

How Antitrust Enforcers Helped Create a Live Events Monster

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When music fans want to go buy concert tickets, or when sports fans want to buy tickets to a game, they are almost always directed to Ticketmaster. Tickets are expensive, and the added service charges can double the final price. Direct ticket sales for popular concerts are often sold out within minutes, but then they are somehow available secondhand for over 50% more than the original price. Simply put, Ticketmaster provides bad service at outrageous prices.

How is Ticketmaster able to do this without anyone else coming into the market to compete? Presumably fans would prefer to go somewhere else. The key reason is that in 2010, Ticketmaster, which already controlled 80% of ticketing, merged with Live Nation, the world's largest concert promoter. This dominance in the live music industry gave Live Nation-Ticketmaster the power to retaliate against anyone who wants to use a different ticketing service. The unforgiving barriers to entry leave us with a monopolistic company that can get away with ripping off music fans and strong-arming venues, all because there is nowhere else to go.

¹ Complaint, Ticketmaster Entertainment, 5.

Approved by the Department of Justice, this merger is one of the clearest examples of failed antitrust policy in recent years. For 15 years prior to the merger, Ticketmaster was already the dominant provider of ticketing services, controlling 80 percent of the market.¹ Live Nation was the largest concert promoter, controlling more than 75 concert venues in the United States, including many major amphitheaters, and had an artist management business with 200 of the top marquee artists, from Miley Cyrus to Willie Nelson.² Allowing this merger to go through created a corporation that has used its monopoly power to bully venues, ticketing providers, concertgoers, and even musicians.

As the Biden Administration and the enforcement agencies seek to redress past mistakes in competition and antitrust policy, it is important to examine key errors in past enforcement. The approved merger between Live Nation and Ticketmaster has among the worst outcomes for recent mergers, and it is a key example of the failures of the light-touch approach to antitrust and merger enforcement.

BACKGROUND

Event promoters like Live Nation manage the business of live events. They organize tours by booking artists at venues, and handle many other aspects of an event, from security to publicity to negotiating ticket prices and terms. Ticketing providers like Ticketmaster manage the marketplace services that customers use to buy tickets. This entails maintaining front-end software, managing IT and customer service teams, and handling the mechanics of when tickets go on sale to concert goers and secondary ticket sellers.

Live Nation was Ticketmaster's largest customer until 2007, when it announced it would build its own competitive ticketing service that would have competed with Ticketmaster.³ Yet just two years later, Live Nation and Ticketmaster announced a merger. Ticketmaster CEO Michael Rapino explained to The New York Times that his goal was to turn Ticketmaster's website into live music's answer to Amazon.⁴ When the deal was announced in 2009, investors feared that antitrust enforcers under the new Obama administration would block the deal. Senator Chuck Schumer attacked the deal and stock prices for both companies dropped.⁵

2 Complaint, *United States v. Ticketmaster Entertainment* (D.D.C. January 25, 2010), 5, <https://www.justice.gov/atr/case-document/complaint-224>; David Segal, "Calling Almost Everyone's Tune," *The New York Times*, April 24, 2010, <https://www.nytimes.com/2010/04/25/business/25ticket.html>.

3 Complaint, *Ticketmaster Entertainment*, 5.

4 Segal, "Calling Almost Everyone's Tune."

5 Yinka Adegoke, "Live Nation to Buy Ticketmaster," *Reuters*, February 10, 2009, <https://www.reuters.com/article/us-ticketmaster-livenation-idUSTRE5194DL20090210>.

Beyond the halls of Congress, musicians also railed against the merger. Bruce Springsteen, already upset at Ticketmaster for steering concertgoers toward its own secondary ticketing platform and offering poor service, wrote in a letter to his fans that “the one thing that would make the current ticket situation even worse for the fan than it is now would be Ticketmaster and Live Nation coming up with a single system, thereby returning us to a near monopoly situation in music ticketing.”⁶

But Christine Varney, the head of the DOJ Antitrust Division, rejected this widespread consensus and adopted a narrow reading of her role, and a narrow reading of antitrust. “I ... understand that consolidation has been going on in the industry for some time and the resultant economic pressures facing local management companies and promoters,” she explained. “Those are meaningful concerns, but many of them are not *antitrust* concerns.”⁷

Varney approved the merger, only asking for the company to sell some minor assets and agree to a consent decree that essentially demanded good behavior.⁸ She described the minimal conditions of the settlement as “vigorous antitrust enforcement – only with a scalpel rather than a sledgehammer.”⁹

Ticketmaster was required to sell its ticketing subsidiary, Paciolan, to Comcast – a company with just 2 percent of the primary ticketing market – and to license its ticketing software to Live Nation’s rival, AEG.¹⁰ The licensing agreement would last for five years in exchange for a royalty fee to the newly formed Live Nation Entertainment.¹¹ The new company was not allowed to bundle services or retaliate against any venue that considers or works with another primary ticketing service. Nor could the combined entity use data it received in the course of processing tickets for concert promotion or management – a prohibition on data-sharing that is extremely difficult to oversee or enforce.¹²

Oponents of the merger had early objections. One antitrust attorney told the Senate that the combined company “will cut off the air supply for any future rival to challenge its monopoly in the ticket distribution market,” as well as use its newfound reach to “diminish

6 Daniel Kreps, “Bruce Springsteen ‘Furious’ At Ticketmaster, Rails Against Live Nation Merger,” *Rolling Stone*, February 4, 2009, <https://www.rollingstone.com/music/music-news/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger-97368/>.

7 Varney, “The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective.”

8 Press Release, “Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.” Dept of Justice, January 25, 2010. <https://www.justice.gov/opa/pr/justice-department-requires-ticketmaster-entertainment-inc-make-significant-changes-its>.

9 Varney, “The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective.”

10 Sean Burns, “Sens Blumenthal, Klobuchar Urge DOJ Inquiry into Live Nation,” *TicketNews*, August 28, 2019, <https://www.ticketnews.com/2019/08/sens-blumenthal-klobuchar-doj-live-nation/>.

11 David Segal, “Calling Almost Everyone’s Tune.”

12 Final Judgment, *United States v. Ticketmaster Entertainment* (D.D.C. July 30, 2010), 19-21, <https://www.justice.gov/atr/case-document/file/513321/download>.

13 David A. Balto, testimony prepared for Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, “The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?” February 24, 2009, 11, <http://www.dcantitrustlaw.com/assets/content/documents/CAP/The%20Ticketmaster-Live%20Nation%20Merger.pdf>.

competition in independent concert promotion.”¹³ A club owner observed that the merger would put all independent concert venues at an “irreparable competitive disadvantage” so severe that they would not even think of publicly complaining, for fear of angering the new Live Nation. The owner then requested that antitrust enforcers uphold Barack Obama’s rhetoric on behalf of competition.¹⁴

Unfortunately, as soon as the merger was finalized, most of these fears came to pass. Ticketmaster immediately began violating the consent decree. Neither the divestment nor the licensing arrangement created any substantial competition. AEG never paid royalty fees for the ticketing software,¹⁵ and Paciolan, which covered 7 percent of the market prior to the divestment,¹⁶ remained a niche ticketing service.¹⁷ Ticketmaster is still the dominant ticketing service, ticket prices are still at record highs, and there have been reported complaints by its chief competitor in concert venues that Live Nation “used its control over concert tours to pressure venues into contracting with its subsidiary, Ticketmaster.”¹⁸ Fear of Live Nation was, and still is, rampant in the industry.¹⁹

HARMS

There are several straightforward harms stemming from Ticketmaster and Live Nation’s dominance. First, as noted by the revised consent decree, Live Nation conditions the availability of its performers to independent venues on those venues using Ticketmaster’s ticketing services. Live Nation essentially uses its concert promotion services to bully venues away from using the few competitors that Ticketmaster still has. If a venue opts not to use those services, Live Nation retaliates by effectively boycotting the venue. Because Live Nation controls so much of the market for concert promotion, being able to book performers who contract with Live Nation can make or break a venue’s ability to survive.

Prices are also high with Ticketmaster dominating ticketing services. Ticketing prices and fees, which make up roughly half Live Nation’s earnings, are at a record high. While Live

14 Seth Hurwitz, testimony before Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, “The Ticketmaster/Live Nation Merger: What Does it Mean for Consumers and the Future of the Concert Business?,” February 24, 2009 (“Someone famous recently said, ‘Competition is a win-win situation because it is great for consumers.’ Antitrust, he continued, ‘helps to keep that system in force. It addresses the temptation that some businesses will sometimes experience, to merge with key rivals instead of outperforming them, to agree not to compete too hard, or to sabotage rivals’ efforts to serve consumers instead of redoubling their own.’ That someone was Barack Obama. I hope he backs it up, and I hope you do, too.”), <https://www.govinfo.gov/content/pkg/CHRG-111shrg54048/html/CHRG-111shrg54048.htm>.

15 Ben Sisario and Graham Bowley, “Live Nation Rules Music Ticketing, Some Say With Threats,” The New York Times, April 1, 2018, <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

16 Burns, “Sens Blumenthal, Klobuchar Urge DOJ Inquiry into Live Nation.”

17 Zach Freed, “Reining in Pharmacy Middlemen,” Institute for Local Self-Reliance, January 31, 2020, <https://ilsr.org/reining-in-pharmacy-middlemen/>

18 Sisario and Bowley, “Live Nation Rules.”

19 Sisario and Bowley, “Live Nation Rules”; Ben Sisario and Cecilia Kang, “Citing Violations, U.S. to Toughen Live Nation Accord on Ticketing,” The New York Times, December 19, 2019, <https://www.nytimes.com/2019/12/19/arts/music/live-nation-ticketmaster-settlement-justice-department.html>.

20 Sisario and Bowley, “Live Nation Rules.”

Nation claims that it splits these fees with concert promoters – little comfort to consumers in either case – Live Nation is often also the promoter, so the company is frequently splitting the fee with itself.²⁰

Ticketmaster has also been found to have facilitated abusive price gouging, also known as scalping, by secondary ticket brokers. A Canadian investigative report found that a Ticketmaster had allowed scalpers to buy up millions of tickets per year, using hundreds of Ticketmaster accounts per seller, in clear violation of the company’s policies.²¹

Ticketmaster profits extensively from this as the fees it earns from transactions on the secondary market are far higher than its revenue from direct sales on the primary market. In short, Ticketmaster has an incentive to minimize the genuine sales by concertgoers on the primary market, by either restricting sales or allowing scalpers to buy, and then profiting from the price gouging in the secondary market, where consumers pay far more.

LIVE NATION AND TICKETMASTER TODAY

In 2019, the Trump administration found that almost immediately after the merger was consummated, Live Nation had repeatedly violated the consent decree, forcing venues to accept Ticketmaster’s ticketing services as a condition for hosting Live Nation performers, and retaliating against venues for using Ticketmaster’s competitors. Shockingly, instead of suing to unwind the merger, the Department of Justice went back to court to modify its settlement decree.

The DOJ made several small changes to the agreement. First, it extended the consent decree by five and a half years. It also added language to try and clarify that Ticketmaster could not retaliate against venues or condition the availability of Live Nation artists on using Ticketmaster’s services. The new agreement also established an investigator, who is now monitoring and investigating potential violations of the consent decree. Finally, it added monetary penalties for each time that Ticketmaster was found to have violated the consent decree. Instead of attacking the structural problem of the dominant ticketing provider being combined with the dominant events promoter, the DOJ tinkered with the terms of the decree and added small fines that amounted to the cost of doing business for Ticketmaster. Thus, DOJ essentially allowed Ticketmaster free rein to continue strong-arming venues and competitors for several more years.

²¹ Anastasia Tsioulcas, “Ticketmaster Has Its Own Secret ‘Scalping Program,’ Canadian Journalists Report,” NPR, September 20, 2018, <https://www.npr.org/2018/09/20/649666928/ticketmaster-has-its-own-secret-scalping-program-canadian-journalists-report>

Having spent 10 years tolerating Ticketmaster's transgressions of the old consent decree without so much as a fine, AAG Makan Delrahim commented regarding the new decree, "merging parties will be held to their promises and the Department will not tolerate transgressions that hurt the American consumer." If ignoring the agreement with no penalty for ten years paid off, why would a new agreement change anything?

Indeed, since the consent decree was revised by the Trump Administration, investment news commentators have reported on the business model of Live Nation as if the consent decree did not exist. "Ticketmaster typically has an upper hand in negotiating with venues, as it also controls access to the talent," noted one writer at Barron's in 2020. "If the firm declines to use Ticketmaster, then LYV can elect to take its talent to an alternative venue. This contractual moat is compounded by Live Nation's frequent practice of installing its own hardware at the venue, using proprietary software to process tickets."

By April 2020, during a pandemic devastating the live music industry, investors still recommended investing in Live Nation's stock. Why? "The company," said one fund manager, "operates an impenetrable moat that has a monopoly-like structure."

Since 2020, Live Nation has continued to consolidate power through what Michael Rapino called an "aggressive on a bolt-on, continued consolidation path" in a February 2021 earnings call. In addition to buying a competing ticketing startup founded by a former Live Nation executive called Rival, the corporation has acquired three leading international ticketing and event companies and bought a majority stake in streaming platform Veeps.

In March of 2022, Senators Richard Blumenthal and Amy Klobuchar wrote to AAG Jonathan Kanter, urging them to evaluate Live Nation's compliance with the new consent decree, and to investigate whether Live Nation's recent acquisitions had an impact on pricing and competition in the ticketing industry. That same month, Representative Bill Pascrell sent a letter to both enforcers, calling for a breakup of the company.

Going beyond this, however, this merger shows why the light-touch approach to antitrust enforcement – allowing companies to merge and ask that they agree to good behavior – is fundamentally misguided. We have antitrust laws, and rules about mergers, precisely because we cannot take corporations at their word when they have structural power and the incentives to abuse it. The solution here is direct and simple. This merger should never have been allowed, and the antitrust agencies should break the company up again.

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