

## LIVE NATION RESPONSE TO REMEDIES PAPER

### 1. INTRODUCTION AND SUMMARY

1.1 In separate papers, the parties have already set out their view that the CC erred, both in law and in fact, in concluding that the merger would result in a substantial lessening of competition in live music ticket retailing. This paper needs to be read in the light of those concerns.

1.2 Many of the issues raised in the substantive papers (e.g. CTS' actual technical deficiencies and the absence of any LOI commitment to the marketing of CTS) challenge the validity of the counterfactual / SLC premise itself, and in any event confirm that a focused remedy is all that is required, if any.

1.3 Notwithstanding its fundamental disagreement with the Provisional Findings, LN has approached the question of remedies as constructively as possible. LN accepts, for the purposes of this discussion, that the assumed SLC essentially consists of CTS allegedly being deprived of the springboard for effective entry. With this in mind, and applying the CC's twin tests of effectiveness and proportionality:

- LN agrees with the CC that there is no basis for an **outright prohibition** of the proposed merger – such a remedy would be neither effective nor proportionate - this possibility is not considered further here;
- LN similarly believes there is no basis for the **structural divestment** options set out in para 11 of the Remedies Notice – such a remedy likewise would be neither effective nor proportionate. Given the availability of a less burdensome and costly behavioural remedy that is straightforward and workable (see below), to permanently deprive LN and TM (by structural divestment) of the opportunity to secure the legitimate merger benefits from their vertical integration would clearly be disproportionate and punitive and counterproductive. Accordingly, this paper does not consider further the detailed divestment considerations as to scope, purchasers etc. set out in paras 12-15 of the Remedies Notice.
- Notwithstanding the above, and as the CC is already aware, LN is in the process of divesting its UK theatres business (comprising a substantial real estate portfolio of 16 venues and ticketing inventory of 5 million tickets per annum). The sale is expected to be concluded within a matter of days, to a UK theatre company which uses a self-ticketing solution and provides ticketing services for third party venues.
- In principle, an **effective and proportionate response** to the alleged SLC would **require LN to allocate to the CTS system (and, within that allocation, to the CTS website) a quantity of LN's controlled UK live music tickets corresponding to the most plausible counterfactual.**

1.4 In light of the existing contract between LN and CTS, the compulsory allocation of a substantial volume of tickets to a **third party** would run a high risk of CTS alleging a breach of contract. To force such a dispute would disproportionately

harm the merged company in circumstances where an equivalent remedial effect would be achieved through a guaranteed allocation to CTS.

1.5 The remainder of this paper therefore focuses on the stated SLC problem and the elements of a possible remedy requiring LN to allocate a proportion of LN-controlled live music tickets to the CTS system. LN submits that any such remedy should address the following elements:

- **ticket volumes:** the proportion of LN-controlled tickets placed on the CTS system should be in line with the proportion contemplated by the CC's working counterfactual (namely 65%). Of those, a further proportion would be ring-fenced for allocation to the CTS website;
- **duration** of the remedial allocation regime: the remedy should run no longer than the 5 years within which the "virtuous circle" is expected to take effect, and a shorter period may well be appropriate;
- **safeguards against abuse:** limits on LN's ability to re-allocate tickets away from the CTS website, together with appropriate certification and reporting requirements, although a combination of CTS' system involvement and LN's financial incentives should ensure that deviation from the remedy would not only be obvious, but also unlikely in any event to occur;
- **fitness for purpose:** the CTS system (as yet untried in the UK and delayed in delivery) should be capable of meeting the needs of this market (its ability to do so being established fairly); and
- **a fall-back remedy**, should CTS be unable to establish and operate an effective system.

## 2. TICKET VOLUMES

2.1 It is clear from the Provisional findings that the CC viewed CTS' projections of future sales as inflated, not least because CTS appears to have assumed:

- that LN ticket volumes have grown between 2006-10 (whereas the CC is aware of LN's reduced promotional activity);
- that LN controls box office sales; and
- that LN would not be required by its business model to continue to use third party agents.

2.2 However, it must be the case that the counterfactual which forms the basis of the CC's conclusions was based on the CC's view of the likely forward reality (para 6.37 of the Provisional Findings) and not on CTS' predictions.

2.3 LN agrees with the starting point for the CC's assessment of the counterfactual, namely that there are [x] LN-controlled tickets (on 2008 numbers). The CC's counterfactual assumptions are that 10% of these tickets would be allocated

to TM and a further 25% to other third party ticket agents, leaving 65% of LN-controlled tickets to be placed on the CTS system.

2.4 **LN would accordingly be prepared to undertake to replicate the counterfactual 65% allocation to the CTS system.** The use of a percentage approach ensures that market growth/decline impacts fairly on both parties. LN is nevertheless prepared in principle to discuss an approach based on absolute volumes of tickets, if that is thought more appropriate.

2.5 The CC's counterfactual goes on to assume that the 65% of LN-controlled tickets allocated to the CTS system would be split 50% to the LN website and 15% to the CTS website. In fact, as explained in detail in LN's Response to Provisional Findings, there was never any intention (and no evidence in the Letter of Intent) that the CTS website would be supported to this extent. Rather, LN's intention under its arrangements with CTS has always (regardless of the merger) been to focus on building up LN's own brand and website – documentary evidence of this will be supplied to the CC under separate cover.

2.6 Accordingly, LN is genuinely unable to understand why the counterfactual assumes strong LN support for the CTS brand – and, presumably, the CTS website – when the CC clearly accepts that LN's economic intention and incentive under the agreement is to maximise sales through its own site, not CTS' (albeit remunerating CTS for its services).

2.7 A **genuine** replication of the real life counterfactual would therefore see an allocation (within the 65% referred to above) of considerably fewer tickets (around [x]) to the CTS website, based on the LOI's [x] formula, applied to a representative sample of events. The CC should note that (as stressed in the Response to Provisional Findings) LN has no incentive to fill this allocation with small shares of small events. LN would therefore be prepared to undertake that all allocations to the CTS website should be for events with a capacity of 300 or more.

2.8 CTS' remuneration would be in line with that set out in the LOI. The CC should note that LN is prepared (without prejudice to the strict interpretation of the LOI) to pay [x] per ticket to CTS for those tickets within the control of LN that are sold outside the CTS system.

### **3. DURATION**

3.1 If the counterfactual prediction of CTS' success is correct, then there is certainly no obvious reason why any remedy should run beyond 5 years. Indeed, since CTS predicts that it will achieve its No.3 market position with the benefit of a substantial number of third party tickets, it may well be that a shorter period would be appropriate. Without access to the projected sales mix through to 2015, it is difficult for LN to be more precise on this point, but it would welcome an opportunity to engage in a more informed discussion.

3.2 LN accepts that the period should run, in principle, from the point at which the CTS system goes live – see **section 5** below.

3.3 LN/CTS are still subject to a 10 year contract which would (in the absence of breach) continue to run in accordance with its terms, following expiry of the remedy period.

#### **4. SAFEGUARDS/MONITORING**

4.1 The “fitness for purpose” trigger for allocations to CTS (see **section 5**) is not at LN’s discretion or otherwise capable of being blocked or delayed by LN, given CTS’ ability to call for independent sign-off, in the proposed remedy.

4.2 Ticket volumes will be capable of straightforward verification by CTS: as a system operator aware of venue capacities, as well as venue/promoter ticketing splits at each venue (whether LN-owned or not), CTS will readily be able to check on allocations to it.

4.3 As the CC is aware and has accepted in its Provisional Findings, the re-allocation of tickets to ensure an efficient sell-out is a necessary and standard practice, given the financial risk to a promoter in being left with unsold tickets.

4.4 LN would nevertheless be prepared to undertake that there should be no reallocations from CTS’ website to either of LN or TM. As the CC has accepted, LN has an economic disincentive to reallocate to other third party ticket agents, save in circumstances where sales are at risk.

4.5 Each of LN and TM would readily be able to provide confirmation, audited if necessary, that no prohibited reallocations had taken place.

#### **5. FITNESS FOR PURPOSE**

5.1 The CC has clearly recognised the balance of financial risk on an unsold ticket for an LN promotion – accordingly, it is unthinkable, and contrary to consumers’ interests, that any remedy should force allocations on to an ineffective system.

5.2 To date, CTS has not delivered a functioning ticketing platform that meets the needs of the UK market:

- it is well-established that LN and CTS are in dispute as to the steps required to be taken for this purpose - enclosed at **Annex 1A** is the latest correspondence from LN to CTS on this matter (dated 9 October), which includes a schedule of outstanding issues; a copy of CTS’ reply (of 19 October) is at **Annex 1B**.
- despite LN’s strong encouragement to do so, LN considers that CTS has not met its contractual obligation to deliver a system on [x] (see Annex 1A), and it has given LN no indication of when it will.
- LN requires significant time with the system to prepare internally for launch (hence the [x] deadline even though LN’s current agreement expires on [x]), and so it seems implausible that LN will launch on [x]. [x];
- LN has throughout not looked for unrealistic performance levels – merely that CTS should match the existing functionality LN receives from the TM system;

- CTS has made strong claims to the CC (which the CC appears not to doubt) as to the superiority of its system;
- in summary, LN does not insist on superiority to TM, but equivalence, and CTS has not to this point delivered either.

5.3 LN is nonetheless prepared in principle to commit to allocate tickets (in the numbers set out in “Ticket Volumes” above) not later than three months after LN or (at CTS’ request) a qualified independent expert has confirmed that, benchmarked against TM, the CTS system capability is substantially equivalent in all material respects, to handle the predicted volume of tickets:

- US experience has shown [x] that it is perfectly possible for an independent expert third party to assess the functional comparability of different systems and to identify shortcomings of one as against another and the operating significance of those shortcomings;
- LN would commit to provide prompt inputs, so as not to delay or hinder sign-off and to pay the experts’ costs if LN were to be overruled on fitness for purpose; and
- the CC should note that, provided the approval process is fair (as it would be, with the availability of independent verification), then however long the approval process takes, this is an accurate representation of the true counterfactual, [x]. The fall-back remedy nevertheless protects against undue delay.

## 6. FALL-BACK REMEDY

6.1 CTS’ strategic decisions are outside LN’s control. LN is nevertheless aware that if CTS were to fail, either to produce a system fit for UK purpose, or to operate successfully having launched the system, then there may be a (mistaken) suggestion that such failures were linked to the LN/TM merger.

6.2 To remove any concerns on this front, LN would be prepared to ensure that a substitute remedy was available, if required.

6.3 Taking “Launch Date” as being the date on which LN is required to commence allocating tickets to CTS (being not more than 3 months after the CTS system has been agreed or independently determined to be fit for purpose in the UK), then **if**:

- the Launch Date has not occurred by, say 31 March 2010 (or whatever date the CC thinks appropriate); **or**
- either party seeks to terminate the Letter of Intent within the first six months (say) following the Launch Date,

then LN will allocate to a single third party (not being TM or See) all the tickets that would have been allocated to the CTS system under the primary remedy, on the same terms and for an equivalent period from its own launch date.

6.4 [X] has indicated its willingness in principle to fulfil this role. There is no doubt that it can demonstrate the necessary experience, system capability and ambition. Further information on [X] is provided at **Annex 3**.

6.5 LN would submit that, beyond a period of, say, 6 months from CTS' Launch Date, there should be no requirement for a substitute remedy. CTS has claimed that it has or will develop a high quality system that will enable it, with initial sponsorship from LN to achieve a top 3 position in the UK market. If CTS fails in its ambitions despite having an operational system and the appropriate allocation from LN, this does not mean that the remedy was inadequate or that substitute measures were required, but rather that the counterfactual was wrong and, in hindsight, so was the finding of an SLC.

## **7. SUMMARY**

7.1 Should the CC call for any remedy at all, the proposed remedy (and back-up remedy, if required) provides a proportionate and effective response, directly implementing the counterfactual on which the SLC finding was based.

7.2 LN would welcome the opportunity to deal with any queries the CC may have, either at or in advance of the Remedies Hearing fixed for 29 October.

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