

Completed acquisition by The Ambassador Theatre Group Limited (ultimately controlled by Exponent Private Equity LLP) of the theatres formerly owned by Live Nation (Venues) UK Ltd

The OFT's decision on reference under section 22(1) given on 10 February 2010. Full text of decision published 24 February 2010.

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

PARTIES

1. **The Ambassador Theatre Group Limited (ATG)** (ultimately controlled by funds managed by **Exponent Private Equity LLP (Exponent)**¹ operates a nationwide portfolio of theatres in the UK.² It is also a theatre producer and supplies ticketing services to itself and to third parties.
2. The target is the entire issued share capital of Live Nation (Venues) UK Limited (**LNT**) which owned and operated the UK's largest national portfolio of theatres.³

¹ Exponent's activities do not create any substantive horizontal overlap or vertical link with ATG or LNT and, hence its acquisition of a controlling interest over ATG is not considered any further.

² **ATG West End theatres:** (i) the Comedy Theatre; (ii) Donmar Warehouse; (iii) Duke of York's Theatre; (iv) Fortune Theatre; (v) Phoenix Theatre; (vi) Piccadilly Theatre; (vii) Playhouse Theatre (50 per cent); (viii) Savoy Theatre (50 per cent); and (ix) Trafalgar Studio 1 and Trafalgar Studio 2;

ATG regional theatres: (i) the Ambassadors, Woking (encompassing the New Victoria and Rhoda McGaw theatres); (ii) Theatre Royal Brighton; (iii) the Regent Theatre, Stoke-on-Trent (iv) the Victoria Hall, Stoke-on-Trent; (v) Milton Keynes Theatre; (vi) Churchill Theatre, Bromley; (vii) Richmond Theatre, Surrey; (viii) the King's Theatre, Glasgow; (ix) the Theatre Royal, Glasgow; and (x) New Wimbledon Theatre (and the New Wimbledon Studio). ATG has also been awarded the contract to operate the Aylesbury Waterside Theatre (due to open in 2010).

³ **LNT West End theatres:** (i) the Lyceum and (ii) Apollo Victoria theatres; and, **LNT regional theatres:** (i) the Edinburgh Playhouse; (ii) the Auditorium, Grimsby; (iii) Liverpool Empire; (iv) Bristol Hippodrome; (v) the Palace Theatre, Manchester (vi) the Opera House, Manchester; (vii) Southport Theatre; (viii) Sunderland Empire; (ix) Grand Opera House, York; (x) Alexandra Theatre, Birmingham; (xi) Leas Cliff Hall, Folkestone; (xii) the New Theatre, Oxford (xiii) the Old Fire Station, Oxford; and (xiv) the Princess Theatre, Torquay.

TRANSACTION

3. ATG completed the acquisition of LNT on 2 November 2009.
4. The administrative deadline expired on 27 January 2010 and the statutory deadline expires on 1 March 2010.

JURISDICTION

5. Prior to the merger, ATG and LNT formed two separate enterprises that have ceased to be distinct for the purposes of the Enterprise Act 2002 (the Act) as a result of the merger.
6. The OFT believes that the share of supply test under section 23(2) of the Act is satisfied because post-merger ATG has an estimated combined share of supply of 30 per cent (including an increment of eight per cent) based on the number of seats in UK regional theatres⁴ with a capacity over 1,000 seats. The OFT therefore believes that it is or may be the case that this transaction has resulted in the creation of a relevant merger situation.

MARKET DEFINITION – THEATRES

Background

7. Theatres have some of the characteristics of two-sided platforms. That is, they act as intermediaries between two distinct sets of customers (theatre-goers and theatrical producers). There are indirect externalities between theatre-goers and producers: the value that a producer realizes from using a theatre increases with the number of theatre-goers (however, it is less clear that the converse is true). The theatre must therefore balance charges to both theatre-goers and producers to get the right amount of both sets of customers 'on board'. To do this, ticket prices to theatre-goers are determined by the producer in consultation with the theatre.

⁴ Those are theatres outside the West End of London.

8. The revenue earned by both producers and theatres usually depends on the number of events hosted, the value of tickets sold, merchandising and expenditure by theatregoers on concessions such as the bar (which is usually retained mostly by the theatre).
9. Two-sidedness complicates the process of product- and geographic-market definition as account must be taken of the linkages between the two sides of the market where necessary.
10. Two other features further complicate the process of market definition in this case. From a producer's perspective, separate candidate markets for theatres may exist depending on the size of production that they are capable of hosting. However, such distinctions are likely to be inherently blurred.
11. The OFT also understands that producers of touring shows will typically contract for a series of theatres across the UK to host them. These contracts may be with individual theatres and with owners of multiple theatres. Where producers contract with owners of multiple theatres, this will usually be done centrally but with regard to the individual terms and conditions for each theatre. Further, the duration of some touring shows may be open-ended, whereas others may be finite. For these reasons, individual theatres that may be substitutes for each other when a producer is planning a tour (for example, as viable starting locations) can become complements to each other when booking the tour or staging it.

West End theatres

12. ATG and all third parties suggest that the dynamics of competition are different in the West End of London than in the rest of the UK (the regional touring market) with no suggestion that producers or theatregoers see a regional theatre to be a substitute for a West End theatre.⁵
13. The OFT has received no evidence to contradict this view and has therefore concluded that West End theatres do not form part of the same product market as regional theatres.

⁵ Although third parties suggested that the geographic catchment area of theatregoers for West End theatres is wider than that for regional theatres, and is likely to include towns/cities containing regional theatres, none suggested that theatregoers saw touring productions at regional theatres as substitutes for productions at West End theatres.

Regional theatres

Geographic scope

14. The relevant geographic market is the smallest area in which a hypothetical monopolist could profitably sustain a small but significant increase in prices. Defining the relevant geographic market requires consideration of the products or suppliers which are viewed as viable substitutes from the perspective of customers. Where the ambit of customer choice is between local suppliers (such as for theatregoers) it may be appropriate to define local markets on the basis of a theatre's 'catchment area'. Conversely, when the geographic location of suppliers is not a key driver of choice (such as for producers), it is likely that a national geographic market is most relevant.
15. Third parties told the OFT that, outside the West End of London, each theatre has a local catchment area from which it draws its audience. This is determined by the size of the city and/or urban area surrounding each theatre. Outside the West End, the parties' regional theatres do not overlap on any plausible candidate local geographic market defined from a theatregoer's perspective.
16. ATG submitted that producers tend to secure a series of theatres (often from several suppliers) with an appropriate national geographic spread over a given period for the purpose of staging a theatrical production, including a musical tour. On this basis, ATG argued that the appropriate geographic frame of reference in this case consists of all those regional touring theatres that together are capable of staging a touring musical or other theatrical production. This geographic frame of reference is national.
17. The OFT's analysis of musical touring schedules⁶ supports ATG's submission that producers procure a sufficient number of theatres to secure an appropriate geographic spread. Moreover, several third parties argued that it was sensible to consider the transaction in the context of a national touring market, as this would be consistent with the purchasing considerations of producers.

⁶ This is a subset of theatrical productions for which data was available on touring schedules. See further paragraphs 30, 57 and 58 as well as footnote 18.

18. Set against this, some third parties commented that specific pairs of the merged parties' theatres may have competed within certain distinct regions of the UK, notwithstanding that their catchment areas (from a theatregoer's perspective) did not overlap on any plausible candidate local geographic market. In particular, third parties suggested that ATG's Milton Keynes theatre competed with LNT's two theatres in Oxford, and that LNT's Edinburgh Playhouse theatre competed with ATG's two Glasgow theatres. However, the data on musical touring schedules did not reveal any pattern of substitution between these areas. Some tours went to both ATG's and LNT's theatres in these areas, for example, whereas others went to just one theatre and some went to neither. This does not support the arguments put forward by third parties that these areas constitute distinct markets for analysis.
19. Third parties also commented that certain locations were essentially 'must have' for producers and that producers had no ability to switch away from these locations for certain types of tour (see paragraphs 80-83). The OFT has therefore not ruled out the possibility that certain 'must have' locations constitute separate geographic markets from the perspective of producers.
20. Finally, and consistent with this, several third parties told the OFT that substitution between the merged parties' regional theatres may be limited because the aim of the tour booker is to add on as many venues as possible to a tour to maximise its revenue within an open-ended time period. If so, regional theatres in different locations may be complementary to, or independent of, each other and not substitutable.

Conclusion on geographic scope

21. Overall, in view of the fact that ATG and LNT did not overlap pre-merger in any plausible candidate local geographic market, the OFT has analysed the transaction principally on the basis of a national geographic market. In doing so, however, the OFT is mindful that individual theatres may place more or less of a constraint on some theatres than on others, from a producer's perspective. The OFT will have regard to these differences (and the relevant evidence supporting them) in its competitive assessment.

Product scope

22. As discussed above, ATG's and LNT's regional theatres do not overlap in any plausible candidate local geographic market defined from a theatregoer's perspective. Their regional theatres may, however, overlap in the national geographic market from a producer's perspective, depending on the definition of the product market for regional touring theatres. On this basis, the OFT has approached product market definition from the perspective of producers, noting, where relevant, any linkages between the two sides of the market.
23. Regional theatres host touring productions (such as musicals, plays and other performances) of differing size and technical complexity. Consequently, all parties – both the merged parties and third parties – agreed that not all regional theatres belong to the same product market and separate relevant markets exist for theatres capable of hosting shows of different sizes and technical complexities.

Regional touring theatres for large-scale productions

24. Large-scale productions require the largest capacity venues with the best technical facilities. The majority of these productions are 'first tours' of successful West End musicals, which will often spend at least five weeks in a large theatre in one location, which may also host ballet and opera productions.
25. For large-scale productions ATG submits that a regional tour will generally visit specific so-called A-list theatres which have sufficient (i) technical facilities (stage size, orchestra pit, dressing rooms and so forth); (ii) seating capacity; and (iii) population catchment areas.
26. ATG further submits that producers have no ability to substitute away from A-list theatres for large-scale productions, and consequently that a relevant 'sub market' should be defined for A-list theatres on the basis that a hypothetical monopolist of these theatres could profitably raise prices for

large-scale productions. ATG identified nine such A-list theatres (five of which are LNT venues but none of which are ATG venues).⁷

27. Consistent with the notion of an A-list of theatres, on the basis of third-party comments, the OFT understands that producers have specific requirements when choosing which theatres to use for large scale productions. The same does not appear to be true for smaller-scale productions, such as subsequent (sometimes scaled-down) tours of former-West End musicals, first tours of smaller-scale musicals or productions other than musicals.
28. However, third parties did not agree on exactly which theatres should be considered as A-list theatres. For example, a limited number of third parties included ATG's Glasgow, Milton Keynes and Woking venues in their definition of A-list theatres, whilst the majority of others said that only five to six locations were core to a large tour (Manchester, Bristol, Edinburgh, Liverpool, Birmingham and Cardiff). Some third parties also included ATG's Regent Theatre in Stoke-on-Trent in the A-list, though others did not (and, as noted below, tour schedules did not support this contention).
29. The distinction between A-list theatres and others is blurred, according to third parties, by the process of tour scheduling and negotiation. In particular, third parties suggested that the desire to optimally sequence a tour meant that smaller theatres might be substituted into a tour, even though they may not be as attractive as larger theatres. Third parties therefore argued that these theatres offered a credible substitute with which producers could constrain the behaviour of the larger theatre operators, even if in practice these alternatives were rarely used by the producers of large touring musicals.
30. However, based on the comprehensive touring schedules ATG presented to the OFT, no ATG theatres have been used for large-scale musicals since 1996. On the basis of our analysis, ATG does not appear to have been a credible supplier for the largest touring productions.⁸

⁷ Edinburgh Playhouse [LNT], Liverpool Empire [LNT], Manchester Palace Theatre [LNT], Bristol Hippodrome [LNT], Sunderland Empire [LNT] and the independently owned: Cardiff Millennium, Birmingham Hippodrome, Southampton Mayflower, Glasgow SECC.

⁸ One third party presented evidence suggesting that ATG was active in the provision of theatres for large-scale touring productions. However, the examples of productions identified in the third party's evidence did not exhibit the characteristics of other readily-identifiable large-scale

Regional touring theatres for medium-scale productions

31. Medium-scale productions may include musicals (such as 're-imagined' versions of initial tours) as well as a variety of other content. They typically reside in a theatre for a period of time between one week and one month. They also typically use a combination of different sized theatres. This makes relating the boundaries of the market for regional touring theatres for medium-scale productions to the characteristics of those theatres particularly complicated.
32. On the basis of third-party comments, the OFT understands that the requirements that producers have when choosing which theatres to use to host medium-scale productions are more flexible than for large-scale productions. For example, subsequent tours are likely to have lower running costs (because they have smaller casts, for example) and may therefore be viable in theatres with a smaller capacity than would be the case for larger productions.
33. By contrast to paragraph 30, touring schedules suggest that both ATG and LNT are credible suppliers of theatres for tours of medium-scale productions. This is because, given their characteristics, these tours appear to have the choice of using large-capacity venues in locations with large catchment areas for shorter spells of time or other venues (such as ATG's) in locations with smaller catchment areas for longer spells of time. The same touring schedules suggest that 111 theatres have been used to host at least one musical tour since 1996.
34. However, third parties suggested that far fewer regional theatres are viable alternatives for medium-scale musical productions on the basis that only theatres with a seating capacity above approximately 1,000 to 1,300 and appropriate technical and other capabilities (such as the number of dressing rooms, an experienced local crew and suitable access to stage) are able to stage a touring musical. According to third parties, a producer will also only consider a theatre that has an adequate population size and demographic within its catchment area to fill the auditorium for the length of the tour.

productions. In particular, the productions used as examples by the third party visited many theatres for shorter runs, which the OFT considers to be more like a medium-scale production than a large-scale one.

35. Although the OFT considered carefully the theatre specifications that certain third parties regarded as necessary for staging medium-scale musical productions, the weight that it could place on some of those third parties' views was limited because the criteria applied was inconsistent from one third party to another and the OFT had no way of discriminating between criteria that were more or less appropriate for the purposes of market definition.
36. The OFT therefore considered it appropriate to give greater weight to evidence of producers' actual use of theatres for staging musicals. This reveals the characteristics that actually mattered to producers. In this regard, the OFT notes that the set of theatres included by a number of third parties as suitable actually excluded theatres that have been regularly used for regional touring musicals over the last three years. On this basis, the OFT considered that the relevant market would appear to be wider than that proposed by these third parties.

Regional touring theatres for small-scale productions

37. Small scale productions⁹ include plays and pantomimes, but do not include any musicals.
38. Comments made by ATG and third parties indicate that — depending on idiosyncratic features such as individual acoustics — a regional touring theatre of around 1,100 to 1,200 seats but without special features such as a large stage or orchestra pit is all that is needed to stage a small-scale production. These small-scale productions usually require the use of such a theatre for around a week at a time.
39. ATG and most third parties told the OFT that LNT's larger theatres did not cater for these touring productions. These comments suggested that these theatres were too large to make staging a small-scale production financially viable and that producers or booking agents therefore selected smaller venues from ATG or other independent theatre owners.

⁹ Small scale productions are generally those requiring the least technical facilities, smaller casts and accordingly lower overall costs than large- and medium-scale productions.

40. More generally, third parties commented that the number of regional theatres available to stage small-scale productions is substantially greater than for large and medium-scale productions.

Conclusion on product scope

41. Overall, in view of the apparent differences of opinion revealed by the OFT's market investigation — and given the fact that the suitability of various regional theatres differs depending upon the touring production in question — the OFT has not sought to establish a firm view on the boundaries of the market from the perspective of producers for the provision of theatres for each type of production based solely on theatre characteristics.

42. As discussed below, the OFT has instead examined data on the historic usage of regional theatres for touring musicals to measure ATG and LNT's market position, and the degree of competition, if any, internalised by the merger.

43. On this basis, the OFT has concluded that;

- LNT is active in the supply of regional theatres for large-scale productions but ATG is not
- LNT and ATG are both active in the supply of regional theatres for medium-scale productions
- ATG and LNT are both active in the supply of regional theatres for small-scale productions, and
- ATG and LNT are both active in the supply of West End theatres (see paragraph 50).

MARKET DEFINITION—THEATRICAL PRODUCTION

44. ATG, but not LNT, currently produces different types of theatrical productions. Its estimated market share of theatrical production (regardless of how the theatrical production market is defined) is low (less than 10 per cent) on any plausible basis. For this reason, the OFT has not needed to

conclude on the relevant product market for the supply of theatrical production services and has instead considered the impact of this merger on the basis of the candidate market on which ATG's estimated market share is highest: all theatrical productions.¹⁰

45. The evidence before the OFT suggests that most producers in the above plausible candidate market (all theatrical productions) operate nationally, facing similar competitive constraints nationwide. On this basis the OFT believes the geographic market for theatre producers to be national in scope.

COMPETITIVE ASSESSMENT

Introduction

46. The appropriate counterfactual for this case is the pre-merger market structure, as this is the most plausible alternative against which the OFT should assess this transaction based on the evidence presented to it. No evidence has suggested that it would be appropriate to deviate from this counterfactual.
47. Third parties — mostly producers and independent theatre owners — submitted that the merger has removed the most important competitive constraint in the market. This view was based on the fact that, prior to the merger, ATG and LNT owned and operated the only substantial portfolios of theatres in geographically dispersed locations across the country.
48. Broadly, the concerns of third parties fall into three categories:
- unilateral effects — that, post-merger, ATG will face less direct competition, giving it the ability to increase prices to producers or equivalently worsen non-price factors such as the allocation of favourable dates (see paragraphs 50 to 93)
 - conglomerate effects — that the merger gives ATG the ability and incentive to foreclose rival theatres by bundling a portfolio of theatres,

¹⁰ ATG's productions are not focussed on musicals (which is the most relevant category of productions for the vertical foreclosure assessment undertaken further below), and therefore its share in a more narrow segment for musical theatrical productions would be less than its share for all theatrical productions.

thereby preventing independent theatres from staging the most profitable type of productions (see paragraphs 94 to 124), and

- vertical effects – that the merger gives ATG the ability and incentive to foreclose competing producers by restricting access to its enlarged portfolio of theatres (see paragraphs 125 to 134).

49. Each of these concerns is discussed in turn below.

UNILATERAL EFFECTS

Introduction

50. The OFT received no concerns from third parties that the merger would lead to a direct lessening of competition in the West End of London.¹¹ On reviewing the parties' seating capacity in the West End, the OFT found that ATG's post merger share of seats was not of a level that would usually cause prima facie unilateral effects concerns (around 20-25 per cent). Moreover, in terms of capacity (which dictates the financial returns that a West End show can achieve) the theatres ATG and LNT respectively operated pre merger were not closer to one another relative to those operated by third parties (in terms of size of theatre). Finally, the existence of long-standing, successful shows in LNT's London theatres (such as the Lion King and Wicked) lessens the potential for direct competition between the parties in the short- to medium-term. In view of this evidence, the OFT does not consider there to be a realistic prospect of a substantial lessening of competition in the West End, and has not sought to consider this market further within its decision.

51. Similarly, the OFT did not receive any substantiated concerns from third parties about regional touring theatres for small-scale productions, and the scope of the product market suggested by third parties was sufficiently wide to limit ATG's combined market share to a low level. Consequently, the impact of the merger on competition between regional theatres capable of staging small-scale productions is not explored further in this decision.

¹¹ One third party suggested that the merged firm's position in London would allow it to act as a 'gatekeeper' for the regional touring market, and therefore place it in a stronger bargaining position in front of performing right-holders and producers. This concern is predicated on the merged firm having market power in the West End of London but this is not realistic on the basis of the OFT's analysis.

52. As noted at paragraph 30 above, pre-merger, ATG did not operate theatres suitable for hosting large-scale touring productions. There was therefore no overlap between ATG and LNT in the provision of these theatres. In light of this, the OFT has concluded that this merger cannot give rise to a loss of competition in the provision of theatres suitable for hosting large-scale productions.
53. The OFT has therefore considered in detail whether there is a loss of rivalry resulting from the merger in relation to the provision of regional theatres for medium-scale national touring productions.

Market shares: provision of regional theatres for medium-scale national touring productions

54. As discussed above, considerable differences of opinion exist over the theatres that should be included in the relevant market, and consequently over the parties' market share.
55. ATG submits that the parties' combined market share of seats in regional theatres for national touring of medium-scale productions is around 20-25 per cent. They argue that it is appropriate to include in the relevant market all 111 theatres that have historically hosted touring musicals. Conversely, by applying more stringent criteria to identifying relevant theatres, several third parties estimated that the parties' combined share of capacity of regional touring theatres for musicals exceeds 50 per cent.
56. As discussed at paragraphs 35 and 36 above, the OFT considered that the evidential value of the market shares resulting from third party analysis is limited as they are not obviously consistent with the revealed preferences of producers. The OFT was also unwilling to accept entirely the market shares presented by ATG, as the share of supply by seats would not take account of the extent to which those theatres are actually used and may therefore underestimate the parties' share if their theatres are more popular among producers than other theatres.
57. For this reason, the OFT sought to estimate ATG's combined market share on the basis of production dates from a comprehensive sample of all touring musicals (medium-scale) from the start of 2007 to the present. Production dates show the length of time that a producer decides to stay

at each theatre and, in the OFT's view, should reasonably reflect the producer's view of the importance of that theatre in the national touring market. Using a sample of three years allowed the OFT to differentiate between long-running tours and shorter ones. The OFT viewed production dates as providing an appropriate volume-based measure of share but not a value-based share, as they do not account for the volume of tickets sold or the price of those tickets. This measure of share is discussed in the following paragraphs.

58. To enable the OFT to calculate market shares on this basis, ATG submitted an analysis of the national touring schedules of all medium-scale musical productions from the start of 2007 to the present.¹² This estimated the parties' combined share of production days at 37 per cent (increment 16 per cent) of the national provision of regional theatres for touring medium-scale musicals.
59. As another measure of market share, the OFT also sought to estimate ATG's combined market share based on seats in theatres that are regularly used for staging touring musicals ('regularly' meaning theatres having been part of more than 10 per cent of all musical tours from 1996 to the present).¹³ This estimated ATG and LNT's combined share of capacity at 33 per cent (increment 11 per cent).¹⁴
60. These estimated market shares are considerably lower than those suggested by third parties, and are not of a scale that would generally give the OFT cause for concern over unilateral effects in their own right. Nevertheless, given the high number of third party concerns in this case, the OFT has carefully assessed whether other evidence is indicative of ATG and LNT having been closer competitors than their estimated market shares alone suggest.
61. The table below provides a summary of ATG's combined market share post-merger on the various bases discussed above.

¹² ATG also submitted a sample of tours from 1996 but this included only those tours that had visited the parties' theatres.

¹³ This analysis was based on the sample mentioned in footnote 12.

¹⁴ The OFT considered analysis limited to those theatres having been part of more than 25 per cent of all musical tours from 1996 to date. However, to exclude theatres that are used for such a high proportion of musical touring productions would be unduly restrictive.

Summary of market shares

Per cent	Share of theatre capacity based on third party submissions	Share of theatre capacity based on parties' submissions	Share of production days	Share of capacity of theatres used for more than 10 per cent of productions
Parties' combined market share	50 +	< 25	37	33

Loss of rivalry between ATG and LNT

62. As discussed previously, the OFT has received conflicting evidence from third parties on the degree to which ATG's and LNT's theatres should be viewed as substitutes, complements or as competitively unrelated.
63. There are two reasons why, on the face of it, ATG's and LNT's theatres may not be considered as close substitutes.
64. Firstly, as noted above, on the basis of the different characteristics of the theatres that they operate, ATG does not compete to stage large-scale musicals and LNT does not compete to stage small-scale productions. This is because ATG's theatres are generally smaller than LNT's and are located in smaller urban conurbations: it is these two factors that principally determine a production's potential revenue.
65. Secondly, ATG and LNT do not overlap in any towns or cities in the UK, which tends to indicate that they offered different opportunities to producers in terms of the size and demographics of the audiences that they could reach.
66. Notwithstanding these reasons why ATG's and LNT's theatres may not be close substitutes, given the significant body of third party concerns, the OFT has also carefully reviewed other evidence to gauge the extent of pre-merger rivalry between the theatres of both parties.

Third parties' views of pre-merger rivalry between the parties

67. Around half of the producers who responded to the OFT argued that the merger results in the loss of the main source of competition in the musical

touring market: the rivalry between the only comparable nationwide portfolios of theatres for hosting medium- and large-scale productions. Producers wishing to stage a regional tour of the UK will engage in iterative negotiations with ATG and LNT at the outset of the tour planning process. This process may lead to one theatre group's offer being preferred to the other's in whole or in part. As an example, third parties said that it would not be uncommon for one of the groups to offer guarantees, 'first calls',¹⁵ an improved box office split, or preferential dates in return for a producer bringing the production to one or a number of the group's regional theatres.

68. By contrast, the OFT also spoke to three booking agents (including two independently identified by third parties), who book tours for those producers who do not have in-house capabilities, and all rejected the view that the theatres of ATG and LNT were substitutes for touring musicals. Their view was that the theatres of ATG and LNT were complementary, required in different proportions to mount a financially-viable regional tour. They did, however, agree with ATG's submission that LNT's theatres were the only option for the largest musicals.
69. In light of these mixed views, the OFT sought to decide between these different views by assessing quantitative evidence of substitution between ATG and LNT.

No quantitative evidence of actual substitution between the parties

70. The OFT was mindful of the fact that, prior to the merger, ATG and LNT owned and operated the only substantial portfolios of theatres in geographically dispersed locations across the country. However, this fact in itself need not indicate that there was any rivalry between them; in particular given the significant degree of doubt that existed over whether individual regional theatres may be substitutes for each other, complements to each other,¹⁶ or be competitively unrelated.¹⁷

¹⁵ This refers to the entitlement to take all box office earnings if the guaranteed minimum has not been achieved.

¹⁶ Two regional theatres would be complements from a producer's perspective if its demand for one was positively related to its demand for the other, meaning (say) a price decrease for one theatre increased the producer's demand for that theatre and for the other theatre.

¹⁷ Producers typically purchase regional theatres in a bundle: some of the theatres in that bundle may be substitutes (that is, theatres whose demand is negatively related), some may be complements (that is, theatres whose demand is positively related) and some may be unrelated (that is, theatres whose demand is independent). Producers may purchase theatres that are

71. The OFT considers that the touring data submitted by ATG provide the most accurate picture of producers' choice of theatre for their touring productions.
72. The OFT first examined whether any producer had chosen theatres from one party's portfolio to the complete exclusion of any theatres from the other party's portfolio ('total substitution'). For medium-scale touring musicals, all tours had used theatres from both the LNT and ATG portfolios. The OFT did not therefore identify any instances of total substitution between the parties' portfolios for the tours for which they could be said to compete.
73. The OFT then went on to examine whether partial substitution between ATG and LNT's theatres had taken place pre-merger. To assess this, the OFT analysed the proportion of LNT and ATG venues used for a sample of comparable touring productions. Were some of the parties' theatres substitutable, the OFT would expect to see a negative relationship between the proportion of ATG theatres used in the tour and the proportion of LNT theatres—controlling for other factors that might affect these proportions. On the basis of the data on historic tour schedules presented by the parties,¹⁸ the OFT's statistical analysis found no such negative relationship.
74. Overall, the OFT found no quantitative evidence to suggest that third parties had actually switched between ATG's and LNT's theatres pre-merger.

No qualitative evidence of actual or potential substitution between ATG and LNT

75. The OFT also considered whether there was any qualitative evidence that producers were in fact benefiting from any rivalry between ATG and LNT to obtain better prices or otherwise more favourable terms, for example by threatening to switch between them (or by otherwise 'playing them off' against each other).

competitively unrelated to each other as part of the bundle for reasons of economies of scale in purchasing ('one stop shopping').

76. However, despite repeated requests from the OFT, third parties were unable to provide any qualitative evidence demonstrating substitutability and pre-merger rivalry between the parties (for example, email or written correspondence showing the parties being 'played off' against each other, or even evidence of any verbal communication in this respect). The OFT considers that, given that it emphasised strongly to third parties the importance of obtaining any evidence showing rivalry between the parties, and given that a number of third parties engaged very extensively and constructively with the OFT throughout its investigation, it is appropriate for it to place weight on the complete absence of qualitative evidence showing the existence of pre-merger rivalry.
77. In discussions with the OFT, ATG strongly argued that rivalry between theatres did not form part of the negotiation process with producers, and that an absence of qualitative evidence to support this point was entirely consistent with this argument being correct. Notwithstanding this, ATG did submit email correspondence concerning two large, well-known touring musicals, which showed that variations in tour schedules were not the result of producers leveraging one party against the other, either for the whole tour or part of it. Overall, the OFT acknowledges that it would be difficult for those companies to present qualitative evidence of something that ATG and former LNT employees submitted never happened. Accordingly, while accepting that this is a very small sample, the OFT considers it appropriate to place some, albeit relatively limited, weight on the evidence ATG presented to the OFT, in the absence of any other evidence to the contrary.

No evidence of market 'tipping'

78. Some third parties argued that, post merger, ATG would be a must-have trading partner for producers of medium scale productions whereas, pre-merger, producers could have engaged in a tour without using one of the parties. Consequently, third parties argued that the merger would result in the market 'tipping' in favour of ATG having market power that did not exist pre-merger.
79. The OFT's best estimate is that over 60 per cent of the market (by production days) will be in the hands of rivals post-merger (see paragraph

¹⁸ The sample for this analysis consisted of 43 musical tours from 1996 onwards.

59). Compared to an increment arising from the transaction of 16 per cent, market shares alone are therefore not indicative of the market tipping in favour of ATG relative to the pre-merger position.

80. The OFT further considered whether pre-merger, ATG and LNT controlled all of the theatres within a large number of crucial, or 'must-have' locations (that producers could not substitute away from) which may make them a 'must-have' trading partner overall. For medium-scale national touring musical productions, ATG and LNT's touring schedules suggested that, post-merger, the parties would own most of the theatres capable of hosting medium-scale musical productions in each of six locations that have been used for more than 80 per cent of tours (Liverpool, Manchester, Edinburgh, Bristol, Milton Keynes and Woking).
81. Conversely, the same touring schedules suggested that producers of medium-scale productions tend to visit more locations for shorter periods of time than do producers of large-scale productions. This suggests that individual cities are less important to the overall touring schedule for a medium-scale production than for a large-scale one. Consistent with this, only Manchester was visited by all tours, and many locations were visited by significantly fewer tours.¹⁹
82. Moreover, third party comments on the 'must-have' nature of these areas tended to focus on large, first-run productions and did not tend to mention second-run productions. Overall, in the context of a national touring market in which producers' schedules vary substantially, the OFT concluded that there was significant doubt as to whether these locations constitute distinct 'must-have' areas from which ATG could derive market power over and above that which was reflected in the parties' market shares.
83. Finally, the OFT sought to analyse whether, pre-merger, producers could have engaged in a tour without using one of the merged parties. However, as noted above, all tours had used theatres from both the LNT and ATG portfolios. The OFT considered that this evidence might suggest that both parties were 'must have' trading partners before the merger, but did not

¹⁹ The Manchester Opera House was used for 52 per cent of productions, whilst the Manchester Palace was used for 59 per cent of productions since 1996. As these percentages sum to more than 100 per cent, all productions appear to have visited Manchester (with some visiting both venues). Conversely, 17 of the parties 24 theatres were visited by 60 per cent or less of tours and 10 of the parties 24 theatres were visited by 30 per cent or less of tours.

support the argument that the merger would lead to ATG being substantially more 'must have' for producers than was the case for either party individually.

Parties constrained by the need to ensure high quality musical content

84. Several third parties (including booking agents) told the OFT that quality of content is the key driver for competition. ATG submitted that pre-merger LNT and itself, and post-merger, the enlarged ATG will be highly incentivised to attract high-quality touring musical productions, as LNT venues in particular suffer from excess capacity ('dark days') because they are too large to viably host small-scale productions such as plays. Consistent with this, the OFT also understands that the fixed costs of theatre operation are high and the variable costs are low, meaning a theatre operator has more of an incentive to sell-out the theatre than it does to restrict sales in order to drive up prices to producers and theatregoers. ATG further submitted evidence that both the average ticket price and level of ticket sales were higher for musicals than for plays. This suggests that, post-merger, ATG will still have the incentive to attract musical productions by offering them better terms and reallocating some of its (enlarged) capacity to musicals from other types of productions.
85. In support of this point, the parties provided evidence on the extent to which box-office revenue is split between theatres and producers for different types of production. The evidence showed that the revenue split obtained by theatre operators is generally lower for musical productions than for other forms of content, consistent with the idea that producers of musicals are in a better position to negotiate as a result of their content being more desirable for the theatre.

Deal rationale and internal documents

86. Against this backdrop, the OFT further considered both the stated rationale of the deal and internal documents created in contemplation of the transaction.
87. ATG initially submitted to the OFT that the transaction would allow them to generate cost savings (via the removal of duplicate functions) as well as improving their offering to producers by providing a 'one stop shop' and enhancing marketing activities.

88. However, in undertaking its analysis, the OFT was also mindful of comments made in the documents received from ATG which suggested that the merger gives the acquirer increased bargaining power²⁰ leading to, for example, **'ticket price rises of 3-4% [/] concurrent to the introduction of the restoration levy equating to overall price increases of up to 10%' and 'an increased amount of contra²¹ charged to producers, improve venue box office share retention and increase the number of musical weeks across regional venues'**.²² In addition, the ATG post-merger Combined Business Plan refers to the merger **'creating a market leader: Ambassador Theatre Group; The largest theatre group in the West End (10 venues) and the second largest regionally; One of the UK's foremost theatre producers'**.²³
89. ATG and Exponent argued that the predicted price increases were not merger-specific and merely reflected business assumptions about the level of inflation over time and the implementation of pre-merger strategic decisions independent of the merger. The OFT accepts that the implementation of the restoration levy across LNT's portfolio was a pre-merger decision. However, it was not clear to the OFT why pre-existing price increases in addition to the levy should be discussed in the synergy assessment section of a merger due diligence report, as these were.
90. In this regard, ATG argued that the comments on increased bargaining power and price increases reflected increases in the provision of marketing and not a lessening of competition, and should not have been included in the synergies assessment in the due diligence report, which itself was undertaken by a third party and not by the acquirers themselves. ATG and Exponent further noted that there were no statements or underlying assumptions in the contemporaneously-dated Combined Business Plan prepared by ATG and LNT corroborating the notion that price increases were planned post-merger. The OFT subsequently confirmed this to be the case.
91. Overall, the OFT has applied low weight to the apparently adverse statements made in the due diligence report as it does not believe that

²⁰ These comments are primarily relevant to unilateral effects but are also relevant to other theories of harm discussed below.

²¹ 'Contra' includes the different service charges (such as marketing, utilities, etc) which are negotiated between producers and theatres in addition to the rent (box office split).

²² PWC Due Diligence Report (ATG Submission to the OFT of 23 November 2009, Annex 6a).

these statements provide reliable evidence of ATG's own view of the scope for price increases as a result of the merger.

Conclusion on unilateral effects

92. Based on the evidence above, the OFT considers that the merger does not give rise to a realistic prospect of a substantial lessening of competition on the basis of unilateral effects in the supply of regional theatres for national touring of medium-scale productions.
93. Notwithstanding the fact that pre-merger ATG and LNT were the only operators with sizeable multiple theatre portfolios at national level, the OFT has not been presented with convincing evidence of significant rivalry between them in persuading producers to book their theatres, or that the market will tip in favour of ATG having market power that did not exist pre merger (even if this pre-existing market power²⁴ has passed on from LNT to ATG as a result of the merger). As a result, the OFT does not believe that it is or may be the case that this merger has resulted or may be expected to result in a substantial lessening of competition based on unilateral concerns.

OTHER EFFECTS

94. A significant body of producers and independent theatres were concerned about non-horizontal effects resulting from this merger.
95. The OFT generally considers non-horizontal mergers as benign as they do not entail the loss of direct competition between the merging parties in the same relevant market. Some may even be pro-competitive, if they give rise to efficiencies. In a small number of cases, however, anticompetitive effects might arise if the merged firm has a significant degree of market power in at least one of the markets concerned. In this case, the OFT considered whether such effects might arise in:
 - the national market for regional touring theatres for medium- and large-scale productions, or in any local market for such theatres, and
 - the provision of theatrical production in the UK.

²³ Combined Business Plan of ATG and LNT dated October 2009.

96. In order to be anti-competitive, the OFT considers that foreclosure must result in a substantial lessening of competition in the affected market(s), and not merely result in disadvantaging one, or a few, competitors.
97. The two main concerns third parties have raised relate to:
- the merger giving ATG the ability and incentive to foreclose rival theatre operators through tying and bundling (**conglomerate effects**), and
 - the merger giving ATG the ability and incentive to foreclose rival producers from using its enlarged portfolio of theatres (**input foreclosure**).
98. A common requirement for both theories of harm is market power in at least one of the markets affected by the merger. Hence, the OFT first addresses this issue before discussing conglomerate and vertical foreclosure in turn.

Market power for large-scale national touring productions

99. Pre-merger, LNT's share of large-scale national touring musical productions (by production days) is between 50 and 60 per cent.
100. For large-scale national touring productions, a number of third parties submitted that the profitability of a musical tour is particularly dependent upon it visiting all (or a very high share) of certain key locations for extended periods of time. These include Edinburgh, Liverpool and Manchester—as well as possibly Bristol, Cardiff and Birmingham.²⁵ Many third parties referred to these locations as 'must have' for producers of large-scale productions, in particular large-scale musicals.
101. Consistent with their share of production days for large-scale national touring productions, LNT (but not ATG) owned most or all of the theatres in many of the locations identified by third parties as 'must have' for first run

²⁴ See paragraph 105 below.

²⁵ These locations are not the same as those discussed at paragraph 80, as the latter relate to medium-scale rather than large-scale productions.

tours.²⁶ These include Edinburgh (the Playhouse), Liverpool (the Empire), Manchester (the Palace and the Opera House) and Bristol (the Hippodrome). This evidence, in conjunction with LNT's pre-merger market share, suggest some degree of market power in the provision of theatres for large-scale national touring productions.

Market power for medium-scale national touring productions

102. The OFT's best estimate of ATG's share of medium-scale national touring musical productions (by production days) is around 35-40 per cent. As discussed at paragraph 59 above, these market shares would not normally give the OFT prima facie cause for concern over market power.

103. The OFT also considered the possibility that ATG would control the majority of theatres capable of hosting medium-scale productions within certain distinct 'must-have' locations that it could leverage into other locations. However, on the basis of the evidence as stated in paragraphs 80-82, the OFT considered it was not accurate to conclude that these areas were 'must-have' locations.

Conclusion

104. In conclusion, on the basis of this evidence, the merger may transfer from LNT to ATG market power in the provision of theatres for large-scale national touring productions (in particular related to large scale musical productions). However, the OFT does not believe that the merger will create or transfer a position of market power with regard to theatres for medium-scale national touring productions.

Conglomerate issues

105. Ten third parties (out of 46 who contacted the OFT or whom the OFT contacted) were concerned that — by offering better terms to producers staging musicals at former-LNT 'must have' venues — ATG could entice them to also use its expanded portfolio of theatres, to the exclusion of other independent theatres.

²⁶ This is in contrast to medium scale productions, where it would not appear that these areas are must have (see paragraphs 80-82 and 103).

106. The OFT considers that anticompetitive conglomerate effects are only likely to arise where:

- ATG has market power in 'must have' venues that it can leverage into other theatres
- 'must have' theatres and other theatres are complementary (that is, demand for them by producers is positively related—an increase in demand for one also increasing demand for the other)
- there is a large pool of common customers for both types of theatre, so that, in the case of 'pure bundling'²⁷ or 'contractual tying',²⁸ the additional revenue earned from the joint selling of both exceeds any revenue lost from customers buying only one or the other,²⁹ and
- such foreclosure is profit enhancing, so that ATG may have the incentive to do it. This in turn depends on the trade-off that ATG faces between the possible costs from foreclosure and the possible gains from expanding market shares in the affected market, or from raising price in that market.

107. The complaints received are best characterised as two separate forms of such conglomerate foreclosure, each of which is considered below using this framework.

Bundling of 'must have' and other theatres for national tours of second-run musicals

108. Some third parties were concerned that, post-merger, ATG would control certain 'must have' theatres for second-run musicals previously owned by LNT. According to these third parties, ATG would therefore be able to exert

²⁷Pure bundling refers to a strategy where ATG only sells its theatres as part of a bundle (and not separately).

²⁸ Contractual tying refers to a strategy where producers are contractually tied to only take other ATG theatres once they have purchased ATG's 'must have' theatres.

²⁹ An alternative strategy for the parties would be to continue to offer theatres separately, but also offer them as part of a bundle at a lower overall price ('mixed bundling'). Mixed bundling may enable firms to increase sales by attracting customers who place different valuations on goods (price discrimination). The limited case in which mixed bundling may have a strong foreclosure effect is when there is a common pool of customers and goods are strongly complementary (in which case the bundled price will be significantly lower, and a large share of consumers will be attracted towards it). This case is discussed in some detail below.

influence over a touring producer to play only its theatres instead of independent theatres by offering a lower bundled price to producers for taking multiple theatres than would otherwise be available if its theatres were procured individually. Consequently, the OFT considered whether producers could be contractually tied to subsequently take only ATG's other theatres once they had purchased ATG's 'must have' theatres ('contractual tying') or whether ATG could offer better terms to producers taking the bundle ('mixed bundling'), to the exclusion of independent theatres.³⁰

109. In assessing this issue, the OFT was mindful of the fact that ATG and LNT's Combined Business Plan mentions scope for 'booking multiple venues via a 'one stop shop'' which is consistent with ATG having the intention to cross-sell its enlarged portfolio of theatres suitable for second-run musicals post-merger in this manner.

110. However, when the products that are sold together are independent and not complements, such bundled-selling often occurs where there are economies of scale in purchasing.³¹ These 'one-stop shopping' effects are generally classified as demand-side efficiencies, as customers derive some benefit from buying a range of products from a single supplier. In this case, this could be, for example, because purchasing from a single supplier reduces producers' transaction costs or improves producer's ability to route tours. In circumstances where there are 'one stop shopping' benefits, the OFT would generally regard a merger giving rise to increased bundling as pro-competitive rather than anti-competitive. To assess conglomerate foreclosure, the OFT must determine whether ATG will have the ability and incentive to foreclose independent theatres, and whether this will result in harm to competition (either nationally or locally). In part, this depends on ATG having market power in distinct 'must have' areas (which producers cannot switch away from because they are crucial to the profitability of a

³⁰ The OFT has also assessed an alternative theory of harm flowing from these third parties' complaints: whether ATG would, overall, become a 'must have' trading partner because of its share of such theatres. The OFT considers that this alternative theory of harm relating to ATG as a 'must have' trading partner is best viewed as a unilateral effect and not a conglomerate effect (see paragraphs 50-93 above).

³¹ For example, supermarkets sell groceries that are substitutes, complements and independent in the eyes of their customers. They do so partly because there are economies of scale in purchasing for shoppers ('one stop shopping'). Therefore, the observation that a shopper buys a basket of groceries does not mean that all the products in that basket are complements.

touring show) that it can leverage into other theatres suitable for national tours of second-run musicals using this form of pricing strategy.

111. As discussed earlier (see paragraphs 59), for all medium-scale national touring musical productions, the parties' combined market share by productions days is not of a level which would normally give the OFT prima facie cause for concern over market power. The OFT also considered the possibility that ATG would control the majority of theatres capable of hosting medium-scale musical productions within certain distinct 'must-have' locations that it could leverage into other locations. On the basis of the evidence presented to the OFT (as explained in paragraphs 80-82) the OFT did not believe this was a realistic alternative. Nevertheless, the OFT also sought to analyse other evidence pertaining to the parties' ability and incentive to foreclose competition via bundling.

112. As noted above the OFT only regards foreclosure as anti-competitive where it results in a substantial lessening of competition in the affected market, not merely where it disadvantages one or a few competitors. This may be the case where:

- competing regional theatres suitable for medium-scale productions are foreclosed in local areas where an ATG regional theatre is also present ('local foreclosure')³² or
- all, or a large number of, competing regional theatres are foreclosed from the national touring market for medium-scale productions ('national foreclosure').

113. The OFT received no evidence of LNT having offered lower bundled prices for its five 'must have' theatres to those producers also using its nine other theatres pre merger.³³ Indeed, ATG submitted that producers had consistently chosen to stage their second-run musicals at the independently-operated Birmingham Hippodrome instead of LNT's Birmingham Alexandra, which is not consistent with this strategy being attempted successfully. This observation was supported by the data on touring schedules, which showed that 55 per cent of all medium-scale

³² The OFT has not needed to assess any foreclosure issue in relation to local areas where neither party is present.

musicals since 2007 had visited the Hippodrome, whereas only 30 per cent had visited the Alexandra while staging in Birmingham.

114. Given that LNT had not sought to engage in bundling pre-merger, the OFT's analysis of 'local foreclosure' considered whether ATG had the incentive to offer bundled prices post-merger in order to foreclose competition in the eight local areas where ATG was present pre-merger.³⁴ However, on the basis of a close inspection of these areas, the OFT does not consider such foreclosure to be realistic. In particular, in Brighton, the Pavilion Theatre and the Brighton Centre have each hosted two or fewer musicals since 2007 and the latter also hosts conferences and exhibitions. In Glasgow, the SECC (the only other theatre which has hosted medium-scale productions) operates as an exhibition and conference centre as well as a theatre. In the remaining six locations, the OFT has not identified any other examples where independent theatres in the same city or town as ATG have staged second-run musicals.

115. In respect of 'national foreclosure', the data on schedules for tours since 2007 shows that around 80 independent theatres have hosted second-run touring musicals, giving them a combined share of production days of 63 per cent. The OFT received no evidence to suggest that post-merger ATG could foreclose all, or a significant proportion of competitors (independent theatres) as a result of a bundling strategy. Moreover, the OFT understands from comments made by third parties that certain independent theatres (such as the Southampton Mayflower)³⁵ are particularly desirable for producers and would therefore be difficult to foreclose.

116. Further to this, the OFT did not find any evidence to suggest that the theatres included in ATG's enlarged portfolio (post-merger) were strong enough complements for ATG to have the incentive to offer better terms to play only ATG theatres instead of a combination of ATG's and independent theatres. As noted above, the OFT received no evidence of LNT having priced its theatres in this way pre-merger. Further, the evidence before the OFT (including replies from independent booking agents) suggests that negotiations (albeit in some cases from a central

³³ The 14 LNT theatres mentioned in footnote 3 less the five LNT theatres mentioned in footnote 7.

³⁴ Brighton, Bromley, Glasgow, Milton Keynes, Richmond, Stoke, Wimbledon and Woking.

³⁵ This is supported by the data on touring schedules, which showed that 81 per cent of medium-scale musicals since 2007 visited the Southampton Mayflower.

reservation office) take place on a theatre-by-theatre basis, which would imply that theatres are independent rather than complementary. Finally, from the touring schedules presented by the parties since 1996, the OFT notes that:

- tours rarely, if ever, visit a consistent portfolio of theatres
- a high proportion of tours do not visit a substantial proportion of the parties theatres³⁶
- tours do not visit individual theatres for a consistent proportion of the overall length of the tour, and
- tours do not visit the parties' portfolios of theatres for a consistent proportion of the overall length of the tour.

117. Overall, this evidence does not support the argument that the parties' theatres are strong complements.

118. For the reasons set out above, the OFT does not consider that, in this case, there are foreclosure concerns either at a national level or in the local areas in which the parties are present.

Tying of 'must have' theatres for first-run musicals with theatres for second-run musicals

119. As noted above, on the basis of its portfolio of must-have theatres and its consequent 60 per cent share of national theatres suitable for staging large-scale national touring musical productions, ATG can be said to have at least the same degree of national market power that LNT had pre-merger.

120. The OFT therefore considered whether ATG might be in a position to leverage this market power into theatres suitable for second-run musicals by contractually tying producers staging national tours of first-run musicals at the former-LNT 'must have' theatres to ATG's theatres for second-run musicals, to the exclusion of other independent theatres.³⁷

³⁶ Seventeen of the parties 24 theatres were visited by 60 per cent or less of tours. Ten of the parties 24 theatres were visited by 30 per cent or less of tours.

³⁷ Again, an alternative strategy for the parties would be to offer first run and second run theatres as part of a 'bundle' at a lower overall price ('mixed bundling'). However, for the reasons discussed at paragraph 124 few producers of first-run musicals would have any incentive to sign up to a bundled price, as they are unlikely to require theatres for use in a

121. However, from the data on touring schedules, the average lag between the first run of a musical and its second run (for those productions with identifiable first- and second-runs) is three to four years. The OFT received no evidence that producers and theatres contract this far in advance.³⁸ This time delay raises significant questions about the feasibility of a contractual tie of the length required to give ATG the ability to foreclose competition.

122. ATG and LNT's Combined Business Plan forecasts an 'improved consecutive routing [that] will enable producers of **large-scale musicals** to undertake longer tours' with '[r]egional venue/producer contracts [that] are negotiated on a **show by show basis**' (emphasis added). However, the OFT believes that the reference to negotiating for 'large-scale' musicals on a 'show by show' basis does not imply an intention to cross-sell theatres for second-run musicals with those for first-run musicals.

123. Similarly the comprehensive touring schedules ATG has presented to the OFT indicate that the pool of common customers for the cross-selling of theatres suitable for first- and second-run musicals is very limited, thereby reducing any potential incentive ATG might have to cross-sell:

- the majority of first runs are not followed by subsequent medium-scale second runs. This means that there is a significant number of producers who will not be affected by the tie, and
- the majority of medium-scale musicals are not second runs and have therefore not been preceded by a first run. This means again that there is a significant number of producers of second-run musicals to whom the parties could not contractually tie ATG's theatres suitable for second runs.

Conclusion

124. On the basis of the above, the OFT does not believe that it is or may be the case that the merger gives rise to the ability and incentive to engage in bundling of the enlarged portfolio of ATG's regional theatres to the

second-run tour. Conversely, few producers of second-run musicals would be subject to improved terms, as they would not have undertaken a first-run tour.

³⁸ The parties' joint business plan mentioned contracting between six and 18 months in advance.

exclusion of independent regional theatres, nor that any such strategy could have an anticompetitive effect at national or local level. As a result, the OFT does not believe that it is or may be the case that this merger has resulted or may be expected to result in a substantial lessening of competition based on conglomerate concerns.

Vertical issues

125. Anti-competitive input foreclosure arises where post-merger the merged firm has the ability and incentive to restrict (or worsen the terms of) access to the 'input' that it sells — in this case to its theatres, which are inputs to producers — thereby foreclosing competition in the market.

126. Nine theatrical producers and independent theatre operators competing with ATG and LNT pre-merger were concerned that this merger would facilitate anti-competitive input foreclosure to the detriment of other producers and other independent theatres (in particular to those relying financially on touring musicals). This would ultimately be to the detriment of theatregoers because of the decline in the variety, innovation and creativity of musicals, and an increase in prices.

127. To assess input foreclosure, the OFT must determine:

- whether ATG will have the ability to foreclose
- whether ATG will have the incentive to foreclose, and
- whether this will result in harm to competition.

128. As noted above, ATG may have some degree of market power post-merger with respect to theatres capable of hosting large-scale touring musicals by virtue of its control of 'must have' theatres acquired from LNT. Hence, ATG may have the ability to engage in vertical foreclosure to such 'must have' theatres for first-run productions. With regard to theatres capable of hosting medium-scale productions, the OFT does not consider that ATG would have market power post-merger.

129. The main concern of third parties has been the negotiating position that ATG will have in its dealings with licensing rights holders. Third parties

argued that producers wanting to use ATG's 'must have' theatres post-merger may find their terms of access to those theatres worsened to such an extent so as to make the tour unviable. This would provide ATG as a theatrical producer with an unassailable advantage over its rivals.

130. ATG has submitted that it is unrealistic to assume that it can increase its 'output' of theatrical production to a level that would fill the void created by foreclosing other producers. It argues that it currently supplies only a very small proportion of national theatrical production at its theatres, two to four per cent, and that there are significant barriers to it increasing this share in the form of long-term relationships between rights holders and producers. Any gains from foreclosing producers would therefore be outweighed by significant losses from a reduction in the volume of musicals being shown in its theatres.

131. ATG further argued that its incentives to foreclose rival producers would be diminished by the fact that risk-adjusted margins are very low for producers. It noted that, despite producers receiving a larger share of the ticket price than theatres, high fixed costs (initial investment) and variable costs (running costs and percentage payments to rights holders) significantly restrict the overall profitability of investments made by producers. Because of this, ATG argued that, other than the largest and most well-known productions (discussed below) it was far from certain that productions would be profitable. Overall, ATG noted that producers performed an important role in supporting innovation and sharing the risk associated with up-front investments in musical theatre productions.

132. Third parties' main concerns related to large-scale productions because these are expected to be the most profitable and have the smallest choice of theatres. As noted above, the interest of both producers and ATG are aligned and refusing to stage a production which is likely to raise substantial revenues for both parties does not appear to be the most reasonable financial decision, in particular in a sector where the interactions between the same parties are recurrent.

133. With regard to the wider set of musical productions (including medium-scale productions), as noted above, the OFT has received evidence from ATG suggesting that post-merger it will still have the incentive to attract musical productions as both average ticket prices and average seat sales are higher than for other forms of content. In these circumstances, ATG

would always have a strong incentive to include the musical productions of other producers as well as those that it produced itself. Put differently, the inclusion of ATG productions within theatres is not synonymous with the exclusion of other musical producers from these venues.

134. In light of the above, the OFT does not believe that ATG would have the incentive to foreclose access to regional touring theatres to rival producers. As a result, the OFT does not believe that it is or may be the case that this merger has resulted or may be expected to result in a substantial lessening of competition based on vertical concerns.

Barriers to entry and expansion

135. Third parties suggested that barriers to entry or expansion into theatres suitable for musical productions are high because of the substantial investment required. Although the return on investment in new theatres does appear small, ATG nonetheless submitted examples of entry by acquisition and plans to build or refurbish several theatres. On this basis, barriers to entry appear high but not insurmountable.

136. There is evidence of recent entry by acquisition as well as of local authorities refurbishing very dilapidated theatres in association with commercial partners. The OFT was not presented with any evidence of planned entry or expansion but it noted that ATG has been awarded the contract to operate the Aylesbury Waterside Theatre (due to open in 2010). The OFT is also aware of the recent expansion by acquisition (albeit limited to date) of the third smaller group operating regional theatres (HQ Theatres). Based on these examples, new entry or expansion appear possible in this market. What is not clear to the OFT is whether such entry would be timely, sufficient and effective to prevent any adverse effects from any substantial lessening of competition.

137. In any event, given that it has not found competition concerns in this case, the OFT does not need to conclude on this question.

Third Party Views

138. As stated above, many third parties are concerned about the merger. The bulk of complaints came from producers of touring musicals and from independent theatres. Many complaints were not merger specific, however.

139. Relevant third party views are referred to above where appropriate.

140. The OFT has also received some letters of support for the merger, mostly (but not exclusively) from organizations or individuals which supply services to ATG.

ASSESSMENT

141. Prior to the merger, The Ambassador Theatre Group Ltd (ATG) and the target, comprising of the nationwide portfolio of theatres owned by Live Nation (Venues) UK Ltd (LNT) overlapped in the provision of theatre venues for live acts entertainment in the West-End of London and the regions.

142. There was consensus between ATG's submission and third parties' comments that the West End and regional theatres constitute separate markets. Given the lack of substantiated concerns regarding the West End theatres, this decision does not assess any further the position regarding West End theatres.

143. While ATG and third parties agree that not all regional theatres belong to the same market, they do not agree on the best way to define those alternative candidate markets due to the fact that the suitability of various regional theatres appears likely to differ depending upon the touring production in question. Hence, the OFT has not sought to establish a firm view on the boundaries of the market based solely on theatre characteristics. The OFT instead examined data on the historic usage of regional theatres for touring musicals to measure the parties' market position, and the degree of competition, if any, internalised by the merger.

144. On the most appropriate geographic scope in theatres, in view of the fact that the parties do not overlap in any towns or cities (catchment areas) within the UK, the OFT analysed the transaction principally on the basis of a national geographic market. In doing so, however, the OFT was mindful that the national market share of any theatre may place more or less of a constraint on the national market share of some theatres than of others— for reasons of possible geographic differentiation and complementarity.

145. The three main categories of concerns third parties raised related to:

- unilateral effects—that, post-merger, ATG will face less direct competition, giving it the ability to increase prices to producers or equivalently worsen non-price factors such as the allocation of favourable dates
- conglomerate effects—that the merger gives ATG the ability and incentive to foreclose rival theatres by bundling a portfolio of theatres preventing independent theatres from staging the most profitable type of productions, and
- vertical effects—that the merger gives ATG the ability and incentive to foreclose competing producers by restricting access to its enlarged portfolio of theatres

146. Based on the evidence above, the OFT considers that those concerns were unfounded in light of the substantive evidence provided by ATG as opposed to the lack of relevant evidence the third party complainants have been able to supply to the OFT.

147. In particular, with regard to harm flowing from anticompetitive unilateral effects, the OFT notes that, notwithstanding the fact that the parties are the only operators with sizeable multiple theatre portfolios at national level, ATG's post merger market share is substantially lower than the one estimated by those complainants. Also, the OFT has not been presented with convincing evidence of significant rivalry between ATG and LNT pre-merger resulting in producers switching between them.

148. Overall, the evidence does not support the argument that the market will tip in favour of one party having market power that did not exist pre merger.

149. With regard to conglomerate effects, the OFT has also concluded that ATG does not have the ability or incentive to engage in anticompetitive conglomerate foreclosure. In particular given the way that producers purchase theatres for tours, ATG will not be in a position to profitably harm competition by forcing independent rival theatres to close.

150. With regard to conglomerate foreclosure, despite owning many highly desirable regional theatres (such as the Edinburgh Playhouse and the

Manchester Palace Theatre), there was no evidence that LNT had attempted to use this position to influence producers to favour its other theatres over independents. Nor did the OFT's analysis indicate that this was likely post-merger.

151. With regard to medium scale productions, the OFT's analysis did not support the argument that ATG would have market power in 'must have' locations from which it could leverage into the wider touring market to foreclose competition, nor did it suggest that producers purchased theatres in a manner that would provide ATG with an ability or incentive to do so.

152. With regard to first-run musicals, the OFT's analysis suggested that ATG might have market power, but that the pool of common customers for the cross-selling of theatres suitable for first- and second-run musicals is very limited thereby reducing any potential incentive ATG might have to cross-sell.

153. With regard to vertical effects, based on the evidence before it, the OFT has concluded that ATG will not have any incentive to foreclose other producers given that it has only a very limited presence in theatre production and that rival producers will continue to provide the vast majority of high quality musical content to regional theatres.

154. While it has not been necessary to conclude on whether new entry or expansion would provide a sufficient, timely and effective constraint on any potential anticompetitive effect arising from this merger, the OFT acknowledges that this is a dynamic market with recent entries. What is not clear to the OFT is whether such entry would be timely, sufficient and effective to prevent any adverse effects from any substantial lessening of competition. In any event, given that it has not found competition concerns in this case, the OFT does not need to conclude on this point.

155. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom

DECISION

156. This merger will therefore not be referred to the Competition Commission under section 22(1) of the Act.