

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

## **Issues statement**

### **Introduction**

1. On 20 November 2015, the Competition and Markets Authority (CMA) announced its [decision](#) to commence a review, under Schedule 24 to the Enterprise Act 2002, of the undertakings given by the Performing Right Society Limited (PRS)<sup>1</sup> in February 1997 following an investigation by the Monopolies and Mergers Commission (MMC).<sup>2</sup>
2. The CMA's decision to undertake a review followed its consultation in July and August 2015 seeking views on whether to carry out reviews of 13 sets of market and monopoly remedies that had been put in place by the CMA's predecessors prior to 2005, and which had not been reviewed recently.<sup>3</sup>
3. Decisions concerning this review will be made by a group of CMA panel members, appointed by the CMA Panel Chair. These are Simon Polito (Chair), Anne Lambert and Philip Marsden. The group was chosen from the [CMA's expert independent panel members](#), who come from a variety of backgrounds, including economics, law, accountancy and business.
4. This issues statement is based on information from the responses to the consultation and our assessment of the evidence in our possession. We are publishing this statement to assist those submitting evidence to focus on the issues we envisage being most relevant to this review. We invite interested parties to comment on the issues set out in paragraphs 21 to 22 below.
5. **Responses including relevant evidence should be submitted to the CMA by 5pm on 15 January 2016.**
6. To respond, please email: [remedy.reviews@cma.gsi.gov.uk](mailto:remedy.reviews@cma.gsi.gov.uk).

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<sup>1</sup> Now known as PRS for Music or PRSfM.

<sup>2</sup> MMC (February 1996), *Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronization rights*, CM 3147 ('MMC report'),

<sup>3</sup> [Review of monopoly remedies put in place before 1 January 2005](#).

Alternatively, please write to:

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Performing Right Society Undertakings Review  
Competition and Markets Authority  
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7. Please note that we may publish responses, or refer to responses in a subsequent report. If you wish to submit a response containing information or evidence that you consider to be confidential, please submit both a confidential and non-confidential version, and provide an explanation as to why you consider specific material to be confidential. For further information please refer to [Transparency and disclosure – statement of CMA’s policy and approach: CMA6](#).

## Background

8. The PRS is a collective management organisation (CMO). It administers some of the rights in the copyrights in musical works – that is the copyright in the composition and lyrics of the music. The copyrights in musical works are generally originally owned by the authors of the music – that is the people who composed the music and/or wrote the accompanying lyrics.
9. The PRS grants licences to users of musical works, such as broadcasters, radio stations and live music venues. It collects the royalties which are due to the authors and then makes a distribution to them after it has deducted a commission. The PRS is a member organisation with more than 111,000 songwriter, composer and publisher members. The PRS’s turnover in 2014 was £513.5 million, with a net distributable income of £457.2 million.<sup>4</sup> Further details on CMOs and the PRS are available in [Annex 2](#).
10. The relevant government agency in this area is the Intellectual Property Office (IPO) (an executive agency of the Department for Business, Innovation and Skills). It is the official UK government body responsible for intellectual property rights including patents, designs, trademarks and copyright.

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<sup>4</sup> Performing Right Society Limited (April 2015), Report and Financial Statements.

## The MMC's investigation and the PRS undertakings

11. Following a reference from the Office of Fair Trading (OFT) in 1994, the MMC investigated whether a monopoly situation existed in relation to the supply of services of administering performing rights and film synchronisation rights. The MMC concluded that a monopoly position existed in favour of the PRS. Specifically, it found that:<sup>5</sup>
  - (a) in matters of corporate governance, the PRS had failed to organise itself in such a way so as to ensure it operated efficiently;
  - (b) the PRS had failed to adopt efficient management practices and systems for distribution of royalties;
  - (c) the PRS had failed to provide adequate information to its members and to operate with sufficient transparency;
  - (d) the PRS had failed to ensure that its members had a right of appeal in matters of dispute and therefore failed to provide a suitable procedure for dealing with their grievances; and
  - (e) the PRS had refused to allow members to administer their own rights in respect of live performances.
12. The MMC noted that:

The PRS has been in existence since 1914 and has changed greatly over the years ... Throughout that time, however, there have been tensions between writers and publishers and between those who are involved in different musical genres. These tensions have contributed to the development of a corporate organization and a way of working which are cumbersome by modern standards. We found evidence of inefficiency, arising from the corporate structure and management practices of the PRS ... We found that the PRS failed to consult the membership adequately and that its policies and procedures were not sufficiently transparent.<sup>6</sup>
13. Following completion of the MMC's investigation, the PRS gave undertakings to the Secretary of State for Trade and Industry on 27 February 1997.

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<sup>5</sup> MMC report, paragraph 2.100.

<sup>6</sup> MMC report, paragraph 1.5.

14. The undertakings given by the PRS include obligations not to:
  - (a) prevent members from self-administering their own live performing rights and other categories of rights;
  - (b) prevent writers from sending representatives that are not members of the PRS to speak or vote for them at general meetings of the PRS;
  - (c) significantly alter the structure or operation of its appeals board; and
  - (d) act in a way contrary to any recommendation in the MMC's report.
15. The PRS also agreed to notify the OFT (now CMA) of proposals to make amendments that would affect the above obligations.
16. In relation to corporate governance, the PRS agreed to keep separate:
  - (a) its chairman and chief executive roles; and
  - (b) its board on the one hand, and its Chief Executive Committee and Executive Committee on the other.
17. The PRS also agreed to provide information to the OFT including:
  - (a) an annual report specifying measures it has taken to comply with the MMC's recommendations;
  - (b) its PRS News publication;
  - (c) the PRS Yearbook containing the PRS's annual report and accounts which would set out:
    - (i) a simplified description of the cost allocation scheme; and
    - (ii) aggregated details of the overseas earnings of members.
18. The PRS also agreed to provide the OFT with such other information as it may reasonably require from time to time to monitor compliance with these undertakings.
19. Full details of the MMC's recommendations can be found in [Annex 1](#). The undertakings can be found on [the CMA's website](#).

## **Issues to be considered in the review of undertakings**

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.

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.**
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.**
  - (b) Legislative changes –** The undertakings and the MMC’s recommendations overlap, at least to some extent, with the Collective Rights Management Directive<sup>7</sup> (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

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<sup>7</sup> 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.

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.<sup>8</sup>**
- (c) **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<sup>9</sup> 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.<sup>10</sup> 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

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<sup>8</sup> For further details, please refer to the recent [consultation](#) by the IPO on the CMO Directive.

<sup>9</sup> Including singles, albums, and music videos.

<sup>10</sup> Music Industry – Keynote Market Report, May 2015.

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 multi-territorial licence.<sup>11</sup> 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;**

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<sup>11</sup> European Commission decision document on the joint venture between PRSfM, STIM and GEMA (Case M.6800 – PRSfM / STIM / GEMA / JV), 16 June 2015, paragraph 24.

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

23. The evidence and views that the CMA receives in response to this issues statement will form part of the assessment of whether there has been a change of circumstances relevant to the undertakings given by the PRS, such that they should be varied, superseded, or released.
24. Once all evidence and views have been collected and analysed, the Group will reach a provisional decision on whether to vary, supersede, release or retain the undertakings. This provisional decision will be subject to public consultation before a final decision is reached by the Group.
25. The Group has also published its [administrative timetable for the review](#), details of which are available on the CMA website.



## **Annex 1: MMC's recommendations to the PRS**

### **A. Corporate governance and management practices**

1. The PRS's General Council to step back from the day-to-day management of the Society to concentrate on key policy issues and supervision of the development of the PRS's future strategy.
2. Reduce the number of meetings of the full Council.
3. Formal delegation by the General Council of responsibility for the day-to-day management of the Society to a new Executive Committee comprising the Chief Executive, Chairman, both external directors, the second executive director and no more than two other director members of the General Council.
4. Disband the existing Executive Committee.
5. Reduce the number of committees and groups.
6. Clear differentiation between the roles of the Chairman and Chief Executive.
7. General Council to define objectives of the PRS within three months of publication of this report.
8. General Council to agree a five-year strategy for the PRS within three months of publication of this report.
9. Evaluate, using a cost-benefit analysis, all major proposals for change.
10. Increase the amount of formal management representation on the remaining committees and groups.

### **B. Management and distribution practices**

11. Set out, with target dates for completion, all key steps necessary to improve efficiency.
12. High priority to be given to the improvement of data.
13. Link consideration of IT strategy to the consideration of the overall five-year strategy. Ensure the objectives of the two programmes are consistent and the timing is synchronized.
14. IT strategy to take into account the need to streamline processes and integrate all major administrative systems.

15. Adopt international standard work code numbers as soon as practicable.
16. Encourage or even require members to adopt these standard work code numbers too.
17. Improve cost appraisal to determine which costs are direct and which are indirect.
18. Implement systems to provide the necessary information for more equitable cost allocations to be made.
19. Publish details of the new cost allocation system within 12 months of publication of this report.
20. Publish sufficient accounting information within 12 months of publication of this report for members to be able to see where costs lie.
21. Targets to be published within two months of publication of this report for reducing administrative costs.
22. Modify the targets described in 21 above as soon as the new cost allocation system is in place.
23. Impose separate annual membership fees for writers and publishers of around £25 plus VAT a year and £125 plus VAT a year respectively.
25. The PRS to work towards accreditation under an approved quality standard.
29. The PRS to take professional advice about the measurement and sampling of public performances and to distribute this advice to the membership.
30. Initial bench-marks for all major areas of public performance to be drawn up within six months of publication of this report.
31. Regular and statistically valid sampling to take place thereafter.
32. Review the LMDP within nine months of publication of this report in the light of the findings at 30 above and amend where necessary.
33. Establish a special committee, including representatives of a range of minority musical genres, to oversee all sampling work.
34. Put in place a financial model which can assess rapidly the effect of changes in distribution policies.

### ***C. Lack of transparency***

24. The PRS formally to set out in the Members' Handbook the responsibilities it has to members and the standards of service it aims to achieve.
26. Amend the rules relating to termination of membership to reflect the flexibility inherent in current practices and set out the changes clearly for members in the published Rules and Members' Handbook.
27. State the limitations of the distribution policy in the Society's literature and bring these to the attention of current and prospective members.
28. Published accounting information to include details relating to members' overseas earnings.
40. The PRS to introduce a formal consultative process to take members' views on proposed changes in policy or strategy.
41. Voting rules to be amended to allow writer members to send representatives who are not themselves members of the PRS to speak and vote for them at all general meetings.

### ***D. Lack of right of appeal in matters of dispute***

35. Establish an Appeals Board to resolve the disputes which members may have from time to time with the Society about their personal rights.
36. Members to pay an initial deposit to the Appeals Board, which would be non-returnable for trivial or frivolous cases.
37. Appeals Board to have right of access to relevant papers.
38. Appeals Board to have a specialist accountant if required to deal with disputes concerning self-administration of performing rights.
39. Appeals Board's findings to be binding on all the parties involved.

### ***E. Exclusivity in relation to rights administration***

42. Article 7 of the Articles of Association to be amended to allow self-administration of the live performance right.
43. Article 7 of the Articles of Association to be amended to make it clear that members already have the right to self-administer the categories of performing rights specified in the GEMA decision.
44. The PRS to publicize the changes to Article 7.

## **Annex 2: The role of collective management organisations and the PRS**

1. The PRS is a member organisation with more than 111,000 composer, lyricist, songwriter and publisher members. The PRS's turnover in 2014 was £513.5 million, with a net distributable income of £457.2 million.<sup>12</sup> The PRS is a CMO and is also known as a collecting society.

### **Copyright and exclusive rights**

2. Copyright in a musical work lasts for the life of the creator, plus 70 years after their death and gives the copyright owner exclusive control of their work. This means that the permission of the copyright owner(s) is required before their music is used in certain ways such as when it is performed in public. As part of their exclusive rights to control any use of their work, the copyright owner(s) is entitled to charge for giving permission to use their work.

### **Who owns the copyright in a musical work?**

3. Authors of a musical work (a piece of music or musical composition) can typically be described as the composer and the lyricist, (if there are lyrics). Another term which is used is 'songwriter'. The composer, lyricist, songwriter and publisher (if the musical work has been published) or CMO (by virtue of an assignment from the composer, lyricist or publisher) will generally be the owners of the copyright in a musical work. Sometimes there may be more than one owner of the copyright in a musical work.

### **The role of a CMO**

4. If someone wants permission to use a musical work, it is sometimes possible for them to approach the copyright owner(s) directly to 'clear' the rights, or, in other words, to obtain a licence to cover the use of the work in a particular way. More usually, copyright owners tend to use CMOs to license their works since it would generally be impractical for them to license their copyrights themselves, as each author would have to enter a contract with each user, track the usage of the works and collect the royalties that are payable under the terms of the licence.

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<sup>12</sup> Performing Right Society Limited (April 2015), Report and Financial Statements.

## **The rights administered by the Mechanical Copyright Protection Society and Phonographic Performance Limited**

5. Several types of rights are relevant for the licensing of music. Different rights may need to be cleared depending on how the music is used and whether a sound recording as well as a musical work is involved. This review only concerns the rights in musical works which are administered by the PRS.
6. The Mechanical Copyright Protection Society (MCPS) administers the rights to reproduce or copy a musical work. These rights are generally owned by songwriters and publishers. Mechanical right royalties are payable when a musical work is reproduced in a physical format such as a CD or a copy is made for the purposes of a broadcast or an online service.
7. The rights in a sound recording should be distinguished from the rights in a musical work. They are owned by the performer whose voice or instrument has been recorded and by the record company who records the performance. Phonographic Performance Ltd (PPL) administers the rights in sound recordings.
8. PPL, MCPS and the rights which they administer are not covered in this review.

## **The rights administered by the PRS**

9. The PRS grants licences to users of musical works, such as broadcasters, radio stations and live music venues. It collects the royalties that are due to its members and then makes a distribution to them after it has deducted a commission.
10. The licences granted by PRS cover different rights depending on how the music user intends to use the music and on the rights that the PRS has been appointed to administer by its member.
11. Under the terms of its Memorandum and Articles of Association, the PRS takes an assignment from its members of certain categories of rights in all of their musical works. This means that members cannot withdraw the rights in individual musical works and that if they wish to 'self-administer' or appoint a third party to administer their works, they must do so in relation to their entire repertoire and in relation to specified categories.
12. The current categories of rights that a member may exclude on admission to the PRS as a member or withdraw from assignment to the PRS are set out in

Article 7 of the Memorandum and Articles of Association of the PRS as amended on 19 May 2015:<sup>13</sup>

- (i) 'The live public performance right;
- (ii) The audio broadcasting right (other than the Online Right);
- (iii) The public performing right of audio broadcast works;
- (iv) The televising (audio-visual) broadcasting right (other than the Online Right);
- (v) The public performing right of televised works;
- (vi) The right of public performance by means of the theatrical exhibition of a film;
- (vii) The public performing right of mechanically reproduced (sound bearing copies) works;
- (viii) The film synchronisation right;
- (ix) The public performing right of works reproduced on video tape;
- (x) The Online Right except for the Making Available Right;
- (xi) The Making Available Right;
- (xii) The exploitation rights resulting from technical developments or future changes in the law.'

13. The PRS only administers film synchronisation rights for its writer members and only when they are commissioned to write music for a new film. A film synchronisation licence allows a musical work to be recorded on the soundtrack of a particular film.

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<sup>13</sup> [Memorandum and Articles of Association of the Performing Right Society Limited.](#)