NON-SELF-ENFORCING REMEDIES AND THE RECENT MODIFICATION TO THE *TICKETMASTER/LIVE NATION* MERGER CONSENT DECREE

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I. INTRODUCTION

Merger remedies may be offered by the merging parties or demanded by antitrust enforcers in cases in which a merger promises benefits to consumers but also risks harm to competition in one or more markets. Blocking such a merger would certainly prevent the competitive harm from occurring, but it would also deny the consumer benefits that would otherwise flow from the combination of assets. Remedies that reliably target the source of competitive harm allow society to reap the benefits of efficiency-enhancing mergers that would, in the absence of remedies, raise competitive concerns. In this article, we consider the economic issues that arise in developing merger remedies – and in particular discuss the use of self-enforcing versus non-self-enforcing remedies. We then discuss how these issues relate to the recent concerns raised by the Department of Justice ("DOJ") regarding whether Live Nation was following the requirements of the remedy associated with its merger with Ticketmaster in 2010.

II. SELF-ENFORCING AND NON-SELF-ENFORCING REMEDIES

Merger remedies can be distinguished by whether or not they require ongoing enforcement by the antitrust authorities. Self-enforcing remedies, also referred to as structural remedies, are those that do not require ongoing enforcement. These remedies often involve the sale of physical assets or the sale or licensing of intellectual property ("IP") rights by the merging firms to strengthen existing competitors or create new competitors. Non-self-enforcing remedies, also referred to as behavioral or conduct remedies, require ongoing monitoring by the antitrust authorities and involve constraints on post-merger conduct by the merged firm. Examples include firewall and non-discrimination provisions.

Self-enforcing remedies are typically preferred by antitrust enforcers. However, antitrust enforcers may be willing to consider behavioral remedies if structural remedies are not practical or would also eliminate significant competitive benefits from the transaction as whole. For example, guidance issued by the Federal Trade Commission ("FTC") in 2012 indicates a willingness to consider non-structural remedies in some circumstances.[2] Similarly, the remedies policy guide issued by the Antitrust Division of the DOJ in 2011 expressed openness towards a variety of remedies, noting that both structural and conduct remedies may be usefully employed, depending on the particular circumstances of the proposed merger.[3] However, recent DOJ statements indicate that they currently

2 Negotiating Merger Remedies, Statement of the Bureau of Competition of the Federal Trade Commission, January 2012, p. 5.

3 Antitrust Division Policy Guide to Merger Remedies, US Department of Justice, Antitrust Division, June 2011 (the DOJ 2011 Policy Guide), p. 4.

are less willing to consider non-structural remedies.[4] DOJ's resistance to non-structural remedies is demonstrated by its rejection of remedies offered by the parties in the *AT&T/Time Warner* merger even though it had accepted similar remedies in the *Comcast/NBC-Universal* merger.[5] As we discuss further below, DOJ's concerns about non-structural remedies may be further increased given its experience with the consent in the *Live Nation/Ticketmaster* transaction.

It is straightforward to demonstrate why antitrust authorities prefer self-enforcing remedies. Consider a merger that provides an incentive for the merged firm to raise price.[6] Now consider two remedies that promise to restore the pre-merger competitive outcome. The first remedy changes the merged firm's incentives so that it no longer would be profitable for it to raise prices. This remedy would be self-enforcing and not require ongoing governmental oversight because the pre-merger competitive outcome is restored by changing the firm's incentives. The second remedy involves a promise or commitment by the merged firm not to raise prices, even though it still has the incentive to do so post-merger. The second remedy thus requires the firm to act against its self-interest and requires an effective commitment mechanism, such as ongoing monitoring and the assessment of penalties if the firm does not fulfil its commitment. Antitrust enforcers typically prefer the first remedy to the second remedy because reliance on market forces to discipline firm behavior is viewed as being more effective and less costly.

Structural remedies are generally self-enforcing because they focus on replicating (or moving toward) pre-merger incentives and rely on market forces.[7] As an example of how a structural remedy works, consider a horizontal merger between two firms that manufacture differentiated products that raises competitive concerns. If the products of the two firms are close competitors, then neither firm has an incentive to raise prices pre-merger, in part because it would expect to lose a significant amount of sales to the competing firm. Post-merger, however, a significant amount of that diversion is internalized within the merged firm and thus may provide the unilateral incentive to raise price.

How can this undesirable outcome be eliminated by a remedy? A remedy that divests one of the competing products to an independent buyer counteracts the post-merger economic incentive of the merged firm to raise the post-merger price on the other product because there is no longer internalization of diversion. To be effective, such a divestiture relies on the independent buyer to "step into the shoes" of the divesting firm and act on its incentives to maximize its own profit. Because it relies on firms' desires to maximize their profits, a divestiture remedy is self-enforcing and does not require ongoing monitoring.

In theory, an alternative behavioral remedy could be crafted that could allow the merged firm to continue to sell both competing products but commit to not raising prices. As discussed, such a remedy does not alter the merged firm's profit-maximizing incentives; rather, it seeks to prevent the merged firm from acting on those incentives in ways that could harm competition.[8] Such a remedy is unlikely to be attractive to antitrust enforcers, however, because it would require ongoing monitoring by the enforcement agency, which would generally be costly and difficult.[9] A commitment never to raise prices would not be sustainable as there are legitimate reasons to raise prices even in the absence of the merger, such as increased costs, increased demand or quality improvements. Not only would it be difficult for the enforcement agencies to assess whether a proposed price increase is justified, but the merged firm would object to the loss of flexibility to react to competitive pressures if pre-approval of price changes were required. Such a behavioral remedy is thus unlikely to be practical or acceptable and, in fact, may be harmful to competition by preventing the merged firm from responding to marketplace forces.

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4 For example, DOJ Assistant Attorney General Makan Delrahim stated in September 2018: "We are also taking a close look at our remedies policy. Negotiating remedies to anticompetitive mergers often adds significant time to the merger review, and our commitment to shortening the duration of merger reviews extends to the remedies phase. While our review is underway, I want to be transparent with the bar about what the Division's practices will be. To that end, today, I announce the withdrawal of the 2011 Policy Guide to Merger Remedies. The 2004 Policy Guide to Merger Remedies will be in effect until we release an updated policy." See DOJ Assistant Attorney General Makan Delrahim's "Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium," September 25, 2018, available at https://www.justice.gov/opa/speech/file/1096326/download, site visited May 9, 2019. Thus, DOJ's remedies policy is apparently in a state of flux. We still view the DOJ 2011 Policy Guide as the most current statement by the DOJ regarding its merger remedies policy.

5 See Post Trial Brief of the United States, *United States of America, Plaintiff, v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc., Defendants*, May 8, 2018, pp. 2, 3.

6 Although we use the example of a price increase as a competitive harm, mergers may provide incentives for other types of harm, such as degrading quality.

7 See, e.g. J. Kwoka, "Merger Remedies: An Incentives/Constraints Framework," *The Antitrust Bulletin*, Vol 62(2), 2017, p. 369; J. Kwoka & D. Moss, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," The American Antitrust Institute, 2012, pp. 5, 6.

8 See, J. Kwoka, "Merger Remedies: An Incentives/Constraints Framework," *The Antitrust Bulletin*, Vol 62(2), 2017, p. 369.

9 The merging firms may also object to such a remedy because of onerous monitoring requirements and the restriction on the firm's flexibility in setting its prices and responding to market conditions.

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In other cases, however, the agencies have accepted non-self-enforcing remedies. Antitrust enforcers may be willing to accept commitments from firms not to engage in anticompetitive behavior if the terms of such commitments are readily (and cheaply) monitored, there is a punishment mechanism for violating them, and a self-enforcing remedy is not feasible or there is some benefit from not requiring a self-enforcing remedy. We next discuss the *Ticketmaster/Live Nation* merger, its remedy and the issues that have been raised with regard to the enforcement of certain aspects of the remedy.

III. OVERVIEW OF THE *TICKETMASTER/LIVE NATION* MERGER

Ticketmaster and Live Nation announced their plan to merge in February 2009. At the time of the proposed merger, Ticketmaster was the largest primary ticketing company in the U.S. with gross revenues of $800 million in 2008.[10] Ticketmaster provided primary ticketing services to more than 80 percent of the major concert venues in the U.S. in 2008.[11] Ticketmaster had also recently expanded into artist management following its acquisition of Front Line Management Group.[12]

Live Nation was the largest U.S. concert promoter in 2008, with $1.3 billion in revenue from its promotions business, and had promoted shows representing one third of concert revenues at the major U.S. concert venues at the time.[13] In addition to entering long-term partnerships with several popular artists, such as Madonna, to exclusively promote their concerts, sell their music recordings and market their merchandise, Live Nation owned or operated roughly 70 major concert venues and had recently entered the marketplace for primary ticketing services.[14]

The DOJ expressed horizontal and vertical concerns about the competitive effects of the proposed transaction. In particular, the DOJ noted Ticketmaster's high market share of primary ticketing services and that its high profit margins persisted due to high barriers to entry. The DOJ also highlighted that Live Nation was a major threat to Ticketmaster because it could obtain sufficient scale to compete by ticketing its own venues and had a competitive advantage by being able to bundle access to concerts with its ticketing service. By early 2009, according to the DOJ, Live Nation was the primary ticket service provider to more than 15 percent of the capacity at major U.S. concert venues. Among its competitive responses to the threat of Live Nation, the DOJ alleged that Ticketmaster attempted to eliminate Live Nation as a competitor by agreeing to acquire it less than two months after it began offering primary ticketing services. The DOJ also stated that the transaction would diminish innovation and would result in even higher barriers to entry in primary ticketing services.[15]

The DOJ also had concerns related to potential anticompetitive practices that might be possible or more likely to occur from being vertically integrated. One potential mechanism of competitive harm would be for Ticketmaster to exploit its dominance in primary ticketing services to encourage customers to use Live Nation's non-ticketing services businesses.[16] Another potential anticompetitive tactic, for example, would be for a venue that preferred Live Nation for concert promotion or artist management to be told that such services would be more available if the venue also used its Ticketmaster ticketing services. The substantial presence of the merged firm at all stages of the business suggested significantly enhanced opportunities to retaliate against those who might desire to part ways from the merged firm at any single stage. Highlighting that these vertical concerns were not just theoretical, Anschutz Entertainment Group ("AEG"), the second largest U.S. promoter, a venue operator, and Ticketmaster's second largest customer at the time, began seeking an alternative to Ticketmaster right after the merger with Live Nation was announced. AEG was apparently concerned about working with and disclosing information to a company that might become a direct competitor.[17]

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10 Competitive Impact Statement filed on Jan. 25, 2010 regarding merger of Ticketmaster and Live Nation at pp. 3,4 (hereinafter, "*Ticketmaster/Live Nation* CIS"). Primary ticketing firms provide services such as websites that help facilitate the initial sale of tickets to concertgoing customers

11 *Ticketmaster/Live Nation* CIS at p. 4. The CIS defined "major concert venues" as the 500 U.S. venues generating the most concert revenues in 2008 per Pollstar.

12 *Ibid*.

13 *Ibid*.

14 *Ibid*. at pp. 4-5.

15 *Ibid*. at pp. 8-12.

16 The potential mechanisms of economic harm are as described by John Kwoka. See Kwoka, Jr., J.E., "Rockonomics: The *Ticketmaster-Live Nation Merger* and the Rock Concert Business (2010)," Case 8 in *The Antitrust Revolution*, Economics, Competition, and Policy, 7th ed., 2019 at pp. 177-178.

17 *Ibid*.

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The merging parties argued that the vertical integration of their complementary businesses would decrease the number of industry participants who would need to be compensated for the production of a concert and therefore would allow the merged company to reduce the prices paid by venues for primary ticketing services and by the ultimate customer, concertgoers, for tickets. The merging parties' efficiency claims were not fully credited according to the DOJ, because many of the efficiencies could be achieved absent the merger: "Ticketmaster and Live Nation each already had expanded vertically before they agreed to the proposed transaction, and but for the proposed transaction, venues and concertgoers would have continued to enjoy the benefits of competition between two vertically integrated competitors."[18]

IV. ORIGINAL CONSENT DECREE

The original consent decree in early 2010 between the merging parties and the DOJ involved a settlement agreement with self-enforcing (structural), non-self-enforcing (behavioral), and monitoring components. According to the prepared remarks of the Assistant Attorney General of the Antitrust Division of the DOJ, the two structural remedies required: (1) "Ticketmaster to license its ticketing platform to AEG, another major promoter and owner of some of the country's most significant venues"; and (2) "Ticketmaster to divest to Comcast-Spectacor its Paciolan line of business."[19] Paciolan, a venue-managed platform, allows venues to host primary ticket services on their own websites and therefore would create venue-ticketing integration as an alternative business model to promoter-ticketing integration per the AEG licensing agreement.[20] This aspect of the consent decree was purported to "preserve not only competition within a business model – namely, integrated live music production firms – but also among different models."[21]

The behavioral remedies were aimed at preventing the merged company from engaging in various types of anticompetitive conduct. First, Ticketmaster and Live Nation were prohibited from retaliating against any venue that "considers or works with another primary ticketing service."[22] Second, the merging firms were prohibited from developing mandatory bundles of their services (requiring that a customer accept Live Nation as a promoter in order to use Ticketmaster's primary ticketing services or vice versa). And third, there were provisions aimed at preventing anticompetitive abuse of Ticketmaster's unique ticketing data.[23] Regarding monitoring safeguards, the settlement agreement stipulated ongoing oversight for a 10-year period, including special provisions to facilitate such oversight and an enhanced obligation to report future mergers.[24]

V. ORIGINAL CONSENT DECREE MODIFIED AND EXTENDED IN EARLY 2020

The original consent decree prohibited the combined company from "retaliating against concert venues for using another ticketing company, threatening concert venues, or undertaking other specified actions against concert venues for ten years."[25] The DOJ received complaints that Live Nation used its control over concert tours to pressure venues into using Ticketmaster for ticketing. For example, AEG had told DOJ officials that venues it managed in Atlanta, Las Vegas, and several other cities were informed that they would lose shows if Ticketmaster were not used.[26] According to the DOJ, Live Nation "repeatedly engaged in conduct that . . . violated the Final Judgment."

18 *Ticketmaster/Live Nation* CIS at p. 12.

19 "The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective," prepared remarks by Christine A. Varney (Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice) for South by Southwest, March 18, 2010 at p. 10.

20 *Ibid.* at pp. 10-11.

21 *Ibid.* at p. 11.

22 *Ibid.* at p. 13.

23 *Ibid.*

24 *Ibid.* at pp. 13-14.

25 "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," Dept. of Justice, Office of Public Affairs, Dec. 19, 2019.

26 Aswad, J., "Department of Justice 'Looking into Accusations' Against Live Nation, Report Claims," *Variety*, April 1, 2018.

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In apparently the most significant action related to an existing antitrust consent decree in twenty years, in late January 2020, the DOJ extended the *Live Nation/Ticketmaster* consent decree by five and a half years and modified the behavioral commitments.[27] The DOJ and the combined firm (Live Nation) agreed to modifications to clarify that: (a) Live Nation may not threaten to withhold concerts if a venue selects a ticketer besides Ticketmaster; (b) a Live Nation threat to withhold concerts because a venue selects another ticketer is a violation; and (c) withholding concerts in response to a venue selecting a ticketer besides Ticketmaster is also a violation.[28] The DOJ will also appoint an independent monitor to investigate and report on the firm's compliance with the revised Final Judgment, and Live Nation will be subject to an automatic $1 million penalty for each new violation.[29]

VI. LESSONS FROM THE *LIVE NATION/TICKMASTER* CONSENT DECREE

The modification and five-and-a-half-year extension of the original consent decree in the *Live Nation/Ticketmaster* transaction underscores the potential pitfalls of non-self-enforcing remedies. Although such remedies allow for some degree of flexibility and customization in complex situations where structural remedies may not be feasible nor appropriate, there are substantial potential shortcomings and, in general, they warrant careful scrutiny. As highlighted above, antitrust enforcers' willingness to accept behavioral commitments from firms should be informed by the ease and cost of monitoring their conduct, the effectiveness of a punishment mechanism for violations, and the extent to which a self-enforcing remedy is infeasible or less preferred. The modification of the original consent decree in *Live Nation/Ticketmaster* is an attempt to clarify what constitutes a violation, as well as strengthen the monitoring and penalty mechanisms.

The fact that the behavioral commitments in *Live Nation/Ticketmaster* required modification and extension (and was the most significant action related to an antitrust consent decree in twenty years) indicates that at least some facets of the non-self-enforcing remedies agreed to by the merging parties and DOJ in 2010 did not work as anticipated. As discussed above, Live Nation apparently threatened holding back concerts from venues if the venues did not use its Ticketmaster ticketing services. This result is not altogether surprising—the behavioral remedies lacked a self-enforcing mechanism, and Live Nation was arguably being asked to behave contrary to its incentives to at least some extent. Without a self-enforcing mechanism, the success of a behavioral remedy depends largely on workable and effective monitoring and punishment. Only time will tell whether the revamped behavioral remedies regarding the *Live Nation/Ticketmaster* merger will create an effective deterrent and allow for easier detection and enforcement should violations occur in the future.

27 "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," Dept. of Justice, Office of Public Affairs, Dec. 19, 2019 and "Court Enters Judgment That Significantly Modifies and Extends Consent Decree with Live Nation/Ticketmaster," Dept. of Justice, Office of Public Affairs, January 28, 2020.

28 "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster," Dept. of Justice, Office of Public Affairs, Dec. 19, 2019.

29 *Ibid.*

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