

## Will Taylor Swift's Bad Blood With Ticketmaster Spur Antitrust Action?

Taylor Swift fans seeking to score tickets to the superstar's highly anticipated "Eras" tour were outraged when Ticketmaster could not handle what it dubbed "unprecedented" demand. In response, [Taylor Swift bemoaned](#), "It's really difficult for me to trust an outside entity with these relationships and loyalties, and excruciating for me to just watch mistakes happen with no recourse."

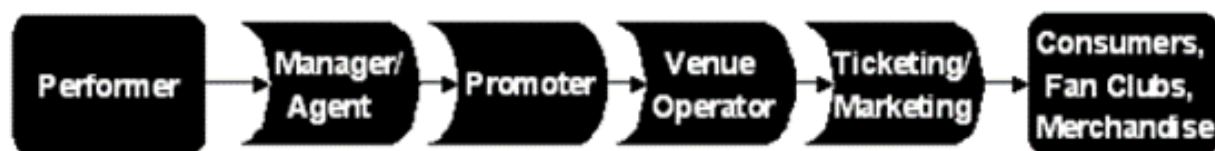
Those following the story know all too well that the political reaction was swift. Representative Alexandria Ocasio-Cortez tweeted, "Ticketmaster is a monopoly, it[s] merger with Live Nation should never have been approved, and they need to be [reined] in. Break them up." Channeling this sentiment, Senator Amy Klobuchar wrote an open letter to the CEO of Ticketmaster's parent company, Live Nation, to "express serious concerns about the state of competition in the ticketing industry and its harmful impact on consumers." Within the week, sources revealed that the U.S. Department of Justice's (DOJ) Antitrust Division (Antitrust Division) had opened an investigation into Live Nation.

After briefly recounting the history of Ticketmaster and Live Nation and their respective lines of business, this Update analyzes the potential legal theories and remedies that antitrust enforcers could pursue against the entertainment conglomerate.

### Begin Again

To grasp the current controversy, it is helpful to understand how Ticketmaster and Live Nation were positioned prior to their merger in 2010. According to an Antitrust Division [filing](#), Ticketmaster had been "the dominant ticketing service provider in the United States" for "over two decades." These services were sold to performance venues seeking to distribute tickets to fans. Enforcers estimated that Ticketmaster's market was more than 80% based on venue capacity.

Live Nation was the "largest concert promoter" in the country and owned "many major amphitheaters" used to host marquee concerts. Once these services were sold to a performer's booking agent or manager, Live Nation offered "venues access to concert tours." Ticketmaster was positioned between the venue and the fan, whereas Live Nation was situated between the performer and the venue. The Antitrust Division illustrated the vertical components of the live music entertainment industry with the following chart:



The Antitrust Division investigated the proposed merger and solicited comments from customers, competitors, and other industry stakeholders. Commenters expressed concerns that the merger would (1) create a vertically integrated entity that could control all aspects of the ticket supply chain, (2) restrict entry into the ticketing

service market due to Live Nation's ownership of several venues, (3) limit the options available to venues for ticketing services, and (4) enable the merged entity to charge excessively high service fees. After investigating the merger and considering the public comments, the Antitrust Division filed a complaint alleging that the combination "would lead to a high share among providers of primary ticketing for major concert venues."

A major focus of the complaint was Live Nation's recent entry into the ticketing services market. Their entry represented a nascent or potential competition theory of harm that was rare for its time. Specifically, the Antitrust Division argued that Live Nation was "in a position to challenge Ticketmaster's dominance due to its control of venues." The complaint stated that a merger with Ticketmaster "would eliminate Live Nation's competitive presence in the market for the provision of primary ticketing services for major concert venues, resulting in less aggressive competition, less pressure on the fees earned by Ticketmaster, and less innovation for venues and fans than would exist absent the merger."

Instead of seeking an injunction to block the merger, the Antitrust Division settled the lawsuit through a consent decree that contained a hodgepodge of structural and behavioral remedies. For example, the merged entity agreed to (1) divest Ticketmaster's software platform to a competitor, (2) not retaliate against a venue for using a service other than Ticketmaster, and (3) not condition or threaten to withhold live entertainment events from venues that wanted to use a service other than Ticketmaster.

## **I Knew You Were Trouble**

However, according to an Antitrust Division filing from January 2020, Live Nation did not live up to its end of the bargain. Federal enforcers claimed that executives were threatening and retaliating against venues that wanted to use one of Ticketmaster's competitors to distribute tickets to fans.

In one instance, after a venue informed Live Nation that it would be using a Ticketmaster competitor that offered better terms, Live Nation allegedly responded that they would no longer book shows at the venue unless there were no other options in the market. According to the [filing](#), Ticketmaster also informed another venue that it would no longer "see any Live Nation shows" if it did business with Ticketmaster's competitor. According to a different venue operator, Ticketmaster warned that the response "would be nuclear" if the venue used a competing ticketing service and "though he would deny it if I repeated it, Live Nation would never do a show in our building, that they would find other places for their content."

The Antitrust Division moved to modify the consent decree with more muscular behavior provisions. These included extending the commitment not to retaliate against venues until the end of 2025 and "appointment of an independent monitor and imposition of certain monitoring, notice and reporting." Live Nation also agreed to pay \$1 million per violation and "reimburse" the United States \$3 million for its costs and fees incurred in investigating and prosecuting the conduct. Notably, however, Live Nation denied the Antitrust Division's allegations.

## **(Not) Out of the Woods**

It is important to recognize that the recent hubbub around Taylor Swift tickets does not appear to violate the amended final judgment. However, enforcers could view the incident as indicative of a lack of competition in the ticket servicing market, resulting in supracompetitive service fees, lower quality, and reduced innovation. If enforcers decide to bring a case against Live Nation, they could proceed under any (or all) of the following five theories:

1. **Conditional dealing.** The Antitrust Division could allege that Live Nation violated Section 2 of the Sherman Act through unlawful conditional dealing. This would require the DOJ to show that Live Nation threatened to withhold concerts from venues unless the venues agreed not to deal with other ticketing platforms—essentially, that Live Nation "conditioned" its willingness to "deal" with venues on the venue's commitment to not do business with competing ticketing platforms.
2. **Tying.** Enforcers could also advance a Section 1 or 2 claim (or both) based on unlawful tying. Under this theory, they would need to show that Live Nation "tied" its provision of concerts to the venue to the purchase of ticketing services. A tying claim would require the agency to prove that (1) concerts and ticketing services are two distinct products or services, (2) venues were forced to use Ticketmaster for their ticketing services, (3) Live Nation had economic power in the concert market, and (4) the tying affected a substantial volume of commerce in the ticketing market.
3. **Illegal merger.** The Antitrust Division could also sue under the theory that the 2010 merger enabled Ticketmaster to maintain a ticketing services monopoly. Even though the Antitrust Division did not pursue an injunction to block the merger in 2010 or seek to unwind it in 2020 after Live Nation allegedly violated the consent decree, courts have held that this does not necessarily bar an agency from seeking a divestiture [several years or even decades after an acquisition](#).
4. **Course of conduct/monopoly broth.** The agency could pursue a Section 2 claim based on Live Nation's aggregate "course of conduct." As the U.S. Court of Appeals for the Seventh Circuit has [stated](#), sometimes "[i]t is the mix of the various ingredients ... in a monopoly broth that produces the unsavory flavor." Under this theory, a court could consider both the 2010 merger and all subsequent conduct.
5. **Unfair competition.** Finally, the DOJ could step aside and let the Federal Trade Commission (FTC) file a case under Section 5 of the FTC Act, which prohibits "unfair" methods of competition. In a recent [policy statement](#), the FTC took the position that Section 5 could reach conduct that falls short of a Sherman Act violation where it is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature." Whether an enforcer would consider Live Nation's conduct "unfair" within the meaning of Section 5 remains to be seen.

## Look What You Made Me Do

If antitrust enforcers prevailed on any of these theories, they would likely seek structural relief through a divestiture. That would involve breaking up Ticketmaster and Live Nation. The DOJ's [Merger Remedies Manual](#) states that "structural remedies are strongly preferred ... because they are clean and certain, effective, and avoid ongoing government entanglement in the market."

By contrast, the consent decree that allowed the Ticketmaster-Live Nation merger imposed primarily behavioral remedies through commitments not to (1) condition concerts on the purchase of Ticketmaster services or (2) retaliate against venues that opted to use a ticketing service other than Ticketmaster. Live Nation allegedly broke those promises. Given the Antitrust Division's preference for structural remedies, it could seek a divestiture to unwind the Ticketmaster-Live Nation merger and break up the company.

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