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Questions for the Record
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QUESTIONS FROM SENATOR BOOKER

1. In 2008, DOJ estimated that Ticketmaster held more than 80 percent of market share in the primary ticket market. Ten years later, in its 2018 report, GAO reported that Ticketmaster was still the primary market leader. Ticketmaster also enjoys significant market share in the secondary market, a position that GAO estimated was the second largest. What's concerning is that it seems that Ticketmaster's behavior in the primary market is constraining other companies in the secondary market.

At an on-sale, a consumer purchases a ticket for an event to be held at a later date. Ticketmaster, however, does not deliver a ticket until just before an event occurs.

- a. What kind of influence should artists have on transferability?

Generally, a well-functioning, competitive secondary ticketing market should work to the benefit of both artists and consumers. Secondary markets allow consumers to resell their tickets for events and permit tickets to be traded from consumers that value them less, to those that value them more. Efficient reallocation of tickets benefits artists, who see positive effects of full venues, including increased demand for their shows. Secondary markets would not exist without ticket transferability. So, artists should be fully informed about the importance of a well-functioning, competitive secondary market in formulating their views and policies governing transferability.

- b. Do you find that it is beneficial for an artist to influence capping ticket prices and/or resale amount?

No. Caps on ticket prices amounts to economic regulation of the primary and secondary ticketing markets. Such intervention is generally limited to markets where there is a demonstrated and significant market failure, such as a natural monopoly (e.g., public utility regulation). Imposing price caps in other situations would result in significant losses in efficiency and potential harm to consumers, artists, and innovation. In the absence of such a market failure, public policy solutions should focus – as is the case in Live Nation – on policies such as stronger antitrust enforcement (e.g., a Section 2 case with a breakup remedy) and legislation that sets the “rules of the road” for secondary markets.

2. Microsoft is proposing to buy the largest game developer, Activision.
 - a. Is the lesson learned from the Ticketmaster-Live Nation case that behavioral remedies are often inadequate to protect consumers and competition?

Yes. The Ticketmaster- Live Nation case shows that behavioral remedies are often inadequate to protect consumers and competition. This is especially true in cases like Ticketmaster-Live Nation where the remedies are contrary to the company's incentives. The merger "supercharged" the combined firm's incentives to foreclose competing venue operators, or raise their costs, by cutting them off from access to critical inputs (i.e., concerts), unless they contracted with Ticketmaster for ticketing services.

It is well established that behavioral remedies do nothing to change the merged firm's incentive to exercise market power. See, e.g., John E. Kwoka and Diana L. Moss, *Behavioral merger remedies: Evaluation and implications for antitrust enforcement*, 57 ANTITRUST BULL. 979 (2012), at 990-992. Behavioral remedies create a system of quasi- regulation under which conduct must be continually monitored - a task for which the agencies and courts are ill-suited. Because conduct remedies invoke rules and requirements designed to constrain powerful profit motives that are driven by the exercise of market power, they create strong incentives for the merged company to find "workarounds" to the remedies. Moreover, conduct remedies rely heavily on smaller rivals to report violations of the consent decree - an expectation that is invariably quashed by rivals' fear of retaliation from powerful incumbents.

Questions for the Record from Senator Alex Padilla
Senate Judiciary Committee
“That’s the Ticket: Promoting Competition and Protecting Consumers in Live
Entertainment”
January 24, 2023

Questions for Ms. Kathleen Bradish

1. Consumers and artists lose out when tickets are bought in a primary ticket sale en masse for the purpose of being resold on the secondary marketplace for a profit. Some ticketing companies operate as both the primary ticketing seller as well as the secondary seller, meaning that they make money both on the initial sale of tickets as well as when tickets are resold. **Do you believe that companies who operate both as primary and secondary ticket sellers have an adequate market incentive to effectively address problems like the use of bots in acquiring tickets in the primary market?**

A company, like LN-TM, that has market power in the primary ticketing market has perverse incentives to frustrate the functioning of a secondary market. This would be true if LN-TM did or did not have a stake in the secondary market. Even before LN-TM entered the secondary market, the company had implemented restrictive policies involving ticket transferability, ranking of resale search results, revolving barcodes, and ticket hold-backs that were designed to drive consumers back to their primary ticketing platform. These incentives have only worsened with LN-TM’s move into secondary ticketing. The bot problem is symptomatic of this. The only way to reduce incentives to engage in such exclusionary practices is to ensure that the primary and secondary ticket markets are competitive. With competition, there are far weaker incentives to engage in such practices or to leverage market power from one market to another.

2. In purchasing tickets online many consumers are dissatisfied with the amount of service fees associated with the price of tickets.
 - a. **Service fees are negotiated between venues and ticketing operators, both of whom may have an incentive to keep those fees high. Would competition in ticketing resolve the concern that these fees are too high, or is this an area where additional rules of the road may be necessary?**

More competition, extracted through stronger antitrust enforcement, is the best way to address the problem of high ticket fees. Unlike the process of setting the face-value of tickets, ticketing fees are purely the product of monopolistic price setting. This is true because LN-TM has significant market power along the live entertainment supply chain, from concert promotion, to venues, to ticketing. Thus, monopoly profits from supra-competitive ticket fees are simply divided between LN-TM affiliates. However, to the extent that high ticket fees, generated through the process of “drip pricing” and lack of transparency available to online purchasers, additional rules may be necessary through legislation.

- b. Can we learn anything from how other countries have dealt with live entertainment ticketing to ensure that the ecosystem benefits all the actors involved from artist to consumer?

A comparison of the U.S. and European live events sectors would inform this question, and is long overdue.

- c. How do service fees and overall ticket prices in the United States compare with other countries?

Respectfully, this question is best answered after the completion of a comparative analysis, so AAI cannot comment at this time.

3. Why is ticket transferability important for consumers and competition in live entertainment?

Generally, a well-functioning, competitive secondary ticketing markets should work to the benefit of both artists and consumers. Secondary markets allow consumers to resell their tickets for events and permit tickets to be traded from consumers that value them less, to those that value them more. Efficient reallocation of tickets benefits artists and teams, who see positive effects of full venues, which can increase demand for their shows and games. Secondary markets would not exist without ticket transferability, so it is a critical and important issue.

Questions for the Record
Senator Chuck Grassley

“That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment
Hearing”
January 24, 2023

Question for Ms. Bradish

1) You spoke about Live Nation’s disregard for the consent orders and important consumer welfare concerns relating to Live Nation’s dominance in the entertainment industry. How has the failure by the DOJ/FTC to enforce these orders harmed consumers in the past decade? Also, could you elaborate on possible solutions to protect consumers?

The failure of the 2010 DOJ consent arises less from DOJ’s unwillingness to enforce its requirements than from the fact that effective enforcement of the consent’s behavioral remedies is simply not possible. Behavioral remedies create a system of quasi- regulation under which conduct must be continually monitored – a task for which the agencies like DOJ are ill-suited. Because conduct remedies invoke rules and requirements designed to constrain powerful profit motives that are driven by the exercise of market power, they create strong incentives for the merged company to find “workarounds” to the consent’s prohibitions. Moreover, conduct remedies rely heavily on smaller rivals to report violations of the consent decree – an expectation that is invariably quashed by rivals’ fear of retaliation from powerful incumbents like Live Nation-Ticketmaster.

When consents cannot be enforced, customers often bear the brunt of the harms the consent was meant to remedy. In the case of Live Nation- Ticketmaster, this means higher ticket prices and ticket fees, less innovation, and less choice for consumers and artists.

In the case of Live Nation-Ticketmaster, a possible solution to protect consumers is for DOJ to bring an action under Section 2 of the Sherman Act and seek a structural remedy. Documented evidence of abuse is the strongest basis upon which a Section 2 case can rest. An adequate structural remedy could (1) separate Ticketmaster’s ticketing services from Live Nation’s concert promotion and venue operation; or (2) require divestiture of a share of Ticketmaster’s position in the ticketing market sufficient to eliminate the demonstrated incentives to foreclose rivals or raise their costs

More generally, possible solutions to protect consumers from single firm dominance must be multi-pronged. The first line of defense is stronger merger control. The incipiency standard embedded in Section 7 is designed to prevent harmful mergers before they occur. Without vigorous merger control, there is more pressure on both Section 2 and Section 1 to address harmful conduct that is likely the result of rising concentration from illegal mergers. At the same time, since the U.S. economy is now seeing the fallout from decades of weak merger control, strong Section 2 enforcement is also important. The need for structural relief, through break-up remedies (not behavioral remedies) is key to stronger monopolization enforcement.

In parallel to stronger antitrust enforcement (especially a new Section 2 case against LN-TM), a legislative “prong” is essential to ensuring more competition in live events. Antitrust enforcement is best suited to (1) improving the structure of markets so they are more conducive to competitive outcomes and (2) reducing the ability and incentive of market participants (i.e., LN-TM) to exercise market power. Legislative solutions are best suited to creating a “regime” that ensures a level playing field, including greater ticketing transparency and bans on the use of bots that impede the functioning of ticket markets.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Kathleen Bradish, Vice President of Legal Advocacy
American Antitrust Institute

1. Your testimony discusses how Live Nation-Ticketmaster is a leading example of both a traditional monopoly and a modern dominant digital player. At the time of the 2009 merger, DOJ raised concerns that Ticketmaster's dominance in the market would result in entrance difficulties to would-be competitors. Could this barrier to entry explain Ticketmaster's complacency?

Yes. When competition in an industry is reduced by high barriers to entry, the potential effect is not only higher prices, but also lower quality and less innovation. A Ticketmaster facing robust competition would have incentives to improve its service and find innovative solutions to industry challenges. Without effective competition, there is significantly less pressure to make the investments required to improve service.

2. In light of violations found by the DOJ, the consent decree was extended for another five years. Do you consider the 2010 DOJ consent agreement to have been a successful solution to the concerns posed by the Live Nation/Ticketmaster merger?

No. Live Nation-Ticketmaster's repeated violations of the 2010 DOJ consent agreement show that the 2010 DOJ consent, and specifically its conduct remedies, did not adequately address the concerns posed by the merger.

The 2020 DOJ consent is arguably a boon to Live Nation-Ticketmaster. With the extension of five and a half years, the 2020 DOJ consent further codifies the conduct requirements that the company has so ably violated for the last decade. With amended conduct remedies, the company is free to engage in behavior that went undetected by the government or was not reported by market participants out of fear of retaliation, and to perfect new "workarounds."

3. In what way(s) did the 2010 DOJ consent agreement fail to address the market domination issues posed by Ticketmaster?

The failed conduct remedies in the 2010 DOJ consent did nothing to prevent Live Nation-Ticketmaster from engaging in exclusionary conduct. The remedies did not restore, much less spur, competition in primary ticketing market. This is not surprising. Behavioral remedies do nothing to change the merged firm's incentive to exercise market power. *See, e.g., John E. Kwoka and Diana L. Moss, Behavioral merger remedies: Evaluation and implications for antitrust enforcement, 57 ANTITRUST BULL. 979 (2012), at 990-992.* Behavioral remedies create a system of quasi-regulation under which conduct must be continually monitored – a task for which the agencies and courts are ill-suited. Because conduct remedies invoke rules and requirements designed to constrain powerful profit motives that are driven by the exercise of market power, they create strong incentives for the

merged company to find “workarounds” to the consent’s prohibitions. Moreover, conduct remedies rely heavily on smaller rivals to report violations of the consent decree – an expectation that is invariably quashed by rivals’ fear of retaliation from powerful incumbents.

4. What steps might be taken by the DOJ and FTC to tamp down on the alarming outcomes of market domination by a single firm?

There are two important prongs of antitrust enforcement that would address single firm dominance. The first line of defense is stronger merger control. The incipency standard embedded in Section 7 is designed to prevent harmful mergers before they occur. Without vigorous merger control, there is more pressure on both Section 2 and Section 1 to address harmful conduct that is likely the result of rising concentration from illegal mergers. At the same time, since the U.S. economy is now seeing the fallout from decades of weak merger control, strong Section 2 enforcement is also important. The need for structural relief, through break-up remedies (not behavioral remedies) is key to stronger monopolization enforcement.

5. Should similar mergers in this industry be permitted in the future?

Live Nation-Ticketmaster has acquired over 40 companies since the merger in 2010. Without further research, it is not possible to determine how many of these acquisitions were reportable under federal HSR requirements. Nonetheless, it does appear that as further acquisitions were made post-2010, antitrust review was particularly lax. A blanket prohibition on further mergers would raise significant questions about targeting the antitrust laws in particular sectors, which may resemble “industrial planning” when the laws were designed to be generalist law enforcement and apply across all sectors. However, any mergers involving a party with significant market share should be deemed presumptively illegal by enforcers and the courts. In such cases, the most effective remedy is for the agency to move to enjoin a transaction. This means stronger antitrust scrutiny of further transactions, and a willingness of enforcers to move to block them.

- a. What legislative language would you recommend adoption to strengthen protections against exclusionary conduct?

While AAI cannot suggest specific legislative language, we support several reforms that would make it easier for the government to bring and prevail in monopolization cases. These include: (1) use of direct evidence of market power, without the need to define a relevant antitrust market; (2) a significant burden shift from plaintiff to defendant to show that their exclusionary conduct is pro-competitive, especially in cases where a firm is dominant.

6. What legislative language would you recommend to prevent self-preferencing by digital firms?

While AAI cannot suggest specific legislative language, we support several reforms that

would make it easier for the government to bring and prevail in monopolization cases that involve exclusionary conduct--which includes self-preferencing by dominant owners of digital platforms. These include, but are not limited to, prohibitions on practices that: (1) produce search results that ensure the superior visibility of the platform owner's proprietary products/services over those of rivals', and (2) deploy biased "algorithmic" suggestions or recommendations to users that steer them toward the platform owners' proprietary products/services, without the user's knowledge.

7. What are possible legislative solutions to prevent the ticketing market from arriving at this type of anti-competitive behavior in the future?

AAI believes that the preferred policy tool for preventing future LN-TM-type outcomes is stronger merger control. That means legislation that strengthens, clarifies, and modernizes Section 7 of the Clayton Act, along the lines of what Senator Klobuchar has proposed in her *Competition and Antitrust Law Enforcement Reform Act*. AAI generally disfavors targeted, industry-specific antitrust legislation because it carves a role for antitrust that comes close to "industrial planning." The antitrust laws are generalist law enforcement and should be strengthened and clarified across the board and apply to all sectors.

**Questions from Senator Tillis
for Kathleen Bradish**

1. Do you think that greater transparency in ticketing will improve the ticket purchasing experience for consumers? Please explain your thinking.

Yes. A lack of transparency in the ticket-purchasing process is symptomatic of the LN-TM monopoly. The process of “drip pricing,” whereby ticket purchasers see the final price only late in the online search process, and after they have expended significant search costs (e.g., time, frustration, etc.), clouds transparency and supports LN-TM’s exercise of market power. This problem is also true of other sectors, such as airline ancillary fees. Additional rules may be necessary through legislation to address the transparency problem.

2. What legislative solutions do you recommend to benefit consumers and to improve operations in this industry?

In parallel to stronger antitrust enforcement (especially a new Section 2 case against LN-TM), a legislative “prong” is essential to ensuring more competition in live events. Antitrust enforcement is best suited to (1) improving the structure of markets so they are more conducive to competitive outcomes and (2) reducing the ability and incentive of market participants (i.e., LN-TM) to exercise market power. Legislative solutions are best suited to creating a “regime” that ensures a level playing field, including greater ticketing transparency and bans on the use of bots that impede the functioning of ticket markets.

3. The process of transferring ownership of a ticket can be confusing and cumbersome for consumers. What can be done to streamline this process for consumers?

A well-functioning, competitive secondary ticket market works to the benefit of both artists and consumers. Secondary markets allow consumers to resell their tickets for events and permit tickets to be traded from consumers that value them less, to those that value them more. Efficient reallocation of tickets benefits artists and teams, who see positive effects of full venues, which can increase demand for their shows and games. Secondary markets would not exist without ticket transferability. In maintaining its monopoly in primary ticketing, and leveraging its market power to the secondary market, LN-TM has implemented restrictive policies such as revolving barcodes and ticket-holdbacks that are designed to drive consumers to their ticketing platform. With more competition in primary ticketing, the ability and incentives to exercise this type of market power would be limited. This could be done most effectively through antitrust enforcement (e.g., a Section 2 case against LN-TM), but also through legislation that would prohibit conduct that limits transferability.

4. Does the industry currently have the necessary tools, be it legislative (e.g., the Better Online Ticket Sales Act), legal, and/or technical, to stop bots from impacting ticketing platforms? If not, what more is needed?

Respectfully, AAI has not closely followed legislation that addresses bots so is unable to offer comment at this time.