



That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment

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Thank you Chairman Durbin, Ranking Member Grassley, and Members of the Committee. It is an honor to be here today to lend the American Antitrust Institute's (AAI's) perspective to the issue of competition in live entertainment. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society.¹ We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. As the leading progressive organization dedicated to promoting competition, for the benefit of consumers, workers, and small businesses, AAI applauds Senate lawmakers for turning their attention to the question at hand today.

I. Summary of Major Themes

My testimony addresses the following major themes:

- ***Live Nation-Ticketmaster is a leading example of both a traditional monopoly and a modern dominant digital player.*** Its dominance in markets in the live entertainment supply chain creates strong incentives to exclude smaller rivals such as smaller or independent concert promoters and venues. Ticketmaster's dominance in digital ticketing also creates incentives to limit competition from ticket resellers and brokers, thus impairing the functioning of the important secondary ticketing market. Customers pay the price with higher ticket prices and ticket fees, lower quality, less choice and less innovation.

¹ For more information, please see <https://www.antitrustinstitute.org>.

- ***The failure of conduct remedies in the 2010 Consent Order is both hard evidence of Live Nation-Ticketmaster's monopoly power and a call for further enforcement action.*** Demonstrated violations of the Consent Order led DOJ to extend the Order and amend it. The amendment, however, does not change Live Nation-Ticketmaster's incentives to exclude its smaller competitors. As a result of conduct and practices that frustrate competition in the secondary ticketing market, the Live Nation-Ticketmaster monopoly has harmed many different participants in the entertainment industry: artists without the bargaining power of blockbuster bands, smaller competitors, and consumers. And because it is insulated from competition, Live Nation-Ticketmaster has little incentive to engage in innovation to improve its products and services, likely contributing to debacles like the Taylor Swift incident.
- ***The Department of Justice should pursue new enforcement action and obtain effective structural relief.*** The most effective remedy for addressing harmful conduct by Live Nation-Ticketmaster is structural relief. This could be obtained through a consummated merger challenge under Section 7 (Clayton Act) *or* a monopolization case under Section 2 (Sherman Act). Eliminating incentives to harm competition in artist management, concert promotion and venues could be addressed by minimizing or eliminating vertical integration. But addressing Ticketmaster's incentives to limit competition in secondary ticketing could require breaking up Ticketmaster itself.
- ***Protecting consumers, artists, and smaller rivals from Live Nation-Ticketmaster's harmful conduct will require multiple policy tools.*** Strong antitrust enforcement against Live Nation-Ticketmaster is the most important prong of a plan to reinject competition in live entertainment. But legislative action is also vitally important to bootstrap stronger enforcement. Proposals to strengthen and modernize the antitrust laws would support more vigorous enforcement, as would those that create a "rules of the road" framework for access and transparency in live entertainment ticketing.

II. Live Nation-Ticketmaster is a Leading Example of Both a Traditional Monopoly and a Modern Dominant Digital Player

The 2010 merger of Live Nation and Ticketmaster joined together artist management, concert promotion, venue operation, and ticketing in a monolithic, multi-level supply chain in the live entertainment business. The \$2.5 billion transaction combined Ticketmaster, the market leader in artist management and dominant seller of tickets to live music events across the country, with Live Nation, the leading concert promoter. In 2008, Ticketmaster held contracts for more than 80% of large venues. Live Nation, which handled just over 30% of major concert events, was the second leading owner-operator of concert venues in the country, and also provided ticketing services that competed directly with Ticketmaster.²

The DOJ's investigation of the proposed merger was joined by seventeen states. In challenging the deal, the government raised vertical and horizontal competitive issues, alleging that the proposed merger would lessen competition substantially for primary

² John E. Kwoka and Diana L. Moss, *Behavioral merger remedies: Evaluation and implications for antitrust enforcement*, 57 ANTITRUST BULL. 979 (2012), at 990-992.

ticketing services to major concert venues in the United States.³ Vertical concerns focused on Live Nation-Ticketmaster’s stronger post-merger incentives to exclude rivals by “explicitly or practically” requiring venues to take: (1) their primary ticketing services if the venues only wanted concerts promoted by, or concerts by artists managed by, the merged company; or (2) concerts they promoted, or concerts by artists they managed, if those venues only wanted to obtain the merged company’s primary ticketing services.⁴ But, as I note below, the temptation for Live Nation-Ticketmaster to do so proved irresistible.

Since Live Nation and Ticketmaster merged in 2010, the combined companies have both continued to grow significantly and expand their hold over live entertainment. Between 2011-2022, for example, the companies made over 40 acquisitions. Over 30 of these were made by Live Nation and about 10 by Ticketmaster.⁵ This amounts to about three and a half acquisitions per year. This spate of acquisitions peaked in 2016, with eight transactions in one year alone. To illustrate the implications of this expansion activity, the figure below shows a word “cloud” of acquisitions based on the industry descriptors of companies acquired by Live Nation and Ticketmaster from 2011-2022. It highlights two important takeaways.

Acquisitions by Live Nation and Ticketmaster (2011-2022)



(Word)

One is the fully integrated nature of Live Nation-Ticketmaster’s operations across markets in the live entertainment supply chain. Indeed, acquisitions since the merger have only solidified the company’s formidable wingspan covering the full range of markets extending from artist management to ticketing. A second takeaway from the figure is that Ticketmaster is now a modern digital platform. This has been accomplished through acquisitions, among

³ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Amended Complaint, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2010) (“Amended Complaint”), at 6.

⁴ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Competitive Impact Statement, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 25, 2010), at 17.

⁵ Acquisition data sourced from Crunchbase.com, queried for “Live Nation” and “Ticketmaster.”

others, involving data analytics, information technology, mobile operating systems, and e-Commerce. These acquisitions have created the digital superstructure to support Ticketmaster's dominant ticketing platform. In an increasingly digital and data-driven industry, Live Nation-Ticketmaster's monopolistic hold will only increase. Its own Form 10K shows that Ticketmaster has an even greater share of mobile app sales than traditional website sales and far greater presence in both than in traditional outlet sales.⁶

In sum, it is critical for policymakers in framing competition policy solutions to the Live Nation-Ticketmaster monopoly problem to consider the company's vast vertical integration throughout the live entertainment supply chain *and* emergence as a dominant digital ticketing platform. This landscape is the starting point for understanding the strength of the company's anticompetitive incentives to squeeze out rivals and impede competition in virtually every part of the supply chain. Consumers, artists, and smaller rivals all pay the price through the loss of choice that is the inevitable outcome of monopoly.

III. The Failure of Conduct Remedies in DOJ's 2010 Consent Order is Both Hard Evidence of the Harmful Live Nation-Ticketmaster's Monopoly Power and a Call for Further Enforcement Action

At the time of the 2010 merger, Ticketmaster's monopoly in ticketing was already well established. The government acknowledged as much when it stated: "*Ticketmaster has dominated primary ticketing, including primary ticketing for major concert venues, for over two decades.*"⁷ By allowing a merger that coupled Live Nation's concert promotion services with Ticketmaster's entrenched monopoly in ticketing, harm to consumers, artists, and smaller rivals was virtually guaranteed. The merger served to "supercharge" the firm's incentives and ability to foreclose competing venue operators, or raise their costs, by cutting them off from access to critical inputs (i.e., concerts) unless they *also* contracted with Ticketmaster for (its higher margin) ticketing services.

The DOJ did not, therefore, need a crystal ball to predict the likelihood the behavioral remedies in the 2010 Consent Order would fail. Indeed, Live Nation-Ticketmaster has become an even more "durable" monopoly in the intervening years, as it continues to dominate the live entertainment markets. For example, in 2018 the New York Times reported: "*Eight years after the merger, the ticketing business is still dominated by Live Nation and its operations extend into nearly every aspect of the concert world. Ticket prices are at record highs. Service fees are far from reduced. . . . No competitor has risen to challenge its pre-eminence.*"⁸ Today, 13 years after the merger, Live Nation's share of the concert promotion market has reportedly risen to about 60%, while Ticketmaster has maintained its dominant, 80% share in ticketing.

Live Nation-Ticketmaster's consistently high and even expanding market shares is compelling evidence that the remedies in the 2010 Consent Order failed to stop the

⁶ Live Nation Entertainment, 10-K for the year ending December 31, 2021, p. 6, available at: https://d1io3yog0oux5.cloudfront.net/_d2b887510cdc4efb0a99d3749abb92db/livenationentertainment/db/670/6205/annual_report/Live+Nation+2021+Annual+Report.pdf

⁷ Amended Complaint, *supra* note 3, at 10.

⁸ Ben Sisario and Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, NYTIMES.COM, Apr. 1, 2018, <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

company's continued growth in market power. The evidence of violations spelled out in the DOJ's 2020 Motion to Amend the Consent Order shows the abject failure of its behavioral remedies.⁹ Accounts from six anonymous venue operators describing Live Nation-Ticketmaster's violations of the Consent Order included threats, conditions, and retaliation designed to force venue operators into contracting with Ticketmaster as their primary ticketing service.¹⁰

As DOJ recognized in its 2020 motion to amend the Consent Order, Live Nation-Ticketmaster's "violations have so permeated the industry that venues now fear retaliation and expect conditioning from Live Nation as a matter of course if they do not contract with Ticketmaster. As a result, Defendants' actions have deterred entry into primary ticketing and foreclosed current competitors from winning venues' primary ticketing contracts."¹¹ Time has shown that the behavioral remedies imposed by the government in the 2010 Consent Order did not restore, much less spur, competition in the primary ticketing market, thus confirming the merger's presumptive illegality.

Live Nation-Ticketmaster's disregard of the DOJ Consent Order is not even the full story. Since the 2010 Consent Order, Live Nation-Ticketmaster has worked to find other ways to leverage its market power in the live entertainment supply chain. For example, the company has engaged in a systematic campaign to extend its market power throughout the broader ticketing market.¹² Resale, or secondary, markets can enhance efficiency by providing a venue for fans to sell and buy tickets, balance supply and demand, and even expand demand for live music, to the benefit of artists and concert goers alike. But Live Nation-Ticketmaster has stood in the way of this potential threat to its monopoly by practices that disadvantage resellers. These potentially include restrictions on the transferability of tickets, holding back ticket inventory, releasing tickets only a short time before show times, and giving resale tickets unfavorable placement in search results.¹³ These practices lend support to the concern that Live Nation-Ticketmaster uses its market power to make sure customers stay within its sphere of influence.

Music fans, artists with relatively little bargaining power, and smaller competitors have all suffered at the hands of the Live Nation-Ticketmaster monopoly. The conduct remedies in the 2010 Consent Order and its 2020 amendment do not do enough to protect them. The company has only grown larger, stronger, and more inescapable in the live entertainment business. Given its investigative work and knowledge of the industry, however, DOJ, if bolstered by the support of lawmakers and policymakers, is now in a unique position to address this entrenched monopoly.

⁹ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Motion To Modify Final Judgment and Enter Amended Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 8, 2020) ("Motion to Amend"), at 7.

¹⁰ *Id.*

¹¹ *Id.* at 18.

¹² See, e.g., *StubHub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC (N.D. Cal. Nov. 5, 2015).

¹³ See, e.g., Alejandra Reyes-Velarde, *Why the Black Keys shut out hundreds of fans, causing chaos at the Wiltern*, latimes.com, Sep. 20, 2019, <https://www.latimes.com/california/story/2019-09-20/black-keys-wiltern-tickets-ticketmaster>.

IV. The Department of Justice Should Pursue New Enforcement Action and Obtain Effective Structural Relief to Address the Live Nation-Ticketmaster Monopoly Problem

Evidence that the company violated the 2010 Consent Order supported, and should have led to a fundamentally different enforcement outcome in 2020. Rather than seeking a more effective remedy, DOJ simply extended by another contracting cycle the conduct remedies that its investigation showed to be inadequate and easily violated.¹⁴ The company's incentives have not changed and it has, therefore, simply been given more time to perfect new "workarounds" and new ways to avoid government detection. Moreover, the company still has the power to silence market participants who fear its retaliation.

This is nothing new. It is well established that behavioral remedies do nothing to change a merged firm's incentives to exercise market power.¹⁵ They 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 Order—an expectation that is invariably quashed by rivals' fear of retaliation from powerful incumbents.¹⁶

Repeating DOJ's decade-old enforcement error by extending ineffective conduct remedies in 2020 has arguably done a disservice to artists, consumers, and smaller rivals in the live entertainment business. Instead, DOJ should have taken action to permanently reduce or eliminate Live Nation-Ticketmaster's incentive to engage in anticompetitive conduct. Structural remedies are the *only* remedial mechanism capable of deterring the anticompetitive conduct unsuccessfully addressed by the 2010 Consent Order. For example, a structural remedy would have: (1) separated Ticketmaster's ticketing services from Live Nation's concert promotion and venue operation; or (2) required 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.

If an effective structural remedy was not obtainable by amending the 2010 Consent Order in 2020, the DOJ could have taken stronger enforcement action by bringing a *new case* against Live Nation-Ticketmaster. For example, a structural remedy could have been achieved through a successful consummated merger challenge under Section 7. The agencies have imposed structural remedies before in consummated mergers with post-merger adverse

¹⁴ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Amended Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2020) ("2020 Consent Order").

¹⁵ Kwoka and Moss, *supra* note 2. See also, Diana L. Moss, *Realigning Merger Remedies with the Goals of Antitrust*, Chapter 3, THE GUIDE TO MERGER REMEDIES, Global Competition Review (2019).

¹⁶ These problems were acknowledged by the current AAG for Antitrust when he stated in 2017 that "[i]nstead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation." See Makan Delrahim, Asst Att'y Gen, Dep't of Justice, Antitrust Div, Keynote Address at American Bar Association's Antitrust Fall Forum, Nov. 16, 2017, www.justice.gov/opa/speech/assistant-attorney-general-makandelrahim-delivers-keynote-address-american-bar.

effects, as is the case in Live Nation-Ticketmaster.¹⁷ A Section 2 case against Live Nation-Ticketmaster in 2020 would have obtained similar, if not stronger, relief.

Documented evidence of anticompetitive conduct provides a strong basis for government action to bring a Section 7 or Section 2 case. And while DOJ did not choose this course in 2020, it should do so now. If such a case is successful, it could seek a structural remedy that separates ticketing from Live Nation-Ticketmaster's other products and services that would, in fact, reduce or eliminate incentives to exclude rivals. Live Nation-Ticketmaster's more recent efforts to limit competition in the resale market are further evidence of the need for new enforcement and should, potentially, also be challenged in a new antitrust complaint under either Sherman Act Section 2 or Clayton Act Section 7. Again, should the government prevail, an effective structural remedy could require spin offs from Ticketmaster to facilitate more competition in ticketing platforms and reinject competition in primary and secondary ticketing.

V. Protecting Consumers, Artists, and Smaller Rivals From Live Nation-Ticketmaster's Harmful Conduct Will Require Multiple Policy Tools

Live Nation-Ticketmaster's continued monopolistic conduct is a failure of vertical merger enforcement. It shows the need for a multi-pronged approach in live entertainment and in any sector with the pervasive competition problems that result from dominant firms or tight oligopolies. AAI urges enforcers and lawmakers to consider three major features of a multi-pronged approach to the Live Nation-Ticketmaster monopoly problem. .

First, the Live Nation-Ticketmaster problem makes a strong case for standards that enable the agencies to challenge vertical mergers as effectively as horizontal mergers (i.e., the "structural presumption"). The incipiency standard in Section 7 of the Clayton Act is designed to prevent *all* mergers that may enhance market power and lead to anticompetitive effects.¹⁸ Those include concentrative horizontal mergers that threaten harm competition and consumers.¹⁹ But they also include vertical mergers. While vertical mergers do not increase market concentration, they can create incentives for the firm to exercise market power against its competitors at one level of the supply chain by giving it control of another point in the chain. This can result in higher prices, lower quality, and less innovation in any given market in a supply chain.

Second, more vigorous antitrust enforcement should be supported by legislation designed to modernize, strengthen, and clarify the U.S. antitrust laws. Senator Klobuchar's proposed

¹⁷ See, e.g., *Chicago Bridge & Iron Co. v. FTC*, 515 F.3d 447 (5th Cir. 2008); Justice Department Reaches Settlement with Parker-Hannifin, Divestiture Will Restore Competition in Markets for Aviation Fuel Filtration Products, U.S. Department of Justice, Dec. 18, 2017, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin>; and *Consummated Merger Challenges – The Past Is Never Dead*, Remarks of J. Thomas Rosch Commissioner, Federal Trade Commission, before the ABA Section of Antitrust Law Spring Meeting Washington, DC, Mar. 29, 2012, https://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf.

¹⁸ See 15 U.S.C. § 18.

¹⁹ See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 338 (1963) and *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

Competition and Antitrust Law Enforcement Reform Act (S. 225 or “CALERA”) is a leading example. The bill would, among other things, update legal standards for mergers and shift the burden to the merging parties to prove their deal would not violate the law.²⁰ The bill would also prevent harmful conduct by dominant firms by strengthening the standard for prohibiting anticompetitive, exclusionary conduct. Other reforms proposed in the CALERA bill include seeking civil fines for antitrust violations and increasing agency resources. Such reforms would reduce the formidable burdens on the government for bringing both monopolization and merger cases.

Finally, the competition challenges posed by Ticketmaster’s transformation into a dominant digital platform may well require lawmakers to consider the merits of an oversight regime to facilitate access to and transparency in ticketing. For example, digital technology can facilitate practices designed to “self-preference” by steering music fans to Ticketmaster’s proprietary ticketing services inside the Ticketmaster digital system. Among other concerns, this could frustrate fans’ ability to access the secondary ticketing market. Constructive solutions to these problems may well require a regime designed to establish “rules of the road” or codes of conduct for digital ticketing platforms. These problems are significant enough that lawmakers have proposed legislation at both the federal and state levels to address them.²¹ Such efforts should be an integral part of a multi-pronged approach to addressing competition problems in live entertainment.

²⁰ *Competition and Antitrust Law Enforcement Reform Act of 2021*, 117th Congress, <https://www.congress.gov/bill/117th-congress/senate-bill/225>.

²¹ See, e.g., *The Curious Case of U.S. Ticket Resale Laws*, seatgeek.com, Feb. 22, 2017, <https://seatgeek.com/tba/articles/ticket-resale-laws/>.