

## The Ticketmaster/Live Nation Consent Decree

*Law360, New York (March 09, 2010)* -- In its highest profile merger enforcement action to date under the Obama administration, the U.S. Department of Justice recently challenged the merger of entertainment giants Ticketmaster Entertainment Inc. and Live Nation Inc.

According to the complaint, the transaction was effectively a horizontal merger to monopoly in the sale of primary ticketing services to major concert venues in the United States, eliminating Live Nation as the only credible competitive threat to Ticketmaster.

Rather than seeking to block the merger outright, however, the DOJ settled on a complex remedy requiring licensing and divestitures designed to establish two new competitors in the market and prohibiting the merged firm from engaging in certain conduct for the next 10 years.

What, if anything, can we glean from this challenge about the new administration's merger enforcement policies? It probably cannot be said that the case signals a "new" focus by this administration on vertical mergers, because the challenge was based on the straight-forward elimination of a new horizontal competitor.

The remedies, however, may portend increased openness by the DOJ to behavioral decrees and a preference for the identification of buyers "up front." Also of interest is the DOJ's oblique treatment of vertical integration and "bundling."

### The Merger

Even prior to acquiring Live Nation, Ticketmaster was by far the largest provider of primary ticketing services to major concert venues in the United States. According to the DOJ, Ticketmaster "dominated the market ... with greater than 80 percent market share." [1]

Until Live Nation entered the primary ticketing market in late 2008, no Ticketmaster competitor had achieved more than a few points of market share. Scale and technology-related barriers preventing new entry and blocking growth by smaller competitors had helped to protect Ticketmaster's dominance.

In the DOJ's account, at the beginning of 2009, Live Nation (which had been Ticketmaster's largest customer) stood poised to challenge that dominance. The country's largest concert promoter, and owner or operator of roughly 70 major concert venues, Live Nation could achieve sufficient scale to compete with Ticketmaster just by selling tickets at its own venues.

In addition, Live Nation possessed a unique competitive advantage vis-à-vis Ticketmaster because it could bundle access to important concerts and artists with its ticketing services.

At the end of 2008, instead of renewing its contract with Ticketmaster, Live Nation launched its own ticketing business in competition with Ticketmaster, using technology licensed from the leading ticketing services provider in Germany.

Within a few months, Live Nation was ticketing more than 15 percent of the capacity at major concert venues in the United States, and it had taken away at least two customers from Ticketmaster.

According to the DOJ, the merger of Live Nation and Ticketmaster was a direct response to Live Nation's emergence as a significant competitive threat to Ticketmaster. Initially, Ticketmaster had sought to compete by offering more attractive renewal rates to customers that might switch.

Ticketmaster also acquired a controlling interest in an artist management company, Front Line, in order to compete with Live Nation's ticketing-and-content bundle. The merger, however, signaled an end to that competition.

Not surprisingly, Ticketmaster and Live Nation offered a different account of the merger. They argued the merger was necessitated by difficult economic conditions facing the music industry.

In addition, they argued that by reducing the number of independent entities involved in producing and selling a concert, the merger would actually reduce the costs to concert venue owners and, ultimately, to concert goers. These integration efficiencies, they argued, would counteract any potential anti-competitive effects.

The DOJ rejected the companies' arguments that the merger, unaltered, was on balance procompetitive. In particular, the DOJ refused to "fully credit" the companies' efficiency claims, arguing that the merger was not needed to achieve such efficiencies because Live Nation and Ticketmaster each had vertically integrated on its own.[2]

The merger thus eliminated horizontal competition between two vertically integrated companies, while at the same time arguably raising the entry bar even further to any future competitive challenge.

### **The Remedies**

More interesting than the theory supporting its challenge — which seems straight-forward and a predictable result of the facts as alleged — are the remedies the DOJ demanded.

The proposed final judgment (FJ) settling the DOJ's challenge seeks to establish two new ticketing entities to compete against the merged company, called Live Nation Entertainment (LNE), in the market for primary ticketing services.

First, the FJ requires LNE to provide Anschutz Entertainment Group (AEG), the second largest concert promoter in the United States after Live Nation, with a branded Web site based on Ticketmaster's core primary ticketing platform.

For up to five years, AEG will have the right to use the platform to sell tickets at its own venues and third-party venues in competition with LNE. Although AEG will pay LNE a royalty on every ticket sold through this platform, the royalty will be below the average rate Ticketmaster charged before the merger.

In addition, the FJ gives AEG the option to acquire a perpetual, fully paid-up license to LNE's platform, including a copy of the source code. To encourage AEG to exercise this option, develop a new platform, or partner with

another ticketing company, the FJ bars AEG from using LNE for primary ticketing services after the end of the five years.

Second, the FJ requires Ticketmaster to divest its Paciolan business, a platform through which venues and other primary ticketing services sell tickets on their own Web sites. The Paciolan business must be sold either to Comcast-Spectacor, a small player in primary ticketing services that also owns or manages concert venues, or to an alternative buyer approved by the DOJ.

The FJ also contains behavioral restrictions that, for 10 years, prohibit LNE from engaging in certain conduct “that would impede effective competition from equally efficient rivals that may or may not be vertically integrated.”[3]

First, LNE is prohibited from retaliating against any venue that may choose to deal with a competing ticketer. Second, LNE is barred from “explicitly or practically” tying concerts or artists promoted by LNE to its ticketing services.[4]

The purpose of this prohibition is two-fold: (1) to preserve competition by primary ticketing companies that do not also control venues or manage artists, and (2) to preserve competition by promoters and artist managers that do not also provide ticketing services.

Third, LNE is prohibited from disclosing client ticketing data to employees involved in the promotions, artist management, or venue sides of LNE’s business.

The FJ also requires LNE to provide any venue owner wanting to switch to a competing ticketer with a complete, user-friendly copy of all ticketing data maintained by LNE for the venue, a provision designed to make it easier for venues to move from one platform to another.

### **Vertical Foreclosure Theories**

The FJ's behavioral provisions reveal concerns about vertical foreclosure — the use by a vertically integrated firm of market power in one market to exclude competitors in a downstream or upstream market.

The anti-retaliation requirement, the ban on conditioning the provision of one service on purchase of a separate service, and the data disclosure requirement are all aimed at preventing the foreclosure of competition.

Although a consent decree can (and often will) prohibit conduct that would not independently violate the antitrust laws, the FJ may still provide insight into how DOJ views vertical foreclosure issues, including tying and bundling, following the DOJ’s withdrawal of its Section 2 Report.[5]

For example, the DOJ’s Competitive Impact Statement explaining the FJ pointedly states that the conduct restrictions are designed to preserve competition by “equally efficient rivals.”[6]

The equally efficient competitor test was addressed in the Section 2 Report. The value of the test in general is that it allows firms to take full advantage of their efficiency, while protecting competition by efficient rivals.

Critics, however, have complained that the test fails to appreciate the competitive stimulus that even less efficient competitors can offer, particularly nascent competitors and in markets where competition is just starting to emerge.

The test has also been criticized as being difficult to apply outside the pricing context. For example, is a nonvertically integrated firm as efficient as a vertically integrated firm, and what if a firm's efficiency depends on how it distributes its product?[7]

In the Section 2 Report, the DOJ suggested that the equally efficient competitor test is best suited to predatory pricing cases and does not readily lead to administrable rules in other contexts, such as tying and bundling.

In its review of the Ticketmaster/Live Nation merger, however, the DOJ appears to have concluded that the test is a useful inquiry even where tying or bundling is at issue. The DOJ has not yet explained, though, how the test should apply in such multiproduct contexts.

In fact, it is not clear how the DOJ will enforce the FJ's prohibition against "practically" tying ticketing services to concerts or artists promoted by LNE. In the abstract, such opaque language could be understood to prohibit LNE from bundling ticketing with access to concerts or artists. But the DOJ has acknowledged the procompetitor, proconsumer benefits of bundling in this industry.

Moreover, the proposed FJ expressly provides that it does not prohibit LNE from "bundling ... services and products in any combination." [8]

In addition, LNE is expressly free to use its "own business judgment in [deciding] whether or how to pursue, develop, expand, or compete for any ticketing, venue, promotions, artist management, or any other business." [9]

And LNE will not be presumed to have violated the FJ based solely on evidence that it deals or does not deal with a particular venue, artist, or promoter, even when it might have done so in the past.

This last caveat seems intended to address Aspen Skiing[10], in which the U.S. Supreme Court suggested that a dominant company's failure to continue in what had been a profitable business arrangement with a competitor might under certain circumstances be condemned as unlawful monopolization.

This language suggests that the DOJ does not have a hostile view of bundling practices in general. It leaves open, however, the circumstances in which the DOJ would regard bundling as violating the FJ, or the Sherman Act.

## **Final Observations**

The FJ may augur changes in the DOJ's approach to merger remedies.

In the past, the DOJ has generally preferred structural merger relief over behavioral remedies that will require extensive monitoring by the DOJ and the court and can involve difficult line-drawing. Such relief is not unprecedented, however, particularly where the concerns addressed are vertical.

The DOJ has also traditionally not required that a specific buyer of to-be-divested asset be identified and named in a final judgment. That practice has been more customary at the Federal Trade Commission, and it is possible that Assistant Attorney General Christine Varney has brought a preference for buyer up-front remedies with her from her time as an FTC commissioner.

Whether behavioral remedies and buyer up-front arrangements will be increasingly common at the DOJ, or whether these features were prompted by the unique facts of the Ticketmaster/Live Nation merger, will become clearer as the DOJ brings additional merger challenges.

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[1] Competitive Impact Statement at 8, United States v. Ticketmaster Entertainment Inc., No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010).

[2] Competitive Impact Statement, supra note 1, at 12.

[3] Competitive Impact Statement, supra note 1, at 16.

[4] Competitive Impact Statement, supra note 1, at 17.

[5] On May 11, 2009, DOJ withdrew a report issued in 2008 by the preceding administration, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act ("Section 2 Report").

[6] Competitive Impact Statement, supra note 1, at 16.

[7] Section 2 Report at 44-45.

[8] [Proposed] Final Judgment at 20, Ticketmaster, No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010).

[9] Id.

[10] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).