Live Nation/Ticketmaster:
Assessment of the Competition Commission's provisional findings on vertical foreclosure

Prepared on behalf of

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1 Introduction and conclusions

1.1 Introduction

[✂] commissioned [✂] to assess the Competition Commission's (CC) provisional findings in its inquiry into the anticipated merger between Live Nation and Ticketmaster.[1] In particular, [✂] was asked to assess the CC's conclusions in relation to vertical foreclosure.

This report critically assesses the CC's provisional finding that foreclosure is unlikely to lead to a substantial lessening of competition (SLC) in this case. Section 2 considers the CC's approach to assessing foreclosure, focusing on whether the CC has properly taken account of the wider issues related to the creation of an integrated entity with operations across the whole live music value chain. Section 3 assesses in more detail the CC's analysis of theories of harm in relation to vertical foreclosure, including the foreclosure of ticket agents, music promoters and venues.

1.2 Conclusions

The CC's provisional findings on vertical foreclosure contain a number of serious weaknesses.

The assessment of foreclosure is generally confined to considering the vertical links between particular stages in the value chain. As a result, the analysis does not fully take account of the integrated nature of the merged entity across the whole live music value chain, and the impact of this on its ability and incentives to foreclose competitors. The facts of the case suggest the vertical effects may well be more significant for competition than the CC's analysis suggests. In particular:

– **The provisional findings do not fully consider 'demand shifting' (section 2.1.3).** The CC's analysis has not fully addressed the possibility that the merged entity could engage in internal 'demand shifting', whereby losses might be sustained in low-margin parts of the value chain to benefit higher margin activities elsewhere in the value chain to the detriment of competition.

– **Implications for artists and managers are not addressed (section 2.1.4).** The CC's foreclosure analysis has not examined the influence that the merged entity would have on artists and their management, despite the merged entity's important presence at this stage of the value chain.

There are also a number of weaknesses in the detailed analysis on which the CC's provisional findings are based. These weaknesses undermine the CC's conclusions that the merged entity would not have the ability and incentive to foreclose rivals in ticketing or in live music promotion.

– **Rejection of ticket agent foreclosure may be due to an underestimate of Live Nation's market power (section 3.1.1).** The CC's conclusion that rival ticket agents are unlikely to be foreclosed relies on Live Nation having a relatively small market share in live music promotion (15–20%). This is based on a broad market definition. There is evidence to suggest that a narrower market for large events, in which Live Nation would hold a larger market share, would have been more appropriate.

[1] Competition Commission (2009), 'Ticketmaster and Live Nation merger inquiry: Provisional findings report', October 8th.

- **Rejection of full foreclosure of promoters ignores strategic behaviour by the merged entity (section 3.2.1).** The CC's analysis of full foreclosure does not properly take account of the strategic nature of foreclosure, or the fact that foreclosure could be focused on particular rivals. The loss of an independent rival such as [✂] would be expected to result in a substantial lessening of competition.

- **Rejection of partial foreclosure of promoters dismissed on the basis of limited evidence (section 3.2.2)**. The analysis of partial foreclosure relies on the finding that rival promoters will switch or threaten to switch away from Ticketmaster. This conclusion appears to rely purely on two pieces of anecdotal evidence relating to one method of partial foreclosure. [✂]. Other evidence presented to the CC suggests that promoters would find it difficult to switch and also that rival promoters switching away from Ticketmaster could benefit the merged entity and harm competition in ways not fully explored by the CC.

- **The CC's lack of concern with regard to data sharing leaves questions unanswered (section 3.2.2).** The CC's conclusion that promoters can prevent the merged entity from misusing their data by threatening to switch away is not fully supported by the evidence. On the other side of the cost-benefit equation the conclusions as to why more direct access to rival promoters' customer data would not benefit Live Nation in terms of winning additional promotions business are not fully explained.

- **The CC's analysis of venue foreclosure is brief and high-level (section 3.2.3)**. [✂]. It also does not take into account other evidence, including from elsewhere in the provisional findings report, which might lead to the conclusion that foreclosure of venues is a concern. This evidence includes the significant switching costs that venues face and the details of local competition between venues.

2 Vertical effects and the value chain

The CC's provisional findings report noted that Live Nation and Ticketmaster are active at different levels of the industry supply chain, and that the proposed merger may therefore give rise to vertical effects (para 7.3). The CC has provisionally found that the merger would not be likely to result in the full or partial foreclosure of existing competing ticket agents, promoters or venues.

These conclusions on the vertical effects of the merger were predicated on an analysis that did not fully explore the implications of the integrated character of the merged entity for competition in relevant markets. In particular, the CC's analysis has not fully addressed the possibility that the merged entity could engage in internal 'demand shifting' within the integrated group, whereby losses might be sustained in low-margin parts of the value chain (eg, promotions) to benefit higher-margin activities elsewhere in the value chain (eg, venues) to the detriment of rivals.

This section assesses whether the merged entity's integrated character and presence in all important parts of the industry value chain should cause the CC to revisit its provisional conclusions on the vertical effects of the merger. Section 2.1 briefly reviews the CC's analysis of vertical effects in the context of relevant economic theories of vertical harm; and section 2.2 evaluates the CC's conclusions on vertical effects in light of the facts of the case.

2.1 Economic theory and the analysis of vertical effects in the provisional findings

2.1.1 Economic framework

The starting point of the CC's analysis of the vertical effects of the merger is the recognition that vertically integrated entities may have the ability and incentive to foreclose rivals fully or partially. Full foreclosure amounts to an outright refusal to supply rivals, while partial foreclosure amounts to a worsening of the terms of trade between the integrated entity and its rivals. Partial foreclosure is, in essence, a means by which a vertically integrated company can 'raise rivals' costs', in the language of Salop and Scheffman (1983).[2]

Foreclosure strategies may reduce demand for the service and facilities provided by the integrated firm, and may therefore reduce its profits, so that the likelihood that a merged firm will engage in foreclosure is an empirical matter that will vary from case to case.[3] The CC considered whether the merged entity could use:

– Ticketmaster's position in the market for the primary retailing of live music tickets to harm Live Nation's competitors in the markets for live music promotion or live music venue provision;

– Live Nation's position in the markets for live music promotion and/or the provision of live music venues to harm Ticketmaster's competitors in the market for the primary retailing of live music tickets (para 7.3).

[2] Salop, S. and Scheffman, D. (1983), 'Raising Rivals' Costs', *American Economic Review*, **73**:2, pp. 267–71.

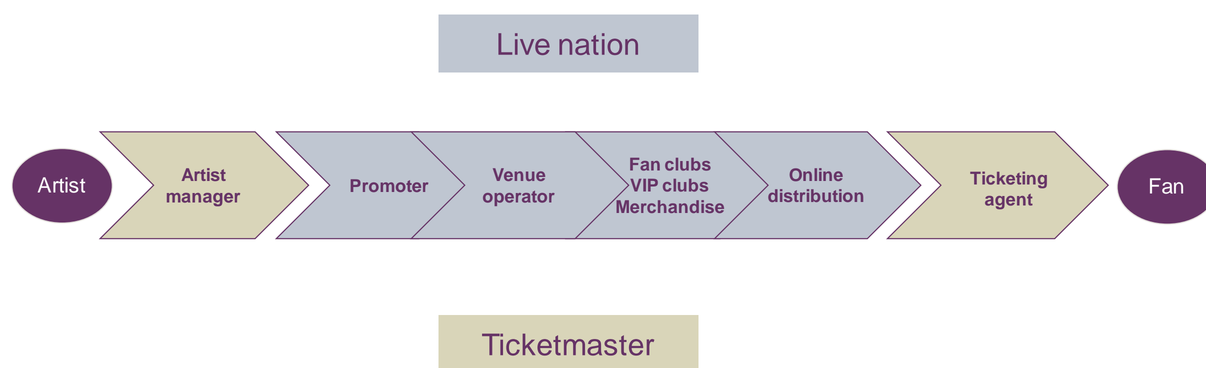
[3] For example, the following studies analyse this incentive in different settings: Mandy, D. (2000), 'Killing the goose that may have laid the golden egg: only the data know whether sabotage pays', *Journal of Regulatory Economics*, **17**:2, pp. 157–172; Kang, J. and Weisman, D. (2001), 'Incentives for discrimination when upstream monopolists participate in downstream markets', *Journal of Regulatory Economics*, **20**:2, pp.125–140; Gilbert, R. and Hastings, J. (2005), 'Market power, vertical integration and the wholesale price of gasoline', *Journal of Industrial Economics* 53:4, pp. 469–492.

2.1.2 Partial foreclosure

The CC considered the following five ways in which 'Ticketmaster could worsen the terms of its offer to other promoters'[4] in order to assess whether the merged entity would have the ability and incentive partially to foreclose rivals:

– reducing the rebate it paid to other promoters;
– increasing the booking fees it charged to consumers of other promoters' tickets;
– reducing its marketing of other promoters' events;
– delaying the payment of cash from ticket sales to other promoters;
– using other promoters' operational or customer data to the advantage of Live Nation.

The CC analyses the incentive and ability of the merged entity to engage in these partial foreclosure strategies, in essence, as if these strategies were independent. This is problematic. An integrated company will typically be indifferent as to where in the value chain it collects profits (see, for example, Hart and Tirole, 1990[5]). This affords such an organisation the opportunity to 'shape' demand across the value chain so that activities with relatively high margins and profits are privileged, even if some short-term costs are incurred in so doing. The CC's Figure 5 on page 24 of the provisional findings clearly summarises the merged entity's presence in all significant parts of the value chain:



Source: Competition Commission.

Paragraph 3.5 of the provisional findings reviews Live Nation's rationale for the merger—to enable artists to connect with their fans—which has resulted in the disposal of activities outside of the music industry (such as motor sports, theatre and sports representation), and the acquisition of businesses across the live music business value chain, in promotions, venue management, fan-based media, digital distribution and merchandising.

The provisional findings report suggests that neither Live Nation nor Ticketmaster submitted evidence that the merger would give rise to significant efficiencies in the UK market (para 7.4).

2.1.3 Demand shifting

In the absence of substantiated merger-specific efficiencies and given that the merger encompasses the entire value chain, a more appropriate starting position for the CC's analysis would therefore be to account more comprehensively for the merged entity's vertically integrated character across the value chain, and to examine the ability and incentives of the merged entity to shape demand at different levels of the industry to benefit its overall margins and profits. This notion is recognised in the European Commission's guidelines on non-horizontal mergers:

[4] It is noted that the CC refers to Ticketmaster (see para 8.42).

[5] Hart, O. and Tirole, J. (1990), 'Vertical Integration and Market Foreclosure,' *Brookings Papers on Economic Activity*, Special Issue, p. 206.

Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.

The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream. Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.[6]

An example illustrates the issue: the CC concludes that the merged entity would have no incentive to reduce the marketing of other promoters' events. This is because the likely consequences of a reduction in marketing efforts would be that promoters would switch away from Ticketmaster to other agents, with the result that the merged entity would face a short-term cost with an uncertain long-term gain.

However, it is conceivable that a small degradation in marketing efforts might be hard for third parties to verify (implying limited cost to the merged entity, as promoters would not switch away from Ticketmaster). This may then increase the marginal attractiveness of the merged entity to artists and their management, which would increase its profits. The extent to which any such degradation would affect the marginal incentives of other parties can only be answered by detailed analysis. However, such analysis is not a feature of the CC's reasoning on the vertical effects of the merger. Additionally, it would be worth assessing whether the advantages afforded to the merged entity through access to customer data may, in combination with other partial foreclosure strategies, overcome the 'short term cost but uncertain long term benefit' conclusion reached by the CC. For example, it may be the case that access to data allows the merged entity to win additional business more quickly or to win a greater proportion of the business of foreclosed rivals than would otherwise be the case, thereby increasing the benefits of foreclosure.

The CC's analysis did encompass, to a limited extent, a certain amount of analysis of the effects of different margins across the value chain. The impact on the relative margin from ticket sales as a ticket agent and as a promoter are analysed (in paras 7.116 to 7.131). The conclusion of this analysis is that the foreclosure of existing ticket agents might be a profitable long-term strategy for the merged entity, but would be a highly risky strategy given the likelihood of short-term loss and the uncertainty of long-term gain, and that the merged entity was therefore unlikely to have the incentive to foreclose other ticketing agents.

2.1.4 The effect of the merger on artists and artist managers

The CC's foreclosure analysis did not examine the influence that the merged entity would have on artists and their management, despite the merged entity's important presence at this stage of the value chain. It is not clear from the provisional findings report whether the CC has undertaken detailed discussions with artists and their managers.

[✂] response to the CC's 'Statement of Issues' explained that artists and their management select promoters on the basis of three main criteria:

– the ability to design a good tour at the right venues;
– the ability to target the right fans to fill those venues;
– revenue.

The revenue that an artist will earn from a tour is derived from the first two criteria: playing the right venues and filling them to capacity will generally lead to higher revenue. In addition, the merged entity is already in a strong position in artist management through Front Line.

[6] European Commission (2008), 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings', 2008/C 265/07, paras 40–41.

Paragraph 8.36 of the provisional findings notes remarks from Metropolis and Regular Music to the effect that artists tend not to change promoters very often. On the one hand, this indicates that artists would not move immediately when confronted by a changed market place post-merger; on the other hand, however, this indicates that, once these parties do switch, it would be increasingly difficult for other parties to compete with the merged entity, whose position in the market could benefit from reinforcing effects over time.

It is also worth reflecting on the analysis of vertical mergers provided by Inderst and Valletti (2008),[7] who argue that pre-merger observables, such as margins, are not necessarily good predictors of post-merger foreclosure incentives. They argue that high upstream and low downstream margins may lead to strong incentives to foreclose downstream rivals, particularly if the level of margins is driven by downstream market characteristics, such as the nature of product differentiation or the intensity of competition.

In their model, a more competitive downstream market is associated with higher upstream but lower downstream margins, which increases the incentive to foreclose in the downstream market. However, the competitive effects of a vertical merger are not necessarily negative since the market characteristics that make foreclosure more profitable may make integration itself more beneficial.

Again, these remarks cannot themselves provide determinative guidance as to the specific circumstances that prevail in the merger of Live Nation and Ticketmaster. However, they indicate that the incentive to foreclose depends on the reasons for which margins differ between different parts of a vertical value chain, and the effect that the merged entity's post merger behaviour has on competition in different markets. This conclusion again demonstrates a more general point: the CC's analysis of the vertical effects of the merger does not take into account all of the relevant factors that may shape competition post-merger in markets across the value chain.

2.2 What does this mean for conclusions on vertical effects?

The proposed merger will create a highly integrated entity that will operate across several different parts of the value chain. None of the foregoing purports to demonstrate conclusively that a more detailed analysis of the vertical effects of the merger will be positive or negative for competition. However, the facts of the case suggest that the vertical effects may well be more significant for competition than the CC's analysis suggests: the presence of the merged entity across the value chain and its integrated character suggest that a more fully articulated analysis of its ability and incentive to engage in foreclosure is warranted before the CC reaches its final position on the merger.

[7] Inderst, R. and Valletti, T. (2008), 'Incentives for input foreclosure', working paper, Imperial College London and University of Rome II, October.

3 Detailed assessment of the CC's foreclosure analysis

Even taking the CC's compartmentalised approach to foreclosure as it stands, there are many areas in which the conclusions may be challenged. Section 3.1 assesses the CC's analysis of foreclosure in relation to ticket agents, and in particular the importance of market definition. Section 3.2 assesses the conclusions on promoter foreclosure and section 3.3 considers venue foreclosure. In each case, significant questions are raised with regard to the CC's conclusion that vertical foreclosure is unlikely to lead to an SLC.

3.1 Foreclosure of rival ticket agents

3.1.1 Market definition

The CC concludes that the ability of the merged entity to foreclose most live music ticket agents was limited due to the small proportion of these agents' sales represented by Live Nation tickets (para 7.110). This conclusion relies on Live Nation controlling a relatively small proportion of the promotions market. The CC estimates Live Nation's market share at 15–20%.

The CC's market definition is flawed in that it does not start from the smallest reasonable set of products and work outwards. The starting point for the product market definition appears to have been live music promotion (rock and pop), including large and small events. There is evidence to suggest that starting with a narrower market—for example, the market for promoting larger events—would have been more appropriate. The CC's analysis of PRS data suggests that: 'Live Nation's promotions business may be slightly more concentrated on larger, more expensive events than average' (Appendix F, para 26). Live Nation itself is cited by the CC as claiming that it 'focused on large events' (Appendix F, para 19). The CC states that 'although there might be an asymmetry, with small promoters generally promoting just small events and large promoters promoting both small and large events, there was no clear basis for delineating the market on the basis of the size of event.'

This conclusion demonstrates why it is important for the SSNIP test to start from the smallest reasonable set of products and work outwards. By starting with a market that includes both large and small events, the CC finds no reason to delineate the market, despite the asymmetries it acknowledges may exist (Appendix F, para 7). If the CC had started the market definition exercise with the promotion of large events only, it might have concluded that small promoters, which generally promote only small events (Appendix F, para 7), could not easily switch into providing large events. This would have led it to define a separate market for the promotion of large events, of which Live Nation would have most likely controlled far more than 15–20% of supply. This could significantly change the foreclosure analysis in relation to foreclosure of ticket agents. The CC should revisit its original market definition and assess whether a narrower definition, including the promotion of large events only, would increase the market power of Live Nation sufficiently to change the outcome of the analysis on foreclosure of rival ticket agents.

3.2 Foreclosure of rival promoters

3.2.1 Full foreclosure of promoters

The CC examines whether the merged entity would have the ability and incentive to foreclose rival promoters by Ticketmaster ceasing to sell tickets to them. This is based on standard economic analysis of foreclosure, which requires that, for foreclosure to harm

competition, the merged entity must have both the ability and incentive to foreclose rivals and that the foreclosure will harm competition.[8]

The CC concludes that if Ticketmaster refused to supply other promoters with its ticketing services, these other promoters could be foreclosed (at least partially) from the market for live music promotion (para 8.21). Therefore the merged entity has the ability to foreclose rival promoters. The CC then goes on to consider a number of issues in relation to the merged entity's incentive to foreclose.

Costs

The CC finds several areas where foreclosure would lead to costs for the merged entity. If the CC has overstated these costs, it may have concluded wrongly that the merged entity would have no incentive to foreclose. In each category of cost, the conclusions are indeed questionable.

- **Loss in profit from lost ticket sales**. This would be from promoters that would no longer be served by Ticketmaster. Although some short- term profits would be lost, it would not be necessary for the merged entity to foreclose all of its main rivals. [✂], were foreclosed, this would account for approximately a fifth of the market, based on the CC's own figures. By selectively foreclosing rivals, the merged entity can minimise the costs associated with foreclosure and maximise the benefits in terms of increasing Live Nation's market power.

- **Loss due to harm to Ticketmaster's market position**. The CC argues that unless the foreclosed rivals can be forced to exit quickly, there would be a gradual reduction in Ticketmaster's range of tickets and an increase in the range offered by rival ticket agents. This would only be a concern if large numbers of rival promoters were foreclosed at the same time. Selectively foreclosing one rival [✂] would have no material impact on Ticketmaster's range as it would continue to sell tickets on behalf of all other promoters.

- **Loss from foreclosure of SJM or Metropolis due to shared interest in AMG**. The CC notes that if SJM and/or Metropolis were foreclosed, this could reduce the profits of AMG. This argument highlights a key point—the CC's approach to assessing foreclosure assumes that the merged entity will take a mechanical approach to foreclosure, rather than an intelligent and strategic approach. Using the CC's own logic, foreclosing [✂] another independent promoter instead of SJM or Metropolis would benefit Live Nation directly, and could also benefit its AMG partners, SJM and Metropolis, leading to increased profits for AMG and thus further increased profits for Live Nation.

Benefits to the merged entity

- The CC states that it did not receive any evidence with regard to diversion ratios between promoters. As a result it assumes that if a promoter were foreclosed totally its business would divert to its competitors in proportion to their market shares (para 8.30). Based on this assumption, it concludes that even if one of the large promoters were foreclosed, the gain in market share for Live Nation would be small. There are a number of problems with this conclusion, as follows.

- Although the CC does not have empirical evidence on which promoters are the closest competitors to Live Nation, it can rely on commercial logic to indicate the strategy that would most likely be employed. The merged entity can be expected to know which promoters are its closest competitors, and it would be rational for it to foreclose these competitors, as this would lead to the greatest benefit to the merged entity in terms of

[8] Rey, P. and Tirole, J. (2007), 'A Primer on Foreclosure', in M. Armstrong and R. Porter (eds), *Handbook of Industrial Organization*, vol.III, September.

increased profits. This is another example where it is reasonable to believe that the merged entity will act intelligently and strategically, rather than behaving mechanically and simply foreclosing rivals at random.

– The nature of the foreclosure strategy weakens all of Live Nation's promoter rivals, even those that are not foreclosed. Only Live Nation can guarantee continued access to Ticketmaster in the future. Thus, if a rival is successfully foreclosed through not having access to Ticketmaster, its customers are likely to switch disproportionately to Live Nation, rather than other promoters, which are also at risk of the same fate.

– As discussed above, Live Nation's market share is likely to be above 20%, based on narrower market definitions not considered by the CC. As such it will receive a greater share of the foreclosed promoter's (or promoters') lost business even on the CC's pro-rata assumption.

The CC does not consider benefits of foreclosure that go wider than promotions. [✂]

Furthermore, as mentioned above, foreclosure of promoters other than SJM and Metropolis would benefit these two promoters, and could be expected to increase the profits of AMG, leading to greater profits for Live Nation.

Conclusion on full foreclosure of promoters

The combination of all the above factors may be enough to show that the merged entity would have the incentive as well as the ability to selectively foreclose rival promoters. [✂] has not seen the CC's detailed calculations and so cannot provide a firm view on this.

At the very least, the CC should reassess the merged entity's incentive to foreclose, taking into account the above concerns. As well as simply calculating the vertical arithmetic (that is, comparing the costs of foreclosure for Ticketmaster to the benefits for Live Nation), the CC must take into account that the merged entity would make decisions on which rivals to foreclose, based on its superior knowledge of its rivals' market positions, its own ownership links with some rival promoters, and the potential to benefit other areas of its business outside promotion.

If the CC were to conclude that the merged entity would have the ability and incentive to foreclose rivals selectively, it would then be required to consider whether such foreclosure would lead to an SLC. This would depend on barriers to entry and the size of the rival that was foreclosed. The CC concludes that there are barriers to entry in promotion (para 5.49), but notes that these are not insurmountable for some potential entrants.

Based on this conclusion, it would be unreasonable to rely on there being low barriers to entry to prevent any harm to competition following foreclosure. [✂]. It is reasonable to expect that the loss of such a player would result in an SLC.

3.2.2 Partial foreclosure of promoters

The CC considers whether the merged entity would have the ability and incentive to foreclose rival promoters through means other than simply not providing them with access to Ticketmaster's services. The potential methods of partial foreclosure considered by the CC are:

– reducing the rebate paid to promoters;
– increasing customer booking fees on rival promoters' tickets;
– reducing Ticketmaster's marketing of other promoters' events;
– delaying the payment of cash from ticket sales to other promoters;
– using operational and other commercially sensitive data to the advantage of Live Nation; and
– using customer data to the advantage of Live Nation.

There are a number of flaws in the arguments that the CC puts forward to reject each of the above concerns. This submission concentrates on two areas which are of greatest concern: the ability of promoters to switch away to other ticketing providers, and the use of customer data.

Ease with which promoters can switch away from Ticketmaster

An essential element of the CC's argumentation is the ability of promoters to switch away from Ticketmaster in the face of price increases or degradations to the quality of service. The CC's lack of concern about partial foreclosure through increasing booking fees for rival promoters, through reducing marketing of other promoters' events or through delaying payments, relies in each case on promoters' ability to switch away.

However, the CC relies on limited evidence to conclude that promoters can switch. It cites an example of two promoters who were recently faced with an attempt by Ticketmaster to lengthen the delay before it paid them the proceeds from their ticket sales (para 8.68) In response, an unnamed promoter, which was not under contract with Ticketmaster, switched most of its ticket volumes to See Tickets. Another promoter, Metropolis, threatened to switch away, and it is reported that Ticketmaster then reinstated the previous payment terms.

This evidence suggests to the CC that, while promoters might need to sell some tickets through Ticketmaster in order to maximise ticket sales, they are able to harm Ticketmaster by switching some volume of tickets to other ticket agents—in particular, See Tickets. It notes that this action, or the credible threat of this action, appears to have been sufficient to constrain Ticketmaster's behaviour pre-merger and should remain a sufficient constraint post-merger.

Given that the ability of promoters to switch away from Ticketmaster is used by the CC to reject three separate theories of harm related to vertical foreclosure of promoters, the evidence base it relies on is not strong. It is not clear that an example based on just two promoters in relation to one particular foreclosure theory is representative of all promoters for each of the four foreclosure theories where switching is used to reject the concern.

It is also not clear from the provisional findings report whether the CC has sought to determine if Metropolis and the unnamed promoter have different business models compared with other promoters that would make it easier for them to switch than others. It is also unclear whether the CC has sought information from other promoters in relation to Ticketmaster's recent plan to increase the time it takes to pay promoters. The CC should seek to understand whether the same conditions were imposed on other promoters and what their reactions were.

In addition to the limited evidence on which the CC relies, there are other areas of concern.

Incentives of Ticketmaster post-merger. The CC's conclusion that switching, or the threat thereof, 'appears to have been sufficient to constrain Ticketmaster's behaviour pre-merger and should remain a sufficient constraint post-merger', does not explicitly take into account the change in Ticketmaster's incentives post-merger. Whereas pre-merger Ticketmaster would receive no benefit from losing a promoter, post-merger, harming an independent rival promoter to Live Nation may well benefit Live Nation directly and also indirectly through its shareholding in AMG. Therefore, post-merger, Ticketmaster will be less constrained by rival promoters than pre-merger.

See Tickets is not a perfect substitute for Ticketmaster. Rival promoters who did switch from Ticketmaster to See Tickets would suffer to some extent because See Tickets is differentiated from Ticketmaster in terms of the types of tickets it sells. As Metropolis told the CC: 'Ticketmaster was good at selling tickets for mainstream pop events, while See Tickets was good for rock and indie events' (para 8.17). [✂]

[✂][9]

As a result, See Tickets may not be as successful in selling tickets that would normally be sold via Ticketmaster.

In conclusion, the CC's key rationale for rejecting three separate partial foreclosure concerns appears to rely purely on two pieces of anecdotal evidence relating to one method of foreclosure. It is by no means clear whether this evidence can be applied equally to other promoters and other methods of foreclosure. The CC should seek further evidence from promoters, which may or may not lead it to revise its conclusions. Furthermore, there are a number of additional concerns relating to the ability of promoters to constrain Ticketmaster's behaviour post-merger by switching away or threatening to switch.

Foreclosure through access to customer data

The CC considers whether Live Nation's access to the customer data of rival promoters would enable it to harm competition by using the data to win additional business at the expense of rivals. It concludes that the merged entity could have some ability partially to foreclose other promoters as a result of Live Nation's access to Ticketmaster's customer database, including customer data gathered by Ticketmaster from sales for other promoters (para 8.94). However, it goes on to conclude that the merged entity would not have the incentive to foreclose in this way. This is based on the conclusion that the costs of the action would outweigh the benefits to the merged entity. It found that promoters would switch ticket agents as a result of data concerns, causing real costs to Ticketmaster in terms of lost sales. At the same time it concluded that the action would be unlikely to result in a significant gain for the merged entity, at least for a very long time (8.98).

Costs to the merged entity from using rival promoters' customer data. The CC concludes that promoters could partially switch away from Ticketmaster as a result of data concerns and this would impose costs on the merged entity. [✂]

[✂][10]

[✂], it is not clear that a sufficient proportion of tickets could be switched away to prevent the foreclosure being profitable.[11]

Benefits to the merged entity from using rival promoters' customer data. The CC finds that Ticketmaster already uses data from one promoter's tour to market other promoters' tours (para 8.88). It then concludes that the merger would not affect significantly the degree to which Live Nation benefited from Ticketmaster marketing its events using customer data from other promoters and venues (para 8.89). The CC does not explain its conclusions in detail. The CC does not fully take account of the advantage Live Nation would receive as a result of having access to data that cannot currently be passed to it by Ticketmaster due to data protection laws and/or specific contractual obligations with other promoters. It also does not adequately take into account the competitive advantage that Live Nation would have as a result of Ticketmaster withholding data that it currently shares with Live Nation's rivals. [✂].[12]

Overall, the CC's conclusion that promoters can prevent the merged entity from misusing their data by threatening to switch away is not fully supported by the evidence. On the other side of the cost–benefit equation, the conclusion as to why more direct access to rival promoters' customer data would not benefit Live Nation in terms of winning additional promotions business is not fully explained.

[9] [✂].
[10][✂].
[11] [✂]
[12] [✂]

3.2.3 Other areas of concern in the CC's analysis of promoter foreclosure

The importance of Ticketmaster in marketing events

On the importance of customer data in successfully marketing an event, the CC concludes that emails from ticket agents 'played a limited role' in making customers aware of live music events (para 5.8). However, the research commissioned by the CC shows that 18.4% of consumers reported that an email from the ticket company was one of their usual ways of finding out about events. The figure for the most recent event is far lower, at 6.6% (Appendix E, para 26). However, this difference will in some part be due to the phrasing of the questions and the fact that consumers were able to provide multiple answers. Consumers asked about their 'usual' method of finding out about live music events are more likely to mention a number of methods since there may be more than one 'usual method'. By contrast, when they are asked which method was used for the last event they attended, a single response is more likely.

This is reflected in the cumulative percentages for all methods of awareness. For the usual method of awareness the cumulate percentage is 226%, whereas for the most recent purchase the percentage is 160%. If the percentages are re-weighted to take into account the difference in the cumulative percentage, the answers are not very different. For each of the possible responses, the difference between the specific question about the most recent purchase and the general question about the usual method is no more than four percentage points. Therefore, the figure of 18.4% of customers who report that they are usually made aware of live music events by an email from a ticket agent should not be rejected as misreporting by respondents.

Furthermore, the largest category of responses—'family and friends', which is reported by 38.2% of respondents as a usual method of finding out about events—is in fact not a direct method of awareness; the family member or friend must themselves have been made aware of the event via one of the other sources listed. If this 38.2% were redistributed pro rata among the other sources of awareness, the 18.4% attributed to the ticket agent's email would increase to almost 30% (29.8%). Therefore it is not appropriate to conclude that emails from ticket agents play only a limited role in marketing events.

Once it is established that the ticket agent plays a significant role in marketing an event, the difficulty of switching away from Ticketmaster is clear. As by far the largest ticket agent for promoters, Ticketmaster will have by far the largest customer database; moreover, it has the additional data from its role as a ticket agent for venues.

3.3 Foreclosure of rival venues

3.3.1 The partial foreclosure of venues is considered only at a very high level

The CC concludes that if Ticketmaster were to cease selling tickets for other venues, or worsened its terms, either the venue would seek to use another ticket agent or the promoters of the events at the venue would reallocate the venue's tickets to other ticket agents (para 8.106). It also concludes that, even if other venues lost all their income from ticket rebates (which it considered unlikely as the venues would switch to another ticket agent or self-ticketing), the small loss in income which would result would be unlikely to have a significant impact on the venues' profitability or competitiveness (para 8.107).

[✂][13][✂]

[✂][14]

[✂]

[13] [✂]
[14] [✂].

Furthermore, the CC's conclusion is based on the argument that if Ticketmaster were to worsen the terms offered [✂], promoters would simply reallocate the venue's tickets to other ticket agents. [✂][15]

The CC also argues that any harm to venues in terms of partial foreclosure would be limited to the loss of the ticket agent rebate. It concludes that the small loss in income which would result would be unlikely to have a significant impact on venues' profitability or competitiveness (para 8.107). This ignores the fact that partial foreclosure could take a number of different forms, including Ticketmaster demanding a negative rebate or other payments, the effect of which could have a significant effect on the profitability of rival venues.

Although the CC notes that the market for live music venues is likely to be local (para 8.104) it does not go on to consider the impact of foreclosure in individual local markets. [✂]

In summary, the CC's analysis of venue foreclosure is brief and high-level. As a result it [✂] does not take into account evidence from elsewhere in the provisional findings report which might lead to the conclusion that foreclosure of venues is a real concern.

[15] [✂]