

Anticipated merger between Ticketmaster Entertainment Inc and Live Nation Inc

The OFT's decision on reference under section 33(1) given on 11 June 2009.
Full text of decision published 23 June 2009

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Ticketmaster Entertainment, Inc. (Ticketmaster)** was founded in 1976 and has its headquarters in West Hollywood, California. It operates in twenty countries providing ticket sales, ticket resale services, marketing and distribution through (a) www.ticketmaster.com and other websites and (b) approximately 6,700 retail outlets and 19 call centres in the US and internationally. In the UK, Ticketmaster provides ticketing services to arenas, stadiums, professional sports clubs, performing art venues, museums and theatres. In October 2008, Ticketmaster acquired a majority interest in Front Line Management Group (**Front Line**), an artist management company that began its operations in January 2005. Ticketmaster provides management services via Front Line, based in the US, to approximately 200 music recording artists in exchange for a commission on the earnings of these artists. In the UK, Front Line does not have business operations, however a few of the artists it manages are based in the UK and some of them periodically perform in the UK. Ticketmaster's UK turnover in the year to 31 December 2008 was [].
2. **Live Nation, Inc. (Live Nation)** is part of the Live Nation group, which is headquartered in Los Angeles, California. It operates live music and theatrical venues in the US and Europe, and promotes and produces live entertainment events throughout the world. In the UK, Live Nation has interests in the ownership and/or operation of live music and theatrical venues, the promotion of live music events in Live Nation owned/operated venues and in rented third party venues, and the promotion of live music festivals. In addition, Live Nation provides music agency services in the UK, via its subsidiaries International Talent Booking Limited (ITB) and Sensible Events Limited, which operate entirely independently. The OFT understands

that Live Nation also has '360 degree' contracts¹ with a select number of artists including Madonna. Live Nation's UK turnover in the year to 31 December 2008 was [].

TRANSACTION

3. Ticketmaster and Live Nation have signed an agreement to form Live Nation Entertainment. Under the terms of the agreement, Live Nation and Ticketmaster will each own approximately 50 per cent of the combined entity.
4. The parties notified the transaction to the Office of Fair Trading (OFT) on 31 March 2009. The administrative deadline for the OFT to decide whether to refer the merger to the Competition Commission (CC) is 5 June 2009.

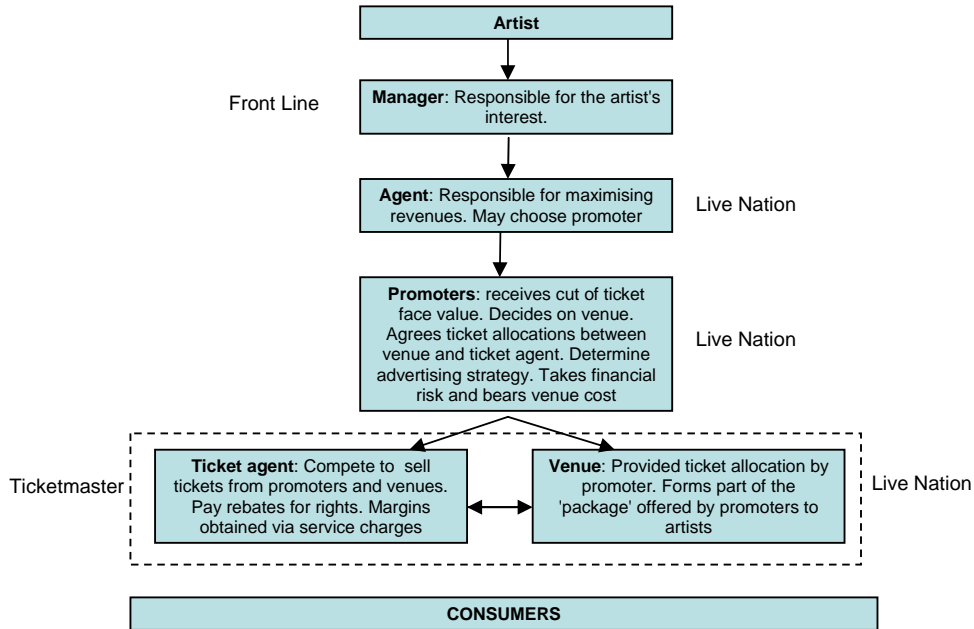
JURISDICTION

5. As a result of this transaction Ticketmaster and Live Nation will cease to be distinct. The UK turnover of Ticketmaster (the smaller of the two enterprises) exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

¹ Live Nation has entered into so-called '360 degree' contracts with several artists, whereby it takes over as the artist's record label, takes charge of touring, merchandising and other rights.

MARKET DEFINITION

6. To frame the subsequent discussion on market definition and the competitive assessment, the following pictorial representation of the live music industry is helpful.



PRODUCT SCOPE

7. The parties do not overlap horizontally in the supply of artist management, promotion, venue ownership and operation, or ticketing agency. Nonetheless, in the context of the vertical theories of harm discussed below, market definition may help identify whether one or both of the parties has market power in any or all of promotion, venue ownership and operation, or ticketing agency. Market definition for these levels of the supply chain in which the parties are active is therefore discussed below.²

Ticketing agency market

8. Ticketmaster provides ticketing services in the UK. Live Nation is not a provider of ticketing services in the UK and any ticket sales made through Live Nation's website are made via Ticketmaster under a [] preferential rights agreement between the parties, due to expire in [].
9. In its 2005 market study report on 'Ticket agents in the UK'³ (2005 market

² Ticketmaster is also active in the supply of artist management services. However, the OFT has left open the definition of this market in view of the fact that it is not relevant to the consideration of the vertical theories of harm outlined below.

³ OFT 762.

study) the OFT drew a distinction between primary ticket agents who have direct agreements with promoters and venues, and secondary ticket agents who obtain tickets from a range of sources for resale to the public (typically at prices greater than those in the primary market). Ticketmaster is active as a primary ticket agent and is also active in the secondary market in the UK via 'Get Me In' (www.getmein.com).

10. Primary agents sell tickets for a given event, usually on behalf of the promoter and/or the venue. Bookings through a ticket agent are usually made over the internet, by telephone or through retail outlets. The ticket agent typically charges consumers a per-ticket booking fee and may also add a per-booking transaction charge. Tickets may also be distributed in the primary channel through the box office at the venue (see paragraph 13) and the artist, for example through the artist's website or fan club.
11. Traditionally, tickets are resold on the secondary market only once they have been distributed through the primary market. A secondary ticket agent, according to the OFT's 2005 market study, will re-sell a ticket for an event—usually at a mark-up over the face value of the ticket—through ticket booths, by face-to-face contact ('touting') or through websites. The mark-up over the face value of the ticket will vary: when demand is high the mark-up may be very high (eg many times the face value of the ticket) but when there is limited demand the price may be at, or exceptionally even below, face value.
12. The parties argue that the secondary ticket market has grown substantially since the OFT's 2005 market study, and that the distinction between primary and secondary ticket agency is becoming increasingly blurred as a number of promoters contract directly with secondary agents. The OFT nonetheless considers that it is still relevant to make a distinction between the two channels given that: (a) the secondary market is still small relative to the primary market, (b) prices and competitive conditions vary significantly between the two markets, (c) prices in secondary ticket agency are unlikely to constrain those in primary ticket agency as consumers will generally see the secondary channel as a last resort.
13. In addition, the parties argue that some venue operators provide self-ticketing services, either by developing their own proprietary software or by licensing ticketing software from a third party. Self-ticketing enables venues to sell and distribute tickets themselves, earning revenue from booking fees. The parties argue that the consequence for a ticket agent like Ticketmaster of venues self-ticketing is a loss of income from booking fees (either wholly—where venues develop proprietary ticketing software—or partially, as the software licensing revenue Ticketmaster receives is significantly lower than its booking fees).
14. Consistent with its general approach to the assessment of self-supply for the purposes of market definition, the OFT considers that self-supply of

ticketing will be included in the primary ticketing market only if it can be demonstrated that it would be profitable for the venue to forego self-supply and sell through primary ticketing agents in response to a small but significant and non-transitory increase in the overall price offering of ticket agents. The OFT has received mixed evidence on this and so has adopted a cautious approach by excluding self-supply.

15. During the course of the OFT's investigation, several third parties suggested that it was appropriate to consider ticketing for large live music events separately from the rest of the ticketing market because promoters may not see smaller ticket agents as viable alternative service providers (see discussion further below – paragraph 79).
16. In particular, one third party stated that in order to service large events it is necessary for ticket agents to have technology in place that is able to handle large volumes of ticket enquiries in short spaces of time. It is also considered important to have an international reputation for provision. For these reasons, the same third party argued that promoters and venues agents may not be willing to switch to smaller ticket agents in response to a small but significant and non-transitory increase in the overall price offering of the more established ticket agents such as Ticketmaster.
17. On the basis of the above, the OFT has examined the competitive effect of the transaction separately in the primary ticketing agency market (excluding self supply) and in the secondary ticketing agency market. In respect to large live music events, the OFT believes as a result of its investigation that such further segmentation is not necessary, as the competitive conditions within this segment do not vary substantially from those in a wider ticketing agency market.

Live music promotion

18. Live Nation acts as a live music promoter in the UK. Ticketmaster does not act as a promoter in the UK.
19. Promoters are hired by artists (through their managers or agents) for the promotion of single events, tours or even events at which several artists appear (festivals). Their role includes costing events and tours, booking venues, marketing, advertising and staging events, and allocating tickets through ticket agents and the venue's box office.
20. According to the parties and third parties, promoters take nearly all the financial risk in organizing a tour or a concert, usually guaranteeing the artist a minimum income from an event.
21. In its report on the Hamsard/Academy live music venues merger

(Hamsard/Academy),⁴ the Competition Commission concluded that the relevant market was no wider than live music promotion services in the UK.

22. According to the parties, within live music promotion, there are no narrower segments based on genre of music, type or scale of event. Some third parties raised concerns that Live Nation has a stronger position in the UK in larger events but the OFT did not receive any convincing evidence to substantiate these concerns.
23. Therefore, the OFT has examined the competitive effect of the transaction in the supply of live music promotion services in the UK generally.

Live music venue owners and/or operators

24. Live Nation owns and operates live music venues in the UK but Ticketmaster does not (venue operation generally excludes areas such as merchandising, which is undertaken by concessionaires renting space from the venue). Venue rental charges usually provide for a number of security stewards, a basic box office service and artists' dressing rooms.
25. In Hamsard/Academy, the CC indicated that the competitive constraint of one UK venue on another will vary, complicating market definition. On this basis, the CC concluded that a better approach in Hamsard/Academy was to consider the competitive constraint upon each of the venues operated by the merging parties individually.
26. On this basis, and given that Ticketmaster does not own or operate UK venues, the OFT has examined the competitive effect of the transaction on the basis of live music venues that Live Nation owns or operates in the UK as a whole, and did not have to look at these venues individually as the OFT considered that it was not relevant to the competitive assessment.

GEOGRAPHIC SCOPE

Ticketing agency market

27. The OFT understands that there is lack of demand-side substitutability between UK based ticket agents and non-UK-based ticket agents for UK live music events. That is, in practice, consumers sourcing tickets for live music events in the UK will use ticket agents active in the UK market. In addition, although ticket agents operate in different countries, the OFT understands that the customer databases held by agents in a particular country are not substitutable with customer databases in other countries. Therefore, the OFT considered the competitive effect of the merger for each of primary and secondary ticketing agency market in the UK.

Live music promotion

⁴ Competition Commission: A report on the proposed acquisition of a controlling interest in Academy Music Holdings Limited by Hamsard 2786 Limited, 23 January 2007.

28. Live Nation is active in live music promotion in the UK and globally. In Hamsard/Academy, the CC concluded that the relevant market was no wider than live music promotion services in the UK. Therefore, in the absence of evidence to the contrary, the OFT considered the competitive effect of the merger in live music promotion in the UK.

Ownership/operation of live music venues

29. Live Nation is active as a venue operator in the UK and globally. On the basis of the evidence before the OFT, venues in different countries do not appear to be substitutes. One third party stated that the Point in Dublin is an important venue for live music tours in the 'British Isles touring circuit'. This appears to indicate it is a complement rather than substitute. However, the inclusion of Dublin Point would not in any event affect the OFT's conclusions. For the purposes of this analysis the OFT has examined the competitive effect of the transaction in live music venue operators in the UK.

Conclusion

30. Therefore, the OFT considers that on the basis of the evidence submitted, the relevant geographic market for venue operators, live music promotion and the supply of ticketing services is likely to be the UK.

HORIZONTAL ISSUES: PRIMARY TICKETING AGENCY MARKET

Introduction

31. As noted above, of the merging parties, only Ticketmaster is active in the supply of primary ticketing agency services. At present, Ticketmaster provides ticketing services to Live Nation under a [] preferential rights agreement⁵. []. Live Nation had, prior to the merger, made arrangements to change its ticketing services provider, after expiry of the agreement with Ticketmaster, to a third party provider of ticketing services, CTS Eventim (CTS). [].⁶
32. CTS has not to date been a provider of primary ticketing services in the UK, but would have become active through its new agreement with Live Nation. The theory of harm considered by the OFT in this section is whether the merger could result in a substantial lessening of competition in the provision of primary ticketing services as a result of the merger on the basis that: (a) absent the merger, CTS would have competed strongly to supply tickets in the UK market on the back of its agreement with Live

⁵ Live Nation and Ticketmaster are parties to a long-term agreement under which Ticketmaster has a preferential right to access for sale those tickets allocated by Live Nation to ticket agents. []. Under the agreement, [].

⁶ [].

Nation, and (b) as a result of the merger, CTS will exit⁷ the market or, in the alternative, will remain in the market but as a less effective competitor than it would have been with the Live Nation volume of business.

33. The theory of harm is therefore horizontal – in so far as it is a removal of competition⁸ on Ticketmaster from CTS – and would result from the merger, albeit that it involves a third party (CTS, effectively 'sponsored' to enter by Live Nation). This theory of harm is discussed fully below – considering in turn the counterfactual, whether the merger could result in CTS exiting the market, or alternatively remaining in the market but as a less effective competitor, and whether this could result in a substantial lessening of competition.

Counterfactual: CTS as a competitor in primary ticketing agency market

34. The OFT's guidance makes clear that, in most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition. However, the OFT may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger. The guidance gives as an example of such circumstances the situation where a firm is about to enter the market.⁹
35. At the time of the merger, CTS was not fully active¹⁰ in the primary ticketing agency market in the UK. Outside the UK it had annual sales of more 60 million tickets across 17 other countries, with over 2,000 clients, including promoters, sports teams and venues.
36. In their submission to the OFT, the parties confirmed that, prior to the merger, Live Nation had signed a preferential rights distribution agreement with CTS. [].¹¹ This agreement replaces the preferential rights agreement currently in place between Live Nation and Ticketmaster.¹² [].
37. Its contract with Live Nation would represent the first activity by CTS, Europe's largest ticketing agent, in the UK ticketing agency market. Moreover, on the evidence before it, the OFT believes that the scale of this activity would be likely to be significant: the agreement will give CTS the

⁷ It is not clear to the OFT whether it is more appropriate at this point to refer to CTS 'not entering' the market or 'exiting' the market. This reflects the factual uncertainty about the extent to which CTS can already be said to be active in the ticketing market in the UK, or has merely taken initial steps in preparation for future entry. For ease of explanation, the OFT has described CTS for the remainder of this decision as being present in the market (and therefore considered whether it would 'exit' it).

⁸ The OFT has not characterised this a potential competition theory of harm because, CTS had already taken steps to enter the market as a result of its agreement with Live Nation.

⁹ OFT Mergers – *substantive assessment guidance* (OFT516), paragraph 3.24.

¹⁰ See footnote 7

¹¹ The Letter of Intent was signed by both parties in August 2007.

¹² See footnote 5.

contractual right to service [10-20] per cent of all live music tickets in the UK, which the OFT estimates is likely to equate in practice to [10-20] per cent, making CTS the third largest ticket agent in the UK.¹³

38. As a result of the contract with Live Nation, the OFT considers that a realistic (and indeed likely) counterfactual scenario against which to measure the impact of the merger includes CTS as a significant competitor to Ticketmaster in the primary ticketing market in the UK.

Loss of CTS as a recent entrant to the UK market

39. The OFT has considered whether the merger could lead to the loss of CTS as a recent entrant to the UK ticketing agency market as a result of failure by Live Nation to adhere to the terms of the agreement between Live Nation and CTS.

40. [].

41. [], it may still be that Live Nation will not continue selling tickets exclusively (or at least on a preferential basis) through CTS after its merger with Ticketmaster. From a commercial perspective, it is credible that the merged entity will have a significant incentive not to supply CTS with the full volume required under the current contractual arrangement in order to provide business to Ticketmaster (and indeed it would benefit the merged business were CTS to exit the ticketing market as a result). When asked by the OFT about this, [].

42. Overall, in view of the significant degree of uncertainty regarding the scope of contractual relationships between Live Nation and CTS going forward and the lack of possible assurances which the parties could provide as to their commercial negotiations, the OFT has been unable to place significant weight on the prospect of Live Nation actually providing CTS with the volume of ticket sales envisaged by the contract or an equivalent volume of sales that Live Nation actually currently provides to Ticketmaster.¹⁴ Therefore, the OFT considers that there is a realistic prospect that the merger will result in CTS losing up to [10-20] per cent of ticket sales in the short term as a direct consequence of the transaction. This raises the question of whether CTS would remain in the UK ticketing market.

43. []. However, the OFT has not received sufficient evidence to conclude with

¹³ Tickets are allocated between ticket agents in varying proportions depending on the event. The parties' estimates suggest that Live Nation's market share by volume of tickets in promotion and venues is in the range of [10-20] per cent. The OFT understands that under Live Nation's contract with Ticketmaster, around [] per cent of tickets are sold by the preferred ticket agent, so on this basis CTS's sales may be expected to be of the order of [10-20] per cent (that is, []).

¹⁴ To the extent that Live Nation did not honour its volume commitments under the contract with CTS, this might result in damages payable to CTS. However, the payment of such damages does not mitigate or prevent the competitive impact of Live Nation's decision not to honour the contract volumes.

enough confidence that the steps taken by CTS towards entering the UK market are sufficient to demonstrate that CTS is committed to staying in the market regardless of the outcome of the merger and any related negotiations with Live Nation. The OFT did not receive detailed information about the amount of sunk costs that CTS has incurred to date, [].

44. The parties submit also that, regardless of what happens in relation to the contract with Live Nation, there are a number of alternative promoters and venue operators in the UK that could have 'sponsored' CTS's entry or even partner with CTS in the same manner as Live Nation. In particular, the parties argued that AEG could be a possible partner to CTS, considering that there is an existing contractual relationship between them in Germany.
45. However, despite numerous attempts to contact CTS, the OFT has been unable to confirm CTS' intentions with regard to its future operations in the UK market and how these would be affected by any loss of Live Nation sales. Moreover, the OFT considers that two pieces of evidence cast doubt on CTS's continued involvement in the UK market in the event that the merger proceeds and Live Nation does not honour its agreement with CTS.¹⁵
46. First, as far as the OFT is aware, prior to signing an agreement with Live Nation, CTS had not been active in the UK market and had not indicated any intention to enter the UK market in spite of being Europe's largest ticketing agent. To the OFT, this is at least consistent with a view that entry by CTS was contingent on its agreement with a significant promoter such as Live Nation.
47. Second, of those promoters that spoke to the OFT, no one of a comparable scale to Live Nation suggested that they would consider entering into a similar 'sponsorship/partnering' agreement with CTS. []. Moreover, given the structural links that exist between Live Nation and the two major remaining promoters, SJM and Metropolis (through the Academy Music Group),¹⁶ the OFT does not consider it likely that either would undertake such a strategy. The OFT's inability to identify another promoter to 'replace' volume lost by CTS from Live Nation is significant because the OFT's investigation in this case indicated that the main barrier to successful sizeable entry, and in particular expansion, in the primary ticketing market is access to tickets from both promoters and venue operators and the ability of entrants to set up a trusted and robust ticketing solution with sufficient historical customer sales data with which to promote future events. It was also pointed out that long term 'preferential supplier agreements', such as that currently operated between Live Nation and Ticketmaster, make it harder for a new entrant to gain significant

¹⁵ [].

¹⁶ Academy Music Group is majority owned by LN-Gaiety Holdings (a joint venture between Live Nation and Gaiety Investments), with minority participation by Metropolis Music, SJM Concerts, and MCD Productions.

market share, as opposed to a smaller presence, as a large part of the market is non-contestable at any one time. Therefore, in order for a ticket agent to achieve a large scale entry in the UK ticketing agency market, it is important to partner with a large promoter.

48. Overall, adopting a cautious approach, on the basis of the evidence available, the OFT considers that there is a realistic prospect that the merger will result in Live Nation significantly reducing its ticket volumes sold through CTS as a result of which CTS will exit the market.
49. In view of these arguments the OFT has sought to consider the extent of current competition in the market and the impact that the exit of CTS from the UK would have on competition in ticketing agency market in the UK.

Current competition in the UK primary ticketing market and the impact of exit by CTS

50. According to the parties, Ticketmaster accounted for [] million of the [] tickets sold through primary channels in the UK in 2008, giving it a market share of [40-50] per cent. The parties presented a number of arguments as to why Ticketmaster did not enjoy market power despite its [40-50] per cent share. The parties note that, whilst the market has grown by over 70 per cent since 2003, Ticketmaster's market share []. The parties argue that Ticketmaster faces strong competition from a number of operators, including See Tickets, with an estimated market share of [20-30] per cent, Ticketline and Seatem with market shares of [0-10] per cent each and a number of smaller operators. The parties also submit that Ticketmaster faces a constraint from the ability of venues to 'self ticket' using software from third party providers, which are not included within its market share estimates. Furthermore, the parties submit that there have been a number of examples of entry into the UK ticketing market since 2003, including HMV, Lastminute.com, Seatwave and Viagogo.
51. In respect of prices, although the parties accept that the price of Ticketmaster's ticketing services (that is, booking and transaction fees) to consumers has risen since 2003, they note that this increase has been offset []. Consequently, the parties argue that, consistent with the market being competitive, the overall margin per ticket retained by Ticketmaster has remained largely constant.

52. Finally the parties submit that they are not key trading partners for promoters, and are subsequently not sheltered from competition from the rest of the market. In addition, the parties submitted evidence showing that there are a number of events where Ticketmaster was not an appointed ticket agent or that just a small proportion of tickets were allocated to it.¹⁷
53. Overall, the parties argue that there is no basis on which to conclude that a lack of competition exists in the primary ticketing market, or that CTS, through its agreement with Live Nation, would materially increase the degree of competition faced by Ticketmaster. The parties further argue that this position is entirely consistent with the OFT's 2005 market study, in which the OFT stated that it had not found a lack of competition between ticket agents resulting in a higher level of gross ticket prices for consumers. On this basis, the parties argued that Ticketmaster does not have market power.
54. By way of initial comment on the parties' arguments, during the course of its merger investigation the OFT considered carefully the findings of the 2005 market study in order to determine what evidential value – if any – could be drawn from it in this context. The OFT considers that, whilst the 2005 market study is helpful in understanding how market conditions may have changed over the last four years, it had a very different remit and focus from the merger investigation under consideration.
55. Of particular relevance in this context is that the 2005 market study focused on examining the explanation for consumers' concerns that ticket agents charged high fee levels. In particular the OFT considered whether a distortion of competition between ticket agents could be resulting in higher fees.¹⁸ The 2005 market study looked at the existing arrangements between event promoters and ticket agents (such as the one between Ticketmaster and Live Nation) in order to examine the form and intensity of competition between ticket agents, and to consider the means by which competition between ticket agents and promoters could potentially be harmed through these vertical agreements.
56. However, the 2005 market study did not analyse the levels of horizontal competition between ticket agents in terms of the supply of tickets outside the context of the vertical agreements, rather, it examined the competition

¹⁷ The parties presented a list of [] large festivals, in which Ticketmaster sold less than [0-10] per cent of tickets in [] instances. However, the OFT notes that in [] of these events (around [60-70] per cent), Ticketmaster sold [15-25] per cent or more of the tickets. The parties also presented a list of small live music events in London and were able to identify numerous instances where Ticketmaster was not active in ticketing. However the OFT notes that a number of the identified small events were not pre-ticketed (instead, tickets were sold 'on the door'). It is therefore unclear how this evidence is relevant to Ticketmaster's position in pre-ticketed events.

¹⁸ OFT 762, paragraph 4.1.

between ticket agents to bid to secure ticket contracts from promoters and venue operators.

57. Finally, and most importantly, the OFT was not required in the 2005 market study to consider the extent to which ticketing agency market could be made more competitive through the entry of a strong supplier.
58. Therefore, the OFT considers that the findings in the 2005 market study would not be inconsistent with any finding that the ticketing market in 2009 could be made substantially more competitive by the entry of a new, significant player.
59. Notwithstanding the parties' arguments, the OFT is unable to rule out the possibility that CTS remaining in the UK market would result in a substantially higher degree of competition in the primary ticketing market than is presently the case for three reasons.
60. First, the OFT notes that the market remains highly concentrated despite the prevalence of small scale entry in recent years. As confirmed by the parties, Ticketmaster's market share has also remained relatively constant since 2003 at [40-50] per cent. Moreover, Ticketmaster's margins have not fallen over the same period which, taken together with its consistent market share, is not consistent with the argument that small scale entry has constrained the market leader's behaviour.
61. Second, despite there being numerous small players in the UK ticketing market, the evidence collected by the OFT is consistent with there being a continued clear distinction between the 'big two' ticket agents and the fringe of smaller competitors, as is indicated by their relative size and failure to gain market share from Ticketmaster¹⁹. The OFT's investigation revealed that for pre-ticketed events both See Tickets and Ticketmaster are almost universally active across the majority of shows, whilst the same is not true for smaller players.²⁰ The OFT considers this to be consistent with the parties' arguments, discussed at paragraph 99 below, that promoters face significant risks if they do not sell out events and must therefore ensure that their tickets are advertised by the major ticket agents. This factor means that promoters sell tickets through the 'big two' in order to benefit from the scale advantages which these ticket agencies bring (see paragraph 47). To the extent that smaller fringe ticket agents are used to complement the larger ticket agents by increasing the range of marketing channels for an event, this structure may mean their effectiveness as

¹⁹ See further analysis in paragraph 77 onwards.

²⁰ The OFT took a random sample of the 25 must see shows as identified by thisislondon.co.uk and sought to identify whether See Tickets, Ticketmaster and Ticketzone advertised tickets for these shows. The OFT found that Ticketmaster and See Tickets were providing ticketing services for all 25 shows. Ticketzone advertised tickets for only 6 shows.

competitors to the 'big two' is in fact reduced.²¹

62. Third, by contrast to previous instances of entry, the OFT believes that in the absence of the merger, CTS would have a high impact on competition in the ticketing agency market. In particular, through the distribution agreement with Live Nation, CTS has the preferential right to sell Live Nation tickets, which account for an estimated [10-20] per cent of the total volume of tickets sold for live music events in the UK, which would otherwise be serviced by Ticketmaster. The immediate effect of this transfer of ticket volumes would be to reduce the industry HHI from [] to [], even assuming that Live Nation actually transferred only the same volume of its business that it currently provides to Ticketmaster (therefore equating to [10-20] per cent).²² In addition, going forward, given that CTS is the largest ticket operator in Europe, with the scale, scope and international reputation with which to challenge Ticketmaster for new contracts, the OFT considers it likely that CTS, in partnership with a significant promoter such as Live Nation, could achieve a greater share of supply than this. The OFT notes from third party comments that access to historic marketing data (that is, information relating to customer contact details and previous transactions) is an important factor in the sales of tickets. The OFT considers it plausible that CTS's entry would therefore be enhanced by the scale of data available to it by servicing the Live Nation contract (as noted in paragraph 47 above).

Alternative scenario: CTS remaining in the market but partnering with a provider other Live Nation

63. The OFT has also considered the potential impact on competition in the market if CTS were to lose the benefit of the Live Nation volumes but were to decide to remain in the UK market in any event.
64. This is the scenario envisaged by the parties when they commented that, regardless of what happens in relation to the contract with Live Nation, there are a number of alternative promoters and venue operators in the UK that could have 'sponsored' CTS's entry or even partner with CTS in the same manner as Live Nation.
65. As stated above, the OFT has not been able to discuss this position with CTS. [] informed the OFT that they would not consider such a strategy given the significant costs that would be involved in switching from

²¹ The OFT is not suggesting that the market has tipped towards Ticketmaster since the 2005 market study. Indeed, the 2005 market study found no evidence (paragraphs 4.42 and 4.43) that the market had tipped such that smaller players had to exit. Rather, the question for the OFT in the context of this merger analysis is whether certain ticket agents - and in particular Ticketmaster - are not subject to as vigorous an amount of competition from current players as they would be in the event of entry of CTS.

²² The Herfindahl-Hirschman Index (HHI) is a commonly accepted measure of market concentration. It is calculated as the sum of the squared market shares of each firm in the market. The HHI ranges from 10,000 for a monopoly to close to zero for an atomistic market.

Ticketmaster.

66. On the basis that [], this counterfactual would therefore involve CTS seeking to establish volumes in the UK market without being able to enjoy the scale of volume it would have gained by partnering with Live Nation.²³ It is true that CTS is a major European ticketing agency with scope and international reputation. However, for the reasons given in paragraphs 61 and 62 – in particular the importance of access to marketing data to increase economies of scale in ticketing – the OFT considers that CTS' prospects of growing into a significant competitor to challenge the 'big two' would be materially reduced by the loss of the Live Nation volume.

Conclusion

67. Overall, on the basis of the above, the OFT believes that there is a realistic prospect of a substantial lessening of competition in the primary ticketing agency market in the UK arising from the loss of an important competitor in the relevant market, and consequently by the reduction of the large ticket agents from three to two, should CTS exit the UK market as a result of the merger.
68. The OFT believes that the test for reference is met given that it is plausible that CTS will exit the market if the merger goes ahead. However, the OFT notes that there is also a realistic prospect of a substantial lessening of competition based on the counterfactual in which CTS remains in the market but is a less effective competitor to challenge the 'big two' as a result of the loss of the Live Nation volumes.

COORDINATED EFFECTS: PROMOTIONS

69. During the course of its investigation, the OFT received no comments from either the parties or third parties regarding coordinated effects. Nonetheless in Hamsard/Academy the CC was concerned about coordinated effects, although it ultimately concluded that the merger would not have a significant impact on the ability of live music promoters to engage in coordinated behaviour because of the competitive constraint arising from the strong position of agents in relation to promoters.
70. The OFT considered whether this merger could give rise to coordinated effects in promotion. In particular, the OFT understands from third parties that the merged entity will have access (through Ticketmaster) to information regarding the planned events of all its main rivals in promotions. In certain circumstances, an increase in the availability of information on rivals' activities can enhance coordinated behaviour. This may be the case if, for example, it materially increases the 'transparency' of a market, thereby enabling all firms to better monitor each other's activities and enhances their ability to punish deviation from a coordinated

²³ [].

strategy.

71. In response to these arguments, the parties submit that the merger will not provide Live Nation with any incremental information with regard to its rivals' planned bids. The parties submit that agents readily disseminate such information already. []. Finally, the parties note that information on future tours is also disseminated by advertising agencies who service the pre-tour advertising requirements of all the major promoters. However, as noted at paragraph 86, third parties did not confirm these arguments and instead suggested that the merger may confer some business sensitive information on Live Nation's promotion business.
72. With respect to the mechanisms by which this information could lead to coordinated outcomes, the parties note that, to the extent that any such additional information would be available, the 'flow' of information does not operate both ways, so the merged firm's rivals would not benefit from increased transparency. This, it is argued, would significantly reduce the likelihood that such information would result in coordinated outcomes.

Conclusion

73. Overall, the OFT has not found evidence suggesting that the merger will materially increase the likelihood of coordination in the promotions market, particularly given that Live Nation alone would benefit from potentially increased transparency.

VERTICAL ISSUES

Foreclosure of promoters

74. Third parties told the OFT that, as a ticket agent, promoter and venue operator, the merged entity would have the ability and incentive to foreclose promoters by limiting access to Ticketmaster as a ticket agent or by providing it with business critical information on its rivals. By foreclosing promoters, Live Nation may, third parties argued, be able to raise prices to them and/or restrict the number of live music shows and the number of bands touring.
75. Based on the evidence before it, the OFT considers that ticketing agency services are a key input for promoters. As noted by the parties and third parties, promoters distribute tickets among ticket agents with a view to selling out the events that they promote. If events do not sell out, promoters bear the full financial risk. In this setting, ticket agents act as a point of sale, helping market the event and holding important information such as customer contact details and purchase histories on which the marketing of events is based. In addition, ticket agents reimburse promoters the full value of ticket sales and may pay rebates to promoters in order to secure exclusive distribution rights for ticketing events. In turn, rebates and marketing activities enable the promoter to offer a competitive

package to agents. Moreover, the marketing activities of ticket agents, which include 'targeted mail shots' to customers who have purchased tickets to similar events previously and increased online presence via website advertising, lower the risk that an event will fail to sell out.

76. Third parties told the OFT that, by virtue of the fact that ticket agents operate as the point of sale for promoters, ticket agents hold information on current and past sales of every event that they have ticketed for a promoter—including sales activity (who tickets are sold to, at what price), as well as the success of current and previous marketing campaigns (in terms of the rate of ticket sales). Third parties also said that ticket agents will necessarily be aware of information on all of the key variables of promoters' 'bids' to artists' agents, such as the dates on which planned events will be staged, the prices at which tickets will be sold, the timing of pre-sales and the seat allocations at venues.
77. Against this background the OFT has assessed whether the transaction gives the merged firm the ability and incentive to foreclose rival promoters. In doing so, the OFT has assessed whether rival promoters would be foreclosed to an extent that compromises their ability to compete, such that there is a realistic prospect of a substantial lessening of competition in promotion.²⁴
78. In assessing the effect of the transaction in these terms, the OFT recognises that vertical mergers are generally efficiency enhancing, in particular because they may eliminate the 'double mark up' that arises when, pre-merger, promoters and ticket agents set their prices independently and both charge a mark-up, resulting in prices to consumers being higher than suits the joint interest of both. A vertical merger may enable and provide the incentive for the merged firm to internalise this double mark-up, resulting in lower prices. However, the parties submitted that—on the basis of the OFT's 2005 market study—their existing long-term vertical supply agreement already achieves this. On this basis, the OFT believes that the merger may not be regarded as efficiency enhancing in this respect.

Ability to foreclose promoters

79. The parties submitted to the OFT that Ticketmaster does not have the ability to foreclose promoters as Ticketmaster is not a key trading partner for promoters, nor does it benefit from having market power. In particular, the parties argue that there are a number of alternative ticket agents and provided evidence of a number of examples of events and festivals where few or no tickets were distributed by Ticketmaster (see paragraph 52 above).

²⁴ This 'ability, incentive and effect' framework is the standard one used by the OFT to assess vertical foreclosure concerns. See, for example, *Anticipated joint venture between Goodrich Corporation and Rolls-Royce plc*, OFT decision ME/3875/08, 8 December 2008.

80. However, on the evidence before it, the OFT considers that, for the majority of pre-ticketed events (see paragraph 58 above), Ticketmaster should be considered to be a key trading partner for promoters to use to minimise the financial risk of an event not selling out.²⁵
81. The OFT notes that Ticketmaster accounts for [40-50] per cent of tickets sold for live music events in the UK, and that no other ticket agent has a comparable market share (the next nearest being See Tickets with some [20-30] per cent). Ticketmaster's market share is some way above the 30 per cent threshold below which the European Commission considers it unlikely that there is sufficient market power for any anti-competitive effects in a vertical merger.²⁶ In addition, from the selection of ticket agents available to promoters, by virtue of the need for promoters to minimise the risk of events failing to sell out, the volume of tickets sold by Ticketmaster ([] million) makes it a key trading partner.
82. In this regard, only one promoter told the OFT it acts entirely independently of Ticketmaster and []. Another promoter told the OFT that promoters are constrained in their ability to switch fully away from Ticketmaster because other ticket agents such as [] are not capable of supplying all the logistical facilities that Ticketmaster provides and because smaller ticket agents such as [] do not represent viable options as they do not provide a full range of services, are not recognized by consumers and have not been tested at scale.
83. This position is clearly distinguishable from smaller ticket agents or new entrants, who appear to have a far narrower breadth of event coverage and whose entry has not acted to reduce Ticketmaster's prices or margins since 2003.
84. The OFT's investigation suggests that Ticketmaster is active in the large majority of events to some degree, suggesting that Ticketmaster's marketing activities are an important input to the promotion of a large majority of events. In particular, third parties stated that Ticketmaster has a large customer database (contact details and purchase history), which gives it the ability to accurately market future events to a uniquely large number of potential customers.
85. Therefore, according to the evidence submitted, the OFT considers that there is a realistic prospect of the merging firm having the ability to foreclose rival promoters, based on Ticketmaster's position in the market as a key trading partner and on some degree of market power.

²⁵ This finding does not preclude the possibility of See Tickets from also being considered a key trading partner (see paragraph 58)

²⁶ Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentration between undertakings, 2008/C 265/07, paragraph 25. See also, *Anticipated joint venture between Goodrich Corporation and Rolls-Royce plc*, OFT decision ME/3875/08, 8 December 2008.

86. Furthermore, third parties argued that the merged firm could use its preferential access to business sensitive information to undermine the activities of alternative promoters. Specifically, they argued that the merged firm will be in a uniquely strong position to compete for promotion business by virtue of its access to rivals' historical customer sales records. They also argue that Live Nation may be able to pre-empt third-party events, to set prices that enable it to outsell its rivals and fill more venues than competitors can match or adjust promotional activity on its events in response to ticket sales of its rivals.
87. Conversely the parties submitted to the OFT that such information would not enable Live Nation to increase sales in promotion as the information is not 'business critical' in view of the fact that promoters are already in a position to access historical data on their rivals by virtue of the fact that this information is jointly owned by Ticketmaster. In addition, the parties argued that previous sales data is a poor predictor of future sales, and that internet ticket sales mean that anyone with on-line access can get information on ticket prices and availability. Further, according to the parties, artists' agents will disseminate bid information in order to 'play off' promoters in the bidding process.
88. However, the OFT does not consider it necessary to conclude on this issue, in particular whether Ticketmaster's ability could be strengthened through its preferential access to business critical information, because it has already concluded that Ticketmaster has the ability to foreclose rival promoters based on its position as a key trading partner and on some degree of market power.

Incentive to foreclose promoters

89. The OFT considers that the merged firm's incentive to engage in foreclosure of the type discussed depends on the trade-off between the profit lost by the merged firm in ticketing (as it sells fewer tickets of Live Nation's rival promoters) and the profit gained by the merged firm in the promotion market, as Live Nation takes business from rival promoters.
90. In particular, this trade-off may depend on:
- Ticketmaster's profit margins in ticketing, particularly for concerts of rival promoters to Live Nation. Any foreclosure strategy is likely to lead to some loss of business to ticketing rivals leading to a loss of these margins. In turn this may depend on the availability of substitutes and how those substitutes respond (for example whether they increase their prices or otherwise worsen their competitive offers when customers seek to switch to them), and
 - Live Nation's profit margins in promotion. A successful foreclosure strategy will lead to additional business being won from rivals here with an attendant increase in profits.

- The volume of business being lost downstream in ticketing as a result of the foreclosure strategy will lead to a lower profitability in this area of business, however
 - the business being won upstream in promotion will increase profitability here and this trade off will determine whether such a foreclosure strategy is profitable overall.
91. The evidence received by the OFT on these factors was mixed. In particular on the basis of data submitted by the parties to the OFT, operating profit margins in ticketing are around [] per cent as a proportion of the gross ticket value. Third parties told the OFT that operating profit margins in promotion are lower, averaging [] (albeit varying widely around this average, as some live music events are very successful whereas others lose money). On this basis, the business lost in ticketing appears equally profitable to the business won in promotion (notwithstanding the volumes of each), which would not tend to suggest much of an incentive to foreclose. Conversely, in their submissions the parties provided an illustrative 'revenue split' for a hypothetical £50 ticket, which indicates that promoters' revenue is significantly greater than that of ticket agents. On this basis, the business won in promotion appears more profitable than the business lost in ticketing (notwithstanding the volumes of each), which would tend to suggest an incentive to foreclose.
92. However, the parties further argued that Live Nation's incentives to foreclose rival promoters are lessened by the fact that Live Nation does not have sufficient market power in promotion to recoup sufficient business to make such a strategy profitable and that, due to the fact that Live Nation only accounts for approximately [] per cent of Ticketmaster's ticket volumes, it would be commercially disastrous for the merged entity to cease dealing with other promoters in a competitive fashion.

Conclusion

93. Overall, based on the evidence submitted, the OFT believes that the merged firm has the ability to foreclose rival promoters. However, there is insufficient evidence for the OFT to conclude that the merged firm has the incentive to foreclose rival promoters. However, given that the OFT has already concluded that there is a realistic prospect of a substantial lessening of competition in the ticketing agency market from the loss of a new entrant (CTS), it can leave open the issue of whether the test for reference is met also in relation to foreclosure of promoters.

Foreclosure of primary ticket agents

94. Third parties argued that, because Live Nation has a significant market position across the two channels by which tickets are made available (that is, venues and promotion), they would have an ability to foreclose rivals in ticketing as they would control a large proportion of the total tickets

entering the market via these two channels.

95. In assessing the strength of these arguments the OFT has sought to estimate the proportion of all ticket sales currently controlled by Live Nation through its promotion and venue operations and the extent to which these are already serviced by Ticketmaster.

Ability to foreclose ticket agents

96. With regard to promotion, Live Nation submitted that it has a market share of [10-20] per cent or less, based on the number of tickets sold. Overall, the OFT has found no conclusive third party evidence on which to dispute these findings.
97. Therefore, given Live Nation's relatively modest share, and the absence of information suggesting that it has market strength beyond that indicated by its share level,²⁷ the OFT concludes that the merged entity does not have the ability to foreclose rival ticket agents from selling tickets for Live Nation promoted events and events in Live Nation's venues, in such a way as to harm competition.

Incentives to foreclose ticket agents

98. The OFT considers that the merged firm's incentive to engage in foreclosure of the type discussed depends on the trade-off between the profit lost by the merged firm in promotion and venues (as it promotes and hosts fewer live music concerts) and the profit gained by the merged firm in the ticketing market, as Ticketmaster takes ticketing business from rival agents.
99. In view of this, based on the evidence submitted by the parties and third parties, it is in the promoter's interest to distribute tickets across the entire retail spectrum, thereby minimising the risk of events not selling out. In addition, Live Nation contends that this is the reason why Live Nation presently sells around [] per cent of tickets through third parties, [].
100. Overall, the OFT concludes that it is not necessary to analyse further whether the merger confers to the parties the incentive to foreclose ticket agents, given that the OFT has concluded above that the parties do not have the ability to do so.

Foreclosure of secondary ticket agents

101. A small number of third parties argued that, by merging with Live Nation, Ticketmaster will have the ability and incentive to diminish the access of

²⁷ The OFT considers that the fact that Live Nation has a modest market share, does not undermine its conclusion that Live Nation is a key ingredient as a promoter and venue operator to sponsor downstream entry. The OFT believes that such a key position can be achieved without having to have market power.

third party ticket agents to tickets, limiting the ability of consumers to secure via third parties tickets to some of the most highly sought concerts and events (ie those promoted and operated by Live Nation). In turn, this may increase the ability of the merged entity to achieve higher margins on the secondary market, thereby encouraging it to allocate more tickets through its secondary ticket agency operation.

102. In response to these issues the parties made a number of comments. Firstly, and consistent with the submissions of a number of third parties, the parties note that Ticketmaster has no control of ticket allocations, which are determined between the venue, promoter and artist. In view of this, the parties argue that, to the extent that the merged entity has the ability to distribute tickets between the primary and secondary market in this manner, this ability exists pre-merger. Secondly, the parties note that, at present, only a very small amount of tickets for its events have been allocated to the secondary market (around 2,300) by artists alone, who may use Ticketmaster's 'Get Me In' platform to sell directly to customers. This, it is argued, provides evidence that such a strategy would not be profitable, given that Live Nation already has the ability to act in this manner.

103. In addition to these arguments, the OFT notes (as discussed at paragraph 97) that Live Nation does not have the outright incentive to foreclose third parties by limiting access to Live Nation tickets.

104. Therefore, for the reasons discussed above, the evidence before the OFT indicates that the parties do not have the outright incentive to foreclose third party access to Live Nation tickets. Moreover, the OFT has been unable to identify a link between the merger and the parties' ability to undertake such a strategy in ticket distribution in the secondary ticketing market.

BARRIERS TO ENTRY AND EXPANSION IN PRIMARY TICKETING AGENCY MARKET²⁸

105. The parties submit that barriers to entry are relatively low in ticket agency market in the UK. In particular, the parties stated that the set-up of a ticketing box-office would require approximately £1 million in investment.

106. In support of this point, the parties identify a number of examples of recent entry, including HMV, Lastminute.com, Seatwave and Viagogo. In addition, the parties submit that credible entry in the UK could be 'sponsored' by other UK promoters such as AEG. The parties stated that evidence of entry into the market was consistent with the conclusions of the OFT's 2005 market study (ie that smaller ticket agents were not being foreclosed).

²⁸ The OFT has considered barriers to entry and expansion in primary ticket agency services only because it has not concluded on whether there is a realistic prospect of a substantial lessening of competition in any other markets.

107. The OFT's 2005 market study found that the existence of vertical relationships such as that between Live Nation and Ticket Master does not foreclose the market to entrants by limiting their ability to achieve economies of scale. Indeed, the OFT notes that this finding of the 2005 market study is consistent with the fact that since 2005 the new entrants into the market appear to have been sustainable, with no significant instances of exit from the market since 2005.
108. However, the continued existence of a fringe of smaller suppliers, including certain new entrants, does not exclude the prospect that the entry of CTS could have a substantial pro competitive effect on the structure of competition in the market that has not been achieved by other smaller entrants. In particular the OFT notes that, despite a number of instances of entry, the market remains highly concentrated. Moreover, as discussed in paragraph 60 above, Ticketmaster's margins have not fallen since entry has occurred and there is a clear distinction to be made between the big two ticket agents and smaller entrants in terms of the breadth of event coverage and their scale of ticket volumes.
109. In addition, as discussed in paragraph 46, the main barrier to large scale entry, and in particular expansion, in the ticketing agency market is access to tickets and in particular the partnership with large promoters and venue operators with sufficient customer data.
110. Accordingly, whilst small scale entry may be achievable, and indeed has occurred since 2003, it is questionable whether such entrants can achieve sufficient scale to challenge Ticketmaster's market share or status as a key trading partner unless they are 'sponsored' by large promoters or venue operators.
111. The OFT considers the fact that CTS, Europe's largest ticket agent, only entered the market upon agreeing a preferential rights distribution agreement with Live Nation is consistent with there being necessary benefits of 'sponsorship' for potential entrants to compete with the large two ticket agents in the UK.
112. With regard to potential 'sponsors', the OFT has been unable to confirm with any promoters or venue operators that, going forward, they would be willing to 'sponsor' entry or that this is considered as a strategy in the short term. In contrast, one third party confirmed that 'sponsoring' entry would require large investments. Moreover, the OFT has been unable to collect evidence from Mama Group regarding the nature of their recent joint venture with HMV and the scale of entry in the ticketing market undertaken by HMV. Finally, the OFT has not been able to ascertain whether any of the alternative credible entrants identified by the parties (which include eBay and Amazon among others) would consider entering the UK ticketing market, and whether they are well placed to enter the ticketing agency market considering their present operations.

113. Overall, on the basis of the evidence before it, the OFT has been unable to conclude that entry will be timely, likely and sufficient to mitigate the potential loss of competition that would arise from the loss of or reduction in competitive pressure from CTS.

BUYER POWER

114. Given that ticket buyers are individual consumers, no significant countervailing buyer power can realistically be attributed to these customers.

115. In their submissions the parties do, however, argue that artists' agents hold a strong negotiating position in relation to promoters and ticket agents. The parties note that the agent/artist derives by far the largest share of income from any event, and has control over the key aspects of events.²⁹ The parties note in their submission that, to the extent that prices to end consumers have risen, these have been fully rebated by Ticketmaster to promoters and artist agents, as evidenced by Ticketmaster's stable margins. Promoters, by contrast, operate on relatively low margins, which could be indicative of a degree of negotiating power from the perspective of artists' agents.

116. The parties also presented a number of arguments as to why agents would constrain any anti-competitive behaviour in the ticketing market directly. In particular the parties submit that some artists (and their managers) take a direct interest in the sale and distribution of tickets for the events at which they perform. They can, the parties argued, dictate (in negotiations with the promoter) that a proportion of tickets be allocated in a certain way – either for direct sale by themselves, for sale to their fan clubs, or, increasingly, for general sale via a specified ticket agent, thereby acting as a constraint on the prices that can be charged by ticket agents. Moreover, the parties submit that some artists have started to avoid using ticket agents for certain ticket sales (in order to avoid their fees or to retain the fees themselves), and to sell tickets directly to consumers from their (artists') agent's own website.

117. Finally, the parties note that this evidence is consistent with the CC's findings in Hamsard/Academy, where a degree of buyer power was attributed to agents.

118. Third party responses on this issue were mixed. Several agents considered that the merger would have substantial adverse effects upon competition in the market, and did not identify their buyer power as potentially offsetting these adverse effects. However, at least two alternative sources indicated

²⁹ Examples of agents' influence, or bargaining power, include instances where they have affected both the ticket price and the booking fee paid by end customers, where they have achieved increases in the 'guaranteed fees' offered by promoters to artists, and where they have been able in practice to break their contracts with promoters.

to the OFT that the power of artists was significant.

119. With respect to the parties' evidence, the OFT notes that the examples provided by the parties generally relate to very high profile, in demand, acts such as []. The OFT is unclear whether the same degree of bargaining power exists with respect to the second tier of less well known artists, or to new acts.
120. Moreover, whilst the OFT notes that Ticketmaster's margins have not risen, it is also the case that they have not fallen (despite new entrants into the primary ticketing market) and that price rises have been passed on to end customers. The OFT is not clear that this trend is consistent with there being buyer power at the level of artists' agents that would operate so as to constrain potential anti-competitive merger effects from affecting end consumers.
121. Overall, on the basis of the evidence before it, the OFT was not able to conclude with confidence that agents' buyer power would constrain anti-competitive effects arising in the primary ticketing market from the merger.

THIRD PARTY VIEWS

122. The OFT received comments and views about the merger from a large number of third parties, agents, promoters, venue operators and ticket agents. The large majority of the third parties who contacted the OFT expressed a high degree of concern regarding the potential for the merger to reduce competition in the UK live music industry. The concerns raised by third parties during the OFT's investigation covered a relatively broad range of issues.
123. First, a concern was raised regarding the impact of the merger on the ticketing agency market in the UK. In particular, it was put to the OFT that the merger may be expected to give rise to a substantial lessening of competition in the relevant market, as it removes Live Nation as the most credible 'sponsor' of a new entrant as a ticket agent in the UK. This concern has been dealt with above.
124. Second, a number of competitors expressed the view that the merger would allow the new entity to foreclose rival promoters to access Ticketmaster services. Moreover, many third parties argued that the merged entity will have access to business-critical information, allowing it to have an unfair advantage to its competitors in promotion and therefore the ability to outbid them in future live music events. These concerns have been dealt with above.
125. Third, third parties argued that the merged entity will be able, by foreclosing ticket agents to Live Nation tickets, to achieve higher margins on the secondary market, thereby encouraging it to allocate more tickets through its secondary ticket agency. However, these concerns were largely

unsubstantiated and the OFT believes, as analysed previously, that the merger does not create the realistic prospect of a substantial lessening of competition through foreclosure of ticket agents by denying access to Live Nation sales.

126. Furthermore, a few competitors stated that the merger will allow the new entity to bundle its complementary services in ticketing and promotion and therefore exclude competitors and extract higher prices. The OFT did not consider necessary to investigate these concerns further, because it has found that the test of reference is met on other grounds.

127. Other third parties argued that the merged entity may have an increased ability to shift tickets into the secondary market, thereby increasing prices to customers. The OFT considered these issues carefully during its investigation but, overall, considered that the evidence before was not sufficient to warrant concern.

ASSESSMENT

128. Ticketmaster and Live Nation are proposing to merge to create a new company which will be active in the supply of services in the live music industry, namely in the supply of ticketing agency services, live music promotions and live music venue operations in the UK.

129. The parties are currently active at different levels of the supply chain in the live music industry. In particular, Ticketmaster is a ticket agent and Live Nation is a promoter and venue operator in the UK. Therefore, there is no horizontal overlap between the parties.

130. However, the OFT believes that there is a realistic prospect of a substantial lessening of competition in the ticketing agency market in the UK by the loss of one important competitor in the relevant market, thereby reducing the number of large ticket agents from three to two, given the risk that CTS will exit the UK market as a result of the merger. This arises because:

- absent the merger, CTS enters the market on the back of its preferential rights distribution agreement with Live Nation from []
- it is uncertain whether, given the merger, CTS will in fact enjoy the volumes of sales envisaged under the agreement with Live Nation and therefore it is credible that it will decide to exit the market in the absence of this volume, and
- the OFT believes that CTS remaining in the UK market and enjoying the scale benefits of its contract with Live Nation would result in a higher degree of competition in the primary ticketing market than is presently the case by challenging the current position of the 'big two' (including Ticketmaster).

131. The OFT concluded that there is also a realistic prospect of a substantial lessening of competition based on the counterfactual in which CTS remains in the market but is a less effective competitor to challenge the 'big two' as a result of the loss of the Live Nation volumes.
132. With respect to the concerns raised in relation to the possibility or otherwise of any upstream or downstream foreclosure issues, the OFT examined whether the transaction confers on the merged entity the ability and incentive to foreclose rival promoters and/or ticket agents to an extent that compromises their ability to compete, such that there is a realistic prospect that a substantial lessening of competition will arise.
133. The OFT has been unable to rule out the prospect that the merged entity will have the ability to foreclose promoters given its [40-50] per cent share of the tickets sold in the UK, the fact that the volume of tickets it sells ([] million) may make it a key trading partner and given that new entry by numerous ticket agents has not impacted on Ticketmaster's margins and market share over time. However, given that the OFT has already concluded that there is a realistic prospect of a substantial lessening of competition in the ticketing agency market from the loss of a new entrant (CTS), it has not had to decide whether the merged party would have an incentive to foreclose promoters, and can therefore leave open the issue of whether the test for reference is met also in relation to foreclosure of promoters.
134. With respect to the ability to foreclose ticket agents, the OFT has not found evidence to support the view that Live Nation benefits from market power in promotions and venue management in the UK. Therefore, the OFT concludes that the merged entity does not have the ability to foreclose rival ticket agents from selling tickets for Live Nation promoted events and events in Live Nation's venues. In addition, the OFT believes that there are strong arguments to suggest that, in the event that such ability did exist, the parties may not have the incentive to do so. In particular, the evidence by the parties and third parties, suggests that it is in the promoters' interest to distribute tickets across the entire retail spectrum, thereby minimizing the risk of events not selling out.
135. Finally the OFT ruled out any concerns regarding the ability and incentive of the merged entity to achieve higher margins on the secondary ticketing agency market, thereby encouraging it to allocate more tickets through its secondary ticket agency operation.
136. The OFT has been unable to conclude that entry will be timely, likely and sufficient to mitigate the potential loss of competition that would arise from the loss of CTS in relation to the primary ticketing agency market. In addition, the OFT was not able to conclude with confidence that agents' buyer power would constrain anti-competitive effects arising from the merger.

137. Consequently, the OFT believes that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

UNDERTAKINGS IN LIEU

138. Where the duty to make a reference under section 33(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.

139. The OFT's *Mergers Substantive Assessment Guidance* states that, 'undertakings in lieu of reference are appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation' (paragraph 8.3).

140. The parties offered a behavioural undertaking according to which Ticketmaster will not share any customer data³⁰ from one client's (promoter-venue operator) events with any other client, and it will not share one client's client data³¹ with another client. In particular, the parties stated that when an event is being set up on the Ticketmaster ticketing system, the current ticketing system has the ability for flags to be established for that event which identify which individuals are allowed access to the data for that particular event. Accordingly, the parties proposed that the functionality needed to ensure that the above rules are followed is already available on the Ticketmaster ticketing system.

141. Such a remedy would, according to the parties, ensure that the promotion and venue management departments of the combined entity would only receive the same data from the ticketing department of the combined entity that Live Nation currently receives from Ticketmaster. Therefore, according to the parties, the combined entity would commit that individuals within the ticketing department could not share data of third party client (promoter –venue operator) with the promotion and venue departments of the combined entity.

142. As noted above, the OFT left open the issue as to whether the test for reference is met in relation to the foreclosure of promoters given that it has already concluded that there is a realistic prospect of a substantial

³⁰ Data regarding customers who have purchased tickets, including their name, contact information and their purchase history

³¹ Financial data relating to a client's event, including on-sale dates for a client's event, the number of tickets sold for a specific event, and the proceeds from those sales for a specific event.

lessening of competition in the primary ticketing agency market. For this reason, the proposed undertaking would not remedy, mitigate or prevent the substantial lessening of competition identified in the primary ticketing agency market. In addition, the undertaking does not address concerns arising out of Ticketmaster's position as a key trading partner and through the existence of some degree of market power (it attempts only to deal with foreclosure concerns arising out of the use of business sensitive information).³²

DECISION

This merger will therefore **be referred** to the Competition Commission under section 33(1) of the Act.

ENDNOTES

143. The parties clarified, subsequently to the decision, that Live Nation has '360 degree' deals with only six artists, and only one (namely, Madonna) of those includes recorded material.

³² Such a behavioural undertaking would, in any event, be unlikely to be considered clear cut, as stated in the OFT's *Mergers Substantive Assessment Guidelines*.