

CMA's review of undertakings given by the Performing Right Society Limited

(“LTD”) Response

16 FEBRUARY 2016

I. FACTUAL BACKGROUND

1. Limited (“LTD”) is a music publishing company which owns and acquires rights to musical compositions, exploits and markets these compositions, and receives royalties or fees for their use.
2. LTD strives to promote the best interests of its songwriters and believes that a healthy vibrant marketplace, which bolsters competition on all levels is key to this endeavour.

A. DIGITAL LICENSING

1. Digital Service Providers (“DSPs”) such as Spotify etc require a licence for both the mechanical rights in the compositions and the performing rights (communication to the public rights) in the compositions which are streamed or downloaded on their service.

2. PRS insists on songwriters granting PRS an exclusive assignment of the performing rights when the songwriter joins PRS as a writer member, even though PRS does not pay any consideration for those rights or make any investment in that writer. LTD considers that this exclusive assignment requirement puts UK songwriters at a distinct disadvantage when contrasted with their U.S. counterparts.
3. When a DSP wants to use the LTD repertoire on its service that DSP must procure the performing rights from PRS and the mechanical rights from LTD.
4. LTD considers that the CRM Directive is a thorough and authoritative statement, which supports publishers, songwriters, DSPs and ultimately consumers of music. By ensuring that CMOs must act in the best interests of the rightsholders they represent, ensuring that their members are entitled to participate in decision making and requiring CMOs to process data efficiently and to be transparent in their business the CRM Directive serves all entities involved in "songs". One key issue relating to the lack of transparency is how PRS (and other CMOs) deal with the income they receive from DSPs in respect of data, which the CMOs cannot match with the song information on their database. The reasons for failure to match the data with the songs can range from bad data from the DSPs to poor IT systems at the CMO but whatever the reason, the end result is that PRS (and other CMOs) sit on a lot of money, which should be shared with the rightsholders. PRS is admittedly better than some CMOs at sharing this income but the distributions are sporadic and lacking in transparency.

II. INTRODUCTION

1. LTD is grateful for the opportunity to submit comments on the above referenced review.
2. The MMC's investigation revealed that a monopoly position existed in favour of the PRS and that amongst other things:-
 - (a) PRS had failed to adopt efficient management practices and systems for distribution of royalties; and
 - (b) PRS's refusal to allow members to self-administer certain rights operated against the public interest.

3. The CMA's current review is focused on whether there has been a change of circumstances such that the undertakings given by PRS should be superseded, varied or released.
4. The CMA wishes to consider whether the undertakings are no longer appropriate and should be revoked, retained or varied particularly in light of the requirements of the CRM Directive which is due to be implemented in April 2016.
5. The CMA is looking for evidence in relation to the following 3 areas:-
 - (a) Internal changes at PRS and whether the changes have fulfilled the PRS's obligations pursuant to the undertakings and thus the undertakings are no longer required.
 - (b) Legislative changes such as the CRM Directive and whether this means there is no additional value in retaining the undertakings.
 - (c) Changes to the music industry and particularly the digital licensing market and whether this has led to a more competitive landscape and how this has affected PRS and the undertakings. The CMA is especially interested in:-
 - (i) The ability to withdraw rights
 - (ii) Practical difficulties in self-administering rights that arise from the ongoing adverse effects identified by the MMC
 - (iii) Differences between withdrawing rights online vs offline as well as the impact of technical change
 - (iv) Whether PRS now faces more competition as a result of overseas CMOs offering EU-wide licensing; CMO hubs; entry of new players providing licensing services; withdrawal of rights by publishers

III. KEY POINTS FOR LTD:

1. The monopoly situation has worsened since the initial investigation by the MMC due to the merger of PRS, STIM and GEMA in ICE Limited ("ICE").
2. PRS insists on deducting the costs of ICE from "the top" (i.e. all members, publishers and writers are paying for the ICE project even if such member is not availing themselves of the ICE licensing and/or data processing service). This is contrary to the recommendation made by the MMC that PRS should provide the necessary information for more equitable cost allocations to be made.

3. PRS requires writers to assign their rights exclusively to PRS when they become members of PRS, although PRS makes no investment in such writers and pays no remuneration for such rights. PRS uses its control over performing rights to induce publishers to use the services of ICE to process the data provided by DSPs as follows: Publishers cannot offer to a DSP all the rights required by digital services (such as Spotify etc) as there is an element of “performance”/”communication to the public” in a download or a stream and as such PRS owns that part of the rights by virtue of the required exclusive assignment to PRS of the performing right when the songwriter becomes a member of PRS. Thus in order for a publisher to grant a licence to a DSP in respect of that publisher’s repertoire PRS has to not only approve the terms of the licence with the DSP (insofar as the PRS rights are concerned) but it has to approve the entity who processes the data provided by the DSP (“Approved Entity”). PRS also has to approve the commission which an Approved Entity may take. As PRS is a partner in ICE it is wielding more power than ever in this regard as currently there is only one Approved Entity outside ICE.
4. PRS refuses to be transparent in respect of its policy in respect of Approved Entities. LTD would like to be able seek the services of other entities in respect of processing data from DSPs. PRS will not authorize any entity which is not a CMO to be an Approved Entity and PRS will not provide LTD with its written policy as to which CMOs it will authorise. PRS has provided a brief summary of their policy but PRS effectively has absolute control over which entity it will mandate to become an Approved Entity and PRS is advising LTD that it will take PRS at least 3-6 months to agree a mandate with any CMO entity.
5. ICE was approved by the Commission on the basis that PRS, STIM and GEMA adhered to certain commitments (“the Commitments”). The Commitments did not go far enough in protecting Option 3 publishers from PRS abusing their dominant position. One of the Commitments made by PRS was that negotiations between PRS and a CMO wishing to become an Approved Entity would not be contingent on any or all of the potential Approved Entity or an Option 3 publisher entering into or concluding negotiations with ICE (including sourcing ICE services). Whilst PRS are being careful not to be seen to directly contravene this Commitment, LTD would submit that their behavior in respect of the introduction of the PRS policy in this regard and the structure of the policy, to the extent that PRS has made the summary of the policy known to LTD, does contravene the basic tenet behind the Commitment. PRS is using its power, arising from the exclusive mandate from the songwriters to PRS in respect of the

performing rights, to ensure that Option 3 publishers have little choice but to use the services of ICE.

In the Commitments PRS reserved the right to retain in their absolute discretion the ability to determine the PRS general policy concerning PRS's rights with the only restriction on this policy being that PRS would not make the grant of a mandate to an Approved Entity contingent upon that Approved Entity or an Option 3 publisher using the services of ICE. PRS has now finally drafted their policy in respect of the above but the PRS will not provide LTD with a copy of this policy and refuse to be transparent about their policy in respect of which entities are approved for the purposes of including PRS rights in digital licenses.

6. The limited protections offered through the Commitments and the protections provided by the CRM Directive are valid only for as long as the UK remains part of the EU. There is to be a Referendum in the UK in the near future and there is currently no way of knowing that the UK electorate will vote to stay within the EU and thus be controlled by the regulations of the EU. In the event that the UK electorate vote to move away from the EU the protections provided by the Commitments and the CRM Directive may not always be effective.

IV. ISSUES TO BE CONSIDERED IN THE REVIEW OF UNDERTAKINGS

Using the numbering contained in the Issues Statement LTD would comment as follows:-

20. The CMA's review of the PRS undertakings is focused on whether there has been a change of circumstances such that the undertakings should be superseded, varied, or released. We are not carrying out a full analysis of competition in the market.

LTD would submit that there have been changes of circumstance such that the undertakings should be superseded by more stringent undertakings. The formation of ICE has provided PRS with an opportunity to be one of only two players in the market who can process digital data on behalf of publishers and songwriters. PRS is not hurrying to ensure that more entities are able to become Approved Entities. Furthermore PRS is not willing to provide LTD with its detailed policy about how an entity can become an Approved Entity nor is PRS willing to consider that entities other than CMOs might become Approved Entities. LTD believes that PRS is abusing its position and that PRS is using its exclusive assignment from writers to ensure that very few competitors can enter the market.

PRS is involved with and funding (therefore deemed supportive of) the CISAC/FastTrack initiative (involving many other CMOs), which aims to provide an alternative to ICE as far as a multi-territory copyright data set is concerned. Although this might sound like a viable alternative to ICE, which PRS is undoubtedly going to support, the publishing community is less convinced about this being a viable and transparent Approved Entity. With PRS's direct involvement in the CISAC/FastTrack initiative it yet again demonstrates their dominant anti-competitive position.

Most CMOs do not have the IT capability to meet the standards PRS will require of an Approved Entity without such CMO using the ICE system, thus ensuring that any competitor will be obliged to plug into the system owned by ICE. LTD believes that there are third-party IT specialist companies (such as a company called Backoffice) who are not CMOs who could process the data from DSPs just as well as a CMO and that PRS should allow Option 3 publishers and the DSPs to use these third parties to process the data (both in respect of the rights brought to the licence by the Option 3 publisher and by PRS) provided that such third parties charge no more than a specified amount by way of commission.

LTD also considers that the introduction of an undertaking obliging PRS to take a non-exclusive assignment from songwriters (rather than an exclusive assignment) would be beneficial to the market and would help negate the more powerful position adopted by PRS since the introduction of ICE. This is how the CMOs based in the U.S. acquire their rights from songwriters (i.e. their mandate from songwriters is non-exclusive) and it generates more competition in the U.S. market. This would have the added benefit of enabling DSPs to take one licence from a publisher in respect of their repertoire, which licence would include all the rights necessary for that DSP, thus simplifying the digital licensing process for DSPs.

21. During this review, the CMA will consider, and is keen to seek the views of relevant stakeholders on the following matters: (a) whether there are undertakings related to the MMC's findings which have now served their purpose such that the undertakings are no longer appropriate and should be revoked; (b) whether there are undertakings which remain relevant in addressing ongoing adverse effects as identified by the MMC, and where either: (i) the undertakings should be retained; or (ii) the undertakings should be varied.

LTD would submit that in light of the formation of ICE the undertakings are now more important than ever and that this would be an opportune moment to introduce more stringent

undertakings to protect Option 3 publishers and their writers from the more dominant position PRS now holds.

The MMC's recommendations in relation to corporate governance and management practices have been very effective and matters in this regard have improved substantially at PRS. LTD would be very reluctant to see the revocation of these undertakings as LTD fears that might result in a reversion to the old practices of PRS.

Furthermore the limited protections offered through the Commitments and the protections provided by the CRM Directive are only certain for as long as the UK remains part of the EU. Therefore in light of the imminent EU Referendum in the UK there is a chance that the UK electorate will vote to move away from the EU and thus the protections provided by the Commitments and the CRM Directive may not always be effective

LTD would repeat its submissions made above that due to the introduction of ICE and due to the imminent EU Referendum in the UK the undertakings are now more relevant than ever and should remain and in fact the undertakings should be bolstered by additional undertakings requiring PRS to be more flexible in their acquisition of rights from writers and in respect of permitting new entities to become Approved Entities.

22. In its decision to launch this review, the CMA highlighted three potential changes that provided grounds for the CMA to consider there to be a realistic prospect of finding a change of circumstances. We are seeking evidence in relation to these three areas as set out below:

(a) Internal changes within the PRS – The undertakings and MMC recommendations included a significant number of internal changes to the PRS. In this area, we are keen to hear from stakeholders as to whether the MMC's adverse findings in relation to the internal structure of the PRS are still present or whether: (i) the undertakings and recommendations in this area have served their purpose, such that they are no longer required and can be revoked; or (ii) the adverse findings remain relevant and the undertakings should remain in force or be varied and if so, how.

LTD considers that the recommendations made by the MMC were extremely effective in improving the internal structure of PRS. However LTD is concerned that the CEO of PRS is also the CEO of ICE as this seems to be not only a conflict of interest but also enables PRS to take further advantage of its powerful position.

LTD'S RESPONSE TO CMA'S REVIEW OF UNDERTAKINGS GIVEN BY PRS

One of the recommendations by the MMC (Recommendation number 12) was that PRS was to give high priority to the improvement of data. LTD would submit that PRS has not complied with this recommendation. PRS has been so involved in the setting up of ICE that it has not been concentrating on improving its own data management and IT systems. Since the turn of the century, it has been known that PRS's IT systems have been creaking and suffered from lack of investment. The solution to their copyright database challenges was significant investment in ICE. However, to this day, PRS is still using its legacy systems for the purpose of processing royalties to its members and challenges continue to exist in this area. By way of example; for many years, publishing agreements have included a post-term collection provision but PRS's systems are still unable to handle this routine business requirement in an automated way. A further example of the failure of PRS's systems is that PRS has failed to process data provided by some DSPs (including one of the large DSPs) for periods as far back as 2009. LTD understands there may be even bigger backlogs in relation to data provided by the small DSPs.

Recommendation number 14 was that PRS needed to adopt an "IT strategy to take into account the need to streamline processes and integrate all major administrative systems." This has not been fully complied with. As stated above PRS has been concentrating its efforts on the setting up of ICE to deal with the digital licensing market at the cost of the rest of the PRS business, for example PRS still does not have the IT infrastructure to offer people the ability to pay for certain low-level licenses by credit card online.

Recommendation number 17 was to "Improve cost appraisal to determine which costs are direct and which are indirect". PRS is imposing the substantial cost of the setting up of ICE upon all its members whether or not such member avails itself of the licensing and/or processing services of ICE. LTD feels this is a direct contravention of the recommendation and that the costs of ICE should be covered by commissions deducted by ICE from those members who use the ICE services in licensing and/or processing data on their behalf.

Recommendation number 40 relating to the "Lack of Transparency" was that PRS should "introduce a formal consultative process to take members' views on proposed changes in policy or strategy". PRS has introduced a policy about which entities can be Approved Entities for the purposes of digital licensing administration without any consultation with members and PRS is not even willing to share the completed policy with its members.

Finally Section E of the recommendations refers to "Exclusivity in relation to rights administration". Whilst these recommendations may have been complied with (such that the Articles of Association have been amended to reflect that members may self-administer the

categories of performing rights specified in the GEMA decision etc) LTD would submit that in light of the formation of ICE these recommendations do not go far enough. LTD would welcome consideration by CMA that PRS should now amend their membership obligations so that writers do not have to grant PRS an exclusive assignment of the performing right in return for no real consideration by PRS. This exclusive assignment is permitting PRS to retain absolute control over which players (if any) can enter the digital licensing and processing marketplace.

(b) Legislative changes – The undertakings and the MMC's recommendations overlap, at least to some extent, with the Collective Rights Management Directive (the CRM Directive), which is intended to modernise and improve standards of governance, financial management and transparency of all EU CMOs. The government has stated its intention that new Regulations will implement the CRM Directive which must be transposed into national law by 10 April 2016. The government plans that the IPO will have day-to-day responsibility for monitoring and enforcing compliance with the implementing Regulations. The implementation of the CRM Directive and the detail of draft implementing Regulations have already been consulted upon by the IPO and it is not the intention of this issues statement to reopen those consultations. However, we would be interested in views and evidence from stakeholders that consider there to be: (i) additional protection provided by the undertakings, such that there may be value from the CMA continuing to monitor or vary the undertakings in a particular way to continue to address particular ongoing adverse effects identified by the MMC. If so, we would be interested in views as to why the CRM Directive does not provide sufficient protection; or (ii) potential conflicts between the undertakings and the CRM Directive and any concerns that arise from this.

LTD would repeat its submissions made above that due to the introduction of ICE and due to the imminent EU Referendum in the UK the undertakings are now more relevant than ever and that not only should the CMA continue to monitor the existing undertakings but that additional protection should be provided by additional undertakings requiring PRS to be more flexible in their acquisition of rights from writers and in respect of permitting new entities to become Approved Entities.

(d) Changes to the music industry – The CMA is keen to understand the impact of changes to the music industry and the position of the PRS. This relates most closely to the undertakings obliging the PRS not to prevent its members from self-administering their live performing and other categories of rights. We note that the

value of physical music sales reduced by over 30% between 2010 and 2013. This decline has been countered to some extent by the increase in revenues from digital and online music, with an increase in value of nearly 60%. However, the lower price of digital and online music, compared with physical music sales, meant that the value of the UK music market contracted in 2011 and 2012. However, this decline slowed to become negligible in 2013 due to increased online music revenue and a slowdown in the decline in physical music sales. The most recent trend for consumers has been the growth of online music streaming services, which allow consumers to listen to a wide variety of music with royalties funded either through advertising, or subscription. We also note that changes to the ways in which the music is licensed and the new digital and online uses of music may have changed the PRS's role in administering copyright for rights holders across multiple territories and may have contributed to a more competitive landscape. We understand that, traditionally, CMOs had agreements with other CMOs called reciprocal representation agreements (RRAs), which allowed each CMO to license the repertoire of other CMOs in its home country. We understand that since 2008 there has been a renegotiation of RRAs among some CMOs such that some offer a multi-territorial licence to online music service providers in the countries covered by the multiterritorial licence. These CMOs no longer grant an unrestricted mandate to other CMOs in other countries to license their music repertoire and collect funds on their behalf via the RRA. They reserve the right to refuse or limit the mandate provided to other CMOs. We understand that this has led to, first, some CMOs directly licensing their repertoire across multiple territories such as the European Economic Area, and second, some overseas CMOs choosing to appoint a third party CMO to license their repertoire on their behalf.

As a consequence, in this area we are interested in views and evidence from stakeholders concerning the following:

- (i) the extent to which PRS members are able, in practice, to withdraw categories of rights and self-administer them or appoint other parties to administer them;*
- (ii) practical difficulties or limitations to self-administration of certain rights that may arise from any ongoing adverse effects identified by the MMC;*
- (iii) any differences between withdrawing rights online and offline as well as the impact of technological change;*

(iv) *whether the PRS is subject to increased competitive pressure compared with 1997, for example, as a result of:*

1. overseas CMOs providing a multi-territory licence directly for online music disseminated in the UK;

2. some CMOs acting as rivals to be appointed by smaller CMOs to license work on a multi-territory basis;

3. entry of new players providing licensing services;

4. the withdrawal of certain rights by major publishers;

(v) *any differences in competitive pressure between online and offline music segments, for example, live performances and physical sales.*

LTD is encouraged that the CMA has recognized that the changes to the music industry may have affected the position of PRS. As outlined above LTD considers that the move of consumers towards digital consumption of music has put PRS in a stronger position than ever. The exploitation of music particularly by streaming has resulted in extremely large data files being sent from DSPs to the CMOs for processing so that such CMOs can ascertain which streams are in respect of the performing rights they control or in respect of the mechanical rights in the same repertoire which are controlled by their publisher members. CMOs then invoice the DSPs for the exploitation of the repertoire/rights controlled by that CMO.

Previously CMOs used to exploit their repertoire (and the repertoire of other CMOs with whom they had a reciprocal agreement) in their own domestic territory only. Processing data in relation to one territory only was relatively straightforward and did not necessarily require such CMO to overhaul its IT systems. However, the Commission recognized the importance of offering DSPs the opportunity to take an EU-wide licence and as part of the CRM Directive the Commission imposed upon the CMOs inter alia the obligation to allow Publishers to partner with any CMO within the EU to offer a DSP a European licence.

In practical terms there are very few CMOs in Europe who can process such complex data. The smaller CMOs do not have the IT systems in place to accommodate and process the enormous data files sent by large DSPs in respect of a European territory. The provision of copyright administration for multi-territorial licences is complex and resource intensive. It requires a technical capacity that very few CMOs possess. Multi-territorial licensing is also

not on a full repertoire blanket basis. It therefore requires the CMO to be able to process music reports from licensees, often containing many millions of individual uses of works and to identify and invoice only for those works that the CMO has the mandate to license in a given country in the territory.

The combination of PRS, STIM and GEMA in ICE has created a dominant position for the supply of multi-territorial licensing services to Option 3 Publishers.

The RRAs between the societies generally deal with the licensing of rights from CMO "A" to CMO "B" for "B" to exploit "A"'s repertoire only in the domestic territory of "B" (and vice versa). The RRAs do not currently operate as a mandate for CMOs within the EU to include the repertoire of other CMOs in EU-wide licences. As mentioned above PRS has admitted that SACEM is the only CMO who is authorised by them to licence PRS repertoire on a EU-wide basis (i.e. SACEM is the only Approved Entity). LTD considers that the CMA should impose recommendations upon PRS to oblige PRS to mandate CMOs outside the EU to offer EU-wide licences and furthermore that PRS should enable Option 3 publishers to engage third-party entities (not CMOs) to process the data provided by DSPs in respect of the rights of the Option 3 publisher and of PRS.

Looking at *"the extent to which PRS members are able, in practice, to withdraw categories of rights and self-administer them or appoint other parties to administer them"* PRS has amended its articles to enable members to withdraw the GEMA categories of rights and Online Rights is one of those categories.

In order to withdraw from PRS the digital rights for a particular album or project requires a decision by PRS at Board level (the Articles permit members to withdraw a category of rights in respect of ALL that member's repertoire or NONE).

It should not be necessary for each writer to have to go through such a laborious process with PRS to enable the writer and the writer's publisher to exploit the performing right in that writer's songs, particularly when PRS makes no investment in that writer or that writer's songs. LTD considers that the non-exclusive mandate obtained by the U.S. CMOs from their writer members is a much more sensible structure, enabling competition in the marketplace and ensuring that the writers are offered the best service by their CMO.

With regard to the question “*whether the PRS is subject to increased competitive pressure compared with 1997, for example, as a result of:*

1. overseas CMOs providing a multi-territory licence directly for online music disseminated in the UK;”

LTD would repeat that as far as LTD is aware PRS has only authorized SACEM to provide a multi-territory licence, which includes the PRS repertoire, for online music dissemination throughout Europe (including in the UK). No other CMO has a mandate from PRS to licence its rights in any territory other than its own domestic territory. PRS is not hurrying to ensure that other entities are given a mandate.

SUMMARY

LTD considers that the undertakings should not only be retained but that the CMA should investigate further PRS and its ever more dominant position in light of the formation of ICE. LTD would welcome the CMA's intervention to protect Option 3 publishers and their songwriters so that more competition could be introduced into the market. The CMA could do this by:-

- A. obliging PRS to allow new third parties, not just CMOs, to become processing partners subject to a specified maximum commission rate and evidence that such third parties can process the data from DSPs with the same level of accuracy as ICE and SACEM (the only Approved Entities).
- B. obliging PRS to stop insisting on writers assigning the performing rights to PRS on an exclusive basis and adopting a similar approach to the CMOs based in the U.S. where their mandate from writers is non-exclusive thus generating more competition in their market. This would have the added benefit of enabling DSPs to take one licence from a publisher in respect of their repertoire, which licence would include all the rights necessary for that DSP, thus simplifying the digital licensing process for DSPs. LTD considers that the ability of a DSP to obtain a single multi-territory licence from a publisher would significantly streamline the licensing process to the benefit of all parties from the songwriters to the DSPs and ultimately to the end consumer. The resultant ease of obtaining a licence would mean that more DSPs would be able to obtain a licence quickly and easily and thus consumers would have a broader range of legitimate, licensed services from which to access music.

LTD'S RESPONSE TO CMA'S REVIEW OF UNDERTAKINGS GIVEN BY PRS

LTD would be happy to discuss any of these points with the CMA directly or to assist the CMA in any manner by way of a meeting or otherwise.