RL Private Equity SBS Fund—see Appendix C.

²²1 per cent of RJD's equity was made available for the non-executive chairman, Brian Mattingley, after completion.

²³[X]

nominated Hamsard executive), currently Hamsard CEO. Key decisions (including the acquisition or disposal of assets over £[REDACTED], and any debt or equity refinancing) require the support of [REDACTED] of the shares. They therefore gave Simon Moran and Robert Angus, with shareholdings of 12 per cent each, a significant degree of control since key decisions could not be carried out without their agreement. Live Nation told us that it considered these terms to be standard from an accounting perspective: it grants such minority protections to enable it to consolidate for US GAAP purposes, and stated that it would have proceeded with the acquisition even if Robert Angus and/or Simon Moran had wanted to exit.

- 3.6 The heads of terms also provided that the renegotiation of supply/service contracts would not be to the detriment of shareholders in Academy (although the parties informed us that these provisions would apply to all promoters, and that all promoters will receive the same venue rates in the merged group's venues). The precise wording was:

Ticketing Agreement—AMG Promoters (SJM and Metropolis) will continue to receive the same terms until the current agreement with Ticketweb expires in October 2006. Thereafter, as part of any new ticketing agreement, [REDACTED].

Venue rentals—Rises in rentals will reflect reasonable adjustments taking into account prevailing costs, including inflation, utilities, legislation, licensing, staffing and security provisions.

- 3.7 Of final note, the heads of terms stated that Academy might wish to acquire venues currently owned and operated by Hamsard or Live Nation, to be achieved [REDACTED]. They provided that any such transaction would require over [REDACTED] shareholder approval and agreement on a fair market price.

Rationale for the proposed merger

- 3.8 Live Nation's internal documents show synergies increasing EBITDA by £[REDACTED] a year from 2008²⁴ arising from the following.²⁵

(a) increased revenues (these are included at [REDACTED] per cent gross margin):

- (i) ticketing (£[REDACTED] after 2008)—the opportunity to negotiate a new ticket deal brings the opportunity of [REDACTED]. There is also the possibility of increasing the venue ticket allocation from [REDACTED] per cent to [REDACTED] per cent;²⁶
- (ii) usage (£[REDACTED] after 2008)—there is the possibility that Live Nation may use the [REDACTED] venues more; however, this is thought to be limited;
- (iii) sponsorship opportunities (£[REDACTED] after 2008)—mainly in secondary sponsors ([REDACTED]);

(b) reduced variable costs from improved supplier deals (£[REDACTED] after 2008); and

²⁴Increased revenues and cost savings are also forecast for 2007 and 2008, totalling £[REDACTED] and £[REDACTED] respectively. After 2008 the synergies are forecast to remain the same.

²⁵To put these figures into context, revenues and EBITDA for FY06 are forecast to be £[REDACTED] and £[REDACTED], with direct costs and overheads of £[REDACTED] and £[REDACTED].

²⁶For details of current ticketing agreements, and Academy's renegotiation of its current deal, see Table 4.

- (c) reduced fixed costs totalling £[redacted] after 2008 (£[redacted] after 2008 in Academy alone)—made up of insurance savings (bringing Academy into the Live Nation group policy), transaction process savings, IT, marketing, and sponsorship. Live Nation also forecasts fixed cost savings in Academy non-executive director fees (£[redacted]) as well as fixed cost savings at Mean Fiddler (£[redacted] after 2008) by using Academy teams in promotions, and in management accounting.

Jurisdiction

- 3.9 Under section 36 of the Act, the CC is required to decide whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation such that:
- (a) two or more enterprises cease to be distinct; and
 - (b) either the turnover test or share of supply test is satisfied.
- 3.10 Any two enterprises cease to be distinct if they are brought under common ownership or common control. As described at paragraph 3.3, under the terms of the proposed transaction Academy will come under the control of Hamsard.
- 3.11 Under sections 23(3) and (4) of the Act, the share of supply test is met if Live Nation and Hamsard together increase their share of supply of goods or services of any description in the UK (or a substantial part of the UK) to at least one-quarter as a result of the merger, or if they already supply at least one-quarter, they increase their share as a result of the merger.
- 3.12 The application of the share of supply test is different from the identification of market shares undertaken as part of an analysis of competition within an economic market. However, our analysis of competition between venues used to stage live music events indicates that where venues in the ownership or management of Live Nation and Hamsard compete with those in the ownership or management of Academy in London, competition falls into two broad groups—venues above 1,000 capacity and venues below 1,000 capacity, with the main potential competition issues raised by the merger relating to the former. We have therefore based our share of supply test on the supply of indoor live music venues in London of over 1,000 capacity. As can be seen from Appendix D, the acquisition of Academy by Hamsard would lead to the share of supply of venues of this description under the control of Live Nation increasing, and amounting to more than one-quarter in total.
- 3.13 We therefore conclude that arrangements are in progress or contemplation which, if carried into effect, would result in the creation of a merger situation qualifying for investigation. The parties did not contest this.

4. Market definition

- 4.1 We considered the appropriate product and geographic market definitions, applying the methodology set out in our guidelines.²⁷ We do not regard market definition as an end in itself, but rather as a framework within which to analyse the effects of a merger on competition. The definition of the relevant market(s) is a useful tool for analysing the competitive constraints faced by the parties to the merger from other firms supplying the market.

²⁷ *Merger References: Competition Commission Guidelines (CC2)*, June 2003.

- 4.2 In this inquiry we are dealing with three separate services being supplied by the merging parties:
- (a) live music venue management, provided by Live Nation, Gaiety (through Bar None Management Ltd), Hamsard and Academy at venues owned or operated by each company across Great Britain;
 - (b) live music promotion services, provided by Live Nation, Gaiety (through DF Concerts), and Academy Events;²⁸ and
 - (c) music agency services, provided by Live Nation via its wholly owned subsidiary ITB.
- 4.3 However, Academy is not involved in the provision of music agency services and, having satisfied ourselves that the merger would lead to neither horizontal nor vertical effects in consequence of Live Nation's involvement in agency services, we concluded that it was unnecessary for us to take a view on market definition of music agency services.

Product market for live music venues

- 4.4 Venues are often categorized according to whether the venue is indoor or outdoor, the type of music played at the venue (for example, classical, rock and pop or jazz) and the capacity of the venue (for example, arenas, 2,000 to 5,000 capacity, etc). For example, the Brixton Academy might be identified as an indoor rock music venue with capacity of about 5,000. However, such categorizations can be misleading. Both the parties and third parties²⁹ told us that the choice of live music venue depended on a number of factors, including (in no particular order):
- *Location*: tours may want to take in certain locations, for example, London.
 - *Availability*: the venue needs to be available at a date that fits in with the artist's touring plans.
 - *Capacity*: a promoter, agent and artist will want a venue size that matches the potential number of tickets which the act is capable of selling.
 - *Ambience and genre*: certain venues have an ambience that suits certain genres of act and the reputation of the venue may have been built around this type of genre.
 - *Configuration*: if the act is to be before a standing audience, venues which are mostly seated will not be suitable.
 - *Facilities*: facilities that may affect the choice of venue include whether the venue is 'just a box' or has experienced production (sound and lighting) crews, and,

²⁸In the course of our inquiry we came across examples of promotions by Hamsard/Mean Fiddler. The parties informed us that since Mean Fiddler's acquisition by Hamsard, it did not promote live music tours and events outside the Hamsard venues, although it continued to take direct bookings by artists/agents at the Hamsard venues (mostly at the smaller venues such as Jazz Café and Borderline) and had one in-house promoter to handle such bookings. It also promoted the Reading/Leeds outdoors festival. Wholly exceptionally, it is promoting the Fleadh tour 2007, encompassing six arena dates in Dublin, Belfast, London, Cardiff, Manchester and Glasgow, arising from the historical fact that Mean Fiddler used to promote the Fleadh festival in Finsbury Park. The 2007 Fleadh tour was originally intended to be a festival but was changed to a tour due to the main artist's unavailability during the festivals season. We were told that it was not intended that Mean Fiddler would promote other tours.

²⁹Third party responses to promoter and venue questionnaires. Other factors listed have included merchandise concessions, popularity of venue and marketing available at venue.

depending on the audience, particular facilities (eg types of bars and food available) may also be preferred.

- *Artists' preference*: some artists may have a preference for a particular venue and insist on playing there.
- *Cost*: a promoter needs to consider costs (including venue hire price) alongside the fee to be offered to the artist when assessing financial viability.
- *Reputation and service quality*: for example, the choice of a venue might be affected by its reputation as violence and drugs free and because of the professionalism of the venue staff.

4.5 The extent of substitutability of one venue for another therefore depends on a range of factors and may vary from event to event. Third party submissions suggested no consistent ranking of these factors, indicating that there is no reliable hierarchy within which to consider them.

4.6 The parties stated that there was no clear line that defined the product market for popular live music venues. For the purposes of this inquiry, they suggested that the relevant market included those venues that were perceived by artists, agents and promoters as substitutable for the venues owned by the parties. In their view, the relevant product market therefore included all venues that offered comparable facilities in the eyes of the particular artist, agent and promoter.

4.7 We recognized that the nature and extent of competition between venues will differ from case to case, thus limiting the ability to make generalizations across acts. In order to explore the range of venue types that we might need to assess we considered the extent to which certain broad differences influence the closeness of competition:

- indoor and outdoor venues;
- venues showing different music types or different types of live entertainment; and
- venues of different sizes.

Indoor and outdoor venues

4.8 Outdoor venues, ranging from large venues such as Hyde Park and Crystal Palace to small venues like Somerset House and Kenwood House in London tend to be used only in summer months (primarily between May to September). They are rarely used during the rest of the year as the weather does not suit such outdoor events.³⁰ Substitutability between indoor and outdoor events is therefore largely limited to the summer months.

4.9 Whilst individual artists may do tours which include outdoor venues,³¹ most outdoor live music events in the UK are part of summer festivals (for example, V Festival, Glastonbury, T in the Park). Negotiations for appearances at festivals take place with a number of artists based on fixed fees rather than, as in the case of indoor events, deals involving a percentage of the ticket revenue net of costs. Festivals also tend to

³⁰Indoor venues tend to be used primarily in the winter months (September to April) although prices do not vary by season.

³¹The parties gave U2, Bon Jovi, Robbie Williams, and Elton John as examples.

attract large audiences and so can generate audience exposure and ticket revenue (and hence fees for the few artists who are the main attraction at the festival) far in excess of that generated by playing to an indoor audience in a venue of under 5,000 capacity.³²

- 4.10 The parties told us that they did not have a firm view as to whether outdoor venues were part of the relevant product market for this inquiry. If not part of the same market, the parties considered that outdoor venues were certainly in a related market of relevance to this inquiry. They noted:
- (a) When planning a tour for any given year, artists and agents will take into account the relative pay-off from playing festivals versus a tour of indoor venues. This effect is partly caused by the practice whereby festival promoters generally sign headlining artists and the top five or six acts on each day's playbill to exclusive contracts that forbid tours in the UK up to 90 days before and after the festival booking (although we were told that this restriction may be relaxed once sufficient festival tickets have been sold).
 - (b) The extended period during which outdoor festivals are staged (which now includes May, June and September as well as July and August) has reduced demand for indoor venues, lowered occupancy rates and affected competition between these venues.
- 4.11 Although certain individual indoor venues may find particular outdoor venues are substitutable at certain times of year, we were not convinced that indoor and outdoor venues can generally be considered to be in same market, such that it would be unprofitable to increase the relative price of indoor venues. However, given the range of factors governing the choice of venues, we recognize that there may be exceptions to this on a venue by venue basis.

Venues showing different music types or different types of live entertainment

- 4.12 Venues tend to have a reputation for a certain type of music and an ambience and configuration for a certain type of music. For example, the Royal Opera House is generally known for opera and ballet, and Brixton Academy has built its reputation on rock music.
- 4.13 Whilst venues may have an association with a certain type of music, this does not prevent some venues from being used for a range of types of music. The parties noted that any space can be set up to stage a concert or event; it is only necessary to have sufficient scale and to install sound and lighting equipment. Unrelated third parties ([redacted]) told us that a venue's musical reputation would often make it unsuitable for a particular type of act, although some ([redacted]) noted that there were occasions where venues with a classical history, for example, may be viable alternatives for a rock act.
- 4.14 The parties additionally noted that each year there will be a certain number of nights that become available at venues usually used for other types of live entertainment. Theatres with up-coming availability will contact promoters to make them aware of specific dates that can be booked for live music. For example, when *Movin' Out* finished prematurely at the Victoria Apollo in 2006, 4 of the 30 nights which became available were booked for live music.

³²The parties told us that fees paid to artists other than headline artists are comparable to those that can be earned by playing to an indoor venue of 5,000 or under.

- 4.15 Venues that are mainly used for other types of music, or as theatres, may sometimes stage popular live music events. But we concluded that, in general, switching to such venues is unlikely to be sufficient to make a small price rise at venues that predominantly stage popular live music events unsustainable.³³ However, again we recognize that it is necessary to consider whether there are any exceptions to this on a venue by venue basis.

Venues of different sizes

- 4.16 Artists at different stages of their careers will tend to play different size venues; the more popular an artist becomes, the more likely it is that the artist will be playing to a larger audience at a bigger venue. Therefore a venue of less than 1,000 capacity, for example, is unlikely to be substitutable for a large arena or venue of over 5,000 capacity.³⁴ Nor is it likely that a larger venue of over 5,000 capacity, say, will be suitable for an artist that is considering playing in a venue of less than 1,000 capacity.
- 4.17 However, the parties told us that for many acts venues of 2,000 to 2,500 capacity were substitutable for 3,500 and even 5,000 capacity venues, and venues of 5,000 capacity were substitutable for venues of 7,000 capacity. Furthermore, they argued that this substitutability operated both ways; an act capable of playing a 5,000 capacity venue may opt for two nights at a 2,500 or 3,500 capacity venue, particularly if concerned about its ability to sell-out a 5,000 capacity venue, and a 5,000 or 7,000 capacity venue may be able to be configured for a 3,000 or 5,000 capacity show. They provided an example of where such substitution may be viable in relation to two nights at the Roundhouse (3,000 standing capacity) or Hammersmith Palais (2,230) instead of one night at Brixton Academy (4,921). They also noted that, for example, Tenacious D has recently opted to play three nights at Hammersmith Apollo (5,039 capacity) rather than one night at Wembley Arena (12,750).
- 4.18 On the other hand, we were told by unrelated third parties that an artist would most often want to play to the largest number of people over the smallest number of days and venues. Nevertheless, some third party submissions noted that it may be acceptable to do two or more nights at a smaller venue instead of one night at a larger venue, for certain venues and certain acts at particular times.
- 4.19 We conclude that whilst certain broad distinctions can be drawn between venues of particular sizes, it would not be safe to assume that clear lines can be drawn around venues of a certain size such that only venues of that size provide a competitive constraint. This would be particularly true if considering a venue that fell on the cusp of any size category. Size can also be variable in certain venues because seating and standing space can be reconfigured.

Geographic market for live music venues

- 4.20 The parties and third parties told us that London constituted a distinct geographic market for live music events. A tour would tend to be organized around the London dates. Once these had been fixed, options outside London would be considered. London was rarely left out of a tour schedule because of its importance as a location in the UK in terms of press and media coverage, the large population centre and the affluence of some of the population.

³³A small but significant non-transitory increase in price (SSNIP).

³⁴Which would require an artist to play five nights at the smaller venue to reach the same audience as one night at the larger venue.

- 4.21 The parties told us that venues outside London competed in relatively local markets. The parties considered there to be four main localities:
- North-West (Manchester, Liverpool, Blackpool);
 - Midlands (Birmingham, Coventry, Wolverhampton);
 - far North (Glasgow, Newcastle, Edinburgh); and
 - South-West (Bristol, Cardiff, Exeter).
- 4.22 The parties stated that these local markets were related because promoters organizing tour venues nationally had the opportunity to decide which cities to play. The parties suggested that artists/agents/promoters may therefore choose within and between these areas depending on availability. Different promoters provided us with variations on local market competition. The key in terms of competition between venues in different locations appears to be the number of concerts on a proposed tour and the desire to reach centres of population that will maximize ticket sales.
- 4.23 Rather than consider local geographic markets further at this stage, we examined the extent of competition from venues in nearby localities on a venue by venue basis (see paragraphs 5.3 to 5.10).

Conclusions on market definition for live music venues

- 4.24 We found that since the extent of substitutability of one venue for another depends upon a range of factors, the relative importance of which depends upon the event being staged, the extent of the competitive constraint of one venue on another will vary. The analysis in paragraphs 4.8 to 4.23 suggests that in general there is limited substitution of outdoor venues for indoor venues, of venues used predominantly for other purposes for venues regularly used for popular live music, or between venues of significantly different capacities, although each of these may occur in particular circumstances. It further suggests that there is limited substitution of venues outside London for those within London. However, these are generalizations and we concluded that rather than attempt to define a product or geographic market for live music venues in terms of these factors, a better approach was to consider each of the venues operated by the merging parties individually and examine the competitive constraints on that venue. Our approach means that we do not need to draw strict boundaries in terms of the factors previously identified nor, for example, take a view on the precise geographic extent of 'London'.

Product market for live music promotion services

- 4.25 The provision of promotions services includes:
- *Tour routing:* the promoter often has the role of suggesting a tour routing.
 - *Financing:* the promoter will make the up-front payment to artists (via agents).
 - *Tickets:* the promoter will be involved in agreeing the ticket price with the agent and in selling his allocation of the tickets, usually through a ticket agent.
 - *Marketing:* the promoter will undertake the marketing of the tour in order to sell tickets.

- 4.26 The parties suggested that the key factor in choosing a promoter was the share of profits or guaranteed fee that the promoter was offering to the artist, which they illustrated with the case of [X] switching to [X] after using [X] for her last two tours because the fee was higher. They stated that this led to little loyalty to promoters, with artists and agents happy to switch between them. They contended that because promotion services were straightforward, any adequately financed promoter of live entertainment could easily pitch for the contract to put together a tour: all that was required was the knowledge of when agents were inviting offers for tour bids. The parties therefore suggested that the most appropriate definition of the relevant product market for promotions would be one that covered the promotion of all live entertainment.
- 4.27 However, this market definition ignores another factor that, the parties acknowledged, influences the choice of promoter—the track record and reputation of the promoter. Artists and agents tend to have a preference to work with certain promoters with whom they have worked before or who have been successful promoters for a given type of music (for example, classical or popular music) over a period of time. The leading promoters of popular live music have been in the business for a number of years (for example, Simon Moran (SJM) for 17 years, Robert Angus (Metropolis) for 21 years, and Danny Betesh (Kennedy Street) for over 40 years) and continue to have good relationships with agents and artists.
- 4.28 The parties suggested that if there were an increase in the price of promotion services by a hypothetical monopolist, an alternative option would be for agents to undertake the promotion of acts themselves. As agents have an acute business sense for the music industry the parties suggested that they had the expertise and know-how to provide promotions services equivalent to those provided by promoters. Whilst this seems to be a possibility, we have seen very few examples of agents providing such services. We are aware of ITB and Solo, two agencies, having provided promotion services. It appears most agents choose not to get involved in promotion services, possibly because promoters have to bear most of the risk of organizing a tour and so it is not an attractive option when the agent is already guaranteed a proportion of the artist's share of profits.
- 4.29 Some promoters act entirely as in-house promoters, being affiliated to a particular venue. Academy Events is an example of such a promoter. We have not defined in-house and external promotion as separate markets, because in some cases in-house promotion may involve actively pursuing bands that might otherwise perform at another venue and be promoted by an alternative promoter. We consider the extent to which Academy Events competes with Live Nation's external promotions business in paragraphs 5.58 to 5.60.

Geographic market for live music promotion services

- 4.30 In relation to the geographic market, the parties suggested that this should be defined as the UK, as agents will use promoters that have a good knowledge of venues, production facilities and the media in the UK. Regional specialism is not critical because promoters regularly promote tours across the whole of England, Scotland, and Wales. However, a number of promoters originated in, and have retained a particularly strong presence in, specific regions (SJM in Manchester, DF Concerts in Glasgow, Metropolis in London, Midland Concert Promotion (MCP)³⁵ in Birmingham, and CMP in Liverpool). For example, Metropolis promoted only two events in Scotland in 2005, with Scottish promoters, such as DF Concerts, tending to

³⁵Now part of Live Nation.

promote the Scottish part of a tour. However, the parties told us that many promoters promoted both in Scotland and in other parts of the UK. The parties further suggested that no more than around 10 per cent of tour mandates were parcelled out on a regional basis.

Conclusions on market definition for live music promotion services

4.31 We concluded that the relevant market for live music promotion services was no wider than live music promotion services in the UK. In the light of our subsequent examination of the possible effects of the merger (see paragraphs 6.38 to 6.41), we concluded that for the purposes of this inquiry it is unnecessary for us to decide whether the ability of promoters who specialize, whether in promotion of types of live music other than popular live music or in local geographic areas, are sufficiently constrained in their ability to compete to indicate narrower product or geographic markets.

5. Assessment of competition

5.1 Our assessment of the competitive effects of the proposed merger focused on:

- (a) The closeness of competition between the parties, and with third parties, in venue operation, venue by venue.
- (b) The respective negotiating strengths of venue operators, promoters and agents, and in particular the ability of agents to exercise buyer power.
- (c) Ease of entry.
- (d) Competition in the provision of live music promotion services, and in particular the extent of competition between the parties as promoters.
- (e) The extent to which the merger would reduce competition, and the extent of any impact on venue rental and other prices, and on service quality.
- (f) The likelihood of portfolio effects.
- (g) The likelihood of coordinated effects.
- (h) The likelihood of vertical effects.

5.2 In this section we examine competition between the parties and with third parties in venue operation, venue by venue; negotiating strengths and buyer power; entry; and competition in the provision of live music promotion services ((a) to (d) above). In section 6 we assess the likely impact of the merger ((e) to (h) above).

Venue by venue competition: venues outside London

5.3 In order to assess competition between venues, we first considered evidence on distance travelled by concert-goers to establish 'overlap areas' in which Academy venues are potentially in competition with those of Live Nation, Hamsard or Gaiety. The overlap areas identified were Bristol/Cardiff, Birmingham, Liverpool/Manchester, Sunderland/Newcastle, Edinburgh/Glasgow, and Oxford. In order to determine whether more detailed consideration was required, we then initially examined four pieces of evidence:

- (a) competing venues as ranked by the parties;
- (b) reports from Academy identifying shows at other venues that in its opinion, could have been staged in Academy venues ('lost show' reports);³⁶
- (c) types of show at each venue; and
- (d) third party responses to our questionnaire on alternative venues.

5.4 Details of this analysis are in Appendix E. It shows that none of the venues outside London are in close competition with one another. In each case, either the Live Nation venues did not often host popular live music whereas the Academy venues have built their reputations on live music and club nights, or the venues have substantially different capacities:

- (a) *Bristol/Cardiff*—Although the Bristol venues were listed as an alternative by two unrelated third parties, Bristol Hippodrome had only nine live music acts in 2005. Cardiff International Arena, whilst showing a number of live music acts, is a 7,500 capacity venue compared with 1,700 for Bristol Academy. No third parties considered the Cardiff and Bristol venues to be alternatives for one another.
- (b) *Birmingham*—Although the Birmingham venues were listed as alternatives by two unrelated third parties, the Alexandra hosted only 22 live music acts in 2005.
- (c) *Liverpool/Manchester*—The Liverpool venues were not listed as alternatives by any third parties and the Empire hosted only ten live music acts in 2005. The Manchester Apollo (capacity 3,500), whilst being a popular live music venue, was not listed by any third parties as an alternative to the Liverpool Academy (capacity 1,200).
- (d) *Sunderland/Newcastle*—The Sunderland Empire had only 11 live music acts in 2005 and was not listed by any third parties as an alternative to the Newcastle Academy.
- (e) *Edinburgh/Glasgow*—The Edinburgh Playhouse had only 16 live music acts in 2005 and was not listed by any third parties as an alternative to the Glasgow Academy. King Tut's Wah Wah Hut, whilst hosting many live music acts, was similarly not considered by any third parties as an alternative to the Glasgow Academy—its 300 capacity makes it a different proposition to Glasgow Academy's 2,500 capacity.
- (f) *Oxford*—During our inquiry, Academy completed the purchase of a 750 capacity venue in Oxford, the Zodiac. Live Nation's New Theatre in Oxford³⁷ has a capacity of 1,826 and hosted only 25 live music events in 2005. The Old Fire Station has a capacity of only 183 and so is considerably smaller than the Zodiac.

³⁶The lost show reports were lists of events staged at rival venues based on publicly available listings. Academy had no knowledge of whether any of the acts actually considered (or would have accepted) performing at an Academy venue (in place of the venue which staged the event).

³⁷Live Nation's Old Fire Station in Oxford has a capacity of 183, and is unlikely to be in close competition with a venue of 900 capacity, as acquired by Academy.

Venue by venue competition: venues in London

Actual and potential substitutability of venues

- 5.5 We undertook a similar analysis of competition between venues in London. Our initial analysis, using the criteria in paragraph 5.3, suggested that the parties' venues appeared to be competing. We therefore undertook a further analysis of the competitive interaction between these venues and third party venues, drawing in more detail on evidence on:
- (a) factors on which venues compete;
 - (b) number of live music events;
 - (c) responses to our questionnaire to promoters and agents;
 - (d) overlap of artists between venues;
 - (e) usage of venues by promoter;
 - (f) Academy lost show reports;
 - (g) the parties' analysis of alternative venues for events held at the Hammersmith Apollo, the Brixton Academy, and the SBE; and
 - (h) an assessment by the parties of the impact on the Brixton Academy of the re-opening of Hammersmith Apollo following its refurbishment and the installation of removable seating in 2003.
- 5.6 Details of this analysis are in Appendix F.
- 5.7 Our analysis shows that although the parties' venues of up to 1,000 maximum capacity compete with one another in some cases (for example, Islington Academy with Mean Fiddler) there are a significant number of alternative third party venues with which the main party venues compete (including the Scala, ULU, Underworld, 100 Club, Bush Hall, Electric Ballroom, Metro, Cargo, and Kings College). Any impact of the merger on competition is therefore likely to be primarily in relation to the parties' larger venues.
- 5.8 The parties own or operate six venues in London with a maximum capacity greater than 1,000—Wembley Arena, Brixton Academy, Hammersmith Apollo, SBE, Astoria, and the Forum (see Tables 1 to 3 and Appendix F for details). On the basis of responses from the parties and from third parties we considered 11 third party venues as possible alternatives: the O2 (hereafter, the O2 Dome), Earl's Court, Royal Albert Hall, Alexandra Palace, Roundhouse, Hammersmith Palais, Royal Festival Hall, Coronet, KoKo, Barbican, and the London Palladium.
- 5.9 Our analysis of the evidence on these shows:
- (a) There are differences between venues in terms of factors such as capacity, configuration, availability and venue hire cost which are relevant to venue choice and hence to assessment of the extent to which one venue is an alternative to another. These point towards the parties' venues competing with each other. For example, in terms of maximum capacity, the closest alternative to the Hammersmith Apollo (3,107 standing plus 1,932 seated upstairs) is the Brixton Academy (3,838 standing plus 1,083 seated upstairs). The parties noted that the

Hammersmith Apollo is used primarily as an all seated venue, and the Brixton Academy is used primarily as a standing venue. For those events where configuration is particularly important, the seated venue with equal or larger capacity closest to the Hammersmith Apollo is the Royal Albert Hall. However, the Royal Albert Hall has limited availability (to some extent dependent upon the time of year and how far in advance the booking is), and a higher venue hire cost (both in absolute terms and cost per person). (See Appendix F paragraphs 17 to 22.)

- (b) The parties' venues were the top five of the venues listed in paragraph 5.8 above in terms of rock and pop music events in 2005, and of the third party venues only the Royal Albert Hall and KoKo hosted more than 30 live rock and pop music events in that year. (See Appendix F paragraphs 23 to 26.)
- (c) All or most of the promoters and agents who responded to our questionnaire identified Brixton Academy as the main alternative to using the Hammersmith Apollo, Hammersmith Apollo as the main alternative to Brixton Academy, the Astoria, and the Forum as the main alternatives to SBE, the Forum and SBE as the main alternatives to the Astoria, and the Astoria and SBE as the two main alternatives to the Forum. Those responding included SJM and Metropolis, the leading promoters of rock and pop events at these venues. (See Appendix F paragraphs 27 to 55.)
- (d) Actual substitutability, based on the extent to which artists that have played in one venue have also played in a competing venue in the last few years, shows that the main parties' venues appear to be each other's closest substitutes (with the exception of KoKo as substitute for the Astoria). (See Appendix F paragraphs 56 to 63.)
- (e) Suggested alternative venues to the Hammersmith Apollo and the Brixton Academy (Alexandra Palace, Earl's Court, and the Royal Albert Hall) were not heavily used by SJM and Metropolis. With the exception of KoKo, nor were suggested alternatives to SBE, Astoria and the Forum (Royal Festival Hall, London Palladium, Hammersmith Palais, Coronet and Barbican). (See Appendix F paragraphs 64 to 66.)
- (f) The competitor venues most frequently mentioned in the Academy lost show reports for the Brixton Academy were the Hammersmith Apollo and the Wembley Arena. The competitor venues most frequently mentioned in the Academy lost show reports for SBE were the Astoria and Forum. (See Appendix F paragraphs 67 to 71.)
- (g) The parties' provided an event by event identification of likely alternative venues, based on their industry experience and knowledge and where artists have historically chosen to play. This showed the Roundhouse as the main alternative to the Brixton Academy, the Royal Albert Hall as the main alternative to the Hammersmith Apollo and the Royal Albert Hall and the Roundhouse as the main alternatives to SBE. However, we considered that the outcome of this exercise depended upon the weight given to particular factors. We noted that it took no account of availability and the results did not accord with our analysis of where those acts had played in the recent past. (See Appendix F paragraphs 72 to 78.)
- (h) The reopening of the Hammersmith Apollo following its refurbishment and installation of removable seating in 2003 did not lead to a reduction in the rental or other charges at Brixton Academy, in the number of shows hosted at the Brixton Academy or in the profits made by Brixton Academy. However, we

considered that this evidence was insufficient to enable reliable conclusions to be drawn on the extent to which Hammersmith Apollo and Brixton Academy compete, given, among other considerations, that it was too aggregated, was not expressed relative to a counterfactual and effects may be disguised by increases in demand in recent years. (See Appendix F paragraphs 79 to 81.)

- 5.10 Criticism of our analysis by the parties is considered in Appendix F. Actual and potential substitutability between venues depends upon the event and in some cases may be limited, with no alternative venues considered to offer a realistic alternative. However, taking all the evidence from the parties and third parties together, on the basis of our analysis we concluded that substitutability is greater between Brixton Academy and Hammersmith Apollo than from either of those to any third party venue. Similarly, substitutability between the SBE and the Astoria is greater than to any third party venue. The Forum is also a significant substitute for the SBE. In each case there appears to be limited realistic scope for substitution of third party venues given their characteristics and availability.
- 5.11 For convenience, hereafter in this report we use the phrase ‘the five venues’ to refer to Hammersmith Apollo, Brixton Academy, the SBE, the Astoria, and the Forum.

Recent and planned entry, expansion and exit.

- 5.12 The parties argued that, as a result of entry, venue choices were sufficiently different from those that existed in 2005 to render historic data of limited relevance. We therefore considered the implications for our analysis of currently available information on venues that have reopened in 2006 and on venues that were due to open or reopen late in 2006 or in 2007. For these venues the record of events is limited and may be an unreliable guide to how they will compete in the future. In paragraphs 5.13 to 5.14 we consider the Ocean Hackney, the Bloomsbury Ballroom, the Roundhouse, the Royal Festival Hall, and the O2 (O2 Dome). Following publication of our provisional findings, the parties put further material to us regarding investment at the Alexandra Palace (together with assessments of increased capability at other venues). We consider the parties’ arguments and further information that we subsequently obtained regarding the O2 Dome, the Royal Albert Hall, the Roundhouse, the Alexandra Palace and the Hammersmith Palais in paragraphs 5.16 to 5.19.
- 5.13 The media have reported that the Ocean Hackney is due to re-open as a live music venue in March 2007. [✂] The Bloomsbury Ballroom has an advertised maximum capacity for live events of 600. We therefore focused on the Roundhouse, the Royal Festival Hall, and the O2 Dome:
- The Roundhouse had only two live music events between its opening in June 2006 and mid-October 2006. However, from mid-October 2006 onwards the diary contained a greater number of live rock and pop music events, with publicity coming from the BBC Electric Proms in late October, and about 20 live music events, covering a range of music types including world music, booked through to the end of January 2007. (See Appendix F paragraph 61 for further analysis). One agent told us that it was putting a lot of artists on at the Roundhouse, although it perceived availability to be limited. The Roundhouse told us that it expected to host around 80 live music events in 2007, covering jazz, folk, and even classical or opera in addition to rock or pop, as part of a broader programme including seven weeks of Shakespeare, seven weeks of circus in the summer, a Christmas Show, other theatre and dance music. Even though the Roundhouse has experienced a recent increase in the number of

popular live music events, the parties told us that new venues tended to go through a 'honeymoon period' and, as noted in Appendix F, it was the Academy board's view³⁸ that although the Roundhouse may temporarily affect Brixton Academy's performance this was not expected to have any long-term consequences.

- The Royal Festival Hall is not due to reopen until mid-2007. We were aware of a small number of live rock and pop music events in the Royal Festival Hall before its closure for refurbishment.
- The O2 Dome is due to open in July 2007 and will contain, in addition to its main hall, a Music Club (the O2 Music Club) of capacity between 2,000 and 2,200 seats depending on the size of seats ordered. The stated minimum seating capacity of 8,000³⁹ for the O2 Dome main hall, together with comments from third parties, suggests that it is likely to compete more closely with Earl's Court and Wembley Arena than with the five venues. By January 2007 the O2 Dome main hall had seven bookings for popular live music events in 2007. Bookings were not yet being taken for the O2 Music Club.

5.14 Our discussion suggests that there is some prospect of increasing competition to the five venues from the Roundhouse, the Royal Festival Hall when it reopens in 2007 and from the O2 Music Club when it opens in 2007. We therefore considered the future ability of the Roundhouse, the Royal Festival Hall and the O2 Dome to provide a competitive constraint in relation to the five venues. We noted that the Roundhouse, the Royal Festival Hall, and the O2 Music Club are all closer in capacity to the SBE, the Astoria, and the Forum than to the Brixton Academy and the Hammersmith Apollo, which might suggest that they will compete more closely with the former three than the latter two. However, given that capacity is only one of the factors taken into account in venue choice, we cannot be confident that they will necessarily compete in this way in practice (See paragraphs 4.16 to 4.19). We also noted that the development of the Roundhouse as a mainstream venue for popular live music events that might otherwise have played in the five venues may be constrained by its use for other purposes. We do not expect the availability of the Royal Festival Hall for popular live music events to remain other than limited. Some third parties questioned whether the location of the O2 Dome would prove disadvantageous and noted that it would lack the 'iconic' status of better known venues. On the basis of the limited information available we take the view that the O2 Music Club remains an unknown quantity in terms of how it will be assessed by agents and promoters. Taking all of the available evidence into account, we do not consider that we can rely upon future competition from the above venues to provide a sufficient constraint to offset the impact of loss of rivalry between the five venues.

5.15 Future competition between venues may also be affected by exit. The Astoria site has been sold to Derwent Valley Central for redevelopment in 2008 and is subject to a compulsory purchase order if the Crossrail⁴⁰ development goes ahead. However, it remains unclear when, or if, redevelopment leading to the closure of the Astoria will occur. In addition, the Garage is currently closed due to its poor state of repair and Hamsard is trying to surrender the lease. Given its small size, we do not judge the closure of the Garage, even if it proves permanent, significant for our analysis.

³⁸Academy Board Minutes, July 2006—'Steve Forster commented that the Roundhouse may temporarily affect Brixton's performance but this was not expected to have any long term consequences'.

³⁹See Appendix F, footnote to Table 1.

⁴⁰Crossrail is a proposed new underground line running through central London.

- 5.16 Following publication of our provisional findings the parties provided a table on event 'capability' at selected venues in 2007, suggesting that as a result of new capability at the O2 Dome and the O2 Music Club; increased capability at the Alexandra Palace as a result of refurbishment to provide a better infrastructure for live music events; increased availability of the Royal Albert Hall as a result of the re-location of Cirque du Soleil to the O2 Dome; and increased use of the Roundhouse, Royal Festival Hall, Hammersmith Palais and Coronet for popular live music events; total capacity at venues with capacity above 1,500 in London would be increased by over 40 per cent. They argued that this would more than compensate for any loss of competitive constraint arising from the proposed acquisition.
- 5.17 We do not accept that future capacity of venues to host popular live music events can properly be assessed by examination of nights available for future bookings based on the parties' concept of capability. Some of these nights will be during periods when use of indoor venues for popular live music events tends to be low (such as during the summer months). Moreover, on the basis of historic evidence, many other nights will in practice be booked for other events or uses.
- 5.18 Nor do we accept that future capacity can be taken as a realistic guide to future competitive constraints. For example, the Coronet has had the capacity to increase bookings of popular live music events, but has struggled to compete successfully with the five venues. The extent to which one venue acts as a competitive constraint upon another depends upon substitutability; data on which is analysed in Appendix F and discussed in paragraphs 5.6 to 5.9. That discussion makes clear that, in line with comments from third party agents and promoters, substitutability is not simply a matter of capacity. Since the extent to which particular venues are substitutable for other venues varies from case to case, we do not regard the parties' attempt to aggregate capacity over a range of venues as helpful.
- 5.19 In order to test the robustness of our conclusion that we cannot rely upon development of future competition from the venues listed by the parties to offset the impact of loss of rivalry between the five venues, we sought further information from the O2 Dome, the Royal Albert Hall, the Roundhouse, the Alexandra Palace and the Hammersmith Palais. This was to see whether current levels of bookings, plans and expectations indicated a greater increase in the level of future competition from those venues than we had previously assessed. The information provided did not cause us to change our earlier assessment.

Competitive constraints on venues: price and non-price competition

- 5.20 We previously considered the range of factors that affect choice of venue, and outlined the way in which decisions on venues are made when putting together a tour. That discussion suggested that the price of hiring a venue is only one of the ways in which venues compete and, since we found no consistent ranking of the factors, in many cases it may not be the most important. We were told that venue costs typically represented only a relatively small part of the cost of staging a tour, estimated by one promoter to be perhaps 10 to 12 per cent of a promoter's costs, which primarily comprise payments to the agent/artist. Indeed [X] told us that venue operators did not really compete on venue hire price and the choice of venue was primarily influenced by other factors. Consistent with this, the questionnaire responses we received suggested that promoters and agents are relatively insensitive to venue hire prices, with several promoters stating that an increase would need to be at least 10 to 20 per cent before they would consider switching events to another venue (see Appendix F). The parties did not dispute that promoters and agents are relatively price insensitive to venue hire prices.

5.21 In the light of this, the question arises why venue owners do not raise prices? The parties argued that the constraint on prices arises from the powerful negotiating strength of agents, which we consider next.⁴¹

Negotiating strength of venue operators, promoters and agents

5.22 The parties emphasized the central role of agents in the staging of popular live music events, arising from their relationship to the acts that provide the essential input upon which the business of promoters and venue operators depends. They contended that artists and their agents were in a position of strength in relation to both promoters and venue operators for the following reasons:

- (a) Agents are large, sophisticated purchasers of the services of venues and promoters, the businesses of which are reliant on agents and their artists.
- (b) It is the agent who decides which promoter to appoint and who in every case ultimately decides which venues will be played and effectively determines the face-value price of tickets.
- (c) Acts which are popular enough to play the five venues are almost all represented by one of the top agencies, which leverage the power derived from their most successful acts across all the acts in their rosters.⁴²
- (d) These agents can switch without obstacle between at least 11 mainstream live music promotion firms (see paragraph 2.8).
- (e) Agents use their privileged access to information on competing tour bids to 'bid up' promoters' offers by playing promoters off against each other.
- (f) Agents have additional power as regards promoters that also promote festivals, as the promoter may need acts whose tours they have not previously promoted to play at their festivals (which provides an additional bargaining chip for the agent).
- (g) The parties claimed that as a result artist (and agent) fees (and, consequently, ticket prices) had grown dramatically in recent years—unlike venue rentals or venues' ticket allocations and unlike promoters' profits.

5.23 We considered the stages in negotiation of a tour in paragraphs 2.12 to 2.21. Several of the points made by the parties relate to the buyer power of agents in relation to promoters. Whilst we do not necessarily accept that the choice of promoter is as wide as indicated by the parties (see paragraphs 5.53 to 5.60 on the degree to which the promotion of popular live music is concentrated within a relatively small number of companies), we consider it likely that agents representing extensive rosters of popular acts are in a strong negotiating position in relation to promoters.

5.24 Although we received conflicting accounts of the role of the promoter in influencing choice of venue, and how far this varies according to the prominence of the artist, it appears to us likely that, for artists who are sufficiently well established to play the

⁴¹The parties further argued that since venue operators earned the largest part of their profits from bar sales and other ancillary income, it would take the loss of only a small number of events in response to any increase in venue prices to make any increase unprofitable. Given venues high fixed costs, they have a strong interest in maximizing the number of events held at their venues and the attendance at each event. We consider this argument in paragraphs 6.15 to 6.17, where we assess the horizontal effects of the merger in relation to venues.

⁴²The parties noted that agents such as Helter Skelter, The Agency, X-Ray Touring, Primary Talent, and Concorde all had substantial rosters of popular artists.

five venues, the final decision in the event of disagreement will come from the agent. If a promoter is unwilling to accept the agent's decision then their only option will be to decline to promote that event or tour. In order to assess whether, and to what extent, buyer power exists in relation to venues we therefore focused on the position of agents.

- 5.25 The ability of agents to constrain venue operators ultimately depends upon their ability to switch acts from one venue to another. This may be for a particular act (either for a particular event or more generally), or for other artists on their roster. The power of agents in relation to venues therefore ultimately derives from two sources:
- (a) the extent and availability of alternative suitable venues; and
 - (b) the extent of the agent's roster and their ability to negotiate across all the acts in it.
- 5.26 We considered the substitutability of alternative venues in paragraphs 5.5 to 5.10 and Appendix F. Whilst there are several alternative venues in London that might be suitable alternatives for some acts, there appears to be limited realistic scope for substitution of third party venues given their characteristics and availability. For many events that would otherwise appear in one of the five venues, the closest third party alternative venue will not represent an attractive option to the agent.
- 5.27 Whilst agents might seek to use the threat of choosing alternative venues for other acts in their roster as a bargaining chip, their ability to carry this out is to some extent limited by their fiduciary duty to each act. They could not, for example, cause an act to play in a venue that they know not to be in the interests of that act, simply because they wished to 'punish' a venue for the operator's behaviour in relation to another act on their roster.
- 5.28 Nevertheless, it appears to us likely that leading agents representing extensive rosters of popular acts are currently in a position to constrain the ability of venue operators to increase venue prices, or reduce venue quality. However, the effect of the merger is to reduce the range of alternative venues not controlled by the parties which, in our view, must weaken the power of the agents to some extent. In assessing whether that reduction would be substantial we note that two leading agents expressed concerns to us over the effects of the merger in terms that suggested that this would be the case, although one judged that their own agency should be in a position to handle the risk to artist/agent earnings that they expected to result from the merger.⁴³
- 5.29 In order to decide whether the buyer power of agents would be sufficient to ensure that the merged group could not exploit any lessening of competition, it is not enough that we should accept that some agents would be in a position to ensure that the merger would lead to no adverse effects in relation to some, or even to all, of the acts they represent. We need to be reasonably confident that this would apply to enough acts across enough agents to ensure that any lessening of competition would not lead to adverse effects. We consider in paragraphs 6.3 to 6.32 the adverse effects that might arise from the merger. But on the basis of the discussion in paragraphs 5.22 to 5.28, and given the reduction in the range of alternative venues not under common control post merger, we conclude that we cannot be confident that the buyer power of agents would be sufficient to ensure that the merger would not lead to adverse effects.

⁴³See *Summary of hearing with an Agent* and *Summary of hearing with an artists' agency* on the CC website.

Ease of entry

5.30 We now consider the extent of constraints arising from new entry and expansion. The threat of entry or expansion in response to an increase in prices or worsening in non-price factors might, in itself, prevent the parties from exercising market power. Alternatively, were post-merger prices to rise, for example, subsequent entry or expansion may be sufficient to reduce prices to pre-merger levels or lower.

Recent examples of entry

5.31 In recent years, demand for live entertainment has increased and, accordingly, the venue market has grown. The parties submitted that 'this growth in the market is likely to have contributed to the entry of a considerable number of new or converted venues'. They informed us that the key requirements are (i) a venue with adequate clear floor space and the other basic facilities required to host live music acts (bar facilities, toilets, exit capacity, etc) and (ii) a manager responsible for bookings who has experience of dealing with promoters and agents and of maximizing ancillary revenue streams.

5.32 We considered in paragraph 5.13 to 5.14 some recent examples of entry in London and venues that are scheduled to enter in 2007. Earlier examples include Koko (2004), the Coronet (2003), and Scala (1999).⁴⁴

(a) Koko, in Camden Town, was opened in 2004 following the restoration of what was previously known as the Camden Palace, a live music venue. Koko has a capacity of 1,500.

(b) The Coronet, a former theatre and cinema in Elephant and Castle, was refurbished in 2003 and has a capacity of 2,200.

(c) Scala, a former cinema in King's Cross, was opened in 1999 as a nightclub and live music venue with a capacity of 1,145.

5.33 Venues operated by the parties that were converted or refurbished in recent years in London include the Hammersmith Apollo (2003, capacity 5,039) and the Islington Academy (2003, capacity 800). The newly refurbished Wembley Arena, for which Hamsard now operates the management contract, has a maximum capacity of 12,750 but is able to offer a reduced capacity of 4,000 and upwards through its so-called Short Hall formats.

Cost of entry or expansion

5.34 The parties estimated that the main conversion/refurbishment expenses will generally amount to approximately £1 million for a venue of 2,000 to 5,000 capacity, but that the scale of investment required to make a venue a credible alternative to the Hammersmith Apollo/Brixton Academy or to the Forum/Astoria/SBE, is more likely to be in the region of £1 million to £5 million. Evidence suggests that the amount of conversion/refurbishment costs required to stage live music may vary considerably, depending on the previous use of an existing building/venue and the venue size, such costs generally being higher for venues previously used for other purposes and larger venues.

⁴⁴See Appendix F for discussion of competition from these venues.

- 5.35 Academy spent £3 million to £3.5 million to convert the former Gala Bingo Hall in Newcastle to create the Newcastle Academy with near 2,000 capacity, and the conversion of ABC in Glasgow, a former cinema, into two live music venues and four bars (with a capacity of 2,550 for the larger venue) cost £2 million. The reconfiguration of the Manchester Apollo (capacity 3,500) in 1994 cost £400,000⁴⁵ and the refurbishment of the Hammersmith Apollo in 2003 cost £1.2 million.⁴⁶
- 5.36 On the other hand, the redevelopment of the Roundhouse (capacity of 3,000) cost £30 million and, according to the parties, £23 million was spent on the refurbishment of the Hackney Ocean (capacity of 2,700).⁴⁷ At the top end of the scale, the refurbishment of Wembley Arena cost £35 million, and, according to the parties, the conversion of the Millennium Dome (capacity 20,000) is costing £135 million, though it is reportedly part of a £500 million investment.
- 5.37 Given that theatres or existing live music venues are already configured for stage performances, the typical refurbishment costs for such venues are likely to be lower than the conversion costs for venues that were previously used for other purposes. According to the parties, any theatre could choose to stage live music events with a few changes, all of which could be achieved within a day and at a cost of approximately £1,000 to the venue. If the theatre wanted to have the option of staging music events to standing audiences, or to have a more flexible capacity, it would need to make certain investments, normally in a mix of seated/standing configurations. They told us that inserting removable seating facilities (so that the venue can show seated performances as well as standing shows) costs approximately £500,000.⁴⁸
- 5.38 The time taken for conversion/refurbishment also varies considerably depending on the extent of refurbishment required. Hammersmith Apollo took only ten weeks to refurbish, whereas Newcastle Academy took ten months to set up and open and Wembley Arena took 16 months to refurbish.
- 5.39 Successful entry into the business of live music venues also requires marketing of the venue to promoters and end-consumers (ie, the potential visitors to live music performances). The parties told us that the total value of direct marketing costs incurred in the launch of new Academy venues in Islington, Liverpool, Newcastle, and Glasgow varied from £1,500 to £3,500. No marketing costs were incurred in launching new venues by either Live Nation or Hamsard.
- 5.40 In addition to the conversion/refurbishment and marketing costs associated with entry into the business of live music venues, other potential barriers to entry include: (i) setting up and maintaining business relations with promoters (and agents) and (ii) the availability of sites and regulatory requirements.

Business relations with promoters and agents

- 5.41 The parties and various third parties stressed the importance of the relationship between agents and promoters on the one hand and venue operators on the other. The parties told us that in the case of a newly launched venue, the venue operator was likely to have to pay for the first few acts to perform, as there would be an initial reluctance to perform at a venue with no track record, but that thereafter the venue

⁴⁵Seats were replaced, an extra bar built in the rear stalls, and an extra five exits were created.

⁴⁶£800,000 of which covered the installation of removable seats.

⁴⁷However, it should be noted that both the Roundhouse and the Hackney Ocean are not purely commercial parties, but are at least partly subsidized by public funding.

⁴⁸But see footnote 57.

would be on the market as one of the alternatives open to agents/promoters to book. According to the parties, the costs of offering to stage one or two introductory shows for free amount to approximately £25,000.

- 5.42 It appears that the costs associated with building and maintaining business relations with promoters and agents are considerably lower for existing venue operators that open a new live music venue than for new entrants to the market. This may be explained by the fact that these venue operators have already built these business relations in the past, when opening their other venues. For example, in the case of the reopening of the Hammersmith Apollo in 2003, emails were simply sent to promoters notifying them of the launch of the Hammersmith Apollo as a live music venue.
- 5.43 New venue operators, on the other hand, may have to invest more time and effort in building and maintaining business relations. These expenses may include expenditure on marketing to encourage attendance at the venue and reduce risk to promoters in order to build relations with those promoters. The process of building and maintaining business relations with promoters and agents can also be time-consuming, particularly for new venue operators. The owners informed us that it took [redacted] six to nine months to become profitable. [redacted] submitted that it took two years to re-launch the venue and needed heavy discounting to build a reputation with promoters. The owners of [redacted] also drew our attention to the time and difficulty in building a reputation with promoters and artists, and therefore in attracting acts. On the other hand, the Roundhouse, reopened in June 2006, appears to be an example of a venue that has increased the number of popular live music events it stages, although, as noted in paragraph 5.13, this may be a 'honeymoon period'.
- 5.44 The parties noted that, were there to be entry in response to a rental increase for venues owned by the parties, agents and promoters would be actively seeking opportunities to work with venues other than the parties. If this were the case, the support that agents and promoters could offer to newly established venues (by getting their acts to play there) could reduce entrants' costs (in terms of value and time) of building relations with these agents and promoters.

Availability of sites and regulatory requirements

- 5.45 We noted various regulatory requirements that apply to the operation of live music venues that may impact on the speed with which entry can occur and therefore on the cost of entry. However, the largest hurdle may be the difficulty of finding an appropriate site to set up a live music venue. The parties drew our attention to a number of unused cinemas and bingo halls in London which they told us would be suitable for conversion into live music venues. However, other venue operators told us it was very difficult to find (and purchase/lease) suitable buildings/venues in London that could realistically compete as venues for live music performances, for example, due to lack of public transport or the presence of neighbouring residential areas.
- 5.46 Finding a suitable site may take a year or longer. Material from the parties showed examples of where time-consuming search efforts and negotiations have not resulted in an acquisition/lease in the end, covering sites in Leeds, Manchester, and Bournemouth considered for acquisition by [redacted] but that, for various reasons, turned out not to be suitable.
- 5.47 In addition to finding a suitable site, entrants have to obtain planning permission and operating licences. Although the costs of these licences are limited (approximately £1,500), obtaining the licences may take up to 12 months (including checks by Local

Authority officers). Combined with the time it takes to find a suitable site, this means that the timescales for new entry may be two years or longer.

Prospects for entry

- 5.48 The parties informed us of a number of possible venues that have previously been used to stage live music and that could be resurrected as live music venues in the future. These include The Rainbow Theatre (currently a Brazilian Pentecostal Church), The Lyceum Ballroom (currently owned by Live Nation and hosting the Lion King), the Lewisham Odeon and Olympia (currently an exhibition centre).
- 5.49 They advised that, in addition, there are many sites in London that can be refurbished and launched as live music venues, including theatrical venues, such as the London Palladium,⁴⁹ as well as exhibition centres, ice rinks, bingo halls, train sheds, swimming pool halls and warehouses. However, they told us that the most likely entry candidates were casino operators, as the relaxation of restrictions on casinos has already prompted global casino operators to apply for national or regional licences and/or take stakes in existing UK casinos, which, according to the parties, would lead to the launch of 10 to 30 new entertainment venues/facilities across the UK by 2010.

Entry and expansion in relation to the five venues

- 5.50 Our interest is in the role that entry and expansion might play in mitigating or eliminating the effects of any loss of competition as a result of the proposed merger. In the light of our earlier analysis we therefore focused on the prospects for entry or expansion of venues that might provide a competitive constraint to one or more of the five venues. We take the view that for this purpose we should give limited weight to entry or expansion expected beyond two years. Whilst, paragraphs 5.30 to 5.47 suggest that under particularly favourable circumstances entry from a previously unidentified source within two years in response to a rise in venue hire prices (or reduction in non-price factors) at one or more of the five venues cannot be ruled out, we heard no evidence to lead us to believe that this was likely.
- 5.51 We conclude that the threat of entry or expansion (or actual entry and expansion) within a timescale relevant to our inquiry from venues not already under development (ie new entry in response to any increase in venue prices or worsening in non-price competition) is unlikely to provide a constraint upon which we can rely.

Conclusions on competition between venues

- 5.52 On the basis of the preceding discussion we conclude:
- (a) Outside London the venues controlled by Live Nation and by Academy are not close competitors.
 - (b) Within London, actual and potential substitutability between venues depends upon the event and in some cases may be limited, but is greater between Brixton Academy and Hammersmith Apollo than from either of those to any third-party venue. Further, substitutability between SBE and the Astoria is greater than to any third-party venue. The Forum is also a significant substitute for the

⁴⁹This venue is discussed in Appendix F.

SBE. In each case there appears to be limited realistic scope for substitution of third-party venues given their characteristics and availability.

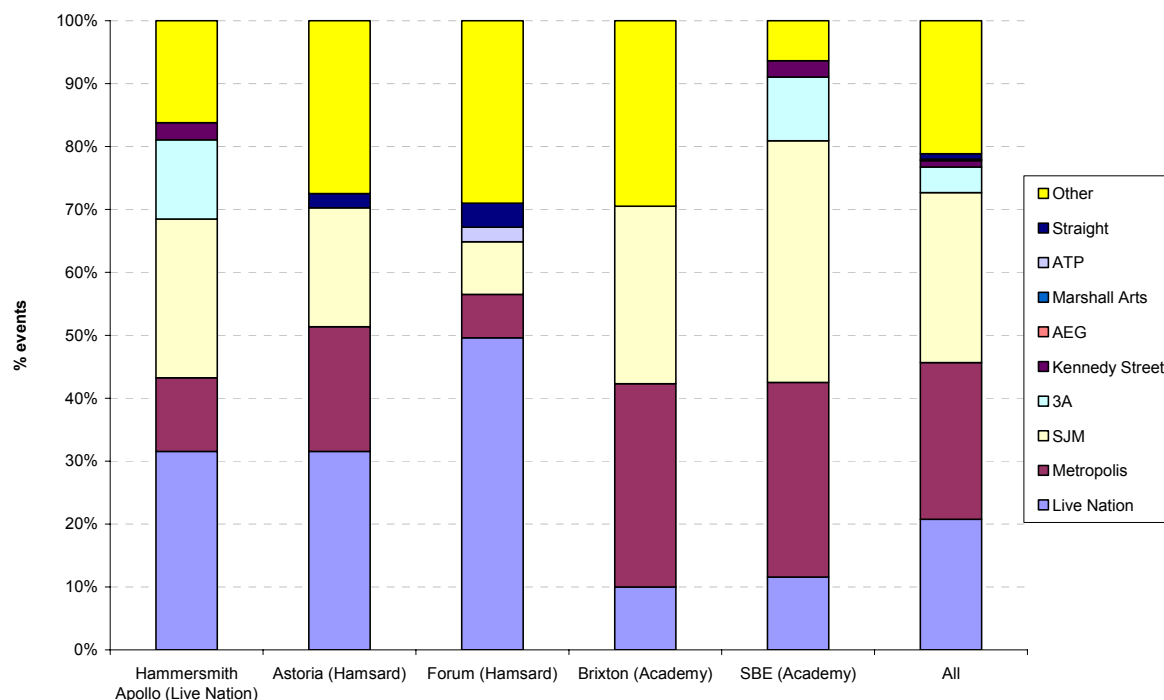
- (c) We do not consider that we can rely upon future competition from the Roundhouse, the O2 Music Club and the Royal Festival Hall to provide a sufficient constraint to offset the impact of loss of rivalry between the five venues.
- (d) Given the reduction in the range of alternative venues not controlled by the parties, we cannot be confident that the buyer power of agents post merger would be sufficient to ensure that any loss of rivalry between the five venues will lead to no adverse effects.
- (e) The threat of entry or expansion within a timescale relevant to our inquiry from venues not already under development (ie new entry in response to any increase in venue prices or worsening in non-price factors) is unlikely to provide a constraint upon which we can rely.

Competition in provision of live music promotion services

- 5.53 Paragraphs 4.25 to 4.29 considered the role of promoters, the extent to which promoters specialize in terms of geography or the types of music they promote, and price and non-price factors in choice of promoter by an agent.
- 5.54 The parties listed 12 major promotion service companies as currently active in the promotion of popular music in the UK (see paragraph 2.8). These vary considerably in the scale of their operations. The parties identified 31 individual promoters at these promotion service companies, of whom eight (26 per cent) were within Live Nation, five (16 per cent) were within Metropolis, and three (10 per cent) were within SJM.
- 5.55 To explore the extent of involvement of each company in promotion of the types of music in the sorts of venue which are the focus of this inquiry, we examined the number of popular live music events promoted by each promoter at the five venues. The results are shown in Figure 2. This shows that across those five venues, Metropolis promoted the largest number of events (27 per cent of events), followed by Live Nation (25 per cent of events) and SJM (21 per cent of events). These were by some margin the most important promoters at those venues, and between them promoted 73 per cent of the events.

FIGURE 2

Number of events promoted by promoter at the parties' venues



Source: CC analysis

Note: Period covered varies according to data available from parties (Hammersmith Apollo is for live music events only in 2005, Brixton Academy and SBE are 2002 to 2005, and Astoria and Forum are 2005 to 2006). In-house club nights have, where possible, been excluded. However, at Brixton Academy and SBE, we did not have a breakdown of the 'other' category, and the figures shown for these venues therefore include some club nights or non-live music events.

5.56 To the extent that Live Nation promoters disproportionately promote events into Live Nation venues, and SJM and Metropolis disproportionately promote events into Academy venues (see paragraph 6.50), these figures may overestimate the market shares of those organizations in terms of the promotion of popular live music in the UK as a whole. As an alternative measure, a third party provided us with numbers of events promoted based on a review of Ticketmaster tickets available for 114 indoor venue concerts in the three-month period from 17 July to 17 October 2006. On this basis Live Nation/DF Concerts had a 39 per cent share, Metropolis an 18 per cent share, and SJM a 16 per cent share, giving them a combined share of 73 per cent.

5.57 We also examined data from Mintel on advertising spend by promoter for the period May 2005 to April 2006.⁵⁰ This showed SJM spent most on advertising during that period (£3.2million, representing 30 per cent of the total), Live Nation (Clear Channel Entertainments and Mean Fiddler together) spent the second most (£2.24million, representing 21 per cent of the total) and Metropolis spent the third most (£1.16million, representing 11 per cent of the total), giving the top three a combined share of 62 per cent.

5.58 Academy Events, in contrast to these promoters, promotes events only at Academy's own venues and focuses on small acts which it then passes on to other promoters

⁵⁰Music Concerts and Festivals, Leisure Intelligence, August 2006. Mintel International Group.

(notably shareholders SJM and Metropolis) if these become sufficiently successful to play larger venues. Its business consists of three promoters, whose stated role is:

- (a) to promote artists that the main UK promoters are not interested in;
- (b) to promote new and emerging talent at the 'lowest end' of the spectrum (ie in Academy venues of below 250 capacity);
- (c) to consider UK tours promoted by mainstream promoters/artists and to try and purchase 'spare' dates in locations in which Academy has a venue that the tour is not taking in, particularly Liverpool and Bristol,⁵¹ and
- (d) to produce events for Academy partners such as Carling, Virgin Mobile, Jack Daniels, and Time Out magazine.

5.59 Academy Events accordingly promoted few events at the five venues⁵² and did not register in the Mintel data on advertising. Nevertheless, it promoted 355 events in 2005, representing an 8 per cent share of events sold through Ticketmaster based on the analysis above.

5.60 Whilst we do not regard any of these estimates as entirely reliable indicators of market shares, they provide a broad indication of relative size and importance in the promotion of live popular music in the UK. As a result of our examination of the effects of the merger on competition in the provision of promotion services for popular music (see paragraphs 6.38 to 6.41), we concluded that it was unnecessary for the purpose of this inquiry to make a more reliable estimate of market shares.

Competition between the parties

5.61 The parties told us that as a result of their differing remits Academy Events never competed with Live Nation promoters; and Live Nation did not bid for one-off events at Academy's smaller venues, which were the only events that Academy Events promoted.

5.62 We examined all the events that Academy Events promoted from February 2002 to September 2005 and compared these with events promoted by Live Nation in 2004 and 2005⁵³ in terms of the location of the event, the volume of ticket sales and the ticket price. Details of our analysis are at Appendix G.

5.63 Our analysis shows that Academy Events promoted primarily smaller scale events, mainly in the smaller rooms at the Birmingham, Liverpool, and Islington Academy venues, whereas Live Nation promoted only 25 shows in these venues in 2004 and 2005. Ticket prices were low at the Academy promoted events, and whereas about [X] per cent of Live Nation's artists earned more than £[X] a show only [X] per cent of those promoted by Academy Events did so, indicating differences in the types of artist appearing. Our analysis therefore confirmed that Academy Events does not compete closely, if at all, with Live Nation.

⁵¹We were informed that the Academy venue managers normally wait until they are sure no mainstream act is going to book the date before confirming an Academy Events event.

⁵²Academy Events promoted seven events at SBE in 2005.

⁵³The only period for which the relevant data was available from Live Nation.

Counterfactual

- 5.64 In deciding whether the proposed merger would be likely to give rise to an SLC we need to compare the competitive situation that we expect following the proposed merger to that which would be expected to prevail without the proposed merger (the counterfactual).
- 5.65 We considered four possible counterfactual situations:
- (a) RJD would have retained its shareholding in Academy.
 - (b) RJD would have sold its shareholding to another financial investor.
 - (c) Flotation of Academy, in part or as a whole.
 - (d) RJD would have sold its shareholding to a trade buyer.
- 5.66 As would be expected for a private equity investor, RJD considered its exit strategies at the time of its original investment in 2004. It told us that at the time of the initial approach from [X] in December 2005 it was not actively seeking an exit and, if the offer had not been made for Academy, it would have continued to hold its investment for the time being.
- 5.67 We consider that, in the absence of the merger, the most likely outcome would have been that RJD would have retained its investment until 2007 or 2008. At some point thereafter, it would have sought an exit for its investment. Having reviewed the options listed in paragraph 5.65, whilst we do not rule any out, we consider the most likely route for this would have been a secondary buyout.

Conclusions on the counterfactual

- 5.68 We therefore conclude that, in the absence of the merger, Academy would remain independent.

6. Effects of the proposed merger

Horizontal effects in relation to venues

- 6.1 On the basis of our findings in paragraph 5.52, against the counterfactual in paragraph 5.68, we conclude that the proposed merger would lead to loss of rivalry between the five venues, and in particular between the Hammersmith Apollo and Brixton Academy and between the SBE, the Astoria, and the Forum. We further conclude that the threat of entry or expansion within a timescale relevant to our inquiry is unlikely to provide a sufficient constraint to offset the impact of loss of rivalry between the five venues, and that, because of the impact of the merger in reducing the alternative venues available, we cannot be confident that the buyer power of agents post merger would be sufficient to ensure that any loss of rivalry between the five venues will lead to no adverse effects.
- 6.2 We now explore what those adverse effects might be in greater detail and consider arguments put to us by the parties as to why such adverse effects would not occur in practice. We consider, first, price effects and, secondly, non-price effects.

Prices

6.3 In order to assess the potential effect on prices we first considered the sources of income to a venue operator, and then examined the role of competition between venues in relation to these.

Income from venue operation

6.4 A venue operator has a number of revenue streams from hosting an event, including:

- (a) *Venue hire revenue*—this is paid by the promoter and can be charged on a number of different bases (see paragraph 6.6).
- (b) *Bar sales revenue*—this is paid for by the concert attendee and includes food and drinks (and may be sold through concessionaires).
- (c) *Ticketing commission*—a venue will usually receive an initial or annual fee and/or a per ticket commission from its primary ticket agent, which will charge concert-goers a booking fee (and sometimes a transactional fee in addition).
- (d) *Merchandising commission*—if the venue is requested to sell merchandise and brochures, it will collect a flat fee or a percentage of the revenues.
- (e) *Sponsorship revenue*—this is revenue generated by sponsorship deals, for example, with drinks companies. These may be annual deals or event-specific.
- (f) *Other income*—some other sources of income (for example, a facilities fee for putting on extra security) may also exist.

6.5 Figure 3 gives an indication of revenue breakdown at the parties' London venues and illustrates the significance of ancillary income together with how venues differ in the revenue they take from venue hire rates, bar prices, ticketing commission, and merchandising commission.⁵⁴

FIGURE 3

Breakdown of revenue at Academy, Live Nation, and Hamsard venues, 2005



Source: CC analysis.

Note: Academy venues are based on financial year 2005 data (October 2004 to September 2005). Live Nation and Hamsard venues are based on 2005 calendar year data. Wembley Arena is based on 2006 calendar year data. Other show revenue includes merchandise fees, facility fees, catering and other miscellaneous revenues. For Astoria, Forum and Mean Fiddler, this also includes ticket revenue for club nights and self-promoted shows. For Wembley Arena, this includes parking charges.

Venue hire prices

6.6 Venue hire prices can be charged in a number of ways:

⁵⁴Figure 3 does not include sponsorship revenue due to the different treatment of sponsorship income in the accounts of Live Nation and Academy. Sponsorship income is allocated to individual venues in Academy's accounts but treated as a central income stream for Live Nation. We have therefore excluded sponsorship income from Figure 1 to make the venues more comparable.

- *Flat venue rental*—this is a flat charge for use of the venue. Academy uses this method at SBE, [redacted]. Hamsard also uses a flat rate charge at the Astoria and the Forum.
- *Cost per person*—this is a price per attendee plus show costs. It is used by Academy at its other venues.
- *Percentage of box office revenues*—this is a charge expressed as a percentage of box office revenues. In the case of Hammersmith Apollo, there is a minimum and an option to have this capped at a maximum amount. Brixton Academy also charges a percentage of ticket sales, but with the option to buy use of the venue for a capped amount.

6.7 The parties' venue hire prices tend to be either based on standard rate cards (in the case of some Live Nation venues) or rates that are communicated to promoters on request (in the case of Academy and some Live Nation venues). The parties told us that prices were set to cover costs. However, we were told by [redacted] that, [redacted], in setting prices at Mean Fiddler venues they looked very keenly at what other venue operators were charging and set their prices accordingly.

6.8 We heard that venue hire prices are more negotiable at some third party venues (for example, [redacted]). We also noted that although Live Nation did not now negotiate venue hire rates at the Hammersmith Apollo, it had sometimes negotiated these in 2003 and 2004 following the Hammersmith Apollo's refurbishment in 2003.

6.9 The parties noted that whilst venue hire was important to cover venue costs, it was not the main source of the venue's profits. The parties told us that rates were reviewed annually and, if altered, were communicated to promoters so as to give them warning when planning budgets for forthcoming tours. Events already booked for the following year at the point of the price increase were not subjected to the annual price increase, only those events that were booked after the price increases are announced. They stated that the most significant changes to costs over the past three years had been in relation to security costs, utilities costs and staff wages. Despite these increases in costs, the parties' venue hire charges have not changed that frequently over the past three years, for example:

- Hammersmith Apollo rates did not change between September 2003, when they were introduced, and 1 January 2006;
- Astoria, Forum, and Mean Fiddler rates did not change between 2003 and October 2005; and
- SBE increased its hire rates on 1 October 2004 and 1 December 2005 and Brixton Academy increased its hire rates on 1 January 2006.

Bar prices

6.10 The parties told us that bar prices were set at a level that was at a slight premium to the local pub. However, [redacted] suggested that bar prices were set by reference to competing venues. From the data submitted by the parties, it appeared that Hammersmith Apollo, Brixton Academy, SBE, and the Forum charge higher bar prices than the three nearest local public houses for each venue, but the Astoria charge less than the three nearest local public houses. Whilst the evidence was not conclusive, we considered that it was more likely that the constraint on bar prices came from local public houses than from competition between the five venues.

Ticketing commission

- 6.11 The parties' venues have a range of agreements with different ticket agents. These agreements set the allocation of tickets between the venue's primary ticket agent and promoter and determine the fees the venue receives. The higher the percentage of tickets the venue's primary ticket agent receives, the higher the commission revenue the venue can generate from the transaction and booking fees charged by the venue's primary ticket agent. It is therefore in the interests of both the venue's primary ticket agent and the venue to have a higher percentage allocated to the venue's primary ticket agent because then both parties can generate more revenue from booking and transaction fees (provided the ticket agent is able to sell the tickets). However, the parties submitted that the level of promoter's ticket allocation at venues reflects an equilibrium between the promoter and venue over the past five or so years. They submitted that these allocations are not changed because this would prejudice relations with promoters and so would damage its venues business.
- 6.12 Table 4 sets out each of the parties' existing agreements with primary ticket agents. These agreements cover all their venues, such that the ticketing arrangements are not differentiated by venue.

TABLE 4 Ticketing agreements of the parties

Company	Ticket agent	% split of tickets between promoter and venue	Fees paid to venue	Notes
Academy	TicketWeb*	60/40	(✂)	Agreement expired in mid-October 2006, currently being renegotiated under heads of terms that envisage a 50/50 split Agreement until January [✂] [✂] agreement until December [✂]
Hamsard	See Tickets	50/50		
Live Nation	Ticketmaster	25/75		

Source: CC analysis.

*TicketWeb is a subsidiary of Ticketmaster.

Merchandising commission

- 6.13 When the venue's concessionaire sells merchandise, gross revenue is split between the artist/agent, the merchandise concessionaire and the venue. In the case of Academy and Live Nation, the artist/agent receives [✂] per cent of the revenue, with the remaining [✂] per cent split between the venue and the merchandise concessionaire.⁵⁵ Hamsard venues do not have an in-house merchandising concessionaire and charge a flat fee of £[✂] for the artist/agent's merchandising concessionaire to sell merchandise at the venue. Table 5 sets out the respective merchandising arrangements of the parties.

⁵⁵At some Live Nation venues the artist may alternatively use their own merchandise sellers in return for a fixed fee negotiated with the venue.

TABLE 5 Merchandising agreements of the parties

Company	Artist/agent share of revenue	Concessionaire share of revenue	Venue share of revenue
Academy Hamsard (flat rate) Live Nation	[✂	*]

Source: CC analysis.

*Determined on a sliding scale operated by each individual venue.

Effect on venue prices

6.14 Several unrelated third parties expressed concerns that the merger would lead to an increase in venue prices. Furthermore, we noted in the statement of intent attached to the heads of terms a provision limiting increases in rentals to reasonable adjustments taking into account prevailing costs, suggesting that the Academy shareholder promoters shared these concerns (see paragraph 3.6). However, the parties argued that it would be neither practicable nor economically rational for the merged group to lose agent/promoter goodwill by seeking to raise rents at their venues, since any marginal advantage would be insignificant as compared with the inevitable future lost business. In particular they argued that:

- (a) only a small number of acts would need to switch away to alternative venues to leave the merged groups' venues in a less profitable position;
- (b) even where certain acts have strong preferences for a specific venue, the loss of goodwill would encourage agents to move other more flexible London acts (and since rate cards are widely known and the venue will normally be unaware of the act's identity when availability on standard terms is provisionally checked by the promoter, price discrimination is impossible in practice);
- (c) the loss of goodwill with agents/promoters would encourage them to use third party venues for non-London dates;
- (d) increases in venue hire rentals significantly above prevailing rates would have wide repercussions, including 'loss of promotions mandates or an ability to obtain such mandates only on less favourable terms', and
- (e) 'there are no high barriers to entry or expansion', and faced with hire rentals significantly above prevailing rates agents/promoters would encourage and sponsor new entry.

Constraints on venue hire prices from other venues

6.15 We previously considered the constraints that might arise from buyer power of agents and from entry in paragraphs 5.22 to 5.51. We now focus on the constraints imposed by possible loss of events to other venues.

6.16 The parties' analysis of Academy data showed that, because of the importance of non-rental income, only five or six shows a year would need to be lost at Brixton Academy to render a 10 per cent price rise in venue hire rental unprofitable. The parties noted that promoters do not, therefore, need to be very price-sensitive before putting up venue hire prices becomes unprofitable.

6.17 The responses to our questionnaire (discussed in paragraph 5.9 and Appendix F) did not allow us to calculate price elasticity with any reliability but did indicate that promoters and agents are relatively insensitive to venue hire prices. We do not accept that the relatively low level of losses that would render a 10 per cent price increase unprofitable demonstrates that there would be no ability to raise venue prices at the five venues after the merger. The risk of losses depends upon the alternative venues available and their substitutability (discussed in paragraph 5.10). We considered two possibilities:

- (a) If venue rentals at each of the five venues are currently constrained by competition from other venues, including competition between the five venues, then any reduction in that competition as a result of loss of rivalry between the five venues would enable hire charges to rise.
- (b) If, on the other hand, as previously discussed, the rentals are currently constrained below those levels as a result of the buyer power of agents, then anything that reduces the agents' buyer power will enable rentals to rise. We previously explained why, in our view, the buyer power of agents in relation to venues would be weakened as a result of the merger due to the reduction in the number of alternative venues not controlled by the parties.

Conclusion on venue hire prices

6.18 We conclude that none of the constraints appear sufficient to ensure that the parties would not be able to benefit from the loss of competition between the five venues resulting from the merger. Therefore we would expect the merger to result in rentals at those venues being higher than would otherwise have been the case.

Implications for ticket prices

6.19 We considered whether any increase in venue hire charges would lead to higher ticket prices for concert-goers.

6.20 The parties submitted that ticket prices were set when promoters put together the tour routing and costings, with ticket prices based on:

- the estimated market price for the ticket (taking into account the type of act and the likely target audience so as to maximize attendance); and
- the costs of putting on the show, consisting primarily of the agent's aspirations in terms of fees being sought, and also including related costs (for example, marketing costs, production/labour/infrastructure costs, and venue hire costs).

6.21 This suggests that ticket prices would be likely to increase in response to any increase in venue hire prices, a view that was also put to us by several unrelated third parties. On the other hand, we might expect ticket prices to be set according to what the market will bear.

6.22 This suggests that the scope to increase ticket prices in response to increases in costs may be limited. However, the OFT in its report on Ticket Agents noted some reasons why promoters and agents may not set ticket prices at the maximum level the market will bear.⁵⁶ We concluded that the possibility of some increase in ticket

⁵⁶The OFT, *Ticket agents in the UK*. January 2005, paragraphs 7.19 to 7.23.

prices could not be ruled out but, since venue hire costs are only a small proportion of total costs, any increase in venue hire prices is unlikely to make a significant difference to ticket prices.

Bar prices, ticketing commission, and merchandising commission

- 6.23 The parties argued that bar prices, ticketing commission and merchandising commission are not dependent upon competition between venues, and so would not be affected by the merger. Whilst this is likely to be true for bar prices, we found these arguments less convincing in relation to ticketing commission and merchandising.
- 6.24 The parties noted that Live Nation, Hamsard, and Academy ticketing commission rates and merchandising commission rates were the same all over the country or based on historic rates that were not going to change as a result of the merger. Whilst ticketing commission does not vary from venue to venue, Table 4 shows that there are significant differences between the Live Nation, Hamsard, and Academy agreements, with the Live Nation agreement providing for the largest share of tickets to be sold through the venue's ticket agent. There may be an ability and incentive for the merged group to obtain additional ticketing commission through changes to the Academy agreement, to the detriment of promoters and/or concert-goers. The synergies from the merger envisaged by the parties included an increase in income from this source (see paragraph 3.8).
- 6.25 During the course of our inquiry Academy commenced negotiations on a successor to its main ticketing agreement. The new agreement has still to be finalized but the parties told us that once the new agreement was in place it would not expect the allocation to venues to rise as a result of the merger.
- 6.26 Nevertheless we remain concerned that there could still be an incentive for the merged group to seek a greater return from its ticketing agreements, and hence a risk that at some point following the merger the merged group will seek to renegotiate the ticketing agreements. The ability to do this may be constrained by agreements with Simon Moran and Robert Angus, [redacted] (see paragraph 3.6). However, we are not confident that this can be relied upon to ensure that no changes will occur.
- 6.27 Table 5 shows that merchandising commission is charged in different ways by Live Nation, Hamsard, and Academy, and can vary from venue to venue. According to the parties, the income from merchandising is small both to the venue and to the artist/agent and levels of commission have not previously featured in discussions with promoters or venues. The ability of the merged group selectively to increase charges for merchandising depends upon what constrains the charges at present and any impact of the merger on these constraints. We did not feel that the evidence available was sufficient for us to draw any reliable conclusions.

Non-price effects: effect on service quality

- 6.28 The preceding discussion has focused on price effects, particularly the expected impact on venue prices, and arguments put by the parties to show that venue prices would not rise. However, in the light of our earlier identification of the range of factors on which venues compete, of which price is only one and not one to which promoters and agents are highly sensitive, we also need to examine non-price factors. These include all factors which affect, directly or indirectly, concert-goers' and artists' satisfaction with the choice of venue. We use the generic term 'service quality' to encompass the various non-price factors on which venues compete.

- 6.29 Third parties listed location, availability, capacity, ambience and genre, configuration, facilities, artists' preference, reputation and service quality (including professionalism of venue management) as important in artists', agents' and promoters' choice of venues (see paragraph 4.4). Whilst some of these, such as capacity and location, are largely fixed and unaffected by the level of competition, others, such as provision of facilities, and infrastructure, and reputation, depend on investment and continuing attention to service quality that could be affected by a loss of rivalry.
- 6.30 The parties told us that a venue operator, in order to maximize event bookings, must consistently meet the needs of the artists and agents in addition to offering a competitive price. This included, among other factors, having appropriate backstage facilities, the required level of security, and a decent bar for fans. They told us that improving the quality of experience for concert-goers was central to their business plans, for which purpose they invest heavily in their venues, and it would make no sense for them to jeopardize this. Following publication of our provisional findings, they further told us that levels of investment were not dependent upon the competition faced by each venue. They said that most investment in service quality was intended to increase attendance at events or, more importantly, to increase willingness of attendees to spend once in the venue. It was thus independent of competition between venues. They invited the CC to identify areas to which these considerations do not apply, other than, perhaps, investment in dressing room facilities for artists.
- 6.31 The need to compete is, in most markets, an important driver of service quality. We approach this case as the CC treats any merger—with the presumption that a loss of rivalry results in adverse effects for customers unless presented with strong evidence to the contrary. We accept that investment and management attention to improving service quality does not occur solely in response to competition from other venues. However, for us to conclude that the loss of rivalry between the five venues would have no non-price effects, we would need to be satisfied that in this case there are no areas where levels of investment and service quality are dependent upon the spur of competition.
- 6.32 In our view the loss of rivalry between the five venues would give the merged group an incentive to reduce its discretionary expenditure wherever this would be profit maximizing; ie where it would not lead to a loss of revenue that would exceed the expenditure saved. We have no reason to doubt the parties' intention to invest in the facilities infrastructure and service quality at the five venues. However, the effects of a reduction in rivalry on non-price factors can be of many different types and are difficult to predict with precision and in advance. The parties put it to us that the CC cannot have an expectation of unspecified adverse effects. We do not accept that we are bound to identify specific areas of service quality that may be adversely affected in order to have an expectation that the reduction in rivalry will lead to a loss of service quality.
- 6.33 On the basis of the considerations in paragraphs 6.28 to 6.32 we expect the loss of rivalry to lead to some loss of service quality in comparison with the situation that would prevail in the absence of the merger, although the precise nature and extent of this is difficult to assess.

Conclusion on effects on prices and service quality

- 6.34 We conclude that we would expect the loss of rivalry from the proposed merger to lead to a worsening in the price and non-price factors on which the parties compete. Our expectation is that this would result in venue prices being higher than would otherwise be the case and to some loss of service quality at the five venues. We also

identified potential issues over ticketing commission and merchandising commission, but did not consider that we had sufficiently clear evidence to form an expectation that these would be adversely affected by the merger.

Portfolio effects

- 6.35 Some unrelated third parties suggested that the merged group may have the ability and incentive to tie the rental of one venue to the rental of another (either of different size or in a different geographical location).⁵⁷
- 6.36 The parties told us that bookings were done on a venue by venue basis and no discounts or other incentives were offered to encourage bookings of multiple venues as part of a tour. Although Live Nation has a central bookings department available to all promoters, each venue is charged out individually and in around 75 per cent of cases promoters contact the venue manager directly. They said that there would be no point in offering incentives for multiple bookings, since as a result of the insensitivity of promoters and agents to venue prices there would be very limited upside to pursuing such a strategy. In addition, since it would involve giving discounts to promoters who would have booked the venue in any event the deadweight cost would certainly outweigh any income from additional bookings.
- 6.37 Tying of venues might be achieved in a range of ways and, to the extent that the merger gave the merged group a degree of market power in London arising from its control of the five venues, this might create opportunities for tying venues that cannot be ruled out on the basis of the arguments in the preceding paragraph. These possibilities would arise only if the merger results in market power in relation to venues. Any such portfolio effect is therefore dependent upon the horizontal effect in relation to venues. On that basis we concluded that we did not need to reach a separate judgement on whether or not the merger would lead to an SLC on the basis of portfolio effects.

Horizontal effects in relation to promotion services

- 6.38 In paragraph 5.63 we concluded that Academy Events does not compete closely, if at all, with Live Nation in the provision of promotion services. Before concluding that the merger would therefore not lead to a loss of competition in this regard, however, we considered whether, absent the merger, on the basis of our conclusion on the counterfactual we would have expected Live Nation or Academy Events to develop their promotions businesses so as to increase the degree to which they compete. Evidence from the Academy Board minutes showed that in the recent past the Board has taken steps to ensure that Academy Events did not develop into a mainstream promoter, which might have led to it becoming a competitor to Academy's shareholder promoters. Equally, we found no reason to believe that Live Nation promoters would change the way in which they currently operate. We further noted that, even if Live Nation were to expand its promotional activities in relation to the types of act for which Academy Events competes, this might not result in greater competition with Academy Events since it would not be in the latter's interest to compete where those acts would anyway play in Academy venues.

⁵⁷Third parties also raised concerns over bundling venues with festivals. We examine this possibility as part of our consideration of vertical effects because of its relationship to issues dependent on links to related third party promoters.

SJM and Metropolis

- 6.39 We next considered whether the merger might nevertheless lead to a loss of competition in promotion services as a result of Robert Angus and Simon Moran (who, as previously noted, control Metropolis and SJM respectively) becoming shareholders alongside Live Nation and Gaiety.
- 6.40 In view of the significance of Live Nation, Metropolis, and SJM collectively in the promotion of live popular music (see paragraphs 5.54 to 5.60), if the merger were to result in those companies acting together in ways that reduced competition between them, then this would be a potential cause for concern. However, whilst the merger would lead to some degree of shared interests with Live Nation in relation to venues, it does not lead to similarly shared interests in relation to the promotion businesses of Live Nation, Metropolis, and SJM. Robert Angus and Simon Moran are already shareholders in Academy (along with Gaiety), and hence have shared interests with respect to venues, but we heard no evidence to suggest that Metropolis and SJM do not compete in provision of promotion services. We would therefore expect any impact of the merger involving Metropolis or SJM to come about only either as a result of coordination on promotion services or as a vertical effect of the merger, eg as a result of changes to incentives for Metropolis and SJM to favour venues currently controlled by Live Nation. We consider the first possibility in paragraphs 6.42 to 6.46 and the second in paragraphs 6.47 to 6.67.

Conclusion on horizontal effects in relation to promotion services

- 6.41 On the basis of paragraphs 6.38 to 6.40, we concluded that we do not expect the merger to lead to an SLC as a result of horizontal effects in relation to promotion services.

Coordinated effects in relation to promotion services

- 6.42 Where markets are sufficiently concentrated, the actions of individual firms can have identifiable effects on competition, such that firms recognize their interdependence. Coordinated effects refer to the effects of the behaviour that results from this recognition and that deviates from the behaviour that would be expected in more competitive circumstances. The CC merger guidelines⁵⁸ list a number of conditions that are necessary for such behaviour to be sustainable though time:
- (a) The market has to be sufficiently concentrated for firms to be aware of the behaviour of their competitors, and for any significant deviation from the prevailing behaviour by a firm to be observed by other firms in the market.
 - (b) It must be clear that it will be costly for firms to deviate from the prevailing behaviour—so costly that it will be in a firm’s interests to go along with the prevailing behaviour rather than seek to deviate from it.
 - (c) This type of behaviour can only be sustained in markets where there are relatively weak competitive constraints.
- 6.43 We considered the possibility of coordinated effects in relation to promotion services involving Live Nation, SJM, and Metropolis. In doing so, we were influenced particularly by two considerations:

⁵⁸Merger references: *Competition Commission Guidelines (CC2)*, June 2003.

- (a) The competitive constraint arising from the strong position of agents in relation to promoters.
- (b) The limited impact of the merger on most of the factors against which coordinated effects are normally judged.

6.44 We noted in paragraph 5.23 that agents representing extensive rosters of popular acts are in a strong negotiating position in relation to promoters. In the event of the type of behaviour with which we are here concerned, the agents would be well placed to identify a gradual reduction in the terms being offered relative to the current situation and could be expected to seek alternative bids from promoters unconnected to the parties. Agents may, therefore, have the ability to offer third party promoters the opportunity to build their reputation, strengthen their relationship with the agent and capture a larger share of the market in the future. This could be sufficient to constrain coordinated behaviour.

6.45 The merger would appear to have little or no impact upon this and the other factors upon which coordinated effects are assessed, namely the degree of concentration in the provision of promotions, the existence and significance of entry barriers, the degree of homogeneity of services and firms, the degree of transparency, the costs of deviation, and ease of detection and punishment.

Conclusion on coordinated effects

6.46 We could not reach an expectation that the merger would have a significant impact on the ability of Live Nation, SJM, and Metropolis to engage in coordinated behaviours.

Vertical effects

6.47 Having considered the effect of the merger on competition in the provision of venues (horizontal effects in venues) and on competition in the provision of promotion services (horizontal and coordinated effects in promotion services) separately, we now consider the possibility of effects arising from linking of venue operation to promotion services (vertical effects).

6.48 The parties told us that Live Nation would book acts promoted by them in Live Nation venues where this was consistent with the four parameters communicated by the agent, and where the Live Nation venue was suitable. However, Live Nation's business strategy involves running its venues business and its promotions business separately; it gives no preferential treatment to Live Nation promoters when booking venues, and no incentives to its promoters to book those venues.

6.49 We described in paragraph 3.1 the benefits to Academy that RJD perceived as arising from having promoter shareholders on the Academy Board. However, Robert Angus and Simon Moran informed us that they saw their shareholdings in Academy simply as investments. Whilst, [REDACTED], Metropolis and SJM are able to obtain lower venue rentals at two Academy venues, we were told that this simply reflected their position as heavy users of these venues. They agreed that Academy benefits from the promoter shareholders' knowledge of the popular live music industry, and hence ability to judge where and what type of new venues are most likely to prove successful, but saw no further benefits from integration of venue operation and promotions.

6.50 We assessed the extent to which Live Nation promoters use Live Nation venues and Metropolis and SJM use Academy venues. This evidence suggests that promoters may tend to use associated venues more than third party venues. Figure 3 in Appendix F⁵⁹ shows that Live Nation promoters promote a higher percentage of events in the Live-Nation- and Hamsard-operated Wembley Arena, Hammersmith Apollo, Astoria, and Forum than in the Academy-operated Brixton Academy and SBE, whereas Metropolis and SJM promote a considerably higher share of events in the latter than the former. Live Nation promoters accounted for 76 of 456 (17 per cent) of the shows at Wembley Arena from 2002 and 2005, but 21 of 54 (39 per cent) of the shows between April 2006 and August 2006 after Hamsard became responsible for its operation.⁶⁰

6.51 In principle vertical effects might arise from the merger if:

- (a) the merged group restricted third party promoters or favoured its own promoters when accessing its venues; or
- (b) the merged group used its promotions business to favour its own venues.

(a) The merged group restricting third party promoters or favouring its own promoters when accessing its venues.

6.52 Several unrelated third parties expressed concerns that the merger would allow the merged group to restrict third party promoters' access to venues they controlled, or favour its own promoters, thereby giving it a competitive advantage over independent third-party promoters when dealing with artists or agents. The latter might be achieved, for example, either by giving preferential hire rates to its own promoters or by giving them an opportunity to obtain preferential 'first pencil' bookings.

(b) The merged group using its promotions business to favour its own venues

6.53 An alternative form of vertical effect might arise if the merged group used its promotion business to favour its own venues. This might be achieved by either:

- encouraging acts which were promoted by the merged group to play in its venues in preference to alternative suitable venues; and/or
- offering artists and agents higher fees than competing promoters to play at the merged group's venues, and so attracting them away from third party promoters and third party venues.

Assessment of vertical effects

6.54 The incentives to engage in any of these behaviours depends on the relative margins between the promotions and venue business. Using data from Hammersmith Apollo over the period 2003 to 2006, the parties estimated that contribution margin per event (ie revenues minus variable costs of a representative event) was [%] higher for the venue than for the promotions business. There is therefore a greater incentive to use the merged group's promotions business to capture events that would otherwise have gone to a competing venue, even if this is at the risk of losing some promotions

⁵⁹See Appendix F page F16.

⁶⁰The parties provided the diary for the Wembley Arena from October 2006 until March 2007, showing Live Nation promoting 40 out of 175 (23 per cent) of confirmed/pencilled dates, still showing an increase over the earlier period but suggesting that the period between April 2006 and August 2006 may have been unusual.

business or makes promotion of that event unprofitable (ie vertical effect (b)), than to attempt to use venues to do the reverse (ie vertical effect (a)).

6.55 In relation to vertical effect (a), the parties told us that they did not presently discriminate between their in-house promoters and third party promoters in relation to either dates available or the cost of hiring a venue, and did not intend to do so post-merger. They argued that there was no incentive for them to undertake such a policy for three reasons:

- live music venues cannot afford to turn away profitable business on the chance that their in-house promoters will find a suitable act wishing to play the same date;
- any perception that Live Nation was attempting to reduce agents' choice of promoter would certainly prompt agents to take their business to rival promoters; and
- any reduction in venue hire charge offered to Live Nation's promoters would be a false economy as up to 90 per cent of it would immediately go to the artist and agent. It would therefore create a scenario where the venue would be better off if a non-Live-Nation promoter won the tour.

6.56 Based on the profitability assessment, the parties' submissions and the fact that we found no horizontal effects in relation to promotion services, we considered that vertical effect (a) was unlikely. We therefore focused our assessment on vertical effect (b).

6.57 The parties told us that promoters had no scope to force artists to play at venues that they regarded as 'second best', and if they were to adopt a strategy of offering artists and agents higher fees to attract them to the merged group's venues then it would expect other promoters to match those fees with the result that promotion costs would rise for all promoters.

6.58 Having considered the ability and incentives that the merged group would face, we would expect that, post merger, Live Nation promoters would try to route tours through associated venues where possible, in line with its existing practice. The merger would give Live Nation promoters an incentive to extend this practice to include Academy venues. However, we would not expect them to seek to place acts in these venues where the agent regards the merged groups' venue as less suitable, since any such behaviour is unlikely to be successful due to agents' power in relation to promoters and the risks of damaging relations with agents. Whilst in principle it could be profitable to 'buy' acts to reduce dark nights, in practice this would be a high risk strategy given the risk of precipitating higher fees to artists more generally. We do not expect that the merger would create a significant incentive to do so. We further noted that any incentive for Live Nation promoters to act in any of these ways in relation to Academy venues would be diluted to the extent that Live Nation has only a 50.1 per cent shareholding in Hamsard, which itself would own only a proportion of Academy. Taking these considerations together, we reached the view that, while such behaviour has the potential to disadvantage other venues and promoters at the margin, we would expect the impact to be limited.

SJM and Metropolis

6.59 An incentive already exists for Metropolis and SJM to favour Academy venues for events that they sponsor. We noted in paragraph 6.48 that SJM and Metropolis promote a considerably higher share of events in the Brixton Academy and SBE than

in the Wembley Arena, Hammersmith Apollo, Astoria, and Forum. This incentive will not change following the merger. However, if, [X], the Live Nation and/or Hamsard venues were transferred into Academy post-merger, vertical issues similar to those discussed above in relation to Live Nation promoters could arise. The extent of any incentive would, however, be much weaker, and dependent upon the eventual shareholdings of Simon Moran and Robert Angus in the merged group and whatever financial or other arrangements were made.

- 6.60 We concluded that, if there were to be such a transfer of venues, some incentive could arise for SJM and Metropolis to try to route tours through associated venues where possible. However, for similar reasons to those previously given in relation to Live Nation promoters, we expect any impact on competition to be limited.
- 6.61 The parties told us that Live Nation/Hamsard currently had no specific plan to transfer any Live Nation/Hamsard venues into Academy post merger (although this is something they may consider in the future) and that any such future transaction would be subject to UK competition law and was not relevant to the proposed merger. In view of the conclusions in the preceding paragraph, we decided that it was not necessary for us to consider whether any such transfer would be a merger situation under the terms of the Act.

Festivals

- 6.62 A number of unrelated third parties ([X]) expressed concerns about the parties' interests in promoting the main UK festivals and how this might be used to bundle their venues in with appearances at festivals.⁶¹ Although Academy does not operate any festivals, the parties, Robert Angus, and Simon Moran have interests in a number of the largest festivals in the UK:
- (a) V festival in Chelmsford and Staffordshire is run by Roseclaim Limited and Maztec Limited, in which Dennis Desmond, Robert Angus, and Simon Moran are shareholders and directors.
 - (b) T in the Park (near Kinross) is run by Big Day Out, in which Dennis Desmond is a shareholder and director.
 - (c) The Reading and Leeds festivals are run by Hamsard.
 - (d) Download (in Donington Park) and the Concerts series in Hyde Park are run by Live Nation.
 - (e) Glastonbury is promoted by Mean Fiddler and in 2005 it had a 39 per cent profit share.⁶²
- 6.63 The opportunity for bundling appears most likely where festivals are a major revenue earner for artists or artists have other reasons to value the opportunity of playing at them. Many festival agreements between promoters and agents/artists already have an exclusivity clause that prevents headline artists from performing at any other venue within a specified geographical area over a period of up to 90 days either side

⁶¹This is a form of portfolio effect. We consider this here because the parties promote and, in some cases, own the festivals. The effect therefore has vertical elements to it.

⁶²Source: Mean Fiddler accounts 2004. The parties noted that the profits from the Glastonbury festival were largely donated to charities, decided by Michael Eavis. Hamsard generally does not make more than £[X] from its involvement in the Glastonbury festival.

of the festival.⁶³ This exclusivity clause is used to protect the commercial interests of the festival organizer, which may have offered considerable guarantees to the agent/artist. As a result, festival organizers that also own venues have a period in which they may have the ability to induce agents/artists to play in their venues (because the artist cannot appear at competing venues without the agreement of the festival organizer).

- 6.64 Unrelated third parties suggested such practices were already observed where artists play a warm-up concert (and sometimes a concert after the festival) during periods of exclusivity in one of the festival operator's venues. For example, Franz Ferdinand and the Arctic Monkeys played at the (Hamsard operated) Forum on 23 and 24 August 2006, prior to playing at the (Hamsard operated) Reading and Leeds festivals on 25 to 27 August 2006. Similarly, Foo Fighters played the (Hamsard operated) Astoria on 24 August 2005 before headlining at the (Hamsard operated) Reading and Leeds Festival on 26 to 28 August 2005.
- 6.65 The parties told us that the majority of acts that play festivals under exclusivity clauses would normally play arenas rather than city hall tours, and that in the case of the examples quoted these had occurred at the request of the agent.
- 6.66 Since Academy has no festival interests, the issues raised are very similar to those previously considered in relation to the use of the merged group's promotions business to benefit its venues and the extent to which the proposed merger might lead SJM and Metropolis to favour venues controlled by the merged group. Our conclusions are similar. To the extent that Live Nation is able to use its festivals interests in this way in relation to Live Nation and Academy venues, the merger does not change this. It would give Live Nation some incentive to extend any such behaviour to include Academy venues. However we would not expect them to seek to place acts in these venues where the agent regards the merged group's venue as less suitable, since any such behaviour is unlikely to be successful and risks damaging relations with agents. We would therefore expect any impact on competition to be limited. Whilst, if there were to be a post merger transfer of Live Nation or Hamsard venues to Academy, there might be some incentive for SJM and Metropolis to behave similarly, we would expect any impact to be even more limited because of their more limited shareholdings in Academy.

Conclusion on vertical effects

- 6.67 We conclude that, whilst the merger has the potential for vertical effects as discussed in paragraphs 6.47 to 6.66, any impact is likely to be too limited for us to find an SLC on the basis of vertical effects.

Efficiency gains

- 6.68 In the course of our inquiry the parties suggested several efficiency gains which they believed would follow from the merger and enhance competition in the provision of venues. In particular:
- (a) the ability to use increased opportunities for sponsorship to improve facilities at the merged group's venues;

⁶³However, we have heard that the restrictions may be lifted once festival tickets have sold out.

- (b) the opening of more new venues in ‘underserved’ cities giving public increased opportunity to enjoy live music events; and
- (c) the extension of ‘one stop’ booking to a larger range of venues.

6.69 In view of the business strategy being followed by Academy, and our conclusions on the counterfactual, we were not convinced that opportunities to improve facilities at existing venues or the opening of new venues are dependent upon the merger. Whilst the extension of ‘one stop’ booking may be considered an advantage by some promoters, we do not consider that it would provide a sufficient benefit to competition to outweigh or substantially offset the adverse affects that we have identified.

Findings on SLC

6.70 We conclude that the proposed acquisition of a controlling interest in Academy by Hamsard may be expected to lead to an SLC as a result of the loss of rivalry between the five venues, and in particular between the Hammersmith Apollo and Brixton Academy, between the SBE and the Astoria, and between the SBE and the Forum, leading to a worsening in the price and non-price factors on which the parties compete and, in particular, to rentals at those venues being higher than would otherwise have been the case.

7. Remedies

7.1 Having determined that the proposed acquisition of a controlling interest in Academy by Hamsard may be expected to lead to an SLC as a result of the loss of rivalry between the five venues, we now turn to remedies.

7.2 Section 36 of the Act requires us to consider three questions:

- (a) whether action should be taken by the CC for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effects that may be expected to arise;
- (b) whether the CC should recommend the taking of action by others (eg regulators, government departments); and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

7.3 In this case the only remedy options appear to be actions for the CC rather than for other bodies.

Remedy options

7.4 In our notice of possible remedies, published on 30 November 2006 (the Notice) we invited views on two structural remedy options which we considered would be effective in addressing the SLC identified. The Notice stated that the Group considered that behavioural remedies were unlikely to be effective, but that we would be willing to consider any practicable remedies—structural or behavioural—that the parties or third parties might put to us. The two structural remedy options set out in the Notice were:

- (a) Option 1: Prohibition of the acquisition;

(b) Option 2: Partial divestiture by disposing of one or more of the five venues. This could combine two elements:

(ii) divestiture of one of the Brixton Academy and the Hammersmith Apollo; and

(iii) divestiture of one of the SBE and the Forum.

7.5 The parties, while not accepting our conclusion that the proposed acquisition of shares in Academy may be expected to give rise to an SLC, proposed behavioural remedies as an alternative.

7.6 We now consider the parties' proposals before examining in greater detail the structural options. We then consider customer benefits arising from the merger.

The parties' behavioural remedies proposal

7.7 The parties argued that behavioural remedies would be reasonable, practicable and proportionate. They proposed a package of behavioural remedies which primarily addressed venue rental prices and involved publication of ratecards for each of the five venues, based on prices no higher than those prevailing on 1 November 2006 and covering all price components with permitted increases not to exceed the increase in the RPI. The parties did not accept that service quality at the five venues depends upon competition between venues. They argued that Live Nation invested in facilities, infrastructure and service quality to ensure required minimum standards were met and to increase venue income other than from rentals, and that this investment was not dependent on competition with other venues. Nevertheless, they said that they were prepared to discuss a commitment to maintaining currently projected levels of investment at the Hammersmith Apollo, Astoria and Forum, and ensuring equivalent investment levels at Brixton Academy and SBE. The parties told us that, although they were prepared to see their proposed behavioural remedies persist indefinitely, they confidently expected that changes in the market would restore effective competition. This would remove the need for the remedies, possibly in as little as three years.

7.8 We do not consider that behavioural remedies could comprehensively address the SLC in this case, since there are no behavioural remedies that would restore effective competition in the market. We cannot be confident that behavioural remedies would address all the adverse effects resulting from the SLC. Behavioural remedies designed to address particular adverse effects will not address effects that cannot fully be foreseen; in particular, the issues relating to service quality discussed in paragraphs 6.28 to 6.34.

7.9 We consider that the parties have proposed a price control that, because of its simplicity, should be relatively straightforward to operate and monitor. However, we are sceptical as to whether a control as simple as the one proposed by the parties would capture all the relevant elements of venue rental prices. We note that the draft ratecards provided by the parties in support of their proposal did not contain several items which were included in the actual Brixton Academy client information, such as: marketing assistance and the use of the database, overnight security, kitchen hire, telephone and high speed broadband. We consider that this suggests that, to be effective, a price control would need to cover a greater number of items than those in the parties' draft ratecard. Inclusion of these additional items, which the parties were prepared to incorporate, would increase the complexity of the control.

7.10 We also note that price controls can provide firms with an incentive to reduce service quality. Although the proposed control would control the level of those prices listed in

the ratecard, it would provide no guarantee in relation to quality of service. We consider that in general service quality commitments are difficult to specify and monitor in a meaningful way. Adding any such commitments into a package of behavioural remedies would also generate significant complexity with no guarantee of effectively addressing our concern.

- 7.11 The proposed control, because it seeks to identify every element of venue rental pricing on an extended rate card and limit increases to increases in the RPI each year, will result in a relatively rigid control. We consider that the composition of the RPI means that changes in the RPI are unlikely to reflect changes in the costs of operating live music venues in London. It seems likely that, as time passes, the controlled prices will drift further out of line with the competitive (cost-oriented) level. The existence of controlled prices at the five venues increasingly unrelated to costs could be expected to impact upon other venue operators.
- 7.12 In addition, we note that the control will fix the structure of venue rental prices in a way which, over time, may become inefficient. In order to be an effective control, we would need to require the parties to introduce no new elements of venue pricing. Without such a restriction, there would be scope for evasion through the introduction of new charges and a reduction in the importance of those charges listed and controlled. However, such a restriction reduces flexibility and would stifle innovation by not allowing the parties to charge for new services. Any attempt to address these risks by allowing, as proposed by the parties, introduction of new elements with the consent of the OFT, would increase the complexity and costs of behavioural remedies without ensuring that the level and structure of prices would be closer to those that would prevail under effective competition.
- 7.13 The parties argued that price rigidity, or predictability, is already a feature of live music venue pricing and that we should not therefore be concerned about the prospect of a price control remedy introducing price rigidity into the market. However, we consider that price stability that happens to emerge under circumstances of effective competition differs from price stability that results from an ongoing regulatory intervention in the market. We note that it is impossible to know what cost-shocks or other significant changes in market conditions may arise in the future and we are concerned that a price control such as that proposed by the parties would hinder the ability of players in the market to respond to such developments efficiently.
- 7.14 In paragraph 6.33, we concluded that we expected some loss of service quality as a result of the proposed acquisition, although the precise nature and extent of this is difficult to assess. The parties' offer to enter into a commitment to maintain current projected levels of investment at the Hammersmith Apollo, Forum, and Astoria, and ensure equivalent levels of investment in the Brixton Academy and the SBE, even if it could be monitored and enforced, could provide only partial reassurance that service quality at the five venues would not suffer as a result of reduced competition. The parties told us that Live Nation/Hamsard did not have annual operating plans/budgets for the relevant venues showing service/quality aspects with sufficient precision to distinguish investments that flow from statutory/regulatory requirements and other reasons. Also, examination of other material they have supplied did not enable us to satisfy ourselves that they make no discretionary expenditure in order to enhance the ability of the venues to compete with alternative venues. Furthermore, undertakings on levels of investment could not guarantee all aspects of service quality. Given uncertainties over the nature of non-price effects, it is difficult to see how these could be remedied effectively through behavioural undertakings. While we cannot therefore assess whether any such non-price effects will prove particularly significant, we can reasonably conclude that any detriments will be difficult to address effectively by any means other than the preservation of effective competition.

Duration of the need for remedies

- 7.15 In commenting on possible remedies, the parties emphasized the ebb and flow of live music venues in London and developments likely to increase availability of alternative venues and hence options for artists, agents and promoters. They invited us to take the view that an increase in the availability of such options would, within a three-year period, restore effective competition for live music venues in London, obviating the need for any ongoing behavioural remedy. They argued that any concerns about RPI linked prices drifting out of line with competitive prices over time was not relevant within a three-year timeframe and, given the temporary nature of any remedy, a structural remedy would be disproportionate.
- 7.16 We considered the prospects for future competition from third party venues currently operating or due to open shortly in paragraphs 5.13 to 5.19, and new entry in paragraphs 5.30 to 5.51. We recognize that competition between venues in London is not static and there are developments that may affect the market over time. It is possible to find evidence in support of a conjecture that over the next few years competition between venues within London for popular live music events will increase. However, in order to be confident that this will occur, it is necessary also to consider the likelihood and impact of occurrences that would have the opposite effect, such as increased booking of relevant third party venues for events other than popular live music and changes in business plans leading to an increased focus by the venues on other competitive opportunities, or possible failure of such venues. This becomes increasingly speculative the further forward considered. We heard no evidence from third parties that would lead us to conclude that future developments can be relied upon to restore effective competition. We must therefore make our decision on the basis that any behavioural remedies may need to remain in place for an indefinite period.
- 7.17 At a late stage in our inquiry, the parties put forward a modified proposal under which the package of behavioural remedies would be supplemented by an agreement by the parties to divest venues in three years' time if, contrary to their expectation, the OFT were not satisfied that market developments have removed the competition concerns identified by the CC.
- 7.18 By limiting the duration of the behavioural remedies to a maximum of three years (plus the length of time taken to effect any subsequent divestiture) this proposal reduces the scale of our concerns about the ongoing distortive effects of the remedy. However, it does not remove these concerns altogether. Furthermore, the proposal does not address our concerns about the failure of behavioural remedies to address non-price effects of the merger. Moreover, the proposal would considerably increase the costs of implementation, by requiring the OFT to undertake a further, future review of competition between venues in London. In our view this could only be justified if we had an expectation that market developments would restore effective competition within that period. While, as discussed in the preceding paragraph, that outcome is not a possibility that we rule out, we judge that the uncertainties are too great to enable us to form such an expectation.

Summary of the assessment of the parties' proposals

- 7.19 In summary, we take the view that the parties' proposed behavioural remedies cannot be considered a comprehensive and effective remedy to the SLC we have identified. They do not restore effective competition, involve price controls requiring a trade-off between complexity and rigidity and the need to avoid creating competitive

distortions, and do not address issues of service quality.⁶⁴ Although we have been invited to accept these shortcomings on the basis that the SLC will persist for no more than three years, we judge that the uncertainties are too great to enable us to form that expectation.

Structural remedies—prohibition of the acquisition

7.20 Prohibition of the transaction would comprehensively remedy the SLC. We are also satisfied that it would be practicable. However, the parties put it to us that it would be disproportionate, affecting venues that were unconnected to the SLC finding. London is the only area affected by the SLC identified in our provisional findings and we found no venues outside London that competed with the five venues. Provided that the divestiture of one of the packages discussed below to a suitable purchaser could be achieved within a reasonable period (see below), prohibition of the acquisition would not be necessary. We therefore considered whether partial divestiture would be practicable and effective.

Structural remedies—partial divestiture: divestiture of elements of Academy and/or LiveNation/Hamsard

7.21 The SLC that we have identified would result from the fact that the acquisition of Academy by Hamsard would bring into common ownership/operation the Astoria and the Forum (both operated by Hamsard), the Hammersmith Apollo (owned by Live Nation, which in turn owns 51 per cent of Hamsard), and the SBE and the Brixton Academy (both owned by Academy).

7.22 A divestiture package comprising only one of the five venues would not be a comprehensive remedy to the SLC we have identified. This is because our examination of actual and potential substitutability between venues in London leads us to conclude that the Brixton Academy and the Hammersmith Apollo are significant substitutes for each other (with capacities of around 5,000), as are the SBE and Forum (with capacities of around 2,000). However, the former venues and the latter venues are not significant substitutes for each other and so a divestiture of only one venue would not fully address the loss of competition resulting from the acquisition.

7.23 In principle, divestiture of the SBE and the Brixton Academy should comprehensively address the SLC because this would remove from common ownership one set of venues that gave rise to the SLC. Similarly, in principle, divestiture of the Hammersmith Apollo and either the Forum or the Astoria should comprehensively address the SLC for the same reasons. However, the uncertainty about the future of the Astoria after 2008 means that we consider that any divestiture package should not include the Astoria. We consider that a divestiture package comprising the Hammersmith Apollo and the Forum should in principle constitute an effective remedy to the SLC.

7.24 In principle, we also consider that a divestiture package comprising either the Hammersmith Apollo and the SBE, or the Forum and the Brixton Academy, (ie a package comprising one Academy venue and one Live Nation/Hamsard venue) should be an effective divestiture package, since it would remove the concentration of ownership that the merger would otherwise create both in venues of around 2000 capacity and in venues of around 5000 capacity.

⁶⁴In our guidance (*CC2 Merger References*, at paragraph 4.23) we have said that in choosing remedies '[t]he Commission's starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, lessened as a result of the merger'.

- 7.25 Having established that, in principle, a divestiture of one of the Hammersmith Apollo and the Brixton Academy, and one of the SBE and the Forum could address the SLC, we considered whether and how, in practice, this divestiture could be implemented successfully. In line with our guidance,⁶⁵ we do this by taking account of composition risks, purchaser risks, and asset risks.

Composition risks

- 7.26 Composition risks are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser, or may not allow a purchaser to operate effectively and viably in the market. In this case, we identified composition risks associated with management resources and customer relationships, and scale of operations.

Management teams and customer relationships

- 7.27 The greater the dependence of a venue on a centralized booking system or other central support, the less stand-alone the venue will be and the more difficult it may be to integrate it into any other operations. We note that Academy venues have historically enjoyed a high degree of autonomy from central management, with the venue management responsible for the operation of the venue. Evidence from the parties suggests that Live Nation operates under more centralized management and support structures. However, although the local management teams depend to a certain extent on support from central systems for services such as investment and financial planning and IT and website management, we take the view that these could be replaced without undue difficulty, particularly if the purchaser already operated other venues.
- 7.28 Bookings at both Academy and Hamsard venues have been handled by the venue management. However, we were told that 25 per cent of bookings at the Hammersmith Apollo were made through a centralized booking system. There may, therefore, be a higher composition risk associated with a package including the Hammersmith Apollo than with one based on Academy venues and the Forum.
- 7.29 To reduce the composition risks in relation to management teams and customer relationships, we consider that it would be likely that any divestiture package would need to include the transfer of the venue management and booking teams, contracts with customers and suppliers and the customer (and potential customer) information and contact lists associated with the venues concerned to the purchaser. Without these a purchaser might find it difficult to develop a viable business within a reasonable period of time, increasing the risk that the remedy would be ineffective. We also note the significance of sponsorship arrangements, and the risk that these might be affected by any change of ownership of individual venues. We consider that, if change of ownership were to jeopardise sponsorship arrangements, there would be a risk that the new owner of the venue would lose significant revenue streams, potentially undermining the viability of his newly-acquired business. We therefore consider that any partial divestiture remedy would need to be accompanied by a requirement on the vendor to use its best endeavours to facilitate the transfer of any venue-specific sponsorship, or venue-specific elements of wider sponsorship deals, to the purchaser. Including all these elements would help to ensure that the purchaser had a viable business in the short term and a solid foundation from which to bid for the business it would need to secure its long term future.

⁶⁵CC8, *Application of divestiture remedies in merger inquiries*, paragraph 2.4

Scale of operations

- 7.30 We considered whether a venue operator with only one or two London venues would be at a disadvantage when competing for business with operators such as Hamsard (through Mean Fiddler) or Live Nation that have a nationwide range of venues. The existence of a number of London venue operators that do not have provincial venues suggests that owning venues only in London would not be a serious disadvantage.
- 7.31 We also considered whether ownership of only one or two venues in London would give a rival to Hamsard/Live Nation and Academy a sufficient scale to compete in London. We note that there are stand-alone venues in London, such as the Royal Albert Hall. However, we also note that most larger London venues appear to be operated either as part of a group or receive local authority support. There appear to be advantages of scale in terms of lower costs (as evidenced by the parties' rationale for the proposed acquisition) and membership of a larger group may also prove beneficial in raising capital for investment. It is therefore not clear whether ownership of only one or two venues in London would be sufficient for a purchaser to be a viable and effective competitor to the merged entity. Confining the divestiture package to just two London venues might, therefore, introduce a degree of composition risk. However, we consider that there is a sufficient pool of potential purchasers that could integrate the divestiture package into a wider operation to suggest that this risk would not have a material impact on the effectiveness of the remedy. We therefore consider that it would not be necessary to widen the divestiture package to include more of the parties' venues to ensure that the purchaser would have a sufficient scale to compete effectively in London.
- 7.32 Overall, we concluded that it should not be necessary to widen the package to include more than one of the Hammersmith Apollo and the Brixton Academy, and one of the SBE and the Forum. We also concluded that it would not be necessary to require that the two venues in the divestiture package would have to be sold to a single purchaser rather than to two separate purchasers, for reasons of commercial viability.

Purchaser risks

- 7.33 Purchaser risks are risks that either a suitable purchaser may not be found or that the merger parties may dispose of the venues to a weak or otherwise inappropriate purchaser. These risks can, to some extent, be reduced through the design of the divestiture process and in particular by the requirement to sell the package to a purchaser approved by the CC and according to a sale and purchase agreement approved by the CC. However, in assessing the effectiveness of the remedy, we need to consider whether a sufficient pool of suitable potential purchasers for a partial divestiture package exists.
- 7.34 The basic criteria for suitability of purchasers⁶⁶ are:
- (a) independence, ie no significant connection to the merger parties;
 - (b) capability, ie the necessary financial resources, incentives and access to appropriate expertise and assets to develop as an effective competitor; and
 - (c) absence of competitive concerns.

⁶⁶CC8, *Application of divestiture remedies in merger inquiries*, paragraph 4.1.

- 7.35 We consider that independence and absence of competitive concerns are self-explanatory. In relation to capability, we would need to be satisfied that the purchaser had, or could put in place:
- (a) any central support services that the venues' local management teams have previously obtained from Academy or Live Nation/Hamsard, or are not capable of sourcing for themselves;
 - (b) a credible outline business plan based on the ongoing use of the venues as effective competitors that are capable of attracting business from promoters of live rock and pop music; and
 - (c) financing for both the purchase of the venues and the operation and maintenance expenditure that would be required in order to continue as an effective competitor whilst new business is being obtained from promoters and agents.
- 7.36 The composition risks described in paragraphs 7.26 to 7.32 may give rise to purchaser risks in relation to the capability of potential purchasers to operate the venues as effective competitors to the merged entity. As noted, a purchaser of one or more venues, even with the venue management included in the package, may not be acquiring an entirely fully functioning, stand-alone business. Depending on the skills and experience of the local management teams, the new owner might therefore need to provide some central support. Similarly, the concern we identified (see paragraphs 7.30 to 7.32) over whether one or two venues alone would provide a sufficient scale to compete with the merged entity suggests that it may be necessary for purchasers to have existing operations into which the venues could be integrated. Both these factors might limit the pool of purchasers to firms already in venue management or closely related businesses. Although this could in principle lengthen, impede or frustrate the divestiture process, the fact that several venue operators have already expressed interest suggests that a reasonable pool of potential purchasers with the capacity to add such additional management resource as was necessary exists.

Asset risks

- 7.37 Asset risks are risks that the competitive capability of a divestiture package will deteriorate prior to completion of divestment, for example through loss of customers or key members of staff.
- 7.38 We identified two specific sources of asset risk in this case. The first stems from a deterioration in the venue's ability to secure bookings, which would reduce the attractiveness of the venue to suitable purchasers and could jeopardize its viability. The second stems from the deterioration of the physical structure of the assets. Any decline in operating standards, possibly following the loss of all or some of the local management team or other key staff, could affect relationships with promoters and agents and future bookings. This could undermine the ability of the new owner to operate the venue as an effective competitor to the merged entity.
- 7.39 Any long period of uncertainty could be expected to exacerbate both these forms of asset risk. It might make it difficult for the venue management teams to obtain bookings from promoters and agents, could put the venues under financial pressure and might cause key managers to seek jobs with other venue operators. Similarly, notwithstanding the parties' emphasis on the high standard of their venues, a long period of uncertainty could, without there being any specific intention to do so, see a reduction in the management time and resource devoted to these venues, a reduction in investment and therefore a degradation in their physical structure.

7.40 These risks, and the difficulty of adequately specifying behavioural commitments to address them, point to a need to ensure a timely divestiture and to the desirability of an ‘up-front buyer’. With a requirement for an up-front buyer, the parties would be unable to complete the acquisition until a suitable purchaser or purchasers had contractually committed to buy the venues and the parties had contractually committed to sell them. Therefore, they would have an incentive to reach agreement with a suitable purchaser as rapidly as possible, thereby reducing the period of asset risk.

The requirement for an up-front buyer

7.41 The Notice suggested that if we were in doubt as to the attractiveness of a divestiture package to purchasers or believed that there was a limited pool of suitable purchasers, we might require the merging parties to identify a suitable purchaser or purchasers that were contractually committed to acquiring the divestiture package before allowing the proposed merger to proceed.

7.42 We consider that there are reasons why an up-front buyer might be required in this case. First, as noted in paragraph 7.40, the requirement for an up-front buyer should reduce asset risk. The requirement for an up-front buyer would mean that the parties would have to have entered into binding commitments with a suitable purchaser or purchasers for the venues before Hamsard would be permitted to acquire a controlling interest in Academy. Thus, the risk of degradation of the venues would be lessened.

7.43 Secondly, a requirement for an up-front buyer would help to address the composition risk that results from the fact that venues themselves are not entirely stand-alone businesses. As noted in paragraph 7.27, the venues rely, to some extent, for provision of services such as investment and financial planning and IT and website management on central systems that would not be included in the divestiture package. We have also noted in paragraphs 7.30 to 7.32 that it may be the case that the divested venues would need to be integrated into wider operations if the purchaser were to be able to operate them as effective competitors. By potentially creating the need for these venues to be acquired by someone with access to additional resources and capabilities, these composition risks also create purchaser risks. Since, as discussed above, the requirement for an up-front buyer would make the acquisition by Hamsard of a controlling interest in Academy conditional on having a suitable purchaser or purchasers in place for these venues, the effectiveness of the remedy would be safeguarded against these risks.

7.44 In addition, we note that under the proposed heads of terms any decision to sell any Academy venues could be vetoed by any two of Simon Moran, Robert Angus, and the Academy managers (see paragraph 3.5). This suggests that there is a degree of uncertainty surrounding any sale of Academy’s venues and therefore a degree of uncertainty over the effectiveness of any divestiture remedy that requires any sale of Academy’s venues but does not require an up-front buyer.

7.45 The parties put to us that this concern could be addressed if the share purchase agreement under which Hamsard acquired a controlling interest in Academy reflected the disposal of one or more Academy venues within a specified period, and if Simon Moran and Robert Angus were bound by this agreement. They did not explain, however, precisely how this would be achieved.

7.46 The concerns about asset risk, composition risk and purchaser risk discussed in paragraphs 7.42 to 7.43 lead us to conclude that an up-front buyer should be required for any partial divestiture package in this case. We note that this

requirement would also address any concern over the ability of Academy to divest any of its venues.

The views of third parties and of the main parties on partial divestiture

- 7.47 One third party ([REDACTED]) told us that it supported partial divestiture rather than outright prohibition and said that it would be seriously interested in acquiring [REDACTED]. This third party also said that it would consider [REDACTED], but would need to consider this further given that [REDACTED].
- 7.48 A second third party ([REDACTED]) told us that it was in principle interested in acquiring all of the venues mentioned as possibly being included in a partial divestiture package, [REDACTED]. This third party also told us that it would be interested in acquiring [REDACTED]. However it would need to give this further thought.
- 7.49 Another third party ([REDACTED]) told us that, in the right circumstances, it [REDACTED].
- 7.50 The parties told us that, if partial divestment were required, to do so by means of leases including a break clause, eg after five years, would be more proportionate and effective than partial divestment by outright sale of venues. They argued that venue operators generally regarded arm's length leases on standard commercial terms as perfectly acceptable. Hence, a lease with rent at market rates, unaffected by trading performance, with standard tenant covenants, with no ability for the lessor to forfeit and itself re-occupy, and with no lessor influence over the leased venue as a business, should not give rise to any concerns.
- 7.51 In our view the use of a relatively short-term lease from the parties of the type envisaged would impact upon the willingness of competitors to invest in developing the business and would raise complex issues, for example over investment in repair and renovation of the venues and required notice periods. We do not believe that a lease from a competitor can be equated to a lease from a property company. We noted in paragraph 7.16 that we must make our decision on the basis that any remedies may need to remain in place for an indefinite period. For these reasons we consider that a divestiture remedy based on leasing arrangements would not provide an effective remedy to the SLC that we have identified.

Relevant customer benefits

- 7.52 In considering possible remedies we also need to have regard to their effect on any Relevant Customer Benefits, within the meaning of section 30 of the Act, that arise from the acquisition. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if we believe that: (a) it has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
- 7.53 In their response to the Notice, the parties listed three benefits that they argued would result from the merger:
- (a) increased investment in venue facilities and infrastructure;
 - (b) more attractive marketing partnerships to prospective partners; and

- (c) allowing Live Nation/Hamsard to fund a more aggressive strategy of opening new venues in cities that are not currently served (at all or adequately) with 'city hall' live music venues.

Increased investment in venue facilities and infrastructure

- 7.54 The parties argued that following the merger Live Nation/Hamsard will make increased investments in venue facilities and infrastructure compared with current levels of investment at the Academy venues. They have said that this would benefit users of the Brixton Academy and SBE as well as users of other Academy venues, and that these benefits would not accrue to users of venues that were divested.
- 7.55 We are not currently persuaded that, in order for there to be increased investment in Academy venues, Academy would have to be acquired by Hamsard/Live Nation. We consider that there were particular factors in Academy's recent history that have contributed to the lower levels of investment in those venues. We further consider that it would be open to other possible owners of Academy to increase investment in its venues if they considered this necessary. We do not consider that increased investment in Academy venues is contingent on Academy's acquisition by Hamsard/Live Nation and we do not therefore consider that increased investment in these venues constitutes a Relevant Customer Benefit.

More attractive marketing partnerships to prospective partners

- 7.56 The parties argued that the combination of Live Nation/Hamsard's existing venues with those of Academy (including the Brixton Academy and the SBE) will enable them to offer more attractive marketing partnerships to prospective partners. They said that some of the incremental revenues derived from such marketing partnerships would likely be reinvested in the parties' venues, but they noted that investments in the target venues were not dependent on this.
- 7.57 We note that more attractive marketing partnerships would only be considered as a Relevant Customer Benefit where they resulted in some benefit for customers, in this case the various users of venues. It is not clear that this is the case. Marketing partnerships would appear to benefit the owners of the venues, but it is less clear that the benefits would flow through to customers, especially given that the merger would reduce the parties' incentives to pass on these benefits. Furthermore, there appears to be a tension between the claim that marketing partnerships are a Relevant Customer Benefit (which requires them to be contingent on the merger) and the parties' claim that investments in the target venues are not dependent on these marketing partnerships.
- 7.58 In addition, we have considered whether the merger would generate benefits for sponsors, who are customers to the extent that they purchase advertising from the parties, and whether any benefits in terms of sponsorship arrangements would flow through to concert-goers. We consider that the merger would to some extent make it easier for sponsors to put in place sponsorship arrangements with a large number of venues, by dealing only with combined entity rather than two separate entities. However, we note that there are sponsors that have, or have had, arrangements with Live Nation, Hamsard, and Academy, such as Carling.
- 7.59 We have received no representations from customers as to their expectation of such benefits or the extent to which they would value them. Overall, we were not persuaded that more attractive marketing partnerships are a Relevant Customer Benefit.

Opening new venues in cities that are not currently served (at all or adequately) with live music venues

- 7.60 The parties noted that Academy has for the past few years pursued a strategy of seeking to open or expand venues in cities that are not currently served (at all or adequately) with live music venues. They have provided the recent examples of Newcastle and Oxford. The parties have argued that the acquisition would allow the roll out of that strategy more quickly and will therefore secure the advantages of a local live music venue to more people in the UK more quickly than would have been the case absent the merger.
- 7.61 The parties stated that Live Nation/Hamsard's deeper pockets and long-term outlook would increase the rate of roll-out and would result in there being more venues in more locations than would otherwise be the case. However, we have seen no evidence that lack of finance has been a constraint on Academy's plans to open new venues. The parties themselves have noted that Academy has been pursuing a strategy of opening new venues in under-served cities for several years. Similarly, we cannot see how the merger would lead to a greater incentive to open new venues—it is not clear, for example, why the merger would make such new venues more profitable than would otherwise have been the case. Overall, we were therefore not persuaded that opening new venues in under-served cities is a Relevant Customer Benefit.

Conclusions on remedies

- 7.62 We conclude that the behavioural remedies proposed by the parties would not constitute a comprehensive and effective remedy for the reasons summarized in paragraph 7.19.
- 7.63 On the basis of our assessment in paragraphs 7.21 to 7.46, we conclude that either prohibition of the acquisition or partial divestiture of a package comprising one of the Brixton Academy and the Hammersmith Apollo and one of the SBE and the Forum would represent a comprehensive remedy to the SLC that we have identified. We consider that a partial divestiture effected by means of the parties leasing the venues to competitors along the lines outlined in paragraph 7.50 would not be likely to be an effective remedy. This is because of the ongoing link such an arrangement would establish between the lessee and the merged entity, and also because such an arrangement would impact upon the willingness of lessees to develop the business. A partial divestiture through a lease would also raise complex issues, for example over-investment in repair and renovation of the venues and required notice periods. To avoid sale to a weak or otherwise inappropriate purchaser, the sale should be to a purchaser approved by the CC and according to a sale and purchase agreement approved by the CC. In order to ensure that the partial divestiture remedy was effective, we consider that the divestiture would be likely to need to include venue management and booking teams, contracts with customers and suppliers, and the customer (and potential customer) information and contact lists associated with the venues concerned. In addition we consider that the vendors should be required to use their best endeavours to facilitate the transfer of any venue-specific sponsorship arrangements or venue-specific elements of such arrangements to the new owner or owners. We also consider that an up-front buyer should be required.
- 7.64 On the basis of these considerations we conclude that the least cost, least intrusive comprehensive and effective remedy option would be partial divestiture, on the terms outlined in paragraph 7.63.

7.65 While we reached no conclusion on possible portfolio effects involving tying the rental of one venue to the rental of another (discussed in paragraphs 6.35 to 6.37), and this possibility was not a factor in our assessment of the remedy options, we note finally that by addressing the potential creation of market power a successfully implemented partial divestiture remedy would also address any such potential concerns.