Peter Hill
Project Director
Performing Right Society Undertakings Review
Competition and Markets Authority

remedies.reviews@cma.gsi.gov.uk

Jonathan Aitken
Head of Legal – Competition, Corporate and International Affairs
PRS for Music
2 Pancras Square, London N1C 4AG

BY POST AND EMAIL

25 January 2016

Dear Mr Hill,

CMA's review of undertakings given by PRS

We set out below the key reasons why we consider that undertakings given by PRS ("Undertakings") are no longer necessary and should be revoked.

We set out our views on the matters contained in the CMA's Issues Statement, namely:

1. whether the undertakings (i) are no longer appropriate and should be revoked; or (ii) remain relevant and should be varied or retained, taking into account changes in circumstances and specifically in respect of:
    - internal changes within PRS;
    - legislative changes; and
    - changes to the music industry;
2. rights withdrawals and self-administration; and
3. any changes in the competitive marketplace, specifically increased competitive pressure.

For further detail and supporting evidence, we refer the CMA to our confidential submissions on 4 September 2015 ("Initial Submission") and confidential replies to the CMA's information request dated 15 December 2015 on 15 January 2016 and 20 January 2016 ("RFI Reply").

Changes in Circumstances

We consider that there have been extensive changes both internally and externally over the last 20 years which mean that the Undertakings are no longer appropriate and should be revoked. The advent of online exploitation has fundamentally changed the music industry and the cross-border markets in which we operate. These market developments and their impact on Collective Management Organisation (CMO) operations have been examined in great depth by the European authorities, leading to a number of legislative and policy initiatives which place clear obligations on PRS (including

the 2005 recommendation[1], the CRM Directive[2] and antitrust case law). PRS has invested considerable resources to be in a position to comply with the relevant obligations and to become a very competitive player in the market structure envisaged by the European authorities.

Our view is that the adverse findings by the MMC do not apply today because: (i) PRS has implemented many changes to address and render unnecessary the concerns of the MMC; and (ii) PRS has no ability and/or incentive to reverse efficiency enhancing changes because it now operates in a much more regulated and competitive environment which must be driven by membership demand and needs.

In addition, since the 'operative' Undertakings (set out below) should no longer be required, we consider that the 'monitoring' Undertakings (i.e. Undertakings 1(2), 1(3), 3 and 4) should also be revoked.

Internal changes at PRS

We consider that the internal changes that have been implemented generally and in response to the MMC (as detailed in the Annex to the Initial Submission) mean that the following Undertakings are no longer required and should be revoked: Undertakings 1(1)(d), 1(1)(e), 2(a), and 2(b).

PRS has become increasingly efficient and strives to be a world-leading CMO; the very low levels of member complaints is just one KPI that corroborates this (please see further the data submitted in the RFI Reply).

Legislative changes

We consider that where the CRM Directive imposes the same obligations or outcomes on PRS as required by the Undertakings, such Undertakings are no longer required and should be revoked; namely, Undertakings 1(1)(a), 1(1)(b), 1(1)(c), 1(4) and 2(a)[3]. There will be a dedicated regulator, the IPO, with an active responsibility to monitor PRS's compliance with the CRM Directive.

Changes to the music industry

PRS is operating in a much more competitive environment than in the late 1990s due to the technological changes in the last 20 years (particularly in the online world) meaning that PRS has to work hard to deliver its services (and royalties) to members and it has to compete for members against many new and emerging players. We therefore have little incentive to unreasonably reduce the flexibility already provided to members in respect of rights withdrawals by 'categories of rights' and self-administration of live public performances, as this would be prejudicial to our ability to attract and retain members. Indeed we need to be, and are, proactive and responsive to market changes, such as when we added to the categories of rights certain online exploitation rights in 2007. As such, Undertakings 1(1)(a) and (1)(b) no longer seem appropriate and should therefore be revoked.

---

[1] Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

[2] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

[3] In relation to Undertakings 1(1)(a) and 1(1)(b), we consider that the fact that the draft Regulations relating to the CRM Directive will impose on PRS a statutory duty – actionable by a rightholder - to comply with regulations requiring the CMO to provide objectively justified reasons for refusing to manage a category of rights otherwise falling within the scope of its activities means that related undertakings 1(2) and 1(3) are no longer required.

Rights Withdrawals and Self-Administration

UK and European competition law authorities have accepted that exclusivity is required and indeed desirable for effective collective rights management, provided that such exclusivity is limited to what is 'absolutely necessary' for a CMO to achieve its object – i.e. to act in the best interests of the wider membership. This principle was the basis for the MMC's recommendations that PRS adopt the 'categories of rights' in the *GEMA* decisions expressly (recognising also that PRS already operated in accordance with the ratio of those decisions) and allowed members to self-administer the live public performance right. As a result, PRS did adopt these rights withdrawal / self-administration options in its Articles (respectively, Articles 7(cA) and 7(h)), in addition to the already wide flexibility given to members whereby PRS can decline to license the whole or part of the performing right (Article 7(g)) and the general discretion of the PRS Board (Article 7(c)(iii)). Since then, PRS has added certain online exploitation rights in 2007 and more recently, PRS has also approved the ability for members to license non-commercial uses to come into effect on 10 April 2016.

PRS always considers in the market context whether the compendium of rights withdrawal / self-administration options provides a necessary balance between the exclusivity required by PRS to operate effectively as a CMO in the best interests of the wider membership and the flexibility that must be afforded to members to manage their own rights. The evidence[4] suggests that PRS has been successful in finding a balance in its modification of rights withdrawal / self-administration options to date.

PRS offers one of the most flexible memberships in the EU (and likely worldwide) both in terms of the granularity of 'categories of rights' available and the relative ease with which members can terminate membership. PRS has little ability to unreasonably narrow the flexibility it provides to members: it is and has always been required to ensure that the exclusivity that it enjoys is limited to what is 'absolutely necessary' in accordance with established competition law principles (e.g. *BRT v SABAM* and later reiterated in the *GEMA* decisions); and, as of 10 April 2016, it will be under an additional obligation to provide such flexibility under the CRM Directive and have specific changes approved by the membership (specifically, Articles 4 and 5). More importantly, PRS has very little incentive to unreasonably limit flexibility because its 'categories of rights' and termination provisions are important selling points when retaining and attracting members in an increasingly competitive inter-CMO marketplace.

For these reasons, there is nothing to suggest that PRS would be able to or indeed want to amend unfavourably or unreasonably the flexibility provided to its members (even if such changes were consented to by members, as required by the CRM Directive). PRS therefore does not view the concerns that are intended to be addressed by Undertakings 1(1)(a) and 1(1)(b) as relevant anymore and therefore considers these Undertakings should be revoked by the CMA.

Competitive Marketplace

PRS is a completely different organisation operating in a completely different market than at the time of the MMC's review.

---

[4] For example, the low uptake of these options by members (<0.01% in 2015), which indicates membership confidence in and desire to remain in the collective rights network; and the low level of complaints from members about rights withdrawal / self-administration (none in 2012-2015).

In response to changing market conditions, PRS has had to rationalise its operations (e.g. outsourcing call centre operations, property relocation) and invest heavily in partnership with other CMOs to achieve positive business cases in sectors that are in decline (recorded media; which PRSfM administers on MCPS's behalf) or subject to increased competition from new entrants or self-supply.

PRS submits that the CMA should not adopt the MMC's approach to market definition since this is now outdated. Today, competition is taking place on a much wider basis in part driven by the near-global reach of online licences. PRS's share of the copyright administration services market is much more moderate on a wider geographic scope and also when considering that there is, in our view, no separate market for performing rights administration versus mechanical rights administration (please see further our reply to question 4 in the RFI Reply).

Conclusion

In summary, we ask the CMA to revoke the Undertakings in light of the evidence presented especially in light of the duplicative obligations under the CRM Directive. We look forward to hearing from you and in the meantime please do not hesitate to contact us.

Yours sincerely,

Jonathan Aitken
Head of Legal – Competition, Corporate and International Affairs