

Department of Justice and State Attorneys General Green Light \$2.5 Billion Merger of Ticketmaster Entertainment and Live Nation

On January 25, 2010, the U.S. Department of Justice and 17 state attorneys general, including attorneys general from California, Florida, Illinois, Pennsylvania and Texas (collectively, “Plaintiffs”), entered into a settlement with respect to Plaintiffs’ allegations that a proposed merger of the dominant firm, Ticketmaster Entertainment, Inc. (“Ticketmaster”), and the firm with the next-highest share in the highly concentrated market for primary ticketing services, Live Nation, Inc. (“Live Nation”) (collectively, “Defendants”), would violate Section 7 of the Clayton Act. The proposed settlement entails creative solutions to address Plaintiffs’ concerns that the proposed merger would reduce competition in an already highly concentrated market.

Nature of the Live Music Entertainment Industry

In the live music entertainment industry, an artist’s booking agent typically contracts with promoters, such as Live Nation, to arrange for venues, local production services, advertising and marketing of the concert.¹ Ticketing companies, such as Ticketmaster, provide the technological infrastructure for ticket distribution (e.g. distribution of tickets through the Internet, call centers, retail outlets and box offices).² This is known as primary ticketing services. Venues generally contract with primary ticketing companies to provide these services on an exclusive basis and for several years.³

The total price consumers pay for tickets includes service fees charged by the primary ticketing service provider. These service fees “can constitute a substantial portion of the overall cost of the ticket to the consumer.”⁴

According to Plaintiffs, Ticketmaster, the largest primary ticketing company in the United States, has dominated primary ticketing for major concert venues in the United States for over two decades, amassing greater than 80% of the market share of major concert venues based on seating capacity, up until the entrance of Live Nation.⁵ Indeed, other than Live Nation, which later captured 16.5% of the market, no other competitor has more than a 4% share of primary ticketing to major concert venues.⁶ According to Plaintiffs, Live Nation, a former customer of Ticketmaster, which only entered the ticket service market in late 2008, was in a unique position to overcome entry barriers because it could achieve sufficient scale by ticketing its own venues, and it could combine access to important concerts with its ticketing service.⁷

¹ *United States v. Ticketmaster Entm’t., Inc.*, 1:10-cv-00139-RMC, Complaint at ¶ 17.

² *Id.* at ¶ 19.

³ *United States v. Ticketmaster Entm’t., Inc.*, 1:10-cv-00139-RMC, Competitive Impact Statement at 3 [hereinafter CIS].

⁴ Complaint at ¶ 20.

⁵ *Id.* at ¶ 21; CIS at 8.

⁶ Complaint at ¶¶ 21, 34.

⁷ *Id.* at ¶ 27; CIS at 10.

Alleged Anticompetitive Effects of the Proposed Merger

Plaintiffs claimed that, without the relief provided for in the settlement agreement, the proposed merger would eliminate competition in the provision of primary ticketing services to major concert venues in the United States in violation of Section 7 of the Clayton Act⁸ and would reduce competition, resulting in higher prices and less innovation for consumers.⁹

In particular, Plaintiffs alleged that the proposed merger would have the following anticompetitive effects:

- a high market share among providers of primary ticketing for major concert venues,
- increased market concentration of an already highly concentrated market,
- elimination of a competitor, resulting in less competition, less pressure on fees earned by Ticketmaster and less innovation for venues and fans, and
- reduced incentives to innovate.¹⁰

Plaintiffs further opined on the lack of countervailing factors — particularly high entry barriers for any future potential competitors.¹¹ Plaintiffs predicted that it would take two years for a new entrant with substantial investment to develop the characteristics necessary to compete with the merged firm.¹²

Proposed Settlement

The proposed settlement attempts to eliminate the anticompetitive effects of the proposed merger in several ways, principally by enabling the entry of two new independent and vertically integrated competitors: Anschutz Entertainment Group, Inc. (“AEG”) and Comcast-Spectacor, L.P.

To make it possible for these companies to enter the market, Ticketmaster must license its software and divest some of its ticketing assets. For AEG, the second-largest concert promoter in the United States, Ticketmaster must provide it with its own branded Web site (“AEG Site”) based on Ticketmaster’s Host platform.¹³ AEG will pay royalties for each ticket sold, but at a below-average rate.¹⁴ Post-final judgment, Ticketmaster must also provide AEG with an option to acquire a perpetual, fully paid-up license of the then-current host platform (including a copy of the source code).¹⁵ The settlement incentivizes AEG to exercise this option “by prohibiting Defendants from providing primary ticketing services to AEG’s venues after AEG’s right to use the AEG Site expires.”¹⁶ AEG may also choose to contract with one of Defendants’ competitors for primary ticketing services. For Comcast-Spectacor, L.P., Ticketmaster must

⁸ 15 U.S.C. § 18; Complaint ¶ 1.

⁹ Department of Justice, “Justice Department Requires Ticketmaster Enter. Inc. to Make Significant Changes to Its Merger with Live Nation Inc.,” Jan. 25, 2010, <http://www.justice.gov/opa/pr/2010/January/10-at-081.html> (last visited Jan. 26, 2010); Complaint ¶ 41.

¹⁰ Complaint. at ¶¶ 37-41.

¹¹ Id. at ¶¶ 42-43.

¹² Id. at ¶ 44.

¹³ CIS, at 13-14. Host is a platform for selling tickets through Ticketmaster’s Web site, and other sales channels, that is managed by Ticketmaster. Id. at 4.

¹⁴ Id. at 14.

¹⁵ Id.

¹⁶ Id.

sign a letter of intent to divest its entire Paciolan business¹⁷ before consummating the proposed merger, and the divestiture must be complete within 60 days of Ticketmaster's signing of the letter of intent.¹⁸

Additionally, Defendants are prohibited from engaging in certain conduct including, among other things, retaliating against venue owners who contract with Defendants' competitors. Defendants must also notify the Department of Justice at least 30 days before acquiring assets in any firm engaged in providing primary ticketing service in the United States, regardless of whether it would otherwise be subject to reporting requirements pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976.¹⁹

Conclusion

The resolution in this case is notable because it indicates that both the Department of Justice and state attorneys general are willing to negotiate a resolution that permits the top two competitors, holding a combined market share of 82.9% in a highly concentrated market, to merge. Although many had predicted that the current administration might be particularly aggressive in challenging mergers, it was willing here to work with the parties to devise creative solutions that would, in the enforcers' view, forestall potentially anticompetitive effects.

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¹⁷ Ticketmaster's Paciolan business is a venue-managed platform by which venues may sell tickets on their own Web sites and other channels. *Id.* at 4.

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 17.