LATHAM & WATKINS LLP

ANTICIPATED ACQUISITION OF

MCD PRODUCTIONS BY LN-GAIETY HOLDINGS LIMITED

Reply to the CMA's phase 1 decision of 11 July 2019

on relevant merger situation and substantial lessening of competition

14 August 2019

TABLE OF CONTENTS

I. INTRODUCTION AND EXECUTIVE SUMMARY

(1) This submission responds to the CMA's Phase 1 decision dated 11 July 2019 (the "Decision") concerning the anticipated acquisition by LN-Gaiety Holdings Limited ("LN-Gaiety") of MCD Productions Unlimited Company ("MCD" and together with LN-Gaiety, the "Parties") (the "Proposed Transaction").[1] The Proposed Transaction involves operations in the Republic of Ireland and, to a limited extent, in Northern Ireland.

A. The Parties

(2) ***MCD***. MCD is a promoter of live events. [✂]. MCD is currently owned by Gaiety, which is ultimately owned and controlled by Denis Desmond and his wife Caroline Downey.

(3) ***LN-Gaiety***. LN-Gaiety is a joint venture between Denis Desmond's Gaiety and Live Nation (Music) UK Limited ("LN-UK") that has been in operation since 2005. LN-Gaiety's activities on the island of Ireland are limited to the operation of festivals in the Republic of Ireland. LN-Gaiety does not have any activities in Northern Ireland. LN-Gaiety is jointly-controlled by Gaiety and LN-UK [✂], with Gaiety's owner Denis Desmond fulfilling the role of Chairman of LN-Gaiety.

(4) ***LN-UK***. LN-UK is an indirect, wholly-owned, subsidiary of Live Nation Entertainment, Inc. ("Live Nation"), a global live music entertainment company. Live Nation's activities on the island of Ireland are limited to the provision of ticketing services via Ticketmaster Ireland ("TMI") and the operation of venues. In Northern Ireland, Live Nation is only active in ticketing. Since 2015, Denis Desmond has also been the Executive Chairman of Live Nation in the UK and Ireland.

B. The Proposed Transaction

(5) As a result of the Proposed Transaction, MCD will move from being solely-controlled by Gaiety (which is controlled by Denis Desmond) to being jointly-controlled by Gaiety and Live Nation (whose executive chairman in the UK and Ireland is Denis Desmond) via LN-Gaiety (whose chairman is Denis Desmond).

C. The Phase 1 Decision

(6) In Phase 1, the CMA assessed a number of theories of harm and eventually concluded that the only theory of harm that might give rise to a realistic prospect of a substantial lessening of competition was the possible input foreclosure of MCD's rival promoters (notably, Aiken) using TMI in relation to the promotion of live music events with over 1,000 tickets capacity on the island of Ireland, including Northern Ireland.

(7) Whilst the Decision is unclear as to how in practice the combined firm would foreclose rival promoters, it excludes partial foreclosure concerns resulting from an increase in ticketing prices because ticketing only accounts for a small proportion of promotion costs (para. 141). Instead, the Decision focuses on the "*the possibility*" of foreclosure "*through degradation in the quality of ticketing services*" (para. 141). The CMA's Issues Statement of 9 August similarly acknowledges that partial foreclosure through

[1] *Anticipated acquisition by LN-Gaiety Holdings Limited of MCD Productions Unlimited Company*, CMA decision of 11 July 2019.

reduced quality or some other form of restricted access, possibly in combination with an increase in prices, may be more likely than either total foreclosure or partial foreclosure through pricing alone.[2]

(8) This submission thus focuses on partial foreclosure resulting from a reduction in the quality of ticketing services, although most of the pertinent points would also preclude a total foreclosure scenario.

D. The Proposed Transaction will not result in the foreclosure of rival promoters

(9) The facts and evidence show that the combined firm would have neither the ability nor the incentive to foreclose rival promoters by degrading the quality of their ticketing services, and that even if it could and would, there would be no anticompetitive effect. The Irish Competition and Consumer Protection Authority reached the same conclusion after an in-depth Phase 2 review of the Proposed Transaction.[3]

No ability to foreclose rival promoters

(10) As further discussed below, the combined firm would not have the ability to engage in such a foreclosure strategy for each of the following reasons:

- First, the Decision does not identify any quality in ticketing services that TMI might be able to degrade and that could be sufficient to foreclose Aiken from the promotion market. A technical degradation of TMI's ticketing services would simply be impossible without also degrading the services to all other customers, including MCD. The Phase 2 case team mentioned the possibility of degrading marketing efforts, a theory not mentioned in the Decision. As shown below, however, TMI's marketing is way too limited to foreclose promoters, who in any event have ready access to other means of advertising. We are aware of no case where mere marketing efforts were a sufficient input to foreclose rivals from a relevant market.

- Second, Aiken has alternatives to TMI for ticketing services (and any related marketing), including for larger shows. In particular, several major international ticketing companies have previously competed for contracts on the island of Ireland and would to do so again if the opportunity arose, including AXS, CTS Eventim, and See Tickets. This is particularly true for AXS, which is owned by the global promoter AEG with whom Aiken has a close relationship, and which has been trying to work with Aiken for some time. The fact that Aiken has chosen to work with TMI, [✂], does not mean it would be foreclosed from the market if it had to use one of the other highly capable and successful international ticketing firms.

- Third, Aiken already has a [✂] contract with TMI that guarantees continued supply on identical terms until [✂]. Although the Decision says the CMA did not have sufficient information to know whether the contract would protect Aiken during its term, the fact of the matter is that TMI could not renege on this contract

[2] Issues Statement, para. 36.

[3] CCPC Determination of merger notification M/18/067 LN-Gaiety / MCD Productions of 5 July 2019.

without exposing itself to potential damages claims as well as reputational and commercial damage.

No incentive to foreclose rival promoters

(11) Nor would the merged entity have the incentive to foreclose Aiken because of the high risk that the lost profits from ticketing would far outweigh any potential upside in profits to be gained from promotions. This is all the more so given that Live Nation will only have partial ownership of the promotions business, as well as the inherent uncertainty in promotion profits versus ticketing.

(12) The potential downside from a foreclosure strategy against Aiken, a key customer for TMI, would be grave. Aside from MCD, Aiken will be TMI's single largest customer after the Proposed Transaction. By contrast, the potential upside for Live Nation in promotions would be highly speculative and unlikely to outweigh TMI's lost profits. This was recognised by the Competition Commission in 2010 when it rejected this concern when approving Live Nation's acquisition of Ticketmaster:

> "*a strategy of foreclosure based on Ticketmaster ceasing to supply other promoters with ticket retailing services would be highly risky for the merged entity.*"[4]

(13) The same is true here.

- First, even if contrary to the facts above the combined had the ability to engage in some form of significant degradation of the quality of TMI's ticketing services that would be sufficient to result in a substantial lessening of competition, the combined firm would have no incentive to do so as a reduction of quality would have a significant adverse effects on Ticketmaster's reputation both in Ireland and outside Ireland. The key reason why Ticketmaster is trusted by event organisers is because it offers quality service. A degradation of quality would cause event organisers to lose trust in Ticketmaster and consider alternative options.

- Second, and in any event, there is no reason to believe that a large number of artists and their agents would switch to MCD if Aiken were foreclosed. Many of Aiken's artists are promoted at the global level by AEG, Live Nation's [✄] competitor. Both Live Nation and AEG have their local promoter on the island of Ireland and would not switch to the local promoter of their rival at a global level, all the more so after MCD becomes part of the Live Nation group.

  The most likely outcome is that AEG would encourage Aiken to use the AXS ticketing solution. AEG would have full confidence in this system (which it owns and uses in the O2) and would have no reason to switch away from Aiken should it adopt this system. Alternatively, AEG would sponsor another local promoter or seek to avoid playing on the island of Ireland.

- Third, many artists would not switch to MCD because of their relationship with Aiken. The artists could simply continue to use Aiken or skip Ireland in favour of one of the many other countries seeking to attract their tour. Artist managers and agents told the CMA during the Phase 1 investigation that "*they considered not*

4 UK Competition Commission, A report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc, 7 May 2010, paragraphs 8.41-8.44.

playing on the island of Ireland to be a possibility should the Parties limit their choice of promoter" (para. 165).

- Fourth, the theoretical upside for Live Nation in promotions is further reduced because Live Nation will have only an indirect [✂]% interest in MCD once the Proposed Transaction closes. MCD will not be acquired by Live Nation but by LN-Gaiety, a joint venture between Live Nation and Gaiety in which Live Nation only holds [✂]%. Live Nation would thus obtain only about [✂] of the hoped-for promotional profits accruing to MCD if Aiken were to be foreclosed and artists were to switch to MCD, but would lose 100% of the foregone ticketing revenues. As a result, margins are significantly lower in promotion than in ticketing (€[✂] vs €[✂]).

- Fifth, profits in promotion are inherently more speculative than profits in ticketing, further decreasing Live Nation's incentive to forego ticketing revenues in favour of promotion business. Promoters guarantee the artist fixed revenues and thus take all the financial risk of the leg of a tour and often make losses when shows fail to sell out. Last year, approximately [✂] of MCD's shows were loss-making. By contrast, ticketing firms typically make a profit on every show.

  Therefore, a foreclosure strategy would require Live Nation to sacrifice stable profits in ticketing in the hope of potentially winning more events in promotion that could easily end up being loss-making. The different level of risk between promotion and ticketing was also recognised by the Competition Commission when rejecting the theory of harm in *Live Nation/Ticketmaster*:

  > "*these markets were characterised by differing degrees of risk: the margins in the promotions market are highly variable, while ticketing generates a more reliable revenue stream. Therefore, we found that a strategy to transfer market power from the market for live music ticketing to the market for live music promotions would involve some increase in the merged entity's total risk.*"[5]

- Sixth, the strategy could only facilitate the entry of international ticketing companies like AXS, Eventim and See Tickets onto the island of Ireland. If the merged entity sought to engage in a foreclosure strategy, Aiken would likely turn to one of those international ticketing agents. Although TMI already faces strong competition from those ticketing firms, this development would put one of them on the ground in Ireland and enable them to use Aiken as a platform to take further businesses away from TMI.

- Seventh, artists and agents deprived of the right to choose their promoter as a result of a foreclosure scheme have several means to retaliate against Live Nation, both in Ireland and elsewhere. They can avoid playing Live Nation festivals and venues and they could forgo Live Nation's promotion in other countries when they have attractive alternatives. These responses would necessarily deter the combined firm from embarking on the self-defeating foreclosure plan. AEG

---

[5] UK Competition Commission, A report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc, 7 May 2010, paragraph 8.36.

would also be able to retaliate against Live Nation though the use of their dominant O2 venue in London.

- Eighth, a foreclosure strategy would be contrary to Live Nation's global business model. Live Nation and active in promotion and ticketing in dozens of countries around the world and does not engage in any foreclosure scheme. Ticketmaster operates on an arm's length basis from the rest of the Live Nation group with a view to selling as many tickets as possible. Deploying Ticketmaster as a weapon to foreclose rival promoters in Ireland would hardly be kept secret in other countries. It would risk far reaching consequences on Ticketmaster's business globally.

- Ninth, if there were no alternatives to TMI, a decision to no longer provide access to Aiken or to provide access in a way that prevents Aiken from effectively competing on the market could invite allegations under Chapter II of the Competition Act 1998 and Article 102 TFEU. This acts as a further disincentive to engage in a foreclosure strategy.

(14) In response to these basic facts, the Decision merely says that the combined firm "*may*" have the incentive to foreclose (para. 184). Not only do the facts preclude that possibility, but a mere "possibility" of success is wholly inadequate when assessing whether a firm would actually dare embark on such a risky scheme. The combined firm would be sacrificing stable profits in ticketing and potentially causing the entry onto the island of an international ticketing firm that would threaten TMI's entire business on the island (festivals, sports, venues, arts, etc.), in the hope of potentially obtaining lower and highly uncertain promotion profits for an uncertain number of additional shows. No sane business person would engage in such a strategy and the CMA should not assume otherwise.

No anti-competitive effect

(15) Even if, contrary to the facts, Aiken were foreclosed, the merged entity could not offer a worse deal to artists. Instead, the result would be that artists would simply not perform in Ireland and would perform in more profitable locations. These artists are represented by agents who are professional negotiators and whose only job is to get artists the best possible deals to maximize the artists' (and their own) income. Artists and their agents choose between different countries when scheduling their tours and therefore MCD would have to continue to offer them the same attractive deals to convince them to play on the island of Ireland. Nowhere does the Decision explain why this would not be the case.

(16) Accordingly, as discussed below, the Proposed Transaction does not give rise to the likelihood of a substantial lessening of competition on a market or markets in the UK and should therefore be cleared unconditionally.

***

II. NO ABILITY TO FORECLOSE PROMOTERS

(17) The Decision finds that the combined firm might have the ability to foreclose Aiken by somehow degrading the quality of TMI's ticketing services. However, the Decision does say what would be degraded or how. Nor does it properly take into account the availability of alternatives and the [✂] contract with Aiken which preclude any foreclosure.[6]

A. Quality factors are not sufficiently important to foreclose

(18) The Decision does not say what quality aspects of ticketing TMI might be able to degrade or why the result would be so harmful to Aiken that it would result in a substantial lessening of competition in the promotions market.

(19) The Decision may be hypothesizing some form of technical degradation of TMI's ticketing services. However, it would simply not be possible for the combined firm to engage in any technical degradation of its ticketing services for Aiken without also degrading its services to all other customers, including MCD.

(20) During a meeting in Phase 2, the case team suggested that TMI might be able to reduce its marketing efforts. However, promoters do not depend on ticketing companies to advertise their shows, let alone rest their very survival on it. [✂].[7]

(21) Promoters have a range of marketing options at their disposal that they already use today to market upcoming events and raise awareness of the shows they are promoting, including their own websites, social media platforms (Facebook, Instagram, Snapchat, Twitter and others), as well as traditional advertising media such as newspapers, billboards, radio and television adverts.

(22) TMI's role in marketing is limited to sending email newsletters to past customers and listing upcoming shows on its website, nothing more. These marketing tasks are simply not an important enough "input" to foreclose promoters from the market. The UK Competition Commission reached the same conclusion in *Live Nation/Ticketmaster*:

> "*Since event-specific marketing by ticket agents did not appear to be an important driver of consumers' ticket purchases, we thought it unlikely that Ticketmaster could affect materially the sales of other promoters by reducing the extent to which it marketed their events*."[8]

(23) A survey conducted in the UK in 2016, moreover, confirms that social media and TV are the key marketing channels, while email newsletter sent by promoters and ticketing companies are one of the least effective means of attracting fans to live music events:

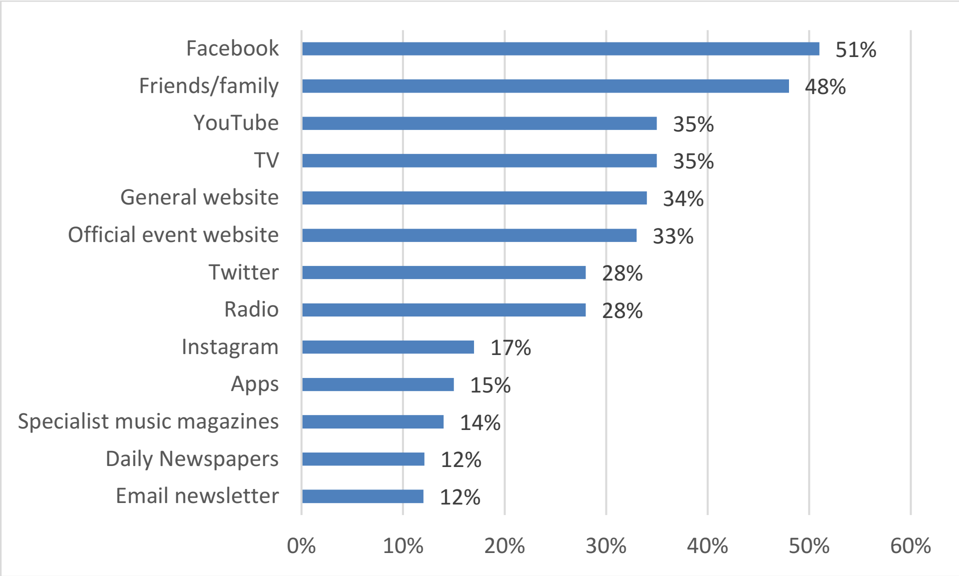
---

6 The Decision's definition of the ticketing market is also overly narrow. The Decision defines a ticketing market limited to live music events based on the fact that the initial sale of live music events may create a spike in demand that would not be present for other types of events such as sport events (para. 62). In fact, many sport events also involve a spike in demand. For example, there has been significant demand for the British Open Golf Tournament that took place in Portrush in Northern Ireland in July 2019. The event sold out completely with over 237,000 attendees.

7 [✂].

8 CC Live Nation/Ticketmaster Report, para. 8.60.

Figure 1 - How do people get information about live music events



Source: Repucom Live Music Report 2016, available at http://nielsensports.com/wp-content/uploads/2014/09/Repucom-Live-Music-Report-2015.pdf.

(24) Even if mere email newsletters were critical, which they are not, TMI could not prevent Aiken from sending them. The customer database that TMI uses to send emails is [✂]. Therefore the promoter has access to it and would be able to send the emails itself. [✂]:

> "[✂]."[9]

(25) Nor is TMI's website a critical input to the marketing of an event. Promoters have many ways of advertising upcoming shows, including social media, advertisement on TV or other media, and popular websites such as Songkick.com, entertainment.ie, Belfastlive.co.uk, Dublin.ie/what-on, etc.

(26) Therefore, the combined firms would not be able to use TMI's limited marketing efforts to foreclose Aiken.

B. Highly-capable international ticketing providers preclude any foreclosure

(27) Aiken has suitable alternatives to TMI for ticketing services that would preclude its foreclosure from the market if Live Nation were to embark on such a scheme.

(28) International ticketing firms such as AXS, CTS Eventim, and See Tickets, which serve major concert promoters in Great Britain and other countries, could and would easily step in to serve Aiken in these circumstances. The fact that Aiken currently is using TMI as [✂] provider says nothing about whether alternatives are available to preclude Aiken's foreclosure should TMI foolishly embark on such a scheme. Those firms are already handling very similar types of events, in particular large live music events, and therefore would be capable of selling tickets on Aiken's behalf in relation to events on the island of Ireland.

(29) Those international ticketing firms have already developed the platforms and technology capable of reliably handling and processing ticket orders, taking payment

9 [✂].

and despatching tickets to fans. Therefore the investment required to serve Aiken would be small and a contract with a large customer like Aiken would be more than enough to justify those investments. That is what happened in the UK, Sweden and the Netherlands where CTS Eventim decided to enter 10 years ago after having won a large contract with Live Nation.[10]

(30) Moreover, major international ticketing agents such as AXS, Eventim, and See Tickets are *already* competing for business on the island of Ireland even in the absence of a foreclosure scheme:

- AXS. Founded in 2011, AXS is a premier global ticketing company and a subsidiary of global concert promoter Anschutz Entertainment Group (AEG). AXS sells tickets for some of the largest live music events in Great Britain (e.g., P!nk, the Spice Girls, Celine Dion, Rod Stewart, Tom Jones, Backstreet Boys). AXS would be a particularly attractive alternative for Aiken to defeat any attempted foreclosure scheme because Aiken already has a close relationship with AEG. [✂].

  [✂].[11,12]

- CTS Eventim. Headquartered in Germany, CTS Eventim describes itself as Europe's largest and the world's second largest ticketing agent.[13] CTS Eventim is already active in Great Britain and in many other countries, including Germany, Italy, Switzerland, Austria, Finland, the Netherlands, France, Spain, and Sweden.

  On the island of Ireland, [✂].[14]

  CTS Eventim's interest in the Irish market is also reflected in the press release that announced the appointment of the current Chairman of Eventim UK: "*As the new Chairman of EVENTIM UK, Nick Blackburn will be responsible for EVENTIM's business development in the UK and Ireland*".[15] This is further confirmed by newspaper articles at the time stating that: "*In addition to concentrating on Great Britain, Blackburn will also look to grow Eventim's ticketing business in Ireland*."[16]

- SEE Tickets is one of the main ticketing agents in Great Britain, selling tickets for large music events such as Metallica, Muse, Keane, and some of the largest festivals in Great Britain. [✂].

---

10 See UK Competition Commission, A report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc, 7 May 2010 ("CC Live Nation/Ticketmaster Report").

11 [✂].

12 [✂].

13 See https://www.eventim.de/obj/media/en/relations/financialReportDownload/2016/AnnualReport_2016.pdf.

14 [✂].

15 https://corporate.eventim.de/en/news-media/news/detail/News/nick-blackburn-appointed-new-chairman-of-eventim-uk/

16 See https://www.ticketnews.com/2011/05/cts-eventim-names-former-see-tickets-ceo-as-uk-chairman/.

(31) [✂].[17] These international ticketing service providers thus constitute very credible alternatives for Aiken, and certainly would be sufficient to defeat any foreclosure strategy.

(32) Aiken has a contract with TMI running until [✂], which would leave ample time for Aiken to sponsor the entry of a rival ticketing firm like CTS Eventim or AXS if it were concerned that Live Nation would engage in a foreclosure strategy. [✂].

(33) As regards costs, TMI estimates that, to service a contract with Aiken, a large ticketing agent would only require an initial capital expenditure of approximately €[✂], and €[✂] per year for five years. This expenditure would cover installation of required equipment in [✂] retail outlets, setting up an office on the island, and IT equipment in window sale positions. The operating expenses required would total approximately €[✂], largely relating to staffing local personnel, as well as rent and upkeep of the office facilities.

(34) A large client like Aiken would provide more than enough ticketing business to justify those investments. The number of tickets sold for Aiken events from 2012-2017 amounted to some [✂] tickets. During this same period, the gross value of tickets sold for Aiken-promoted events exceeded €[✂]. Aiken accounted for over [✂] tickets and [✂]% of TMI's sales in 2017. TMI's gross margin per ticket for Aiken was €[✂] per ticket, meaning Aiken accounts for a total gross margin of over €[✂] per year. As acknowledged by the Decision, "*these costs are also relatively low compared to the likely potential revenue from entry*" (para. 171). Indeed, winning even a [✂] of Aiken's entire business would be sufficient to cover the entry costs of a large player such as AXS.

(35) The Decision recognises that these large international ticketing agents could preclude any foreclose concerns but it finds that there is "*uncertainty*" as to whether their "entry" would be sufficiently timely and likely and whether it would be sufficient to prevent any foreclosure (paras. 149, 170, 176, and 178).

(36) International firms like AXS and CTS Eventim who already are competing for customers in Ireland can hardly be considered only "potential" entrants. Moreover, all the facts and evidence show that TMI would not have the ability to foreclose Aiken because of Aiken's ability to turn to these highly capable firms.

1. Timeliness

(37) The technology used to serve large ticketing customers is located centrally, not in local countries like Ireland. Therefore, all it takes for a firm like AXS or CTS Eventim to start serving customers is office space, personnel, phones, and the like. If customers also want physical outlets like kiosks, those are readily available and take no time to establish. Nor does it take the usual amount of time for a firm to establish a reputation in the market since promoters already know the capabilities of these companies from their dealings around Europe and the world, while fans immediately learn where to buy tickets for awaited concerts. Timeliness of "entry" simply is not an issue.

(38) This is particularly true since any such firm would have an unusually long lead-time to enter before any supposed foreclosure scheme could happen. As explained above, Aiken has a contract with TMI running until [✂], which would leave ample time for a

[17] [✂].

rival ticketing firm to enter if Aiken had any honest concerns about TMI. The Decision agrees, saying only that "*the CMA cannot be confident that the contract guarantees Aiken's continued supply with ticketing services by Ticketmaster on no worse terms following the Merger*" (para. 169). No further explanation is provided about why the contract, negotiated by sophisticated businesses and their lawyers, could be so flawed. As explained above, the agreement guarantees continued supply and prevents TMI from delaying the payment of ticket proceeds or to selectively raising booking fees, and guarantees Aiken's access to the customer data.

(39) The Decision's only other brief reference to timeliness is a redacted comment from a third party. It is unclear how the unidentified party's opinion about timeliness could be confidential, and there is no indication of the basis for its opinion. But there is nothing this third-party can say to detract from the objective fact that timely entry is easy by international firms already operating throughout Europe.

2. Likeliness

(40) The Decision recognises, as it must, that "*the cost of entry does not appear to be a large barrier to entry*" (para. 171), and that "*the CMA considers entry of a ticketing agent to the island of Ireland to be possible.*" This should be the end of the matter. But the CMA nevertheless says there is "*a significant risk"* that entry *"may not occur"* and therefore there is *"uncertainty as to whether it would be sufficiently likely*" (para. 176). Again, "uncertain" entry is more than enough to deter a risky strategy of attempting to foreclose TMI's largest ticketing customer post-merger.

(41) Yet the Decision says nothing even about why entry is uncertain, particularly after finding that entry barriers and costs are low. Under those circumstances, merger control laws assume firms are rational and would exploit an opportunity created by the combined firm's reckless foreclosure effort. Instead, the Decision points to two international ticketing agents who reportedly told the CMA that they had considered entering and even had discussions with customers on the island of Ireland, but the CMA found that they did not already have "*well-developed plans for entry such that the evidentiary standard at phase 1 for the likelihood of entry would be met*" (para. 175).

(42) The correct question, however, is not whether firms already have "*well-developed*" entry plans but rather what these firms would do in response to an opportunity created by a foreclosure effort and a need by Aiken to find an alternative ticketing company to avoid foreclosure. The fact that these firms had already considered entering and even contacted would-be customers is only powerful evidence that they are likely entrants in response to a foreclosure scheme.

(43) Nevertheless, there is considerable evidence of the interest of ticketing agents such as CTS Eventim and AXS for the Irish market even without the new opportunity that a foreclosure effort would introduce. [✄].

(44) Moreover, CTS Eventim's interest in the Irish market is reflected in the press release that announced the appointment of the current Chairman of Eventim UK: "*As the new Chairman of EVENTIM UK, Nick Blackburn will be responsible for EVENTIM's business development in the UK and Ireland*" (emphasis added).[18] This is further confirmed by newspaper articles at the time stating that: "*In addition to concentrating*

[18] https://corporate.eventim.de/en/news-media/news/detail/News/nick-blackburn-appointed-new-chairman-of-eventim-uk/

on Great Britain, Blackburn will also look to grow Eventim's ticketing business in Ireland."[19]

(45) AXS also has a particular interest in the Irish market and Aiken's business specifically as Aiken is the local promoter that is being used by the global promoter AEG, who owns AXS. The Decision contests these facts by stating that AXS has not to date won a contract with Aiken despite Aiken's relationship with AEG and AEG's ownership of AXS (para. 174). The Decision's argument misses the point. The question is whether AXS would be able and willing to supply Aiken if the combined firm sought to foreclose Aiken. TMI understands that [✂].

(46) Moreover, the CMA's conclusion ignores the substantial evidence that TMI itself strongly believes that entry by international ticketing firms is likely, which alone is sufficient to deter a supposed foreclosure effort.

(47) First, the CMA acknowledges that a [✂] mentions [✂], stating that they "*will pursue our larger clients*", but disregards it only because the document does not provide sufficient detail (para. 172). On the contrary, the fact that a recent internal document refers to the immediate competitive threat of international ticketing firms is key evidence of likely entry. TMI's internal audience knows the "detail", and it is more than odd for the Decision to disregard contemporaneous [✂] that explicit state entry "will" happen by identified firms, who will pursue TMI's large clients, merely because the document does not say even more.

(48) Second, the Decision ignores that TMI has to made substantial concessions to customers due to competition for international ticketing firms, as explained above. The Decisions says only that these concessions are of "*limited value*" because (para. 173):

- The Decision says that the customers may have overstated the quality of their alternatives when negotiating with TMI (para. 173(a)). TMI is an experienced ticketing company in Ireland and there is no reason to believe it would be fooled into making substantial financial concessions because it does not know the capabilities of its rivals. In any event, the point is that the competition was deemed credible enough *by TMI* to make substantial concessions, which shows the threat alone would deter any foreclosure scheme. The importance of concessions was recognized for example in the *Google/DoubleClick* case, where the European Commission found that the combined firm did not have the ability to foreclose:

  > "*while DoubleClick is the leading supplier of publisher and advertiser ad serving tools in Europe and worldwide, it faces strong competition from a number of rivals as evidenced, in particular, by the price pressure in recent years leading to price reductions for existing and new customers*".[20]

- The Decision also says that the TMI's concessions might not reflect competition but merely that TMI's initial offer might have been too high (para. 173(b)). The argument is simply contrary to the objective facts. TMI's starting position in the

---

[19] See https://www.ticketnews.com/2011/05/cts-eventim-names-former-see-tickets-ceo-as-uk-chairman/.

[20] Case M.4731 – Google/DoubleClick, European Commission decision of 11 March 2008, paragraph 296.

negotiations was [✄]. The Decision's unsupported hypothetical is simply contrary to the actual evidence.

[✄]:

[✄]	[✄]
[✄]	[✄]

3. Sufficient

(49) The Decision acknowledges that international ticketing firms would have the required technical capabilities and expertise to operate on the island of Ireland but expressed some concern about their ability to "*match Ticketmaster's capability in the short-term*", in particular in relation to marketing (para. 178). As a result, the CMA the Decision finds that the position of Aiken might be "*weakened*" in the short term (para. 178).

(50) The Decision's comment is misguided for the following reasons:

(51) First , Aiken would not be weakened since, as explained above, the role of ticketing firms in terms of marketing is very limited.

(52) The most important marketing is done by the artist itself.[21] When Lady Gaga goes on tour, for example, she announces it publicly (among other things, through media platforms, like twitter, Instagram, Facebook, which are nowadays the main communication channels), the specialised press and newspapers will publicise the event, and her fans will know she is coming to the island of Ireland. For the rest, the promoter is in charge of advertising by organising local marketing campaigns on social media, TV, etc.

(53) The role of the ticketing agent in marketing is limited to sending emails to prior customers at the request of the promoter and listing the shows on its website.

(54) The customer database that TMI uses to send emails is [✄]. Therefore the promoter has access to it and would be able to send the emails itself or would simply share it with the Eventim, AXS, SEE Tickets or other ticketing company.

(55) Moreover, while the Irish websites of international ticketing firms such as Eventim, AXS and SEE Tickets might not immediately have the visibility of TMI's website, these firms, if given the opportunity by a misguided foreclosure scheme, could easily compensate by initially investing more in advertising (e.g., on Google and social media).[22]

---

21 This is true not only for popular artists but also for smaller upcoming artists who also have a fan base who will closely follow when they go on tour. This reply focuses on larger artists because, as explained in the Decision (para. 163), smaller shows account for a relatively small proportion of Aiken's revenues and therefore even if Aiken's competitive position were temporarily weakened with respect to those shows Aiken would not be foreclosed from the market. Moreover, as explained below, the Decision accepts that local ticketing agents such as Tickets.ie are an alternative for smaller events.

22 International ticketing firms do not currently have retail outlets on the island of Ireland but this would not prevent them from being a suitable alternative to TMI. As third parties told the CMA, "*the importance of these outlets is decreasing*" (para. 69) with the development of the Internet.[22] In any event, setting up retail outlets is simple because ticketing firms typically partner with third party retailers. Retailers such as [✄]

(56) Second, even if these facts were not the case, a concern that Aiken might be "weakened" would not mean that it would be foreclosed from the market. There is nothing to suggest that a short-term reduction in marketing could or would foreclose Aiken from the market.

(57) Third, as the Decision notes, any supposed reduction in marketing capabilities would at most be a "short-term" problem and therefore the international ticketing firm could always compensate any short-term disadvantage by investing in advertising. We are aware of no case where mere advertising was an entry barrier, and that is particularly true in this case.

(58) Fourth, there is real world evidence of large customers switching to new entrants in other markets, even though those new players were undoubtedly at the time considered "inferior" to other more established market players. [✂].

(59) Fifth, [✂] already compete for business on the island of Ireland, [✂], which provides yet further evidence that those companies believe they are credible alternatives on the island of Ireland.

C. The availability of local ticketing agents preclude any foreclosure

(60) Another reason why the combined firm would not be able to foreclose Aiken is that Aiken could and would turn to local ticketing agents if the combined firm sought to degrade the quality of TMI's services to Aiken.

(61) Aiken could defeat a foreclosure strategy by switching all or part of its business to Irish-based ticketing services providers such as Tickets.ie, Ticketbooth, Eventbrite, and others. Those rival ticketing agents are already very active on the island of Ireland today, selling tickets for a wide variety of events, including live music events.

- Tickets.ie launched in 2004 and issues more than [✂] tickets a year for music, arts, comedy, educational, family and sporting events.[23] Tickets.ie sells tickets on behalf of the Gaelic Athletic Association, which is the largest sports organisation in Ireland and [✂], live music festivals such as the Indiependence festival, and other customers.

  [✂].[24]

- Future Ticketing launched in 2014 and is expanding rapidly. It describes itself as Ireland's "Fastest Growing Ticketing Company" with 110 customers in Ireland and Great Britain.[25]

  [✂]. Future Ticketing's customers also include several football clubs (Shamrock Rovers, Bohemians FC, Dundalk FC, Derry City, Bray Wanderers and Waterford FC), the Book of Kells, and major visitor attractions across Ireland including Birr Castle, Gardens and Science Centre, Clonakilty Park Adventure Centre, Dunbrody

---

have all proposed to have their store networks used as ticketing outlets. Deals with ticketing firms are attractive to retailers because they generate higher footfall for their stores.

23 https://tickets.ie/about-us/.

24 [✂].

25 See https://twitter.com/futuretktingie?lang=en.

Famine Ship, Funtasia Waterpark, Hook Lighthouse, The Kennedy Homestead, The National Aquatic Centre, The National Acquarium, Oakfield Park, Skerries Mills and Wooly Wards Farm.[26]

- Ticketbooth. Sydney-based Ticketbooth offers a ticketing software covering online tickets sales, box office sales, Facebook ticketing, ticket scanning technology as well as event marketing and analytics. It has a strong Australian customer base, but has also recently expanded into Europe with the launch of ticketbooth.eu.

  [✂].[27,28,29]

  [✂].[30]

- Eventbrite launched its first physical presence in Ireland 2014, before it opened a customer service centre in Cork in 2016. As the Cork office subsequently evolved into a fully-fledged hub for the company's European operations, Eventbrite opened a new 11,500 square feet office in Cork in June 2018.[31] Its growing Irish customer base includes festivals Bodytonic, BD and Fever Pitch, The Helix in Dublin, District 8 in Dublin, the University Concert Hall in Limerick, as well as WOMAD music festival, Newport Folk, Oktoberfest Beag, Ramblin' Man Fair, Vrienden van Amstel Live!.[32]

  [✂].

(62) The Decision says there are "*few current alternative*" providers of ticketing services to TMI and that these alternatives are "*less suitable than Ticketmaster*" (para. 145).

(63) However, the relevant test is not whether alternative agents are currently viewed as "*less suitable*" by Aiken. In every input foreclosure assessment, downstream rivals always are presumably using their first choice. Rather, the question is whether the alternative ticketing providers are sufficient to prevent Aiken from effectively competing for shows on the island of Ireland if faced with a degradation of the quality of TMI.

(64) The Decision appears to accept that local ticketing firms currently active on the island of Ireland could be an alternative for Aiken's smaller shows and therefore that the combined firm would not be able to prevent Aiken from competing effectively for those shows (para. 163). This is confirmed by third parties that told the CMA that "*Tickets.ie was a possible alternative to Ticketmaster for smaller music events*" (para. 64).

(65) The combined firm's potential ability to preclude Aiken from organising shows is thus limited to larger shows. The Decision says that local Irish promoters are less suitable for larger shows in terms of "*marketing capability, including reputation, customer*

---

26 See https://www.futureticketing.ie/case_studies/#.

27 [✂].

28 [✂].

29 [✂].

30 [✂].

31 See https://www.idaireland.com/newsroom/eventbrite.

32 Id.

database and physical outlets", and "*operational support and reliability*"." (para. 145). The Decision's assessment is misguided:

- *Reputation*. Many of the local ticketing agents are already very well known on the island of Ireland, selling millions of tickets annually for live music festivals and large sports events, as explained above. Tickets.ie for example sells more than [✂] tickets a year on behalf of customers such as the Gaelic Athletic Association, which is the largest sports organisation in Ireland and live music festivals such as the Indiependence festival.

- *Marketing and customer database*. Local ticket agents would be perfectly able to handle the very limited marketing activities conducted by TMI, as explained above in relation to international ticket agents. In particular, they would have access to TMI's database of customers [✂] and thus would be able to send newsletters by email on behalf of the promoter.

- *Physical outlets*. Some of the local ticketing agents have a broader network than TMI itself. Tickets.ie, for instance, has about 400 retail outlets on the island of Ireland.[33]

- *Reliability and operational support*. The Decision's concern appears to be that ticketing systems of local players may face difficulties when selling tickets for the largest events, where a large number of tickets have to be sold in a short period of time (para. 146).

  Even if that were true, TMI estimates that there are only about [✂] events a year on the island of Ireland with a significant spike in demand. Local ticketing agents would thus be perfectly suitable alternatives for almost all Aiken's shows and thus would not be foreclosed. This is all the more so since Aiken could rely on an established ticketing agent such as AXS for the few events where significant demand can be expected.

  In addition, Aiken would be able to sponsor the expansion of a local ticketing agent. The prospect of concluding a [✂] contract with a large customer such as Aiken would justify investing in operational support and their platform to handle the largest concerts on the island of Ireland. Nowadays, cloud platforms such as AWS and others enable ticketing firms to offer cloud based solutions that enables them to purchase the computing power that they need to sell tickets for any type of event.

D. The possibility of self-ticketing also precludes foreclosure

(66) If faced with a foreclosure strategy, Aiken could also rely on self-ticketing, either definitively or temporarily until one of the international ticketing firms enters the market or local ticketing firms expand their platform. The Irish Competition Commission previously acknowledged that "*The fact that both MCD and Aiken can generate large annual volumes of ticket sales suggests that they can credibly threaten to self-supply*."[34]

---

[33] See https://www.tickets.ie/outlet/#1477651663130-e1bfe27f-fd74.

[34] Para. 2.53.

(67) Some of the largest event organisers globally rely on self-ticketing solutions. For example, the Tomorrowland festival in Belgium, which is one of the largest festivals globally, uses the Paylogic self-ticketing solution. In 2019, more than 350,000 tickets were sold in only 45 minutes, which shows that the system is reliable and able to handle concerts with a significant spike in demand.[35]

(68) Similarly, the organiser of the British Open Golf Tournament that took place in July 2019 in Portrush in Northern Ireland relied on SecuTix to sell the tickets. The event broke all previous records selling out completely with over 237,000 attendees.[36] It was by far the event with most demand on the island of Ireland in 2019 and SecuTix was able to sell the tickets without any issue and without any local footprint. All the service required for this high profile event was delivered from remote data centres.

E. Aiken already has a [✂] contract with TMI

(69) The combined firm could not foreclose Aiken by degrading the quality of its ticketing services because Aiken has a [✂] contract with TMI that guarantees continued supply on the same terms. An inability to foreclose Aiken, the combined firm's largest competitor in promotions, precludes any substantial lessening of competition in the promotions market.

(70) Aiken's contract, which was negotiated prior to the Proposed Transaction, runs until [✂]. It ensures that TMI would not be in a position to reduce its competitive offer to Aiken for the next [✂] at least, even if it were not constrained by the alternative providers discussed above.

(71) Moreover, if Aiken had any concerns that TMI might nevertheless try to engage in a foreclosure strategy, it has more than ample time to line up one of the alternative ticketing companies discussed below. The strategy therefore would fail to foreclose Aiken while costing the merged entity Aiken's ticketing business.

(72) The Decision finds that that the CMA "*cannot be confident*" that the contract guarantees Aiken's continued supply (para. 142). The Decision appears to be claiming that TMI could terminate the contract. The Decision's argument disregards the fact that [✂]:

[✂]

(73) Therefore, TMI could not renege on this contract without exposing itself to potential damages claims as well as reputational damage.

(74) The Decision explains further that the CMA "*cannot be confident*" that the agreement would prevent TMI from offering worse quality of service following the merger (para. 142). However, the Decision does not explain what is meant by a reduction of quality. As regards a potential reduction of marketing that was mentioned by the case team in phase 2, the agreement guarantees Aiken's access to the customer data, as explained above.

(75) The Decision also claims that TMI could decide not to renew the agreement when it expires or only on different terms that "*there is no clear milestone for establishing the*

---

35 See https://thegroovecartel.com/news/tomorrowland-2019-sells-out-how-get-tickets/.

36 See https://www.irishtimes.com/sport/golf/portrush-will-be-second-highest-attended-british-open-in-history-1.3959119.

new contract before that point." (para. 142). If Aiken had any concern about the combined firm's intentions, it would be free to negotiate a new contract well in advance of the expiry of the contract, [✂].

III. NO INCENTIVE TO FORECLOSE PROMOTERS

(76) The combined firm would not have the incentive to foreclose rival promoters because of the very high risk that the lost profits for TMI would far outweigh any potential upside in the profits obtained from the promotion of additional events. This is all the more so given that Live Nation will only have a partial ownership of the promotions business, as well as the inherent uncertainty in promotion profits versus ticketing.

(77) The potential downside from a foreclosure strategy against Aiken, a key customer for TMI, would be grave. Aside from MCD, Aiken will be TMI's single largest customer after the Transaction. Any effort to foreclose Aiken would be putting at risk this important business. By contrast, the potential upside for Live Nation in promotions would be highly speculative and unlikely to outweigh TMI's lost profits.

(78) The Decision confirms that there is considerable uncertainty as to whether the merged entity would have the incentive to foreclose. There is uncertainty about the proportion of Aiken's business that TMI would have to recoup for the foreclosure strategy to be profitable, uncertainty about how much business MCD would be likely to recapture if Aiken were foreclosed, uncertainly about whether the entry of international ticketing firms would be timely, likely and sufficient to act as a disincentive to foreclose, and uncertainty about the wider strategic and commercial implications of a foreclosure strategy.

(79) However, the Decision fails to assess how that uncertainty affects the combined firm's incentive to foreclose. Faced with so much uncertainty, the Decision should have found that there was no realistic prospect that the merged entity would have taken the risk to lose one of its largest ticketing customer and cause the entry or expansion on the Irish market of a highly capable ticketing agent.

(80) Instead, the Decision finds that the combined firm "*may have the incentive to foreclose promoters*" on the basis that MCD is the only other major promoter on the island which could lead to a high degree of diversion of customers from Aiken to MCD if Aiken were foreclosed (para. 184).

(81) However, the Decision does not effectively consider the many reasons why this is not true, let alone justify a risky foreclosure strategy. As the Competition Commission explained in *Live Nation/Ticketmaster*, the uncertainty in itself precludes the combined firm's incentive to foreclose:

> "*We concluded that a strategy of foreclosure based on Ticketmaster ceasing to supply other promoters with ticket retailing services would be highly risky for the merged entity. We concluded that, on balance, the merged entity was unlikely to have the incentive to foreclose other promoters in this way*." [37]

[37] Paragraph 8.42.

A. The proportion of Aiken's business that MCD would need to recoup

(82) Based on the relative margins in ticketing and promotion (€[✂] vs €[✂]), MCD would need to recoup a significant proportion of Aiken's business (at least [✂]%) for a foreclosure strategy to be profitable (para. 156). The Decision finds that this figure is "*helpful*" but that "*there is some uncertainty around this figure*" for the following reasons (para. 157):

(83) First, the Decision argues that if the foreclosure strategy is successful, the combined firm would likely be able to raise its margins, which would reduce the proportion of Aiken's business that MCD would have to recapture.[38]

(84) However, the argument that MCD would be able to offer a worse deal to the likes of Ed Sheeran and other Aiken artists is at best very uncertain. If MCD sought to offer a worse deal, the artist would simply play in another country. As a promoter and an artist agent told the CMA, artists "*might consider substituting an event in Dublin with an event in other European city*" (para. 97). This is particularly true for large artists who have significant bargaining power.

(85) Second, the Decision claims that the Aiken business that is recaptured by MCD could increase the use of Live Nation's venues, which would create additional benefits for the combined firm and thus reduce the proportion of Aiken's business that MCD would have to recapture for the foreclosure strategy to be profitable.

(86) However, the Decision's analysis is one-sided and fails to take into account the many factors that show that in reality MCD could have to recoup significantly more than [✂]% of Aiken's business for foreclosure strategy to be profitable.

a. Firstly, a foreclose strategy based on a degradation of quality would affect considerably TMI's reputation in the industry (and more broadly Ticketmaster's reputation globally). Even organisers use TMI because it offers a quality service and any degradation of such quality would cause it to lose business to other ticketing companies.

b. Secondly, a foreclosure strategy would facilitate the entry of international ticketing companies like AXS, Eventim and See Tickets on the island of Ireland. If the combined firm engaged in a foreclosure strategy, Aiken would likely turn to an international ticketing firm like AXS. Although This development would put an international ticketing firm on the ground in Ireland. The combined firm would thus not only lose not only ticketing revenues from Aiken's business, but eventually also from other customers as that ticketing agent would start competing for TMI's entire business (not only its concerts but also festivals, venues, sporting events, cultural events, etc.).

c. Thirdly, artists may decide to skip Ireland, in particular if MCD sought to offer them a worse deal, which would mean that in addition to losing ticketing revenues the combined firm would also be losing venue revenues. Artist managers and agents told the CMA that "*they considered not playing on the island of Ireland to be a possibility should the Parties limit their choice of promoter*" (para. 165). Another third party told the CMA that artists "*might consider substituting an event*

[38] Note that it is standard to assume fixed margins when doing vertical arithmetic as increased margins would reduce the rate of actual recapture as well as the critical rate.

in Dublin with an event in another European city" and therefore the CMA concluded that "*From an artists' perspective, the relevant geographic scope might be wider [than the island of Ireland]*"(para. 97)

There is substantial evidence of artists choosing to play dates on tours in other countries rather than in the island of Ireland. For example, [✂].

Other recent examples of artists to whom MCD made a pitch to play in Ireland, but who declined to do so in favour of additional shows elsewhere in Europe include:

- [✂];
- [✂];
- [✂];
- [✂]; and
- [✂].

d. Fourthly, profits in promotion are inherently more speculative than profits in ticketing. Promoters guarantee the artist fixed revenues and thus take all the financial risk of the leg of a tour and often make losses when shows fail to sell out. As noted by Prof Mike Waterson in his May 2016 review of ticketing services in the UK: "[Promoters] *are essentially risk-takers and commonly bear a good deal of this risk personally, both financial and reputational. Staging a concert is an expensive business, with often tight margins, and judging the level of demand is difficult, because consumer tastes change rapidly.*"[39]

Last year, approximately [✂]% of MCD's shows were loss-making. By contrast, ticketing firms typically make a profit on every show. Therefore, a foreclosure strategy would require Live Nation to sacrifice stable profits in ticketing in the hope of potentially winning more events in promotion that could easily end up being loss-making.

The different level of risk between promotion and ticketing was also recognized by the UK Competition Commission when rejecting the theory of harm in *Live Nation/Ticketmaster*: "*these markets were characterized by differing degrees of risk: the margins in the promotions market are highly variable, while ticketing generates a more reliable revenue stream. Therefore, we found that a strategy to transfer market power from the market for live music ticketing to the market for live music promotions would involve some increase in the merged entity's total risk.*"[40]

---

39 See paragraph 3.8 of Prof Waterson's report, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525885/ind-16-7-independent-review-online-secondary-ticketing-facilities.pdf.

40 UK Competition Commission, A report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc, 7 May 2010, paragraph 8.36.

e. Fifthly, deploying Ticketmaster as a weapon to foreclose rival promoters in Ireland would hardly be kept secret in other countries. It would thus risk far reaching consequences on Ticketmaster's business globally.

f. Sixthly, artists and agents would have several means to retaliate against Live Nation, both in Ireland and elsewhere. They can avoid playing Live Nation festivals and venues and they could forgo Live Nation's promotion in other countries when they have attractive alternatives. These responses would necessarily deter the combined firm from embarking on the self-defeating foreclosure plan. AEG would also be able to retaliate against Live Nation though the use of their dominant O2 venue in London.

(87) Considering the above, there is uncertainty the exact proportion of Aiken's business that MCD would need to recover for a foreclosure strategy to be profitable. However, it is likely that the proportion would be significantly above [✂]%. This high percentage and the uncertainty surrounding the exact proportion create a high disincentive for the combine firm to engage in a foreclosure strategy.

B. Degree of switching

(88) Moreover, there is considerable uncertainty around the proportion of Aiken's business that would switch to MCD if Aiken were foreclosed.

(89) The Decision finds that artists using Aiken are likely to switch to MCD simply because MCD is the other large promoter on the island of Island. The Decision's finding fails to properly take into account the many reasons why this is not true:

(90) First, there is no reason to believe that a large number of artists and their agents would switch to MCD if Aiken were foreclosed since many of Aiken's artists are promoted at a global level by AEG, Live Nation's [✂] competitor.

(91) The close relationship between AEG and Aiken is illustrated by [✂].[41]

(92) [✂] provide yet further evidence that AEG would not necessarily switch from Aiken to MCD. [✂]. In other words, both Live Nation and AEG have their local promoter on the island of Ireland and would not switch to the local promoter of their rival at a global level, all the more so after MCD becomes part of the Live Nation group.

(93) The Decision acknowledges that AEG has a special relationship with Aiken, who acts as AEG's local promoter, but it says that AEG might not use Aiken anymore if Aiken were no longer able to secure high quality ticketing (para. 162).

(94) In fact, [✂]. It is very unlikely that AEG would turn to MCD, particularly after it becomes part of its [✂] rival.

(95) The Decision also notes that the proportion of Aiken's business that is promoted by AEG at a global level varies considerably depending on the artists who go on tour in a particular year (about [✂]% in 2016, [✂]% in 2017 and [✂]% in 2018) (para. 162). The lack of predictability of the proportion of Aiken's business that will come from AEG is a key reason why the combined firm would not have the incentive to engage in

---

[41] [✂].

a foreclosure strategy because the profitability of such a strategy would be highly uncertain.

(96) Second, certain other artists would [✄].

(97) The Decision accepts that many of the artists promoted by Aiken result from strong personal relationships. However, the Decision finds that artist loyalty is predicated on a certain level of quality of service and that if Aiken were unable to secure high-quality ticketing those artists could switch to MCD (para. 162).

(98) The Decision underestimates the importance of personal relationships in this industry. As third party promoters told the CMA, "*long-standing contacts, relationships and goodwill are an important feature of this sector*" (para. 162). The strong relationship of Aiken with certain artists is illustrated in [✄].[42]

(99) These relationships can lead to the choice of a promoter that is not deemed to be the best choice for a show, as illustrated in [✄].[43]

(100) The Competition Commission also stressed the importance of personal relationship in *Live Nation/Ticketmaster*, finding that "*Both promoters and artists' agents told us that agreements were often determined by personal relationships rather than on the optimal commercial terms.*"[44]

(101) Therefore, there is considerable uncertainty about the proportion of Aiken's business that would leave Aiken and potentially join MCD. And those who would do so are unlikely to do so immediately. As the Competition Commission also found in *Live Nation/Ticketmaster*, "*so long as other promoters could continue to sell tickets for their events, albeit with some lost sales due to not being able to sell through Ticketmaster, they were unlikely to lose their client base immediately. Therefore, the foreclosure of promoters was unlikely to lead to much benefit for the merged entity in the short term.*"[45]

(102) Third, the Decision fails to take into account that Aiken's personal relationship with certain artists is an important reasons why such artists are coming to the island of Ireland and therefore if Aiken were foreclosure those artists would likely play elsewhere. The combined firm thus benefits from Aiken's presence in the market because it generated ticketing and venue revenues that would be lost if Aiken were foreclosed.

(103) Fourth, the Decision recognises that some artists might decide not to play on the island of Ireland if Aiken were foreclosed but says that the Parties only provided "*a small number of examples*" and that the evidence provided "*does not show how significant this constraint is*" para. 165).

(104) Compelling evidence is provided in Decision itself, where artist managers and agents told the CMA that "*they considered no playing on the island of Ireland to be a possibility should the Parties limit their choice of promoter*" (para. 165). Another third

---

42 [✄].

43 [✄].

44 Para. 8.40.

45 Para. 8.39.

party told the CMA that artists "*might consider substituting an event in Dublin with an event in another European city*" and therefore the CMA concluded that "*From an artists' perspective, the relevant geographic scope might be wider [than the island of Ireland]*"(para. 97).

(105) Still additional evidence is provided by the Irish Competition Authority that found in 2005:

> "*Promoters in the island of Ireland compete aggressively with promoters in other countries to convince high-profile artists to perform by offering them sufficiently attractive terms. Thus, high-profile artists have strong bargaining power in their negotiations with promoters.*" [46]

(106) As the Authority also made clear:

> "*Any decline in the level of competition between the Promoters through lower artist fees would see artists switching to other countries where fees are more attractive.*"[47]

(107) The Decision's concern that this constraint is hard to "quantify" is precisely the reason why the combined firm would not have the incentive to foreclose. It creates substantial uncertainty that a foreclosure scheme could be successful and thus would serve as an additional disincentive to engage in it.

(108) Fifth, the Decision accepts that Aiken's smaller shows would not necessarily leave Aiken and move to MCD as Aiken would be able to rely on one of the existing local ticketing agents for such shows. Moreover, even if they left Aiken, the diversion to another smaller promoter on the island of Ireland would be more likely. However, the Decision argues that smaller events account for a relatively small proportion of Aiken's revenues, saying that [✂]% of Aiken's revenues came from events with over 5,000 tickets (para. 163).

(109) What this shows is that [✂]% of Aiken's business is unlikely to be diverted to MCD, which is yet another reason why the combined firm would not have the incentive to foreclose. In reality, the proportion is even higher because the relevant factor is not so much the size of the event but the demand for an event. As explained above, TMI estimates that annually only about [✂] events on the island of Ireland involve a significant spike in demand.

C. International ticketing agents

(110) The Decision says that it is uncertain whether the entry of international ticketing agents like AXS, CTS Eventim and SEE Tickets would be timely, likely, and sufficient in the short term and therefore concludes that entry may not act as a disincentive to engage in a foreclosure strategy (para. 179).

(111) As explained in paragraphs (35)-(56) above, there is significant evidence that those conditions would be met and therefore that the combined firm would not have the ability to foreclose. In any event, the uncertainty surrounding entry that is highlighted

46 See Decision of the Competition Authority (Case COM/107/02).

47 See Decision of the Competition Authority (Case COM/107/02).

in the Decision would act in itself as a major disincentive to engage in a foreclosure strategy. The combined firm would never engage in an already very risky strategy if it creates even a small risk that it would provide an international ticketing firm with an opportunity to enter the market and take over not only TMI's [✂] customer (Aiken) but would also start competing strongly for TMI's entire business on the island of Ireland, including festivals, venues, sporting events, cultural events, etc.

(112) A foreclosure strategy would thus threaten TMI's entire business on the island of Ireland and its stable profits, in the hope of potentially obtaining [✂] of the profits (Live Nation's share in LN-Gaiety) a very uncertain number of additional shows in promotion, shows which could end up being unprofitable given the highly variable nature of promotion profits.

D. Retaliation

(113) The Decision finds that it is uncertain whether a retaliation from artists or AEG in response to a foreclosure strategy would be likely or sufficient to act as a disincentive to foreclose (para. 164).

(114) <u>First</u>, the Decision argues that "*it is unclear that artists would be motivated to retaliate, particularly as retaliation would likely be costly to artists and AEG*" (para. 164).

(115) There is evidence that AEG has been willing to retaliate when it felt it was being treated unfairly. In 2017, AEG complained about an alleged tying practice in the US where a venue operator was according to AEG requiring promoters who wanted to book the Madison Square Garden in New York also book the operator's Forum in Los Angeles. AEG retaliated by engaging in a tying practice itself. AEG required all promoters who wanted to book its O2 venue in London to also book its Staples Centre in Los Angeles. Both firms have since then ceased all tying practices.[48]

(116) <u>Second</u>, the Decision says that "*artists or AEG may not be able to infer the reasoning for any refusal to supply or worsening of terms by Ticketmaster; they may see the effect and the resulting foreclosure, but not Live Nation's reasons for their actions*" (para. 164).

(117) On the contrary, international agents and promoters are sophisticated businesses who understand the ticketing business. If TMI suddenly stopped supplying Aiken, it is hard to imagine what Live Nation's motives could be other than foreclosing Aiken. Similarly, if TMI stopped sending email newsletters, increased booking fees only for Aiken, delayed the payment of cash, or engaged in any other similar practice, Aiken would notice immediately and would inform the agent, AEG and the artist. Live Nation certainly could not embark on such a risky foreclosure scheme simply on the hope that the parties who benefit from competition in Ireland might not notice.

(118) <u>Third</u>, the Decision claims that it "*received no evidence to indicate that such retaliation would be likely or sufficient to prevent the incentive to foreclose*" (para. 164).

(119) The example provided in paragraph (117) above shows that retaliation is not a mere possibility but has actually happened. The potential impact on the combined firm of a retaliation strategy could be significant. While it is hard to quantify, the uncertainty

---

48 See https://variety.com/2018/music/news/aeg-ends-block-booking-policy-connecting-l-a-s-staples-center-and-londons-o2-arena-1202938410/

about potential retaliation and its effects acts as a further disincentive to engage in a foreclosure strategy.

E. Wider strategic and commercial implications

(120) A foreclosure strategy would also be contrary to Ticketmaster's global business model, which is to operate on an arm's length basis from the rest of the Live Nation group in dozens of countries with a view to selling as many tickets as possible.

(121) The Decision accepts that Live Nation is active in promotion and ticketing in dozens of countries around the world and does not engage in any foreclosure strategy but finds that the incentives could be different on the island of Ireland (para. 182).

(122) The Decision does not provide any reason why Live Nation's incentive might be different on the island of Ireland. Moreover, even if for whatever reason Live Nation incentive were different on the island of Ireland, the adoption of a foreclosure strategy would have an effect beyond the island of Ireland where promoters would lose trust in Ticketmaster and therefore would be likely to take their distance vis-à-vis Ticketmaster. Live Nation's strategy is thus to [✄].

(123) [✄] is not only Live Nation's strategy but the strategy of all firms that are active in both promotion and ticketing, including AEG and CTS Eventim. [✄].

(124) The Decision also recognises that a foreclosure strategy could invite allegations under competition law, which could act as a further disincentive to engage in a foreclosure strategy. However, the Decision appears to consider that the combined firm's foreclosure strategy might not be "*clearly, or highly probably, unlawful under competition law*" (para. 183).

(125) A potential complaint by Aiken or others about the compatibility of a foreclosure strategy with competition law and the possibility that such a strategy would be found to be unlawful clearly acts as a disincentive to engage in such a strategy, in particular when viewed in combination with the many other uncertainties surrounding the profitability of a foreclosure strategy as discussed above.

(126) In sum, all of the facts and evidence confirm that the combined entity would not have the requisite incentive to foreclose promoters even if it had the ability to do so.

IV. NO ANTICOMPETITIVE EFFECT

(127) A hypothetical foreclosure of Aiken and other Irish promoters could not have an anticompetitive effect even if, contrary to all the facts and evidence, the merged firm had an ability and incentive to do so.

(128) The question in the present case is whether hypothetically foreclosing MCD's rival promoters in Ireland could allow it to offer worse financial or other terms to MCD's customers. Those customers are rock and pop stars. They are represented by agents who are professional negotiators and whose only job is to get artists the best possible deals to maximize the artists' (and their own) income.

(129) The fact of the matter is that these artists and agents would not be dependent on MCD even if other promoters were somehow foreclosed. MCD instead would continue to need to offer artists the same attractive deals to convince them to play in Ireland, rather than any number of other countries for their tour.

(130) As shown above in paragraph (88)c, there is substantial evidence of artists choosing between the island of Ireland and other countries when scheduling their tours. [✂].

(131) The negotiation power of artists is also evidenced by the high share of profits that artists typically secure and the associated high level of risk that promoters take on. An artist will typically receive the higher of either (i) a guaranteed fee (typically around [✂]% of projected net profits of the show and payable regardless of the actual profits) or (ii) a proportion of actual net profits of the show (typically [✂]%).

(132) Even if the merged entity somehow could foreclose rival promoters from the market, contrary to all the evidence, MCD therefore would continue to compete with promoters in other countries to attract tours to Ireland with competitive terms. The Proposed Transaction does not change this fundamental dynamic.

(133) The Decision argues that Aiken must exercise some competitive constraint on MCD and that the constraints from outside the island of Ireland are unlikely to be sufficient to compensate for the loss of Aiken (para. 187). Yet, this is in direct contradiction with the statements of artist managers and agents who told the CMA that "*they considered not playing on the island of Ireland to be a possibility should the Parties limit their choice of promoter*" (para. 165). Another third party told the CMA that artists "*might consider substituting an event in Dublin with an event in another European city*" and therefore the CMA concluded that "*From an artists' perspective, the relevant geographic scope might be wider [than the island of Ireland]*"(para. 97)

(134) Moreover, the UK merger control laws required that the lessening of competition be "substantial". Therefore, even if Aiken did exercise some competitive constraint, it would have to be such that the Proposed Transaction would result in a substantial lessening of competition. As explained in the Merger Assessment Guidelines, "[s]*ome mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time*".[49] That is the case here, the competitive constraints from outside of Ireland would preclude a substantial lessening of competition.

(135) The Decision also claims that there may be some artist who do not have the option to play outside the island of Ireland (para. 187). However, the Decision does not provide any example of such artists. They would likely be smaller local artists for which there would likely be many alternative ticketing options (including existing ticketing firms such as Tickets.ie, Eventbrite, Ticketbooth, and others) and therefore for which no foreclosure concerns would arise.

V. CONCLUSION

(136) In sum, the combined firm could not, and would not, use its ticketing business to foreclose Aiken from the market. And any such effort could not have an anticompetitive effect. The Proposed Transaction therefore merely takes the next logical step in the already close relationship between the Parties without posing any possible threat to competition.

---

[49] Merger Assessment Guidelines, OFT1254, September 2010, para. 4.1.3.