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Anticipated acquisition of a controlling interest in Academy Music Holdings Limited by Hamsard 2786 Limited (a company jointly controlled by Live Nation (Music) UK Limited and Gaiety Investments Limited)

The OFT's decision on reference under section 33(1) given on 21 August 2006. Full text of decision published 18 September 2006.

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Please note that square brackets indicate figures or text which have been deleted at the request of the parties for reasons of commercial confidentiality.

#### PARTIES

1. **Hamsard 2786 Limited (Hamsard)** is active in concerts, festivals, promotions and venue operations businesses in the UK. It is jointly controlled by Live Nation (holding 50.1 per cent of its shares) and Gaiety Investments Limited (holding the remaining 49.9 per cent). Hamsard acquired the Mean Fiddler Music Group plc (Mean Fiddler) in 2005.<sup>1</sup>
2. **Live Nation (Music) UK Limited (Live Nation)** (formerly Clear Channel Entertainment (Music) UK Limited) is a wholly owned subsidiary of the US company Live Nation Corporation. In the UK, Live Nation owns and manages live music venues<sup>2</sup> and produces and promotes live music concerts, festivals, theatrical and arts performances.
3. **Gaiety Investments Limited (Gaiety)** promotes concerts and festivals in the UK and abroad. It is solely controlled by Mr. Dennis Desmond. Mr Desmond also holds 67 per cent of DF Concerts, which is active in the promotion and organisation of festivals in the UK<sup>3</sup>. Gaiety (through its wholly-owned subsidiary MCD

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<sup>1</sup> OFT decision on the anticipated acquisition of Mean Fiddler Music Group by Clear Channel Entertainment (Music) UK Ltd and Gaiety Investments Ltd of 17 June 2005 (the Mean Fiddler Decision). Mean Fiddler owns and manages venues including in London: Forum, Astoria, Mean Fiddler, Garage, Borderline and Jazz Café.

<sup>2</sup> In London, it owns Hammersmith Apollo and manages Wembley Arena (under a long-term management contract).

<sup>3</sup> See Mean Fiddler decision for further details on DF Concerts.

Productions) already holds a 12 per cent share of Academy which it will retain post-merger.

4. **Academy Music Holdings Limited (Academy)** is an owner and operator of live music and club venues in the UK.<sup>4</sup> Its main shareholders are Royal London Private Equity Fund (53 per cent), Gaiety (12 per cent)<sup>5</sup>, SJM Limited (12 per cent)<sup>6</sup>, and Customblock Limited (12 per cent)<sup>7</sup>. The remaining 11 per cent shareholding is divided into smaller stakes held by several individuals. Its UK turnover in the financial year ended 30 September 2005 was £ 17 million.

## **TRANSACTION**

5. Hamsard will acquire the whole 53 per cent of the issued share capital of Academy, currently held by Royal London Private Equity Fund, and as a result, it will acquire a controlling interest in Academy.
6. The OFT's administrative deadline expires on 21 August 2006.

## **JURISDICTION**

7. As a result of this transaction enterprises carried on by or under the control of Hamsard, Live Nation and Gaiety will cease to be distinct from enterprises carried on by or under the control of Academy (collectively 'the parties'). The parties overlap in the ownership and management of indoor live music venues in London with a capacity of over 1,000 people in respect of which their combined share of supply exceeds 25 per cent. Thus, the OFT believes that the share of supply test in section 23(4) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which if carried into effect, will result in the creation of one or more relevant merger situations ('the merger situation').

## **FRAME OF REFERENCE**

8. Hamsard and Academy overlap in the ownership and/or management of indoor live music venues in the UK.

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<sup>4</sup> These include: the Brixton Academy; the Shepherd's Bush Empire; and the Islington Academy.

<sup>5</sup> According to Hamsard, via Gaiety's wholly owned subsidiary, MCD Productions.

<sup>6</sup> A company solely controlled by Mr Simon J Moran.

<sup>7</sup> A company solely controlled by Mr Robert Angus.

9. Live Nation and Gaiety<sup>8</sup> are also active in the provision of promotion services for live music events. Two other existing Academy shareholders are also promoters (namely SJM Limited and Metropolis Music<sup>9</sup>). These vertical links give rise to a second affected sector: that of the provision of promotion services for live music events.
10. There is also a brief description of other affected markets at the end of this section.

### **Indoor live music venues**

#### **Product Frame of Reference**

11. Third party evidence indicates that the choice of indoor live music venue depends on a number of factors including cost (comprising of venue rental and commission taken from merchandising, ticket and other sales), capacity, configuration (standing and seating options), ambience and location in relation to population centres. Other relevant factors include artist's preferences, public perception, acoustics, TV capabilities, overall logistics costs, travelling time between tour locations, venue management and/or ownership and a venue's marketing ability.
12. Hamsard submits that in view of the range of capacities offered by each venue, there is a single market for indoor venues due to a chain of substitution connecting live music venues of all sizes. The OFT notes that it did not reach a firm conclusion on market definition in the Mean Fiddler Decision which is cited by Hamsard in its submission to support this argument. In addition, Hamsard believes that venues hosting other types of live performances (e.g. theatres) can stage live music events without significant additional cost. Also it believes that outdoor venues are substitutes for indoor venues to some extent and that smaller venues could be used (over several nights) as an alternative to a larger venue.
13. However, third parties said that additional costs, differing reputations, weather risks, seasonality (outdoor venues can only be used for a limited period of the year), configuration (such as fixed seating) and availability constraints (such as a long running show in a theatre) prevent outdoor and other indoor venues not regularly used for contemporary live music performances from acting as sufficiently close substitutes for the Parties' venues.
14. Furthermore, third parties submitted that a decision to put on several performances at a smaller venue instead of a larger event would be made for

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<sup>8</sup> Through different companies and subsidiaries controlled by Mr Desmond.

reasons other than cost (which will be higher for the former), such as ambience. We were also told that it is not cost efficient to host a small event in a larger venue. This tends to suggest that venues of substantially different sizes are unlikely to be substitutes on the demand side and so are unlikely to constrain each others' prices.

15. Given the wide range of factors affecting venue choice and the fact that different venues are often considered to be suitable for different artists, the OFT considers that in this case, the most appropriate way to assess whether competition may be substantially lessened as a result of this merger is to focus on the evidence it has obtained on the closeness of competition between the Parties' venues.

### **Geographic Frame of Reference**

16. The OFT's evidence shows that the geographic scope of venues is local because most tours include multiple concert dates at different locations. However, given the lack of competition concerns in relation to areas outside London, the OFT has focussed its analysis on London which most third parties submitted is a key venue location and is the main focus of concern for this transaction. Furthermore, given that the OFT's assessment considers the closeness of competition among specific venues, the OFT considers that the exact geographic frame of reference can be left open.

### **Promotion services**

17. Promoters of indoor live music events negotiate with the artist's agent, hire venues and undertake the advertising and marketing of an event. The promoter, usually in conjunction with the artist (or his/her agent) sets the ticket price. Promoters may absorb most of the commercial risk on behalf of more established artists by guaranteeing them a minimum income from the event/tour.
18. Given the importance of local knowledge in negotiating venues and advertising, artists and agents will generally use a promoter experienced in operating in the UK for events held in the United Kingdom. The evidence before the OFT suggests that in certain cases promotion services could be regional in scope (hence promoters will jointly organise and run a tour). However since the outcome of this decision does not depend on the geographic scope of promotion services, it is not necessary to define the geographic scope of these services.

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<sup>9</sup> While the shares are held by Customblock, both Customblock and Metropolis are solely owned by Mr Robert Angus.

## **Other Issues:**

### **Agency services**

19. Agents claim a percentage of an artist's gross receipts in return for their knowledge of the market and specialist expertise in terms of negotiating on the artist's behalf with promoters or venues. Sometimes agents organise events themselves rather than asking a promoter to organise it.

### **Ticket agents**

20. Ticket agents sell advance tickets for various entertainment events on behalf of those staging such events (such as promoters). Ticket agents have agreements with promoters and also with venue owners.

### **Music festivals**

21. The organisation of music festivals involves having an agreement with a landlord or local authority, arranging a licence and co-ordinating suppliers, marketing and booking talent.

## **COMPETITION ASSESSMENT**

### **HORIZONTAL ISSUES**

#### **Non-co-ordinated effects**

22. The concern expressed by a number of third parties that contacted the OFT is that there will be a loss of competition among indoor venues of a certain size located in London. The theory of harm is that the parties are each other's closest competitor at venues of a certain size so the merger will eliminate the competition that currently exists between Hamsard (and Live Nation) and Academy at those venues with the result that prices (the cost of hiring venues) might be expected to rise above the competitive level post-merger.
23. Third parties have consistently identified the Parties' venues in London as each others' closest substitutes. Given their different sizes, third party comments indicated that there are three broad 'groupings' of closely competing venues determined by the factors discussed above including the approximate capacities of the venues, ambience, public perception and artists' preferences. These are:

- (1) Hammersmith Apollo (Live Nation) and Brixton Academy (Academy) at around 5,000 capacity;
  - (2) Shepherd's Bush Empire (Academy), The Forum (Mean Fiddler) and The Astoria (Mean Fiddler) at around 2,000 capacity;
  - (3) The Islington Academy (Academy), Mean Fiddler (Mean Fiddler) and the Garage (Mean Fiddler) at around 1,000 capacity.
24. The main concerns appear to focus on venues of around 5,000 capacity and around 2,000 capacity. While third parties identify the above named Parties' venues as close competitors for venues around 1,000 capacity, the view that these venues were the only good alternative was not so consistent. On the basis of the evidence presented and reviewed by the OFT, we believe that there are a sufficient number of similar sized venues in London such that the merger should not substantially lessen competition for venues of this size. For example, KOKO (1,450 capacity); The Scala (1,000) or 93 Feet East (680) cater for the same type of events, and are regarded by most third parties as competitive in terms of a combination of ambience, public perception and artists' preferences.
25. Other indoor venues suggested by the parties - and some third parties when asked to name other venues used in London - included the Royal Festival Hall (2,900 capacity), Royal Opera House (2,257 capacity), Theatre Royal (2269), the Camdem Roundhouse (3,000), the London Coliseum (2,400), Hammersmith Palais (2,230), Royal Albert Hall (5,200), Alexandra Palace (9,750) and Barbican Centre (2,900). However, most third parties told us that, they do not consider these venues as sufficiently close substitutes to those listed above in (1) and (2). Third parties said that while they may be viable substitutes for particular live music events, they are not as close substitutes for the Parties for a number of reasons: (i) similar capacity but different ambience (e.g. Royal Festival Hall is known as a classical music venue); (ii) limited availability (e.g. in use for long running shows); (iii) used only for exceptional events (e.g. Elton John performing at the Royal Opera House).
26. With respect to the Royal Albert Hall, the OFT notes that the third parties which named it as a potential substitute in the 5,000 capacity grouping, still regarded the parties' venues as the closest substitutes. In addition, given the popularity and variety of acts performed at this venue, its availability is limited. Thus, the OFT considers that the Royal Albert Hall does not have enough spare capacity to accommodate enough acts from the Parties' venues to make unprofitable any rental fee or other effective venue price increase post-merger.

27. Third parties submitted that post-merger, if they require a venue of similar reputation, size and character to those included in the above 'groupings' (1) and (2), they would, in most cases, have no good alternatives to the Parties' venues. Third parties have given examples where promoters have been able to obtain a better deal by playing off the Parties' venues against each other. Third parties have also told the OFT that the refurbishment of Wembley Arena forced promoters to move acts which would have been hosted at Wembley to other venues, including Brixton Academy and Hammersmith Apollo and that this has limited the scope for price competition since capacity has been more constrained.<sup>10</sup>
28. Hamsard submitted that post merger, sufficient competitive constraints will remain on the Parties' London venues because: (i) there is scope to substitute one large event for several smaller venues; (ii) there will remain similar sized venues owned by third parties (iii) artists (and consequently their agents) have sufficient countervailing buyer power to constrain any attempt to increase rental fees. As discussed above, the OFT does not consider (i) and (ii) to be sufficient constraints on the Parties post merger. As regards (iii), this is discussed below at paragraphs 29 and 43.
29. The OFT has considered whether any other factors could, post merger, exert a sufficient competitive constraint on the Parties namely:
- (i) Agent's negotiating power: the parties suggested that some agents have sufficient market power to constrain the Parties post merger. For example, they argue that some agents might bundle the opportunity to promote established artists with a requirement to also promote emerging or less popular bands. The parties implied that given the risk of losing out on an event and having a 'black night', the venue owner will be prepared to accept downward pressure on pricing, expecting to make most of its profits out of other streams of revenue, such as food, beverage, merchandising, etc. However, it is usually the promoters who negotiate rates with venues rather than the agents so this reduces the agents' influence on venue rental negotiations. Furthermore, with the lack of alternative venues of similar size it is not obvious what incentive the parties would have – as venue owners – to reduce rental charges to promoters. Given the evidence before it, the OFT does not believe that

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<sup>10</sup> This is not to suggest that Wembley Arena should be considered an alternative to the Brixton Academy and Hammersmith Apollo; rather that when Wembley Arena was unavailable the next best alternative for some promoters was multiple nights at either of these two venues. Moreover, the management contract for Wembley Arena is now held by Live Nation.

the negotiating power of individual agents is sufficient to constrain venue rental prices post merger.

- (ii) Punishment in other geographic markets: tours usually visit several locations. In locations outside London, promoters may find that the Parties do not control the closest competitors and could therefore opt to use a venue outside the control of the Parties even though in London they might be obliged to use a venue belonging to the Parties. However, since such punishment could involve a cost to promoters (potentially selecting a less preferred venue outside London) it was unclear whether this could be a significant constraint.
  
- (iii) Effect on ticket prices: the parties argued that the ticket price may not be affected by any increase in the rental fee of the venue since promoters and artists set the ticket price according to a number of factors, and venue rental is only a small factor so has little influence on the final ticket price. Given that a large proportion of the income of venue owners/managers (in some cases more than half) comes from ancillary sales, namely food and beverage and merchandise sales, the Parties argued that venue owners have an incentive to ensure that there is maximum attendance at their venues. However, all promoters consulted during the OFT's investigation stated that as a result of an increase in the rental fees for venues, ticket prices would increase. The proportion of the ticket price accounted for by venue cost varies by artist: the less popular and well-known the artist is, the lower the ticket price and the greater the proportion attributable to venue hire. Insofar as venue owners believe that an increase in venue rental will feed through to an increase in ticket price they may not have as much of an incentive to raise the price of venue rental. The effect that ticket prices have on event attendance will vary from artist to artist, but where the venue owners believe that consumers will be sensitive to changes in price, they may decide not to raise venue rental even when they would have the ability to do so. However, the OFT considers that the weight of any such effect on the incentives of venues owners to raise venue rental is difficult to ascertain (the certain loss of venue rental as against the possible increase in ancillary sales). Moreover, there may be artists for which consumers are not price sensitive and venue owners may have an incentive to raise venue rental in these cases where they have the ability to do so.

## **OTHER ISSUES**

### **Vertical issues**

30. The vertical concern with this merger relies on the fact that the parties have control of certain key London venues. Third parties have argued that Live Nation may be in a position to obtain preferential treatment for the use of the Parties' venues, for example in the form of lower prices or first choice of dates. The theory of harm raised by third parties is that Live Nation, as a venue owner, would have the ability and incentive to foreclose the market for promotion services by limiting access to or raising the costs of its venues (including those acquired as a result of this merger) to other competing promoters.
31. By foreclosing the promotion sector, Live Nation (solely or together with the other promoters which are shareholders in Academy) may, it is argued, be able to raise prices for promotion services and also ensure that events that they are/it is promoting are held in venues owned by them, maximising the use of their venues.
32. Evidence from third parties suggests that those promoters connected to the Parties account for between 60 and 80 per cent of the live music promotion market in the UK (see below). This may restrict an agent's ability to find promoters not connected to the Parties. On the other hand, given that tours often play at a number of UK locations and that agents will have artists that wish to play at venues other than the Parties venues in London, agents will be able to use promoters other than Live Nation to promote these events. This may limit Live Nation's ability to foreclose the promotion sector.

### **Co-ordinated effects in promotion services**

33. Three of the four shareholders which will be on the Academy board post-merger are the three largest promoters in the UK: Live Nation, Mr Robert Angus (through his wholly-owned company Metropolis Music) and Simon J Moran (through his wholly-owned company SJM Limited). In addition, Academy has its own in-house promotion team and Gaiety has some promotion activities in the UK.
34. The OFT received varying estimates of shares of supply in live music promotion services from third parties. However, the clear message was that Live Nation is the largest promoter, that SJM and Metropolis are the second and third largest promoters and that together these three promoters account for a large share of the sector (likely to be greater than 50 per cent). Some third parties estimated between 60 and 80 per cent. After that there are a number of smaller but

significant promoters. A third party stated that there are five promoters in this category. There is also a fringe of small competitors.

35. The OFT considered the possibility that the proposed merger may increase the risk of collusion among these promoters. The structure of the transaction will increase the links among these promoters (given the presence of the three largest promoters in the UK on the Academy board) giving more scope for sharing information about their promotion activities. This could be in the form of an explicit information sharing agreement or just the tacit sharing of information on their promotion activities. Tacit coordination requires the ability to detect and punish deviation from the collusive behaviour. As the main players in promotion, these promoters will be competing for contracts on a regular basis, giving some scope for detection, and punishment could be possible through reverting to competitive conditions or through their influence in Academy board meetings.
36. The ability to sustain any such coordination relies to some extent on barriers to entry and expansion into promotion being high (preventing disruption of the collusive behaviour), which in turn may depend on the Parties' control of access to key London venues.

#### **Portfolio effects**

37. Live Nation and Gaiety have a strong presence in other related markets such as festivals. Given the portfolio of venues, festivals and promotion controlled by the Parties, some third parties have expressed concerns that the Parties might have the ability and the incentive to bundle acts at festivals or venues (for example a venue in London with a less desirable venue elsewhere in the UK). To an extent such bundling is already possible. Consequently the concern raised by third parties is that post-merger, the control of all key London venues of a certain size may increase the ability of these promoters to make the performance in one of their key London venues conditional on appearing in other venues or festivals also controlled by the Parties.

#### **The Ticketmaster Agreement**

38. Third parties raised the concern that as a result of bringing Academy venues under the control of Live Nation, which already has a ticketing contract with Ticketmaster, the opportunity to bid for this large ticketing agreement would be lost. [ ] Hamsard told the OFT that it is intending to put up for open tender the ticketing contract of Academy when its current contract terminates in November 2006), [ ].

39. Third parties submit that if there were to be one less large contract to bid for – that for Academy venues - it is possible this might lead other ticketing agents to exit the market and so reduce competition in this sector. However, there are a large number of events other than contemporary live music events for which to sell tickets unaffected by the merger. It is not clear to the OFT how significant, in such a wider market, the Academy contract might be.

## **BARRIERS TO ENTRY**

40. Third parties have indicated to the OFT that entry into live music venues is difficult since (i) it takes between two and five years for their venues to become established; (ii) the investment required is substantial, a large proportion of which comprises sunk costs; (iii) regulatory consents exist; and (iv) some support from a large promoter is required to ensure that the venue has the opportunity to host successful events. The OFT was not presented with sufficient evidence of successful recent (or likely new) entry to conclude that new entry would represent a sufficient competitive constraint on the Parties' venues.
41. AEG is expected to open the O2 Dome in 2007 with a large 23,000 capacity arena and a 2,200 capacity music venue. While this entry is clear cut and timely whether it would be sufficient to address any anticompetitive effect of the merger is more uncertain. As noted above (paragraph 40) other venues owners estimate that it takes between two and five years for their venues to become established. Also, it is uncertain the competitive constraint these venues will confer on the merging parties' venues given the combination of factors influencing the customer's choice: reputation, location, public perception and artists' preferences these venues.
42. Concerning entry into the supply of promotion services, there is mixed evidence. Given the importance of successful live performances to an artist's career, artists and agents are unlikely to choose promoters without an established reputation to promote their live music events. This is likely to make substantial entry into promotion difficult. However one third party promoter told us that entry and expansion into promotion is easy. However, there are no promoters with substantial share that did not exist three years ago.

## **COUNTERVAILING BUYER POWER**

43. Hamsard submitted that agents have countervailing buyer power arising from the 'market power' of their most established artists as discussed above at paragraph 29. However, not all agents manage artists with such considerable buyer power.

Most acts will not have much buyer power with venues or promoters. The OFT does not believe it can rely on buyer power to mitigate any of the concerns arising from the merger.

### **THIRD PARTY VIEWS**

44. Extensive third party comments were received. The majority of these raised concerns. The most substantive concerns have been discussed above. The OFT has considered carefully the quality of the evidence supplied to support these concerns.

### **ASSESSMENT**

45. The Parties overlap in the business of owning and/or managing indoor live music venues, particularly in London. Live Nation and Denis Desmond are also active in the promotion of live music events. Two of Academy's other existing shareholders are also promoters. In addition, Mr. Denis Desmond, Mr. Robert Angus and Mr. Simon J Moran are active in the organisation of music festivals.
46. Given the wide range of factors affecting venue choice and the fact that different venues are often considered to be suitable for different artists, the OFT considers that in this case, the most appropriate way to assess whether competition may be substantially lessened as a result of this merger is to focus on the evidence it has obtained on the closeness of competition between the Parties' venues.
47. At the horizontal level, the merger brings together the closest competitors in: (1) live music venues of around 5,000 capacity in London (Hammersmith Apollo and Brixton Academy), and (2) live music venues of around 2,000 capacity in London (the Forum, Astoria and Shepherd's Bush Empire).
48. Third party responses and the OFT's own assessment of the evidence provided suggests that the merger of the closest competitors in some London venues may give rise to a substantial lessening of competition: the Parties may be able to increase the venues' rental fees higher than absent the merger. While some venues (such as the Royal Albert Hall or the Barbican Centre) are good substitutes for certain types of event, the OFT does not consider that they represent a sufficient competitive constraint on the Parties.
49. The OFT considered whether some mitigating factors could prevent the Parties from raising rental fees post-merger. We considered potential agent's countervailing buyer power; the possibility that promoters could discipline the Parties by using alternative venues owned by third parties in other locations

outside London where there is more choice; and whether any increase in venue rental fee would not be passed on to the final ticket price. However, the OFT considers that the evidence before it is not sufficient to enable it to conclude that any of these potentially mitigating factors is strong enough to counteract the loss of rivalry at the horizontal level.

50. In relation to barriers to entry, third parties identified a number of potential barriers to timely entry, and the OFT did not find sufficient evidence of recent (or likely new) entry to conclude that entry would be a sufficient constraint on the Parties post-merger such as to counteract the OFT's concerns.
51. The OFT has noted in this decision other issues raised by third parties or considered by the OFT. These include: vertical issues, portfolio effects, risk of co-ordination among promoters and the Ticketmaster issue. However, since the OFT's duty to refer has been triggered in relation to the horizontal issues discussed above, there is no need for the OFT to conclude on any of these issues.
52. Consequently, the OFT believes that it is or may be the case that the merger situation may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom as a result of the horizontal overlap in the ownership and/or management of indoor live music venues in London.

#### **UNDERTAKINGS IN LIEU OF REFERENCE**

53. Where the duty to make a reference under section 33(1) of the Act is met, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from such of the parties concerned undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may result from it.
54. The OFT has therefore considered whether there might be undertakings in lieu of reference which would address the competition concerns outlined above. The OFT's guidance states that in order to accept undertakings in lieu of reference '...the OFT must be confident that the competition concerns identified can be resolved by means of undertakings without the need for further investigation. Undertakings in lieu of reference are therefore appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation...'<sup>11</sup>.

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<sup>11</sup> See paragraph 8.3 of OFT *Mergers Substantive Assessment Guidance*.

55. Live Nation, proposed undertakings to the OFT, intended to address the potential competition concerns, in lieu of a possible reference to the Competition Commission. The proposed undertakings were that:

[ ]

56. These proposed undertakings do not, however, address the horizontal issues which have triggered the OFT's duty to refer, and therefore, would not resolve the competition concerns identified and as such are not appropriate.

57. Accordingly, the OFT has decided not to exercise its discretion under section 73(2) of the Act to consider whether to accept undertakings in lieu of a reference.

#### **DECISION**

58. The merger situation will therefore be referred to the Competition Commission under section 33(1) of the Act.