

**TICKET SUMMIT 2009**  
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**RELEVANT ISSUES IN EVALUATING THE TICKETMASTER/LIVE NATION  
MERGER**

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**I. Introduction**

Thank you. I am pleased to be here. Before proceeding, I'd like to emphasize that I am speaking only for myself and not offering legal advice to or on behalf of anyone. Indeed, my analysis rests solely on publicly available information, whereas the Department of Justice relies on a great deal of non-public information as well.

The proposed merger of Ticketmaster Entertainment and Live Nation is currently undergoing in-depth, legal and economic analysis at the Department of Justice. If DOJ decides to challenge the merger, it will file a complaint in the district court seeking to enjoin the parties from consummating the transaction. As a rough guess, DOJ might decide by early fall whether to go to court. The merger is also being examined by some individual states and in the United Kingdom. Today, I will review some of the issues that DOJ officials will consider in evaluating this transaction. Significantly, it is these same issues will also guide the analysis of any future mergers or acquisitions in this industry.

A. **Legal Standard.** The controlling legal standard for mergers is drawn from the Clayton Act. This statute declares that mergers and acquisitions are unlawful if “the effect of such acquisition may be substantially to lessen competition or create a monopoly.” (15 U.S.C. §18). In this matter, DOJ will be particularly concerned with

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whether the merger will make it easier for the new entity – Live Nation Entertainment – to raise prices and gain monopoly profits.

B. **Affected Markets.** This merger appears likely to affect as many as five of the live entertainment industry’s main markets: talent management, event promotion, venue ownership or management, primary ticket sales, and secondary ticket sales. Although neither firm has a substantial presence in the market for booking, at least one ranks first or second in each of the other markets.

For each affected market, DOJ’s lawyers and economists must determine precisely which products or services are involved and the market’s geographic boundaries. For example, is the line between primary and secondary ticketing so blurred that they really are parts of the same market? Personally, I doubt it. Should primary ticket sales for sporting events and concerts be separated into individual markets, or should concerts at large venues be placed in a separate market from those at smaller ones? I would guess, “yes” to both of these, but I haven’t done the detailed analysis. DOJ will resolve such questions by looking at how consumers’ buying decisions would likely change if prices rose in one part of the market. In essence, where would consumers likely turn? For primary ticketing, DOJ will look not only at fees and service charges, but also at ticket face prices, to the extent that the parties have influence there as well. Only after properly defining the market will it be possible to determine which firms are in it and how much power each possesses.

C. **Complex Transaction.** This is a complex transaction. First, it affects horizontal competition – that is, head-to-head competition between active rivals – in the market for primary ticket sales services. Second, the transaction also is a vertical merger,

since the parties are attempting to cobble together powerful positions in 5 distinct markets linking artists with concertgoers. And third, by joining Ticketmaster and Live Nation, the merger would remove each as a potential competitor for markets in which they have not already entered. I'll discuss each of these, in turn. Then I'll look at three factors – entry barriers, efficiencies, and re-structuring – that could influence DOJ's ultimate decision, one way or the other.

## **II. Horizontal Competition.**

In my view, the most serious antitrust problem with this merger is its impact on horizontal competition in the market for primary ticket sales services. For years, Ticketmaster has been the overwhelmingly dominant firm in this market. At the beginning of this year, Live Nation seemed poised to challenge that dominance. Before this threat could mature, however, the companies announced their merger. DOJ might reasonably view this as Ticketmaster's effort to buy out its only viable competitor, or as Live Nation's attempt to find some means easier than competition to share in Ticketmaster's dominance. If you look at the rankings for primary ticket sellers posted on TicketNews.com, you will see that Ticketmaster, number 1, is several times stronger than Live Nation, number 2, and the two companies together dwarf many times over the market strengths of all their significant competitors combined. Although more factors need to be considered, these indicators suggest that the merger would enable the parties to effectively lock-up this market. Most of the mergers that DOJ challenges are of this sort, that is, where the merging parties compete horizontally in the same market.

## **III. Vertical Effects.**

Vertical mergers – that is, mergers between firms in different markets within the same chain of production or distribution -- can be procompetitive or anticompetitive. The conditions when a merger should be characterized as one or the other have long been a matter of controversy. Vertical mergers tend to be challenged less in conservative administrations than in more enforcement oriented ones.

The most common competitive concern regarding vertical mergers is that a vertically integrated firm might be able to chill entry by withholding from an entrant access to critical supplies, outlets, or customers. If so, the entrant might need to enter a second market just to be confident it can get what it needs to compete in its preferred one. This can be a costly and daunting, even forbidding prospect.

I am nearly as concerned about the vertical effects of this merger as I am about its horizontal impact. The new entity, Live Nation Entertainment, will have powerful positions not just in two or three vertically related markets, but five. A firm that wants to enter almost any of the industry's markets will have to compete with Live Nation Entertainment at that level yet need to deal with it at one or more other levels. DOJ analysts will therefore ask such questions as: will Live Nation Entertainment be able to frustrate a new promoter's efforts to find artists to perform or sufficient venues of the right size and location to put together a tour? Or, will Live Nation Entertainment control so many artists and venues and be able to lock them into ticketing arrangements such that there won't be a way for a new challenger to enter the ticketing business? DOJ should also consider whether Live Nation Entertainment would acquire through its ticketing services competitively sensitive information about rival promoters and venues owners.

#### **IV. Potential Competition**

It is harder to assess whether the merger might restrain potential competition. In antitrust terms, potential competitors are firms that are in a unique position to enter a concentrated market, and, by doing so, could de-concentrate it. Potential competitors can bolster competition in several ways.

First, if monopolists perceive the presence of a potential competitor, they might keep prices lower than otherwise in order to discourage entry and the heightened competition that might come with it.

Second, allowing a potential competitor to actually enter the market through a merger might remove the possibility that it could have entered in more pro-competitive ways. For example, if the firm enters on its own, the market will have an additional firm, become less concentrated and probably more competitive. This is how Live Nation entered the primary ticket sales market. Or the entrant could make a toehold acquisition that would provide greater rivalry, independence, and innovation than the smaller, acquired firm could have offered.

It is hard to know whether the parties might enter some new markets on their own if the proposed merger fails. Both firms have a history of expanding into related markets. Both appear capable of doing so again, possibly in ways that would promote competition. For most markets where only one of the parties is present, that party almost certainly perceives the other in the wings and wants to avoid conduct that might trigger its entry. The merger, of course, would remove the potential competitor's salutary presence.

## V. Qualifying Factors

Several factors may make a merger more or less worrisome than would initially appear. I'll briefly look at three – entry barriers, efficiencies, and restructuring of the transaction to eliminate serious competitive concerns.

A. Entry Barriers. First, it is critical to any antitrust analysis whether there exist “barriers to entry or expansion.” In the absence of such barriers, if a dominant firm raises the market price above competitive levels, new firms can enter, undercut the dominant firm’s price, and gain market share until the dominant firm rescinds its price increase. Existing rivals could similarly compete for market share and expand.

With respect to entry, the situation in the primary ticketing market provides a marked contrast to that in secondary ticketing market, which has enjoyed frequent, and often innovative, entry. By contrast, a single firm has long dominated the primary ticket sales market, significant entry has been rare, and substantial barriers appear to be present. For example, Ticketmaster and Live Nation have locked up a huge number of venues with long-term, exclusive contracts. Even if an entrant or smaller rival has the skill, technology, and capacity to meaningfully compete and expand – and this is far from given -- it is doubtful the rival could sign enough venues to make its challenge successful.

B. Efficiencies. I anticipate that the parties will attempt to make a spirited defense of their proposed merger on efficiency grounds. The burden rests with the parties to prove that the merger would be beneficial, on balance, not with DOJ to prove the opposite. I doubt they can meet it.

First, the parties’ claims that the merger will increase investment and innovation appear to be speculative, at best. It is hard to foresee even what products this increased

investment might yield, much less assess their benefits. In any event, both firms have a history of developing and revising product offerings on their own, suggesting that the merger is not necessary for this purpose. The merger also seems unnecessary to enable the parties to bring legal, promotional, booking, and other skills in-house. The parties can achieve this goal simply through selective hiring and strategic alliances. Even assuming some claimed efficiencies are real and demonstrable, the parties would need to show that the magnitude of these benefits outweighs the merger's competitive harm in every injured market.

C. **Remedies.** The federal enforcement agencies often permit merging parties to restructure a proposed transaction to eliminate competitive concerns. I doubt restructuring will work here. For example, Live Nation could offer to sell its still-embryonic, primary ticketing business. That business, however, would probably be a far less viable enterprise in other hands, especially if it was sold without any guarantees about getting contracts with Live Nation's venues. Restructuring also would not ease the concerns created by the merger's vertical attributes. Although the parties might accept prohibitions on various kinds of anticompetitive conduct, effective strictures are notoriously difficult to define, monitor and enforce.

## **VI. The Impact on the Secondary Ticket Sellers**

The secondary ticket sales market appears to be healthy. Ticketmaster and Live Nation apparently want to reap for themselves some of the secondary market's profits. Arguably, the most effective way for the parties to do this is to merge and coordinate their strategies. For example, the parties might auction off the most desirable primary tickets themselves, or charge extra fees for re-sellable tickets. They could also try to

make primary tickets more difficult to re-sell, perhaps by providing the customer with only a non-transferable bar code rather than a paper ticket. If such efforts were merely vigorous competition, there would be no problem. But the post-merger situation might also be interpreted as a monopolist predatorily trying to starve out and take over a related market. With only one significant primary ticket seller remaining, not even the venues, which contract for the primary ticket sales and marketing services, would be in a position to object or threaten to go elsewhere.

Although I doubt that DOJ will view the merger's potential impact on the secondary market as a decisive factor in their decision, the situation still might carry some persuasive force. What secondary sellers can do at this stage is to make sure that their legislators and attorneys general, both state and federal, are aware of the merger's likely competitive harm to the secondary market and, even more important, to consumers.

## **VII. CONCLUSION**

It would be presumptuous for anyone to claim to know how DOJ will evaluate this merger. What I have done here is to highlight some of the issues that will be considered. But since lawyers do tend to be just a bit presumptuous at times, I will offer my own mini-prediction that DOJ will be troubled particularly by the horizontal and vertical aspects of this transaction and challenge it in court. If I am wrong, I never made this forecast and you never heard it.

Thank you.