

ALLEN & OVERY

**COMPETITION COMMISSION
TICKETMASTER/LIVE NATION INQUIRY**

CTS EVENTIM AG

**SUBMISSION ON THE FURTHER PROVISIONAL FINDINGS REPORT
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1. INTRODUCTION AND SUMMARY**(a) Introduction**

- 1.1 In this paper, CTS Eventim AG (**Eventim**) explains why the completed merger between Ticketmaster Entertainment, Inc. (**Ticketmaster**) and Live Nation, Inc. (**Live Nation**) to form Live Nation Entertainment, Inc. (**LNE**) is likely to give rise to a substantial lessening of competition (**SLC**) and the Competition Commission (**CC**) should therefore depart from its Further Provisional Findings Report published on 12 February 2010 (**the Further PFs**).

(b) Summary

- 1.2 The nine principal effects of the merger are summarised in Table 1.

Table 1: The Nine Principal Effects of the Merger

Issue	Counterfactual	Effects of the merger
1. Live Nation's incentives	To maximise its profits: <ul style="list-style-type: none"> • By selling as many Live Nation tickets as possible • If it cannot sell Live Nation tickets on its own website, by selling them through Eventim in preference to other ticket retailers.¹ 	To maximise its profits: <ul style="list-style-type: none"> • Taking account of its merger with Ticketmaster ... • ... which creates an incentive to act strategically to exclude or marginalise Eventim with the purpose of promoting Ticketmaster's interests.²
2. Number of Live Nation tickets allocated to Eventim	Of the tickets that Live Nation cannot sell through its own website, Eventim is "allocated" ³ as many as Eventim can sell. ⁴ Eventim has the assets, skills and capital necessary successfully to sell Live Nation tickets. ⁵ Eventim's cautious, normal course of business forecasts ⁶ from 2007 estimated that Eventim would sell <i>[CONFIDENTIAL]</i> per cent of the "tickets actually sold by Live Nation". ⁷ Eventim's forecasts are corroborated by experience of operating the LOI in other European countries. ⁸	The minimum under the LOI (reflecting Live Nation's changed incentives summarised in issue (1) above) <i>[CONFIDENTIAL]</i> , as explained in issue (3) to (5) below; and note the consequence of this in issue (6). ⁹ More generally, it is important to appreciate that the <i>number</i> of tickets is relevant, but it is only part of the story, as explained in issue (3) to (6) below.

¹ Further PFs, para. 6.29.

² Further PFs, paras 7.35 and 7.58.

³ See para. 3.31 below for an explanation of why ticket "allocations" strictly do not arise when tickets are sold from Eventim's system.

⁴ See Further PFs, para. 6.31.

⁵ See section 3(e) below.

⁶ The ICN's Investigative Techniques Handbook for Mergers (<http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>) says: "Because they were created before the merger was contemplated, ... ordinary-course-of-business documents tend to be viewed as reliable sources of evidence."

⁷ See section 3(e) below.

⁸ See section 3(d) below.

⁹ See section 4(c) below.

Issue	Counterfactual	Effects of the merger
3. Interpretation of the LOI	<p>Reasonable: each party benefits from the LOI's ongoing success and has an incentive to maintain a relationship of partnership, not conflict.¹⁰</p> <p>The CEOs of Eventim and Live Nation described the position very clearly in an exchange of emails on 20 December 2007, the day the LOI was signed.¹¹ Eventim's CEO stated: <i>[CONFIDENTIAL]</i> Live Nation's CEO responded: <i>[CONFIDENTIAL]</i></p>	<p>Live Nation adopts a very narrow and restrictive interpretation of its obligations, reflecting its changed incentives summarised in issue (1) above.</p> <p>This covers, e.g.:¹²</p> <ul style="list-style-type: none"> • the meaning of "<i>[CONFIDENTIAL]</i>"; • the meaning of "<i>[CONFIDENTIAL]</i>"; • the meaning of Live Nation's "<i>[CONFIDENTIAL]</i>"; and • the operation of the <i>[CONFIDENTIAL]</i> criteria.
4. Operation of the LOI	<p>Reasonable: each party benefits from the LOI's ongoing success and has an incentive to maintain a relationship of partnership, not conflict: it is a "win win" as Live Nation's CEO put it.</p> <p>(Note that each party took different things from the relationship: Eventim granted an exclusive licence over its ticketing platform for North America in return for (amongst other things) preferential access to large volumes of attractive tickets in Europe and in particular in the UK. This is reflected in the parties' press announcements.¹³ Live Nation's internal documents of course focused on what Live Nation was getting out of the deal, but they are not a reliable guide for what Eventim was getting out of the very same deal.¹⁴)</p>	<p>"Soft biases": Live Nation's changed incentives that were summarised in issue (1) above mean that it has an incentive to operate the LOI in a way that marginalises or excludes Eventim. This covers, e.g.:</p> <p><i>[CONFIDENTIAL]</i></p> <p>(Note that the "win" that Live Nation took from the LOI has been eliminated by the merger, with the consequence that Live Nation and Eventim are no longer in a "win win" situation to use <i>[CONFIDENTIAL]</i>. On 25 February 2010, LNE announced that it would stop using Eventim's platform in the US and switch to Ticketmaster's system.¹⁵)</p>

¹⁰ See section 3(e)(vii) below.

¹¹ See Annex 1, which also contains emails *[CONFIDENTIAL]* sent from Bryan Perez (CEO of Live Nation Global Digital) to Eventim.

¹² See para. 3. 31 below.

¹³ Annex 2.

¹⁴ See section 3(e)(vii) below.

¹⁵ Annex 3, transcript of Q4 2009 Earnings Call, p. 7.

Issue	Counterfactual	Effects of the merger
<p>5. Compliance with the LOI</p>	<p>Yes – Live Nation places all of its tickets on Eventim's ticketing system and internet platform (LOI, Section 5.3¹⁶).</p> <p>This means that Live Nation's tickets cannot be sold off any other ticketing system or internet platform (in particular Ticketmaster's) <i>[CONFIDENTIAL]</i>.</p> <p>As a result, on the counterfactual, consumers try Eventim's website to obtain attractive tickets, like its features (especially interactive seat maps, speed of use and shopping baskets), and become loyal Eventim customers.¹⁷</p> <p>(In any event, leaving to one side the binding terms of the LOI, Live Nation would not allow Ticketmaster to sell Live Nation tickets : it has no incentive to support its leading US and global rival; the LOI outcome in other European countries corroborates this.¹⁸)</p>	<p>No –</p> <p>Live Nation has <i>[CONFIDENTIAL]</i> Ticketmaster's "sticky" customers will not try Eventim and will end up remaining with Ticketmaster.¹⁹</p> <p>Consumers lose the benefits of Eventim's service (including interactive seat maps, speed of use and shopping baskets) and Ticketmaster remains under no pressure to innovate.</p>

¹⁶ See Further PFs, paras 6.9 and 6.35.

¹⁷ See section 3(c) below.

¹⁸ See section 3(f) below.

¹⁹ See section 4(b)(iii).

Issue	Counterfactual	Effects of the merger
<p>6. Eventim's investments</p>	<p>Issues (2) to (5) above provide a sound basis for Eventim to invest heavily in marketing and promoting its ticket retailing activities in the UK.²⁰</p> <p>(Note that Eventim's core business is retailing tickets: its decision to enter the UK market was most definitely not "focused" on the provision to Live Nation of a managed ticketing service, as the normal course of business forecasts from 2007 clearly show.²¹)</p>	<p>The uncertainties created by issues (2) to (5) above mean that Eventim has so far (entirely rationally) <i>[CONFIDENTIAL]</i>.</p> <p>It has no incentive to invest further (in particular in marketing and promotion) until those uncertainties are resolved by binding and effective remedies.</p> <p>(Live Nation's "commitment" that the CC relied on in its Further PFs would not resolve the competition issues if it were binding and effective and, in any event, it is neither binding nor effective. <i>[CONFIDENTIAL]</i>.²²)</p> <p>Without binding and effective remedies, <i>[CONFIDENTIAL]</i>.²³²⁴</p>

²⁰ See generally Further PFs, para. 5.48.

²¹ See section 3(g) below.

²² See section 4(d) below.

²³ *[CONFIDENTIAL]*

²⁴ See sections 2(e) below.

Issue	Counterfactual	Effects of the merger
<p>7. Non-Live Nation tickets</p>	<p>Issues (2) to (6) above, taken together, mean that Eventim has significant numbers of attractive tickets to some of the best shows available to place on its innovative, market-leading system, and is able to invest heavily in marketing and promotion.</p> <p>Eventim's site will attract large numbers of customers which, in turn, will enable Eventim to obtain substantial and increasing allocations of tickets from other promoters and venue operators (despite the long-term relationships between large incumbent ticket agents and promoters/venues²⁵), creating a "<u>virtuous circle</u>".²⁶</p> <p>Eventim's cautious, normal course of business forecasts²⁷ from 2007 put the number of non-Live Nation tickets (including non-music) at <i>[CONFIDENTIAL]</i>²⁸</p>	<p>Issues (2) to (6) above, taken together, mean that Eventim is a much less successful retailer and the incentive for other promoters and venue operators to allocate tickets to Eventim is much reduced. Rochet & Tirole explain: "Platform operators ... must address the celebrated '<u>chicken and egg problem</u>' and be careful to 'get both sides on board'²⁹ (emphasis added).</p> <p>The "chicken and egg problem" is supported by abundant evidence:³⁰</p> <ul style="list-style-type: none"> • the economics literature; • the failure of any UK entrant to grow to significant scale; • the specific failure of Lastminute.com and Gigantic to grow to significant scale; • Eventim's decision over many years not to implement its announced strategy to enter the UK despite having all the assets other than access to large ticket allocations; and • the incumbency advantage found by the CC's survey.

²⁵ Further PFs, para. 5.49.

²⁶ See section 4(c) below.

²⁷ See fn. 6 above.

²⁸ See section 3(e)(ii) below.

²⁹ Rochet & Tirole, "Platform Competition in Two-Sided Markets", *Journal of the European Economic Association*, vol. 1, no. 4, June 2003, pp. 990-1029.

³⁰ See section 4(c) below.

Issue	Counterfactual	Effects of the merger
[CONFIDENTIAL]	[CONFIDENTIAL]. ³¹	[CONFIDENTIAL]. ³² [CONFIDENTIAL]
9. Competition between Live Nation and Ticketmaster	Live Nation intended to operate its own ticketing sales channel operation in competition with Ticketmaster, the largest incumbent. ³³	None. The merger has eliminated Live Nation as a competitor to Ticketmaster (and will eliminate or marginalise competition from Eventim). ³⁴

³¹ See sections 3(e)(vii) below.

³² See section 4(b) below.

³³ See sections 3(i) and (j) below.

³⁴ See section 5(c) (and section 4) below.

- 1.3 Table 1 shows that Live Nation has a clear incentive to exclude or marginalise Eventim and the ability to do so through the number of tickets it allocates, the interpretation and operation of the LOI, and by breaching fundamental provisions including the obligation to distribute all its tickets from Eventim's system and platform. *[CONFIDENTIAL]* Taken together, this means that the merger will marginalise (or exclude) Eventim from the market for ticket retailing *even if the LOI remains formally in place.*
- 1.4 However, it is abundantly clear from the decision *[CONFIDENTIAL]*³⁵
- (a) Live Nation has announced that it will switch to Ticketmaster's system in the US, even though access to Eventim's system for the US was Live Nation's principal rationale for entering the LOI.
 - (b) Live Nation audited Eventim's system very thoroughly before entering the LOI and identified it as the best option. The system is materially the same and, indeed, has been augmented considerably with various additional features at the request of Live Nation.
 - (c) Live Nation had no significant complaints about Eventim's system when it used it before contemplating the merger. The responsible top Live Nation US executive even communicated to his own ticketing team in an internal memo in August of 2008 that Eventim *[CONFIDENTIAL]* The system is materially the same.
 - (d) Live Nation's Dutch promoting subsidiary – which is its second largest European promoting business – has said that it likes Eventim's system and services so much it *[CONFIDENTIAL]*.
- 1.5 This analysis reveals the SLC: if Eventim exits from the market or is significantly marginalised, it will not provide a competitive constraint (or will provide a significantly less effective competitive constraint) in a £1 billion market where, according to the Consumers' Association, consumers desperately need the fruits of more competition given its current sub-optimal state: it is "less than fully effective".
- 1.6 The SLC is reinforced by the fact that the merger eliminates competition between Live Nation and Ticketmaster.
- 1.7 Finally, this case is very interesting from a merger policy perspective because it will be possible, shortly, to assess whether the predictions in the Further PFs are correct.³⁶ Prior to the Further PFs, Eventim submitted to the CC *[CONFIDENTIAL]* The CC rejected this argument and has provisionally approved the merger *because of the rights given to Eventim under the LOI.*³⁷ Eventim respectfully submits that if the final decision maintains this approach, then it will inevitably and quickly be shown to be fundamentally flawed: preventing an SLC in this case requires binding and effective interim orders and remedies.

³⁵ *[CONFIDENTIAL]* This is important for the reasons given in issue (5) of Table 1 and is capable of ready determination by the CC which has already reached a provisional conclusion on the meaning of the LOI on this issue; see the Further PFs, paras 6.9 and 6.35.

³⁶ For "after the event" studies analysing CC merger decisions see, e.g., the PWC report, "Ex post evaluation of mergers", OFT 767, March 2005 and the Deloitte & Touche Report, "Review of Merger Decisions under the Enterprise Act 2002", March 2009.

³⁷ See, e.g., Further PFs, para. 7.59 (the extent to which Live Nation could limit its use of Eventim's services in favour of Ticketmaster's "was limited, in particular because it was constrained by its existing obligations in the LOI").

(c) Significant parts of the Further PFs are correct

- 1.8 Before turning to Eventim's substantive submissions, it is useful to identify seven material respects in which Eventim agrees with the Further PFs:
- (a) ***Competition is less than fully effective.*** The Further PFs found that in the absence of the merger, "with only two large primary retailers of live music tickets and little likelihood of one of the small retailers (none with more than 5 per cent of the market) expanding to become a large retailer in the near future, competition in the market was less than fully effective."³⁸ (Eventim notes that the logical corollary of imperfect competition is a degree of market power, in this case in the hands of the duopoly of Ticketmaster and, to a much lesser extent, See Tickets.)
 - (b) ***Live Nation will "hedge its bets" to maximise ticket sales by relying on more than itself as the sales channel for its controlled tickets.*** It is generally profit-maximising for a promoter active in retailing to sell tickets through sales channels other than itself as the small "penalty" of a lower share of the fees per transaction (worth a fraction of the ticket) is outweighed by the risk of losing the full face value of the ticket if it fails to sell the ticket itself. Live Nation's "overriding incentive is to ensure that as many tickets as possible were sold".³⁹ Evidence from both Eventim and Live Nation and other quarters universally supports this.
 - (c) ***Part of Live Nation's rationale for the strategic alliance was to align incentives with Eventim.*** The Further PFs noted that "... absent the merger, Live Nation's incentives could ... have been *aligned with those of Eventim* under its new ten-year agreement ... we noted that part of Live Nation's rationale for changing the supplier of its ticketing services [from Ticketmaster to Eventim] *was to achieve this alignment, both in the USA and elsewhere in the world*".⁴⁰ This is consistent with Live Nation's public statements by its CEO about Eventim being the "ideal partner", that "together we will expand on our current market position" and the "win-win" nature of the alliance.⁴¹

³⁸ Further PFs, para. 5.52 (and see also para. 6.45).

³⁹ Further PFs, para. 6.26.

⁴⁰ Further PFs, para. 7.12. Emphasis added.

⁴¹ See Annex 2.

- (d) ***Eventim is the second-most profitable sales channel for Live Nation on the counterfactual.*** The Further PFs "accepted that, if Live Nation were faced with two equally successful ticket agents, it would choose Eventim on the basis of the greater rebate"⁴² and unequivocally concludes that "under the LOI, Live Nation has a clear financial incentive to use its own website to sell as many tickets as possible, with sales through Eventim being the *next most profitable*. Live Nation has the incentive to use other ticket agents *only to the extent that tickets cannot be sold through either Live Nation or Eventim.*"⁴³ (It has to be pointed out, however, that on the counterfactual, Live Nation's incentive would still be not to sell any tickets through Ticketmaster, which would be its major competitor in its US home market and in the UK).
- (e) ***Eventim has a proven track record as the world's second largest ticket retailer.*** Under the heading "Eventim as a distinctive new entrant",⁴⁴ the Further PFs note that Eventim is the world's Number 2 ticket retailer with a proven technological solution (licensed by Live Nation itself for its own retail entry in the U.S. market⁴⁵) and operates on a *completely different scale* from any other operators that have tried to compete against Ticketmaster and See Tickets in the UK.⁴⁶ Eventim's evidence also supported the CC's observation that "Eventim was a distinctive new entrant that could be expected to succeed in circumstances where other new entrants might struggle".⁴⁷
- (f) ***But for the partnership with Live Nation, Eventim would not have entered the UK retail market and would only have done so if it believed it could be successful and had that intent.*** The LOI was critical to Eventim's decision to enter⁴⁸ and the Further PFs "accepted that Eventim would only have decided to enter the UK if it believed it could be successful and if it had the intention of becoming so ... and that the LOI with Live Nation was critical to Eventim's decision to enter the UK, as it provided Eventim with both a substantial [wholesale] revenue stream and significant [retail] ticket inventory for sale."⁴⁹
- (g) ***In contrast, Ticketmaster is Live Nation's principal competitor absent the merger.*** The Further PFs state: "Ticketmaster was aware that the loss of the contract with Live Nation would have a significant effect on its business"⁵⁰ and "by merging with Live Nation, Ticketmaster removed a new competitor for ticketing services in the US market";⁵¹ "in the USA, Live Nation incurred significant upheaval in transferring its ... systems from Ticketmaster to Eventim"⁵² and Live Nation had sold almost 9 million tickets (in competition with market leader, Ticketmaster) in the first nine months of 2009 in North America (and another 1.7 million outside North America);⁵³ and "according to Live Nation, it was better at utilizing its customer data ... than Ticketmaster".⁵⁴

⁴² Further PFs, para. 6.51.

⁴³ Further PFs, para. 6.29. Emphasis added.

⁴⁴ Further PFs, paras 6.52 to 6.60.

⁴⁵ Further PFs, para. 3.2.

⁴⁶ Further PFs, para. 6.52.

⁴⁷ Further PFs, para. 6.63.

⁴⁸ Further PFs, para. 6.67.

⁴⁹ Further PFs, para. 6.56.

⁵⁰ Further PFs, para. 3.9.

⁵¹ Further PFs, para. 3.10.

⁵² Further PFs, para. 6.7.

⁵³ Further PFs, para. 6.30, fn 38.

⁵⁴ Further PFs, para. 8.93.

- 1.9 The CC's conclusion on point (g) above is supported by the publication by the US Department of Justice (**DoJ**) of the "Competitive Impact Statement"⁵⁵ and the "Complaint"⁵⁶ that were prepared in relation to the US challenge to the merger. The DoJ concluded: "Ticketmaster has dominated primary ticketing ... for major concert venues for over two decades". Further, that once Live Nation entered in December 2008 it "[a]lmost overnight ... became the second-largest provider" and having since "sold millions of tickets using the CTS system" reduced Ticketmaster's sales by one-fifth and directly took away over 16 percentage points of Ticketmaster's market share, from 82.9 per cent down to 66.4 per cent.

(d) Concluding comments

- 1.10 However, there are important respects in which Eventim does not agree with the Further PFs. This paper focuses on the principal points that Eventim wishes to make in response to the Further PFs. Eventim has not challenged all of the points in the Further PFs with which it disagrees. Therefore, Eventim should not be taken to agree with a point simply because it has not challenged it in this document.
- 1.11 Finally, this paper is structured as follows. Section 2 discusses five scenarios that are referred to on numerous occasions in sections 3 (The Counterfactual), 4 (The Post-Merger Outcome) and 5 (SLC Analysis). The approaches underlying the five scenarios are justified and explained in detail through this paper, but Eventim believes it is useful to outline them in a single section at the outset to provide a framework for the more detailed analysis that follows.

⁵⁵ Annex 6 (available at <http://www.justice.gov/atr/cases/f254500/254544.htm>).

⁵⁶ Annex 7 (available at <http://www.justice.gov/atr/cases/f254500/254552.pdf>).

2. THE FIVE SCENARIOS DISCUSSED IN THIS PAPER

(a) Introduction

- 2.1 This section describes five scenarios, three under the counterfactual and two assuming that the merger proceeds without any remedies.
- 2.2 In analysing the scenarios, Eventim sees no benefit in making fresh forecasts at this stage. Instead, Eventim has sought to rely on its normal course of business documents from the time the LOI was entered (scenario 1) and Live Nation's own data (the first four scenarios). For this reason, Table 2, which identifies the numbers of tickets "allocated"⁵⁷ to Eventim on the first four scenarios is only partially complete: when Eventim does not have a robust mechanism for predicting the numbers, it has described the position verbally.

(b) Scenario 1: The counterfactual using Eventim's 2007 business forecasts

- 2.3 The first scenario assumes that the merger does not occur and uses Eventim's 2007 business forecasts. There are eight points to note.
- (a) Table 1, "Counterfactual" column above summarises the operation of the counterfactual.⁵⁸
- (b) Section 3(e) below explains in detail why the volumes forecast by Eventim in 2007 are credible.
- (c) It is crucial to appreciate that these forecasts were made in the normal course of business by Eventim. They comprise a prudent assessment of Eventim's likely success in selling tickets. They are not coloured by the existence of the merger.⁵⁹ As "primary evidence" (to use Peter Freeman's phrase⁶⁰) or "pre-existing documentary evidence" (as the ICN describes them⁶¹), they are recognised as carrying much greater weight than documents created for the purposes of the merger review.

⁵⁷ See para. 3.31 below for an explanation of why ticket "allocations" strictly do not arise when tickets are sold from Eventim's system.

⁵⁸ See section 3(c) below on the meaning of *[CONFIDENTIAL]*

⁵⁹ Eventim has used the forecasts consistently through the CC's investigation.

⁶⁰ See Peter Freeman's Key Challenges speech (http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_kings_college_280508.pdf): "A second technique for bringing greater focus is the use of what may be called '*primary evidence*' in other words documents and data generated in the normal course of a party's business, outside the context of and probably prior to our — or any other competition regulator's — inquiries. In addition to collecting primary evidence, we normally receive a great volume of evidence from the parties that is deliberately prepared for the inquiry. From our point of view, such prepared evidence, whilst often extremely helpful, can sometimes be less persuasive. Primary evidence gives us insight into how the parties manage their businesses, how they assess the state of competition outside the context of our inquiry and the nature of their corporate strategy. Obtaining entire datasets or analysing entire documents rather than carefully selected extracts is invaluable in giving us a full explanation of the parties' actions and intentions."

⁶¹ See the ICN Investigative Techniques Handbook for Mergers (<http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf>): "Pre-existing documentary evidence' (pre-existing documents) means ordinary-course-of business documents, that is, documents prepared and used in the normal, day-to-day and year-to-year operations of the business. It includes such documents as sales reports, production reports, strategic plans, and budgets. Pre-existing documents that were prepared before the merger was under consideration are especially useful. Pre-existing documents are valued by agencies for the opportunity to see how the parties acted and how they viewed competition and markets before they had the merger in mind. ... Agencies usually value pre-existing documents for two key things that they contain: facts and analysis...*Documents that*

- (d) The starting point for the forecasts is the figure provided *by Live Nation in writing when the LOI was being negotiated* for the number of Live Nation controlled tickets that were actually sold in the UK. *[CONFIDENTIAL]* This document is attached as Annex 9.
- (i) This is the information that Live Nation gave to Eventim in the normal course of business, before the merger was in contemplation, when Eventim wanted information to allow Eventim to make business projections. It is "primary evidence" and it is difficult for Live Nation to argue with any credibility that in practice, if the merger did not proceed, the relevant number of tickets would have been lower.
- (ii) The information provided by Live Nation is *[CONFIDENTIAL]* public statements at the time which refer to a "2006 actual" sales for the UK of 2.5 million controlled tickets (excluding box office tickets).⁶²
- (iii) The information provided by Live Nation and used by Eventim in its forecasts involves Live Nation controlled tickets that were actually sold in the UK (excluding tickets to Live Nation events controlled by third party venues, and also excluding box office sales). In other words, Eventim's projections were *not* based on *[CONFIDENTIAL]*. As explained in para. 3.31 below:
- (A) It is common ground between Eventim and the CC that "sellable ticket inventory" for the purposes *[CONFIDENTIAL]* includes tickets that are not sold and tickets that are sold through box offices.
- (B) "Sellable ticket inventory" is a standard ticketing industry term for the total of tickets to a given event that are available for sale (as opposed to "venue capacity", which also includes seats that cannot be sold due to their location behind the stage, the need to reserve certain space for the stage itself, the speakers, front-of-house, spot operators, camera positions, media etc. or other limiting factors – the so-called "seat kills"). The "sellable ticket inventory" of a given event is a fixed total number of tickets, regardless of who controls which portion of them. Eventim believes that the expression therefore can only be read to also include tickets that are not "controlled" by Live Nation but are nevertheless tickets to "Live Nation events".

This means that, when Eventim calculated its projected sales of Live Nation tickets by taking *[CONFIDENTIAL]* per cent of the figure of *[CONFIDENTIAL]* controlled sold tickets supplied by Live Nation, it was using a basic figure that was *[CONFIDENTIAL]*

mainly contain analysis can provide pre-merger description and analysis of market conditions. Examples include strategy documents, pricing documents, business plans ... short- and long-term projections, and other competitive assessments. Such documents can reveal how the merging parties assessed the competitive situation. Because they were created before the merger was contemplated, such ordinary-course-of-business documents tend to be viewed as reliable sources of evidence upon which analysis can be conducted and appropriate conclusions drawn. These documents can provide valuable and reliable information regarding competitive behavior in the market generally. Analytical documents may contain important information regarding market structure and competition within the market ..."

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Annex 8.

- (e) Live Nation had informed Eventim that Live Nation's UK business was growing, and Eventim therefore assumed a very conservative⁶³ [CONFIDENTIAL] per cent annual growth rate, giving [CONFIDENTIAL] tickets for 2010. (Eventim notes para. 6.36 of the Further PFs, which explains that Live Nation's ticket sales fell between 2006 and 2008. This suggests that Eventim's forecasts turned out to be over-optimistic on this point, even though Eventim relied on information from Live Nation. However, for the reasons given in para. 2.4(a) below, Eventim queries this part of Further PFs. In any event, this does not cast doubt on the reliability of the forecasts: it *partly offsets* the use of a very conservative starting number of tickets as explained in subparagraph (d) above.)
- (f) Eventim's forecasts assumed that Eventim sold [CONFIDENTIAL] per cent of "LN Controlled Ticket Sales" and that Eventim used the fact that it [CONFIDENTIAL]⁶⁴ to significant increases in the numbers of third party tickets sold over time.
- (g) The forecast growth for non-Live Nation tickets was based on the fact that [CONFIDENTIAL] non-LOI tickets that are currently under TSP agreements will become free in [CONFIDENTIAL]. Eventim assumed that it would win [CONFIDENTIAL] per cent of that business if its relationship with Live Nation developed in accordance with the "Counterfactual" column in Table 1 above.⁶⁵
- (h) The forecasts for third party business assumed that:
- (i) No Live Nation controlled tickets are sold on Ticketmaster's system or website. This is consistent with the clear meaning of the LOI, and is commercially very important for the reasons given in section 3(c) below.
 - (ii) Live Nation does not allow Ticketmaster to sell any Live Nation-controlled tickets because Live Nation has a clear incentive not to support its number 1 competitor in the US and globally. This conclusion is supported by the evidence from other European countries. See section 3(f) below.

⁶³ In particular, Live Nation is investing heavily in launching new festivals which tend to involve large numbers of tickets. See generally [CONFIDENTIAL] for an explanation of why [CONFIDENTIAL] is a very conservative figure.

⁶⁴ Assuming that Eventim invested in marketing and promotion as it intended to.

⁶⁵ See [CONFIDENTIAL]

(c) Scenario 2: The counterfactual using Eventim's realistic hopes

- 2.4 Eventim's business projections (scenario 1) were calculated on a prudent basis. In reality, Eventim hoped to sell more Live Nation tickets and estimated that it would probably be able to sell between [CONFIDENTIAL] and [CONFIDENTIAL] per cent.⁶⁶ For the purposes of Scenario 2, Eventim has assumed that [CONFIDENTIAL] per cent of the Live Nation tickets identified in scenario 1 (i.e. using the numbers *identified by Live Nation itself*) are sold by Eventim. This is [CONFIDENTIAL] than the proportion of Live Nation tickets that were sold by Eventim in the Netherlands ([CONFIDENTIAL]) and Sweden ([CONFIDENTIAL]) in 2009 once the LOI came into force⁶⁷ and is therefore consistent with the fact that Live Nation has a greater incentive to make sales on its own system in the UK than it has in the Netherlands and Sweden. The points made above about scenario 1 are equally applicable to scenario 2, except that:
- (a) In the light of para. 6.36 of the Further PFs, Eventim has assumed that the number of Live Nation tickets remains constant from 2006 to 2015, i.e. that Live Nation replaces the volumes of tickets lost between 2006 and 2008 but does not otherwise increase the total number of tickets beyond [CONFIDENTIAL]. However, Eventim respectfully requests the CC to verify the contents of para. 6.36. Live Nation's financial results show that its "international music" revenues (of which the UK is the largest part) have grown by over 45 per cent from 2006 to 2009; this may be due to differences between the UK and the remainder of the "international music" division and/or as a result of the change in the average revenue per ticket, but the contrast between the reported growth rate and para. 6.36 requires further investigation.
 - (b) The forecast growth for non-Live Nation tickets (row 7) is understated because having more Live Nation content will attract more customers and more third party promoters and venue operators.

(d) Scenario 3: The counterfactual if Eventim receives the minimum ticket allocation but the parties operate the LOI cooperatively

- 2.5 Eventim regards this scenario as unlikely because most events do not sell out⁶⁸ and if there are unsold tickets then Live Nation would have an incentive to sell them through Eventim ahead of any other third party ticket seller.⁶⁹
- 2.6 The first step in constructing scenario 3 is to take the numbers of tickets sold by Live Nation in the UK (as supplied by Live Nation and used as the basis for scenarios 1 and 2), and *add* those additional tickets that are covered by [CONFIDENTIAL]:
- (a) It is common ground between Eventim and the CC that "sellable ticket inventory" for the purposes of [CONFIDENTIAL] includes tickets that are not sold and tickets that are sold through box offices.
 - (b) As explained above, "sellable ticket inventory" is a standard ticketing industry term for the total of tickets to a given event that are available for sale (as opposed to "venue capacity", see above), and the "sellable ticket inventory" of a given event is a fixed total number of tickets, regardless of who controls which portion of them.

⁶⁶ [CONFIDENTIAL]

⁶⁷ See section 3(d) below.

⁶⁹ Further, as noted above, the obligation in the LOI to distribute all tickets controlled by Live Nation exclusively on Eventim's ticketing system and internet platform means that Live Nation's tickets cannot be sold off any other ticketing system or internet platform, in particular Ticketmaster's [CONFIDENTIAL]

Eventim believes that the expression therefore can only be read to also include tickets that are not "controlled" by Live Nation but are nevertheless to "Live Nation events", notwithstanding the CC's finding in para. 7.28 of the Further PFs that there is scope to discuss what is meant by "Live Nation events".

- (c) There is scope to discuss the operation of the *[CONFIDENTIAL]*, as the CC recognised in para. 7.28 of the Further PFs.
- (d) Finally, there are open questions about whether Live Nation has an *[CONFIDENTIAL]*.

2.7 Although points (b) to (d) are uncertain, to a greater or lesser extent, Eventim has identified scenario 3 on the assumption that Live Nation would agree them as a reasonable interpretation as part of the "win win" relationship (as described by Live Nation's CEO after signing the LOI) under which Live Nation would wish Eventim to take a reasonable interpretation (in particular) of Live Nation's entitlements in the US (see Table 1, issue (3) above). In terms of data:

- (a) The CC has data on the number of Live Nation tickets that went unsold in the UK in 2008.⁷⁰ Eventim does not have the actual data, and has assumed for the purposes of preparing Table 2 that *[CONFIDENTIAL]* per cent of Live Nation's ticket inventory was unsold *[CONFIDENTIAL]*⁷¹, meaning that the "sellable ticket inventory" is *[CONFIDENTIAL]* times the number of Live Nation tickets that were sold.⁷² Of course, if the actual proportion of unsold tickets in the UK is not *[CONFIDENTIAL]* per cent, the multiplier of *[CONFIDENTIAL]* will need to be re-calculated.
- (b) Eventim has carried out its calculations for scenario 3 on the basis that the number of Live Nation tickets that were sold in 2006 was *[CONFIDENTIAL]* plus *[CONFIDENTIAL]* box office tickets (see Annex 8), making a total of *[CONFIDENTIAL]* tickets.⁷³
- (c) Eventim has very conservatively assumed that there was no growth in the number of Live Nation tickets from 2006 to 2015, as discussed in scenario 2. (As noted above, Eventim doubts whether para. 6.36 of the Further PFs is correct and requests the CC to verify it.)

2.8 The main point to note about scenario 3 is that, on current calculations, Eventim would have obtained *[CONFIDENTIAL]* of Live Nation tickets on scenario 3 (the minimum ticket allocation) as on scenario 1 (Eventim's own projections). Of course, the calculations are sensitive to the assumptions that have been used and Eventim has sought in this section of the paper to identify clearly its assumptions and to flag those which may require adjustments to take account of the greater information held by the CC. Nevertheless, even allowing for a reasonable margin of error, the conclusions seem to be:

- (a) Eventim's forecasts (per scenario 1) really were - as Eventim has always contended - very conservative, prudent figures.

⁷⁰ Further PFs, para. 7.27.

⁷¹ Further PFs, para. 7.27.

⁷² Eventim's calculations have assumed that it will receive *[CONFIDENTIAL]* of total tickets.

⁷³ Note that the numbers are conservative as they do not include Live Nation's non-controlled tickets, even though they need to be included for the purposes of determining the sellable inventory and applying the minimum ticket obligation as explained in para. 2.3(d)(iii) above.

- (b) The CC's analysis of the effects of the merger is not sensitive to the choice between scenarios 1 and 3 (if the CC wishes to identify a single scenario as the most likely rather than, as Eventim submits in para. 3.6, considering several different scenarios).

(e) Scenario 4: The effects of the merger assuming that the LOI remains in force: Live Nation interprets the minimum ticket allocation restrictively

- 2.9 At the time the LOI was negotiated and executed, the parties to it never intended to define a fixed limit on the number of tickets that Eventim would be able to sell through its own sales channels. *[CONFIDENTIAL]* Once Live Nation's incentives change so that its profit-maximising strategy is to exclude or marginalise Eventim in order to maximise Ticketmaster's profits as well as its own *[CONFIDENTIAL]*
- 2.10 This scenario is described in Table 1, "Effects of the merger" column above.
- (a) It involves Eventim receiving the theoretical minimum number of tickets under the LOI, but with Live Nation adopting a very narrow and restrictive interpretation of the LOI and operating the LOI in a way that involves "soft biases" and therefore frustrates Eventim's interests.
- (b) It involves a *[CONFIDENTIAL]*
- (c) In these circumstances, it makes no business sense for Eventim to invest *[CONFIDENTIAL]*, and it *[CONFIDENTIAL]* see Table 1, issues (6) and (7).

[CONFIDENTIAL],

- 2.11 *[CONFIDENTIAL]*.

Table 2: The numbers of UK tickets sold by Eventim by scenario

*[CONFIDENTIAL]*⁷⁴

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3. THE COUNTERFACTUAL

(a) Introduction and summary

3.1 The CC's conclusions in the Further PFs on the counterfactual were as follows:

"6.66 We concluded that the LOI with Live Nation provided Eventim with a way to enter the UK with a secure revenue stream from the provision to Live Nation of a managed ticketing service, which would cover its fixed costs and entry costs in the near future, and with access to a guaranteed minimum volume of tickets from Live Nation for sale. From this foothold, we expected that Eventim would offer similar services to other live music promoters and venue operators (and organizers and venues for other events) in order to grow.

6.67 We found that the extent of Eventim's success in the UK as a retailer of live music tickets would be dependent on its ability to generate sales to consumers and gain further live music ticket allocations, as well as on its ability to gain contracts to provide managed ticketing services to other venues and promoters. We concluded that, although its agreement with Live Nation was critical to its decision to enter the UK, Eventim's success as a retailer of live music tickets was likely to be largely dependent on its own abilities rather than on any support from Live Nation beyond the requirements of the LOI.

6.68 We did not form a view on how successful Eventim was likely to be in the UK market for the primary retailing of live music tickets in the absence of the merger but, rather, we focused on the extent to which the merger affected Eventim's success and, thereby, the degree to which the merger affected the level of competition in the market, which we discuss in Section 7."

3.2 Eventim's case on the counterfactual can be summarised as follows:

- (a) It is necessary for the CC to form a view on how successful Eventim was likely to be in the UK market for the primary retailing of live music tickets. Without taking this step, the CC cannot identify the extent to which competition will be lessened by this merger for the purposes of the SLC test.
- (b) The position in the absence of the merger is summarised in the "Counterfactual" column of Table 1 above. For the reasons given there, Eventim would have entered the UK ticket retailing market successfully as a large-scale supplier using:
 - (i) tickets supplied by Live Nation under the LOI;
 - (ii) Eventim's own market-leading ticketing system;
 - (iii) Eventim's capital and well-established expertise (as a successful entrant in 17 countries⁷⁵) to market its brand and website; and
 - (iv) Eventim's expertise and relationships to negotiate with promoters and venue owners for substantial further allocations of tickets once Eventim had significant numbers of customers.

⁷⁵

Leaving to one side Eventim's home country, Germany, and the UK.

- (c) Successful large-scale entry by Eventim using its innovative system would have brought significant benefits to consumers in a market which the Further PFs found was not fully effective.

(b) The importance of assessing Eventim's likely success in the absence of the merger

(i) Relevant legal principles

- 3.3 In the Further PFs, the CC chose not to make a finding on the number of tickets that Eventim was likely to sell in the absence of the merger on the grounds that, "*in order to assess the effect of the merger, it was necessary only to focus on the difference made by the merger to Eventim's eventual success in the market*".⁷⁶
- 3.4 Eventim submits that this approach is incorrect. Identifying the counterfactual is central to the CC's overall assessment of this merger⁷⁷ because the core concept of an SLC is the lessening of competition caused by the merger when compared with what would have happened had the merger not taken place and the theory of harm in this case is based on the foreclosure of a unique third party entrant.
- 3.5 The necessity of identifying clearly the proper counterfactual has been recognised by the Competition Appeal Tribunal and the CC itself.
- (a) In *IBA Health Ltd v. Office of Fair Trading*, the Tribunal stated:⁷⁸

"It may well be that, as the decision says at paragraph 32, the situation needs to be judged against 'a new scenario'. But to determine whether the reduction in competition resulting from the merger is 'substantial' one needs to know for how long, and to what extent, the 'old scenario' is likely to subsist alongside the 'new scenario', both inside and outside the NPfIT. For example, the absence of a substantial lessening of competition in the sphere affected by the 'new scenario' does not necessarily preclude a substantial lessening of competition in spheres that will for a long time to come form part of the 'old scenario'. It is a matter of fact and degree, but unless one starts with a clear exposition of the relevant facts it is difficult for the analysis to get satisfactorily off the ground."

⁷⁶ Further PFs, paras 6.64 and 6.65.

⁷⁷ There are of course cases in which it is *not* necessary to make a finding on the counterfactual. For example if a merger does not lead to an SLC when judged against pre-merger conditions, there is no need to reach a conclusion on a failing firm defence (which is essentially an argument that the counterfactual should not be treated as the pre-merger conditions of competition).

⁷⁸ [2003] CAT 27, para. [244]. The decision of the Tribunal was appealed to the Court of Appeal, but the Court of Appeal's judgment does not cast any doubt on the proposition that a careful identification of the counterfactual is an essential part of merger control analysis.

- (b) The draft joint Merger Assessment Guidelines of the CC and OFT reflects the Tribunal's decision:⁷⁹

"The theories of harm trace the logical steps between the merger, the loss of rivalry and expected harm to customers, compared with the situation likely to arise if the merger did not take place (known as the 'counterfactual'). Identifying the counter-factual is central to the Authorities' overall assessment of a merger since the core concept of an SLC is the lessening of competition caused by the merger when compared with what would have happened had the merger not taken place."

- 3.6 If the CC had followed the principles set out above, it would have formed a view on Eventim's likely success in the absence of the merger. Of course, this is a difficult exercise, and the Competition Appeal Tribunal in *British Sky Broadcasting v. Competition Commission*⁸⁰ made clear that the counterfactual is an analytical tool that takes into account the potential for change in the market:

"the Commission was entitled to compare the competitive effects of the Acquisition with those of what it regarded as the most likely counterfactual of an independent ITV, but at the same time to take into account in its assessment of SLC plausible situations or strategies which might result in the postulated independent ITV ceasing to be so. Similarly, in considering the ways in which Sky's ability materially to influence ITV's policy may be expected to give rise to an SLC, the Commission was correct to consider the effect such influence could have on potential ITV acquisitions or on ITV being acquired. We consider that the Commission would have been vulnerable to criticism had the possible occurrence of these situations or transactions been left out of account."

In the light of this judgment, the CC would be entitled to find (as Eventim submits) that each of scenarios 1, 2 and 3 is realistic (with scenarios 1 and 2 being more likely than scenario 3) and, since there is an SLC on any of them, it is not necessary further to refine the counterfactual. Alternatively, the CC could identify the most likely scenario, minimum likely sales (e.g. "at least as many tickets as in scenario 1") or ranges (e.g. "somewhere between scenarios 3 and 2") and/or consider the nature of any likely errors in its predictions.

(ii) Counterfactual analysis cannot be avoided by jumping directly to "the difference made by the merger"

- 3.7 The Further PFs concluded that it was not necessary to make such a finding because *"it was necessary only to focus on the difference made by the merger to Eventim's likely success in the market"*.⁸¹ Only if the Further PFs had found on compelling grounds that the merger would make *no difference whatsoever* to Eventim's eventual success in the market, would it be logical to say that there was no need to attempt to determine the level of Eventim's eventual success in the market, since this would be an academic exercise. But such a finding would be entirely unsustainable and the Further PFs did not make such a finding. The CC's provisional conclusion was that the merger would make *some* negative difference for Eventim

⁷⁹ April 2009, para. 4.9. See also "Merger References: Competition Commission Guidelines", June 2003, CC2, para. 1.22: *"The counterfactual will be that situation which the CC expects to arise in the absence of the merger under consideration"*.

⁸⁰ [2008] CAT 25, para. [92]. The Tribunal's judgment was appealed to the Court of Appeal which did not cast any doubt on the finding on this issue.

⁸¹ Further PFs, paras. 6.64 and 6.65.

(which, in the circumstances, means some adverse effect on competition) but the difference would be "limited" and "not likely to be significant":

*"Eventim's success in the UK market for the primary retailing of live music tickets might be affected adversely by the merger to some extent, but the effect was not likely to be significant."*⁸²

*"the merger made a limited difference to Eventim's ability to compete as a retailer of live music tickets in the UK."*⁸³

3.8 Para. 7.32 of the Further PFs illustrates the importance of properly identifying the counterfactual:⁸⁴ *"we concluded that there was sufficient scope for differing interpretations of the LOI for Live Nation to have the ability to limit, to some extent, Eventim's allocation of Live Nation tickets compared with the counterfactual."* This statement rightly recognises that it is necessary to identify the counterfactual⁸⁵ in order to identify the effects of the merger. The principal problems with the statement are that:

- (a) It *pre-supposes* that the counterfactual involves Eventim being "allocated"⁸⁶ the minimum ticket volumes specified under the LOI, without analysing which of scenarios 1, 2 and 3 in Table 2 above is the most likely (which is the relevant question if the CC chooses to select a single counterfactual rather than using scenarios or ranges).
- (b) It limits the analysis of the effects of the merger to two points of interpretation of the LOI, i.e. it examines the effects of the merger solely with reference to part (not the whole) of issue (3) of Table 1 above; yet Table 1 shows that there are nine principal effects of the merger, and there are no grounds for excluding from the analysis the other eight whole issues and the missing part of the ninth.

3.9 This flawed *pre-supposition* about the counterfactual is important because it led to the conclusion in para. 7.59 that *"Live Nation could, to some extent, limit the volume of tickets that it allocated to Eventim"*.

⁸² Further PFs, para. 7.58.

⁸³ Further PFs, para. 7.60.

⁸⁴ For a more general example of the importance of properly defining the counterfactual, consider the following. If a public health commission had an inquiry into whether heavy smoking by pregnant mothers is *likely to be a substantial cause* of birth defects or health trouble in infants, it is no good for that commission to short-circuit the scientific method and say "we have no need to examine the health of infants born to non-smoking mothers" (the "control" or "counterfactual" group) but will rather "focus on the difference smoking makes to the likely health" of the infants whose mothers smoked. If it transpires that (as a group) the infants with mothers who smoked heavily were in "less than fully effective" health in their first two years of life, how can one tell whether it is *smoking* during pregnancy that makes a *substantial* difference to the health of the babies? The exercise has validity only if the commission also systematically examines the health of the group of infants with non-smoking mothers. It can then conclude whether, taken as a group, the non-smoking group fares no better on average, better but only "to a limited extent" or "very much better". Only once this question has been asked and answered would the commission be in any position to conclude whether heavy smoking by pregnant mothers increased the risk of harm to infants by 1 per cent, 10 per cent or 50 per cent relative to (the counterfactual outcome in which there is) no smoking at all.

⁸⁵ See also para. 6.3 of the Further PFs: *"we assessed how this market was likely to develop so as to identify the counterfactual against which to compare the effects of the merger."*

⁸⁶ See para. 3.31 below for an explanation of why ticket "allocations" strictly do not arise when tickets are sold from Eventim's system.

(iii) Counterfactual analysis cannot be avoided by saying that Eventim's success would depend on its own endeavours

3.10 The starting point in assessing the effect of Eventim's entry in the counterfactual is the likely allocation of ticket volumes from Live Nation to Eventim: would the allocation be minimal or a substantial number? The CC found that the *merger* would lead Live Nation to supply Eventim with only the *minimum* number of tickets required under the LOI,⁸⁷ that this was *fewer* tickets than Live Nation would have supplied absent the merger, and that a reduction in the number of tickets would have *some* effect on Eventim's ability to attract customers or to attract further ticket allocations,⁸⁸ but the CC did not make a finding – even in broad terms, or based on a range of scenarios – as to the number of tickets that Eventim was likely to receive absent the merger.

3.11 Instead, the Further PFs found that:

- (a) Obtaining access to tickets was not a *sufficient* condition for successful entry by Eventim.⁸⁹
- (b) Obtaining access to tickets was not the *most significant* determinant of Eventim's success in the primary retailing of music tickets.⁹⁰
- (c) The number of tickets sold by Eventim would depend on Eventim's ability to make sales:

"We concluded that, although the LOI with Live Nation gave Eventim a starting point, in order to grow and become successful in the UK market for the primary retailing of live music tickets, it would need to attract consumers, demonstrate an ability to sell tickets, and gain substantial further allocations of tickets from Live Nation or other promoters."⁹¹

3.12 These findings do not answer the relevant legal question, namely: what is the counterfactual? The Further PFs effectively say: we predict that Eventim will do as well as it will do. This circular reasoning then forms the "baseline" for the conclusion that the merger will likely make *some* but not *much* difference. The approach in the Further PFs makes it impossible to assess the magnitude of the change for Eventim's prospects, and in turn the prospects of consumers, brought about by the merger.

3.13 The relevant questions on the counterfactual can be distilled as follows:

- (a) Leaving to one side the allocation of tickets from Live Nation under the LOI, does Eventim have the assets necessary to enter the UK market for ticket retailing on a large scale? More specifically:
 - (i) Does Eventim have a ticketing system that customers are happy to use and is capable of handling large volumes of customer traffic?
 - (ii) Does Eventim have the financial capital necessary to build up its brand and website traffic in the UK?

⁸⁷ Further PFs, para. 7.46.

⁸⁸ Further PFs, para. 7.58, referring to the fact that a reduction in the number of tickets "would not have much effect on Eventim's ability either to attract customers or to attract further ticket allocations from other promoters and venue operators" but conspicuously *not* saying that a reduction in the number of tickets would have *no* such effects, implying that there would be *some* effects.

⁸⁹ Further PFs, para. 6.59.

⁹⁰ Further PFs, para. 7.59.

⁹¹ Further PFs, para. 6.60.

- (iii) Does Eventim have the skills to launch into the UK, a country where it has little brand recognition?
 - (iv) Does Eventim have the ability to obtain substantial further ticket "allocations" from other promoters?
 - (b) If the answer to (a) is "Yes, Eventim has the necessary assets, leaving to one side ticket allocations from Live Nation under the LOI" (and it does) then the next question is: given that Eventim has those necessary assets, what volume of tickets would Eventim be likely to sell in the absence of the merger?
- 3.14 The evidence on these issues is discussed in section (e) below. Before turning to it, this paper discusses the interpretation of the LOI and the relevance of evidence from the parties' experience in operating the LOI from 1 January 2009 in the Netherlands and Sweden.

(c) The interpretation of the LOI

- 3.15 The Further PFs raise two important points of interpretation of the LOI.

Obligation exclusively to use Eventim's system

- 3.16 The first issue is whether the LOI requires Live Nation to distribute all tickets Live Nation (by itself or through subsidiaries⁹²) controls in the UK and Ireland exclusively over the Eventim ticketing system and internet platform (i.e. to the exclusion of any other ticketing systems and, in particular, Ticketmaster's system).

- 3.17 This issue is important for the following reasons:

- (a) If Live Nation is required to distribute all of its controlled tickets over Eventim's ticketing system and internet platform then:
 - (i) the commitment from Live Nation (to pay Eventim a specified sum for each controlled ticket sold "*whether or not the ticket was sold off the Eventim system*"⁹³) that the CC relied on in finding in its Further PFs that the merger was not likely to lead to an SLC is *premised* on Live Nation breaching the LOI;
 - (ii) the CC's own finding in the Further PFs that "*If the merger were to proceed, Live Nation might choose to put the majority of its controlled tickets on Ticketmaster's system and not on Eventim's system*"⁹⁴ is *premised* on Live Nation breaching the LOI;
 - (iii) Live Nation's evidence to the CC that under the LOI it would allocate and sell tickets "*through other ticket agents on their own systems*"⁹⁵ was *premised* on Live Nation breaching the LOI; and
 - (iv) **[CONFIDENTIAL]**
- (b) This obligation is important because customers are much more likely to use Eventim's website if Eventim offers tickets that are not available on Ticketmaster's website.⁹⁶ If

⁹² With the exception of those subsidiaries listed in **[CONFIDENTIAL]**

⁹³ Further PFs, para. 6.20.

⁹⁴ Further PFs, para. 7.43.

⁹⁵ Further PFs, para. 6.20.

the tickets are also available on Ticketmaster's own website then the survey results make clear that customers are likely to shop on Ticketmaster's website.⁹⁷ If customers buy tickets on Eventim's website once, then:

- (i) Eventim has a good chance of persuading them to come back because they like Eventim's system (with its interactive seat choice technology);
- (ii) Eventim has their details for marketing purposes; and
- (iii) other promoters and venue operators are likely to supply more tickets to a ticket retailer with more customers.

[CONFIDENTIAL]

3.18 *[CONFIDENTIAL]*

3.19 *[CONFIDENTIAL]*⁹⁸

3.20 *[CONFIDENTIAL]*

Primary evidence of parties' intent with respect to the UK

Context of the evidence

3.21 *[CONFIDENTIAL]*.

3.22 *[CONFIDENTIAL]*

⁹⁶ See section (f) below for an explanation of why, *even leaving to one side the meaning of the LOI*, under the counterfactual, Live Nation would not allow Ticketmaster to sell Live Nation tickets in the UK.

⁹⁷ Further PFs, Annex D, paras 20 (there is very little shopping around), 22 (most customers will try another source if their first source cannot sell them the tickets they want), 23 (customers are not sensitive to fees) and 32 (Ticketmaster has very strong customer awareness).

⁹⁸ i.e the position is exactly the same as sales on the "Live Nation UK website"

[CONFIDENTIAL]

3.23 *[CONFIDENTIAL]*

3.24 *[CONFIDENTIAL]*

3.25 *[CONFIDENTIAL]*

3.26 *[CONFIDENTIAL]*

ticketmaster.co.uk is conspicuous by its absence

3.27 *[CONFIDENTIAL].*

- 3.28 Again, this is because it was totally out of the question that Live Nation would ever use Ticketmaster after the launch (in the UK and elsewhere, for example, in the Netherlands, Finland and Sweden): all the tickets would be sitting on the Eventim system and the two online channels, as well as the traditional sales channels, would pull tickets from the one database (see UK/Netherlands diagram at Figure 2 below). It is Live Nation's highly attractive artists (content) that has driven US and Dutch consumers away from Ticketmaster, and would equally do so under the UK counterfactual: Ticketmaster is a *redundant* TSP for Live Nation under the LOI partnership, and a *redundant* online sales channel for Live Nation in the presence of Jay-Z, U2, Madonna and a host of other attractive Live Nation content on *livenation.co.uk* and *eventim.co.uk*.
- 3.29 *[CONFIDENTIAL]* third party retail outlets and box office, which are relatively insignificant compared to online channels in the UK, which account (according to the CC's GfK survey) for 77 per cent of ticket sales, of which *ticketmaster.co.uk* has been by far the most important.
- Meaning of the minimum ticket obligation
- 3.30 There are also questions about the interpretation of the "minimum ticket obligation" in *[CONFIDENTIAL]*
- 3.31 Before turning to the specific issues that arise under *[CONFIDENTIAL]*, it is useful to understand how ticket sales from Eventim's system operate. When tickets are sold from Eventim's system, they do not need to be "allocated" in the sense that tickets were historically allocated to retailers in the UK: on Eventim's system, it is possible to allow any retailer to sell any ticket and the system ensures that retailers cannot sell tickets that have already been sold. Against that background, *[CONFIDENTIAL]* raises six issues.
- (a) Does "sellable ticket inventory" include tickets that are not sold? Eventim submits that it does: "sellable" means "capable of being sold" which therefore includes tickets that are not in fact sold. The Further PFs accepted this argument in para. 7.27.
 - (b) Does "sellable ticket inventory" include tickets that are sold through box offices? Eventim submits that it does: "sellable" means "capable of being sold" which therefore includes tickets that can ultimately be sold, wherever they can be sold. The Further PFs accepted this argument in para. 7.27.

- (c) Does "sellable ticket inventory" include tickets which are not "controlled"⁹⁹ by Live Nation but are nevertheless to "Live Nation events"? *[CONFIDENTIAL]* Live Nation's view (now) appears to be that "full sellable ticket inventory" means the same as "tickets 'controlled' by Live Nation". In fn. 39 of the Further PFs, the CC records that "Live Nation's interpretation was consistent with its interest in retaining control of as many of its controlled tickets as possible, so as to be able to sell them directly to consumers." The Further PFs consider neither the implications of the different wording of the two provisions nor the fact that Eventim's interest is to secure the ability to sell as many tickets as possible to Live Nation's events. In any event, the starting point for interpretation of the LOI must be the terms of the LOI, and not Live Nation's commercial interests (or, indeed, Eventim's).
- (d) What is meant by "Live Nation events"? Eventim agrees with the CC's conclusion in para. 7.28(a) of the Further PFs that there is scope for disagreement about this term, and that the dispute is relevant to the number of tickets covered by *[CONFIDENTIAL]*.
- (e) Can Live Nation *[CONFIDENTIAL]* for the purposes of administering *[CONFIDENTIAL]*? Eventim agrees with the CC's conclusion in para. 7.28(b) of the Further PFs that there is scope for disagreement about this term, and that the dispute is relevant to the number of tickets covered by *[CONFIDENTIAL]*.
- (f) Can Live Nation *[CONFIDENTIAL]* engage in pre-sales or sales when the tickets first come on to the market? Again, there is clearly *[CONFIDENTIAL]* on this issue.

(d) The significance of evidence from the Netherlands and Sweden

3.32 In this case, identifying the counterfactual involves predicting the way in which the market would operate in the future following Eventim's entry. This is a prospective, hypothetical exercise that is difficult. Eventim submits that the most probative evidence on this issue is "real world" experience in the Netherlands and Sweden ("**the comparator markets**") where the LOI had come into operation on 1 January 2009 (i.e. one year earlier than the scheduled start date in the UK¹⁰⁰). Eventim submits that the "real world" experience in the comparator markets is a compelling proxy for the future UK market because the comparator markets are the same as, or very similar to, the UK on key aspects that are relevant to the CC's assessment.

⁹⁹ There is a separate issue about the meaning of "control". The Further PFs noted an argument from Eventim, based on experience in Continental Europe, that Live Nation could adjust the number of controlled tickets under the LOI by (a) applying new interpretations of "controlled" or (b) transferring "control" over tickets (para. 7.21). The Further PFs found that there would be no incentive for Live Nation to transfer "control" over tickets (paras 7.23 and 7.24) and therefore rejected Eventim's argument. However, paras 7.23 and 7.24 address argument (b) and not argument (a). Argument (a) remains valid and is not addressed in the Further PFs.

¹⁰⁰ The scheduled start date in the UK was postponed to 1 February 2010.

Operational and LOI similarities

- 3.33 It is important, when reading the LOI's terms, to understand the difference between (i) the *[CONFIDENTIAL]*, (ii) the *[CONFIDENTIAL]*, and (iii) the *[CONFIDENTIAL]*. The operational and LOI-based similarities between the UK and the Netherlands are illustrated in Figure 2 below. These similarities cover both the LOI terms governing the relationship between Eventim and Live Nation (which are the same in respect of exclusive distribution of tickets via the Eventim ticketing system and the principle that each party retains its own customer data, for example) and in the way the operation and service provision is actually set up: tickets are all sold off a single system, the Eventim system. (The operational set up is equally no different for Sweden.)

[CONFIDENTIAL]

Marketplace similarities

- 3.34 The "real world" evidence is that in all three countries (the UK, the Netherlands and Sweden) Eventim and Live Nation were both start-up or fledgling retailers of attractive live music tickets, whilst Ticketmaster was the long-term incumbent number 1 supplier and, prior to the coming into force of the LOI, had been the preferred or exclusive sales channel for Live Nation. In the two comparator markets
- Live Nation is a leading promoter and tends to promote the same Anglo-American artists as in the UK; it severed its long-term ties with Ticketmaster when it went into partnership with Eventim and entered the retail ticket market in competition with, and at the expense of, Ticketmaster. In established its own online retail presence through *www.livenation.nl* and *www.livenation.se*, linked to the Eventim platform and system, it had no incentive or need to utilise Ticketmaster, the number 1 supplier, as either TSP or sales channel for a single Live Nation-controlled ticket. Eventim estimates that Ticketmaster's share of Dutch live music ticket sales dropped from over [CONFIDENTIAL] per cent in 2008 (a higher share than in the UK) to below [CONFIDENTIAL] per cent in 2009, losing some share to third parties but the majority to the Eventim platform, [CONFIDENTIAL]
 - Finally, in the comparator markets, Eventim sold no live music tickets and had no material brand awareness among consumers as a retailer of live music tickets prior to 2009, when the alliance commenced. With no previous brand presence, Eventim had to spend effort raising brand awareness of the new *www.eventim.nl* and *www.eventim.se* sales channels and gained a market share of ticket sales by TSP of over [CONFIDENTIAL] per cent in its first year of operation.

Outcome in 2009 and implications for the UK counterfactual

- 3.35 The experience in the comparator markets after the LOI came into operation was that: in terms of sales of Live Nation-controlled tickets from the Eventim platform in the Netherlands, Live Nation sold [CONFIDENTIAL] per cent of its controlled tickets through its own website, *livenation.nl*, and Eventim sold the remaining [CONFIDENTIAL] per cent via Eventim's own sales channels. No other online sales channels were used, and Ticketmaster was "allocated" no controlled tickets whatsoever. In Sweden, Live Nation sold [CONFIDENTIAL] per cent and Eventim [CONFIDENTIAL] per cent, with Ticketmaster again receiving no Live Nation controlled tickets.¹⁰¹ This real-world evidence suggests that Eventim will receive and be able to sell a very significant "allocation" of tickets (in contrast to the Further PFs in para. 6.60) and that Live Nation would have "allocated" no tickets whatsoever to Ticketmaster (in contrast to the Further PFs, paras 6.32 and 6.35).
- 3.36 Given the difficulties in identifying the counterfactual and the unique nature of the evidence from the comparator markets (in the sense that it is the only available evidence about how the parties have acted in *real life*, rather than *conjecture* about how they will act), it is crucial carefully to consider whether the comparator markets are a good proxy for the likely future of the partnership in the UK. Such "primary evidence" (to use Peter Freeman's terminology¹⁰²) is extremely valuable in merger appraisal. In the Further PFs, the CC discounted the "real world" evidence from the comparator markets on the grounds that there were differences between the UK and the comparator markets:

"We found that it was difficult to draw many conclusions from Eventim's experience in other European countries for several reasons. First, we noted that there were significant differences between how the UK ticket retailing market operates and how

¹⁰¹ [CONFIDENTIAL]

¹⁰² See fn. 60 above.

*the markets in the Netherlands and Sweden operate. In the UK, promoters allocated tickets to a number of different ticket retailers, but in the Netherlands and Sweden tickets were sold off a single system. Second, we noted that the terms of the LOI differed between the UK and other European countries. In the UK, Live Nation had a greater financial incentive under the LOI to sell its tickets through its own website, in comparison with sales through Eventim's website; whereas, in the Netherlands and Sweden, the financial incentives were the same. Third, we noted that the significance of Live Nation as a promoter and venue operator differed in each geographic market."*¹⁰³

3.37 The first difference identified is the fact that promoters allocate tickets to a number of different ticket retailers in the UK, whereas tickets are sold off a single system in the comparator markets.

- (a) The issue in identifying the counterfactual is to assess how Live Nation controlled tickets would be "allocated"¹⁰⁴ as between Live Nation, Eventim and Ticketmaster *after the LOI comes into force* (assuming that there were no merger between Live Nation and Ticketmaster). In the Netherlands and Sweden all Live Nation controlled tickets were placed on a single system, namely Eventim's system, in accordance with the LOI.¹⁰⁵ In the UK, in the absence of the merger, the position would have been *exactly the same* because the LOI provisions dealing with the UK are *exactly the same* as those dealing with the Netherlands and Sweden on this point: all Live Nation controlled tickets were to be sold off a single system, namely Eventim's system.¹⁰⁶ The Further PFs therefore found a difference when there is none. *Moreover*, the CC itself recognised this point in July 2009 when it wrote: "*our understanding is that all the LN controlled tickets are put on the CTS platform to be accessed simultaneously by all LN's chosen ticket agents in real time*".¹⁰⁷
- (b) Even if the Further PFs were right in identifying a difference (which they were not for the reasons given in (a) above), this difference is entirely irrelevant to the numbers of tickets that were likely to be "allocated" in the UK to Eventim, Live Nation or Ticketmaster.¹⁰⁸ The difference identified by the CC is one of logistics, not substance, because the Further PFs themselves found that in the UK (i.e. prior to the launch of Eventim's system) "*tickets can be allocated and reallocated easily*"¹⁰⁹ and the Original PFs note that promoters have "*total discretion*" to do so.¹¹⁰ Putting to one side the launch of Eventim's system, what matters is the success of the sales channel: in the comparator markets, a successful seller simply pulls more tickets directly off the single electronic system and an unsuccessful seller pulls fewer tickets; in the UK, the successful seller traditionally will be allocated additional tickets via the promoter, and an unsuccessful one will have tickets withdrawn by the promoter. The status quo industry practice in the UK is simply a less efficient mechanism for rewarding successful sales channels, but that is not a relevant distinction for the purposes of the analysis.

¹⁰³ Further PFs, para. 6.62.

¹⁰⁴ See para. 3.31 above for an explanation of why ticket "allocations" do not arise when tickets are sold from Eventim's system.

¹⁰⁵ **[CONFIDENTIAL]**

¹⁰⁶ **[CONFIDENTIAL]**

¹⁰⁷ **[CONFIDENTIAL]**

¹⁰⁸ Or, indeed, any other ticket suppliers.

¹⁰⁹ Further PFs, para. 7.60. See also Annex E, para. 12.

¹¹⁰ Original PFs, para. 7.21.

- 3.38 The second difference identified is the fact that, in the UK, Live Nation has a greater financial incentive to sell tickets itself, rather than via Eventim. This is entirely irrelevant to the number of tickets that were likely to be "allocated" in the UK to *Ticketmaster* (i.e. none at all). The point identified in the Further PFs is relevant to the likely allocation of tickets between Live Nation and Eventim: it means that it is not possible simply to "read across" Eventim's shares in the comparator countries into the UK, and suggests that the proportion of tickets sold by Live Nation itself may be greater in the UK than in the comparator countries. However, the Further PFs found that Live Nation's principal objective is to sell as many tickets as possible,¹¹¹ that up to half of Live Nation's tickets would be sold other than through Live Nation's website,¹¹² and that sales through Eventim were the next most profitable after sales on Live Nation's own website.¹¹³ These findings need to be considered with the evidence from the comparator countries which shows that Eventim is capable of selling Live Nation tickets with great success in markets where Eventim is a new entrant. If up to 50 per cent of Live Nation's UK tickets are available for sale by third parties and Eventim is a successful seller, then, in the absence of the merger, it was likely to receive and sell a significant share if not all of these tickets. Indeed, Eventim projected that it would sell a share in the UK that is *[CONFIDENTIAL]* it actually achieved in the Netherlands and *[CONFIDENTIAL]* it actually achieved in Sweden. Even taking account of the differences in the LOI, Eventim's forecasts for the UK appear remarkably conservative compared with its success in the comparator countries.
- 3.39 The third point identified in the Further PFs is that the significance of Live Nation as a promoter and venue operator differed in each geographic market. Any difference¹¹⁴ is entirely irrelevant: the Further PFs concluded¹¹⁵ that Live Nation's objectives as a promoter and a venue operator were to sell its tickets in a way that maximises total ticket sales, and quite rightly did not suggest that those objectives would vary depending on whether Live Nation has a market share of 10, 20 or 40 per cent. The incentive to sell as many tickets as possible to reduce the risk of unsold tickets is the *basic profit-maximising incentive of any promoter*: it does not vary by market share or geography. In any event, Live Nation's activities are similar in all three countries as it focuses on the promotion of leading Anglo-American artists across the world.

(e) Eventim's likely success in the absence of the merger: evidence

(i) Introduction

- 3.40 In the counterfactual, the relationship between Eventim and Live Nation would have operated in the way summarised in the "Counterfactual" column of Table 1 and Eventim would have been at least as successful as its own forecasts predicted (scenario 1 in Table 2; see also scenario 2). The evidence to support the claims of Eventim's likely success in the absence of the merger is discussed in this section and can be summarised as follows:
- (a) It is supported by Eventim's own, normal course of business, forecasts. The criticism of those forecasts in the Further PFs is misplaced.
 - (b) It is corroborated by experience in the comparator countries.

¹¹¹ Further PFs, para. 6.26.

¹¹² Further PFs, para. 6.32.

¹¹³ Further PFs, para. 6.31.

¹¹⁴ In fact, Live Nation is the leading promoter in each of the UK, the Netherlands and Sweden because it promotes the same headline acts globally.

¹¹⁵ Further PFs, para. 6.26.

- (c) It is further corroborated by Eventim's track record of entering 17 countries successfully¹¹⁶ and by the CC's own findings about Eventim.
- (d) It does not depend on Live Nation providing customer data or marketing support going beyond Live Nation's obligations under the LOI. Eventim never submitted that Live Nation would provide such assistance and instead relied on LOI compliance and what would be profit-maximising for Live Nation to do.

(ii) Eventim's normal course of business forecasts

- 3.41 When Eventim was negotiating the LOI it made its own forecasts of UK ticket volumes for use in its own business. Forecasts made in the normal course of business are generally regarded as important and probative because the analysis is entirely untainted by any competition investigation.¹¹⁷ Eventim's forecasts are attached as Annex 11.
- 3.42 In its Further PFs, the CC decided effectively to disregard the forecasts Eventim had made when negotiating the LOI for the *volumes* of tickets it expected to achieve, on the grounds that Eventim's assumptions about the *prices* it expected to charge in the UK were not reliable in the light of comparisons with existing market rates and Eventim was unable to supply supporting documentation for some of its assumptions on prices.

6.39 *"Very shortly before the publication of our provisional findings, we received more detailed projections from Eventim, made at the time of the negotiation of the LOI. Our subsequent analysis of this information showed that the net prices which Eventim anticipated charging in the UK, both for Live Nation's controlled tickets and for other parties, were very high in comparison with existing rates. In particular, we found that the level of rebate which it expected to pay promoters and venue operators was low compared with existing market rates, and the amount of the per-order transaction fee which it expected to be able to charge was high. Although Eventim showed us the evidence on which it had based some of its assumptions (eg the average service fee charged by Ticketmaster for sales of Live Nation's tickets), it was unable to provide supporting documentation for its other assumptions. We concluded that, due to the inaccuracy of Eventim's assumptions about the prices it would charge in the UK, we could not put much weight on Eventim's forecasts for the volumes it expected to achieve."*

The price comparison methodology is not robust

- 3.43 In finding that Eventim's price forecasts were unreliable, the Further PFs relied on a comparison between Eventim's predictions and the prices charged by other suppliers. This methodology (of comparing prices between ticketing suppliers) was inconsistent with a separate finding that such comparisons were not robust. The Further PFs stated:

"We attempted to compare prices (fees net of rebates) of different ticket agents but we were not able to make robust comparisons that took account of differences between clients and types of contracts."¹¹⁸

Eventim submits that if robust comparisons are not possible, then Eventim's forecasts should not be criticised - let alone entirely discounted - on the basis of comparisons of prices.

¹¹⁶ The list of 17 countries excludes Eventim's home market, Germany, and the UK.

¹¹⁷ See Peter Freeman's reference to "primary evidence" and the ICN's reference to "pre-existing documentary evidence" in fns 60 and 61 above.

¹¹⁸ Further PFs, Annex E, para. 124.

The original projections

- 3.44 As Eventim's forecasts have been questioned - and, indeed, largely disregarded - it is important to examine them carefully. They were prepared when Eventim was in the process of negotiating the LOI in 2007 and were intended to inform Eventim's commercial strategy. **[CONFIDENTIAL]**

The forecasts distinguish three different revenue streams.

- 3.45 Under the first heading "LN content LN", the forecasts identify revenues from the sale by Live Nation on its own system of Live Nation controlled content; the income stream here includes the payment of **[CONFIDENTIAL]** sold off Eventim's system. The second heading is "LN content (eventim.co.uk)". This involves Eventim itself selling Live Nation controlled tickets. The sources of income are a "Service Fee" of **[CONFIDENTIAL]** and an "Add. [i.e. additional] order fee for delivery and payment" of **[CONFIDENTIAL]**.¹¹⁹ The rebate payable is identified as **[CONFIDENTIAL]** per cent. The third heading is "add. [i.e. additional] Content". **[CONFIDENTIAL]**.
- 3.46 In terms of ticket prices, Eventim's forecasts under the **[CONFIDENTIAL]** for the Service Fee and **[CONFIDENTIAL]** for the Order Fee for delivery and payment. Converting these into sterling at the exchange rate that Eventim used at the time gives charges of **[CONFIDENTIAL]** and **[CONFIDENTIAL]** respectively. As the numbers were prepared for use within Eventim's business they did not include VAT. If VAT is added at 17.5 per cent the projected charges are **[CONFIDENTIAL]** and **[CONFIDENTIAL]**. This is important when it comes to attempts to compare Eventim's projections with the prices charged by competitors in the market.

Rebates

- 3.47 The Further PFs concluded that Eventim's expected rebates were low compared to existing rates. However, Eventim's rebate to Live Nation for selling Live Nation controlled tickets is fixed in the LOI at **[CONFIDENTIAL]** per cent¹²⁰ and therefore Eventim's projections on rebates under the second heading in the document flowed directly from its agreement with Live Nation.
- 3.48 For additional third party content (i.e. under the third heading in the document), Eventim's projections were for **[CONFIDENTIAL]**. Eventim is active across Europe and has some experience to draw on in estimating rebates.
- 3.49 Further, Ticketmaster's reported UK gross margin was around 50 per cent in 2007 after paying rebates and other costs.¹²¹ If Ticketmaster paid a rebate of **[CONFIDENTIAL]** per cent to Live Nation **[CONFIDENTIAL]** then its rebates to other promoters and venue operators must on average have been considerably lower because the gross margin also takes account of costs other than payments of rebates.

Transaction fees

- 3.50 As noted above, Eventim's forecast Order Fees in sterling including VAT were **[CONFIDENTIAL]** per ticket. In its projections, Eventim described the transaction fee as "add. [i.e. Additional] order fee for delivery and payment". The transaction fee referred to in the Further PFs therefore covered: (a) an average delivery fee (both standard and the more expensive premium delivery services); and (b) charges to cover payments incurred in collecting funds from the customer, such as credit card payments.

¹¹⁹ **[CONFIDENTIAL]**

¹²⁰ **[CONFIDENTIAL]**

¹²¹ See Ticketmaster UK Limited's Report and Financial Accounts 2008 (Annex 12) (which includes figures for 2007 and 2008 in the Profit and Loss account).

- 3.51 It is entirely wrong to isolate one type of fee from another rather than looking at total fee volumes. *[CONFIDENTIAL]*
- 3.52 *[CONFIDENTIAL]*.
- 3.53 However, putting these reservations to one side, there is evidence that Eventim's projections were in line with the fees actually charged by other suppliers (recognising the difficulty of carrying out robust comparisons as the CC itself noted). The original Provisional Findings Report dated 8 October 2009 (**Original PFs**)¹²² refer to the fees charged by ticket retailers for purchasing two £45 tickets to see REM. Eventim's *[CONFIDENTIAL]* (including VAT) transaction fee for two tickets would obviously be *[CONFIDENTIAL]*. The CC found that See Tickets' transaction fee for these tickets would have been £4.80, Ticketmaster's would have been £4.95 and Stargreen's would have been £5.50. Therefore, Eventim's transaction fee would have been *[CONFIDENTIAL]*.
- 3.54 In any event, if Eventim's projections on the Order Fees turned out to be too high, it would have re-considered its fee structure. *[CONFIDENTIAL]* Ultimately, what matters to Eventim is its income, and not the categories of fees it receives.¹²³

Total fees

- 3.55 Since there are difficulties in comparing transaction fees between different suppliers, it may be better (although still difficult) to compare total fees (i.e. service fees plus transaction fees). Eventim's projected total fees were *[CONFIDENTIAL]* per ticket (i.e. *[CONFIDENTIAL]*) including VAT.
- 3.56 Returning to the REM example, the total fees for two tickets from Eventim (on its projections) would have been *[CONFIDENTIAL]*. If Eventim had been added to the CC's table with fees as projected in 2007, it would have ranked *[CONFIDENTIAL]*.

No correlation between assumptions on net price and assumptions on number of tickets sold

- 3.57 Even if Eventim's price forecasts were unreliable (which Eventim denies strenuously), this does not in any way undermine Eventim's volume forecasts because the two forecasts were reached using different methodologies,¹²⁴ with the result that any error in one calculation did not taint the other (and there could be absolutely no question of Eventim's forecasts being coloured by the fact that they were being submitted to the CC, because they were made in the *normal course of business* prior to the announcement of the merger when Eventim was relying on the quality of its own forecasts in making a major strategic decision for the company).
- 3.58 Eventim estimated the volumes of tickets using actual data from Live Nation (for Live Nation tickets), estimates of the numbers of non-Live Nation tickets that were likely to become free of TSPs and a conservative prediction of Eventim's likely success in winning that third party business.¹²⁵ This approach to forecasting volumes is completely different from Eventim's approach to forecasting prices, which had involved surveying current UK prices and discussions with Live Nation. Since the approaches to the two forecasts were completely different, even if one turned out to be wrong, it does not follow that the other might be wrong as well.
- 3.59 *[CONFIDENTIAL]*.¹²⁶

¹²² Original PFs, Annex E, para. 36.

¹²³ *[CONFIDENTIAL]*

¹²⁴ *[CONFIDENTIAL]*

¹²⁵ *[CONFIDENTIAL]*

¹²⁶ *[CONFIDENTIAL]*.

(iii) Evidence from the comparator countries

- 3.60 The experience in the comparator markets after the LOI came into operation is summarised in para. 3.35 above. This "real-world" evidence suggests strongly that in the UK Eventim, with all Live Nation-controlled tickets already exclusively on its system, would equally be the premier supplementary sales channel for Live Nation content, in circumstances where the CC recognises that: (a) Eventim is the next most profitable sales channel for Live Nation after self-ticketing; and (b) promoters will risk leaving unsold seats if they seek to sell via only one channel. The evidence also suggests that Live Nation would have "allocated" no tickets whatsoever to Ticketmaster (in contrast to the conclusion in paras 6.32 and 6.35 of the Further PFs).

(iv) Eventim's track record as a successful entrant

- 3.61 In assessing Eventim's likely success as an entrant into ticket retailing in the UK, it is important to appreciate that Eventim has successfully entered 17 countries.¹²⁷ By becoming the largest ticket retailer in Europe, Eventim has also grown into the world's number 2 ticket retailer behind Ticketmaster. It is in a super-league of global ticketing service providers that can handle massive global events: for example, in 2006, Eventim group companies successfully handled the tickets for the last Football World Cup in Germany (3.5 million tickets sold and 100 million website visitors) and the Winter Olympics in Turin, Italy. This track record of success strongly suggests that Eventim has the capital, assets and skills necessary to enter the UK market successfully.¹²⁸
- 3.62 There are no reasons to believe that Eventim would not have been able successfully to enter the UK market if the merger had not occurred. Of course, the UK is not *identical* to the other 17 new national markets, but none of those 17 was identical to any other market and Eventim was able successfully to adapt to the differences.
- 3.63 Indeed, the Further PFs found that Eventim was a distinctive entrant because it has its own proprietary ticketing system, significant prior experience and scale (quite unlike any other recent entrants) and that the LOI was critical to Eventim's decision to enter the UK.¹²⁹ These findings support Eventim's case that, in the counterfactual, Eventim had all of the assets, skills and capital necessary successfully to become a large-scale player on the UK ticket retailing market, *and* that the only necessary assets it lacked itself was the volume of *tickets* themselves to be supplied under the LOI for retailing, and from which third party volumes would flow.

(v) The reasons why Eventim delayed entry into the UK

- 3.64 In its Business Report for 1999, Eventim stated:¹³⁰
- "The Number One throughout Europe***
...As a result of its admission on the stock exchange, the CTS EVENTIM AG is now in the position to utilize these excellent market opportunities increasingly at home and abroad. Expansion to Great Britain, the Czech Republic and the Scandinavian countries is included in the program." (Emphasis added.)
- 3.65 As noted above, Eventim has considerable experience of entering new geographic markets and establishing successful ticket retailing businesses. The fact that Eventim delayed its entry into the UK for over a decade, despite the obvious attractions of entry, implies that Eventim judged that it lacked an asset necessary for entry. As explained in the *[CONFIDENTIAL]*¹³¹
- 3.66 *[CONFIDENTIAL]* In terms of weight of evidence, actual conduct by profit maximising companies in the real world amounts to "primary evidence" (to use Peter Freeman's terminology¹³²) and is much more probative than argument and submission crafted in the context of an ongoing investigation.

(vi) The customer data and marketing support issues

¹²⁷ The list of 17 countries excludes Eventim's home market, Germany, and the UK.
¹²⁸ i.e. that the answer to the four questions posed in para. 3.13(a) is "yes".
¹²⁹ Further PFs, paras 6.54 and 6.56.
¹³⁰ http://www.eventim.de/invre/eng/download/cts_JA-1999_engl.pdf.
¹³¹ *[CONFIDENTIAL]*
¹³² See fn. 60 above.

- 3.67 The Further PFs emphasise that the Original PFs were mistaken in finding that Live Nation might, for example, place Eventim's website details on the promotional material for Live Nation's events or share its customer data with Eventim.¹³³
- 3.68 Eventim agrees that neither of these examples will arise, unless the concessions would maximise Live Nation's own profits (e.g. giving Eventim access to customer data in order more efficiently to market ticket inventory that would otherwise remain unsold). **[CONFIDENTIAL]** Eventim can see no reason why, in the counterfactual, the parties would choose to depart from the terms of the LOI on these issues in the absence of the particular circumstances described earlier in this paragraph: the parties had considered how they wanted these aspects of their relationship to operate and documented their agreement in the LOI.
- 3.69 Although partly of historic interest, Eventim emphasises that it *never argued* to the CC that Live Nation would act in the way contemplated by these two examples. Eventim raises this issue because it was greatly concerned by the implication in paragraph 18 of the CC's Skeleton Argument to the Competition Appeal Tribunal that Eventim had misled the CC by making unsustainable assertions:

"Having considered the material submitted by the merging parties in response to the submissions of Eventim, the Commission decided that the provisional findings which accepted a number of assertions from Eventim could not be sustained."

If the Original PFs were mistaken in giving these two examples, then that mistake had nothing to do with Eventim. Indeed, at the Remedies Hearing, which followed the publication of the Original PFs, when asked about these two points, Eventim responded by citing the relevant provisions of the LOI and did not suggest that Live Nation would go further.¹³⁴

¹³³ Further PFs, paras 6.49 to 6.51, 7.39 and 7.40 (and see also Summary, paras 15 and 16).
¹³⁴ **[CONFIDENTIAL]**

(vii) In the counterfactual, Eventim would have had a "cooperative" "win win" relationship with Live Nation

- 3.70 Developing the theme from point (vi) above, it is important to appreciate the very limited nature of the error in the Original PFs on this issue. The Original PFs stated:

"We noted that, in the absence of the merger, Live Nation and CTS had the incentive to work together on a global basis as long-term partners. Although Live Nation had an incentive to sell as many of its own tickets as possible through its own website (and call centre), it also had an incentive to sell tickets through CTS in preference to any other ticket agent ... We concluded that Live Nation had an incentive to assist CTS in becoming successful, so that CTS would be an effective retailer of its tickets in the UK market."¹³⁵

The Original PFs then gave five examples of how Live Nation might have helped Eventim, whilst stating that it was "uncertain how Live Nation might have helped".¹³⁶ Live Nation criticised two of the examples of possible assistance identified by the CC. The other three, which have been lost by the wayside,¹³⁷ were: ensuring that Eventim received an allocation of tickets for all of Live Nation's events, providing Eventim with a wide range of tickets to offer for sale, and using its influence in its subsidiaries to encourage them to allocate a large number of tickets to Eventim. All three remain valid.

- 3.71 More generally, it is useful to tease out three different respects in which Live Nation might cooperate¹³⁸ with Eventim. First, in the absence of the merger, would Live Nation have an incentive to operate the LOI effectively? Since, on the counterfactual, each party benefited from the operation of the LOI, each would have operated the LOI effectively. In particular, it is likely that neither party would have breached its terms, acted obstructively, adopted especially narrow or restrictive interpretations of those terms, terminated the agreement or commenced litigation.

- 3.72 **[CONFIDENTIAL]**

¹³⁵ Original PFs, para. 6.53.

¹³⁶ Original PFs, para. 6.54.

¹³⁷ There is no reference to them in para. 6.49 of the Further PFs, which instead focuses on data sharing and marketing support.

¹³⁸ "Coooperation" seems a better term than "incentive to assist".

- 3.73 *[CONFIDENTIAL]*¹³⁹
- 3.74 Secondly, in the absence of the merger, would Live Nation have operated the LOI in a way that maximised Live Nation's profits? The answer, clearly, is "yes": see Table 1, issue (1). This explains why Eventim conservatively *[CONFIDENTIAL]*
- 3.75 Thirdly, in the absence of the merger, would Live Nation make voluntary concessions to Eventim going beyond its obligations in sections of the LOI that were specifically negotiated (e.g. on marketing Eventim's services or the sharing of data)? Unless the concessions would maximise Live Nation's own profits (e.g. giving Eventim access to customer data in order more efficiently to market ticket inventory that would otherwise remain unsold), the answer is "no" as the Further PFs found.
- 3.76 This process of teasing out the different types of cooperation shows that, when judging the likely success of Eventim in the absence of the merger (for the purposes of identifying the counterfactual), the most important issue is the second one (cooperation from Live Nation that goes beyond Live Nation's minimum obligations but which maximises Live Nation's profits) whereas the third (the marketing and customer data issues) is immaterial. Paras 15 and 16 of the Summary to the Further PFs conflate these distinct issues. Further, the first form of cooperation (i.e. the simple willingness to operate the LOI effectively and constructively without trying to frustrate it) is significant because it is quite different from the likely position following the merger, as explained in Table 1, issues (3) and (4) and section 4 below.

¹³⁹

Annex 2.

(viii) Conclusion

- 3.77 For the reasons given above, in the counterfactual, Eventim benefits from a "win win" "cooperative" arrangement with Live Nation under which Eventim receives and sells Live Nation tickets that Live Nation cannot itself sell, the LOI is interpreted and operated reasonably and Live Nation complies with its obligations under the LOI. This stable environment provides a sound basis for Eventim to invest heavily in marketing and promotion to win customers, which in turn enables Eventim to enter preferential arrangements with other promoters and venue operators to sell large numbers of their tickets, kicking off a "virtuous circle". The various components of the counterfactual are summarised in Table 1 above.
- 3.78 This analysis is entirely consistent with the findings in the Further PFs¹⁴⁰ that Live Nation's preference is to sell as many tickets through its own website and it would have sold at least 50 per cent of its tickets through its own website; but that of other retailers, Eventim is the most attractive for Live Nation. This means that Eventim had the opportunity to sell *[CONFIDENTIAL]* per cent of Live Nation's tickets. Since Eventim has the assets, skills and capital necessary to enter the UK successfully, the likelihood is that on the counterfactual it would (on a very conservative basis) sell *[CONFIDENTIAL]* per cent of Live Nation tickets as its original projections suggested.

(f) Live Nation's likely allocation of tickets to Ticketmaster in the absence of the merger: evidence

- 3.79 The Further PFs concluded that in the absence of the merger, Live Nation would have "allocated"¹⁴¹ tickets to Ticketmaster "*as it is the largest live music ticket retailer in the UK and has access to more consumers than any other ticket agent*".¹⁴² Eventim disagrees because this would be a clear breach of the LOI as explained in section 3(c) above.
- 3.80 The remainder of this section assumes that, notwithstanding the clear provisions of the LOI, Live Nation is *on the counterfactual* able to "allocate" tickets to Ticketmaster. On this very strong (i.e. incorrect) assumption, it is necessary to analyse:
- (a) Live Nation's *incentives* to assess whether it would, on the counterfactual, have "allocated" no tickets to Ticketmaster in the UK.
 - (b) The *ability* of Live Nation and Eventim between them to sell all or most of Live Nation's tickets without using Ticketmaster.

¹⁴⁰ Further PFs, paras 6.30 to 6.32.

¹⁴¹ See para. 3.31 above for an explanation of why ticket "allocations" do not arise when tickets are sold from Eventim's system.

¹⁴² Further PFs, paras 6.32 and 6.35.

(i) Live Nation's incentives

- 3.81 The starting point in analysing Live Nation's incentives is the CC's provisional finding that Live Nation's principal objective was to sell as many tickets as possible.¹⁴³ The further PFs concluded that this objective meant that Live Nation would choose to deal with Ticketmaster because of Ticketmaster's access to customers.¹⁴⁴ This conclusion seems to depend on an assumption that Live Nation was not entitled to obtain Ticketmaster's customer data under their long-term agreement, and Eventim respectfully requests the CC to verify the accuracy of this assumption. Eventim understands that under Live Nation's previous long term agreement with Ticketmaster for the UK, Ticketmaster was under an obligation to provide Live Nation with a full copy of the customer database for all Live Nation sales on a regular basis. Live Nation therefore possessed all customer data for tickets sold in the UK until the end of 2009 even absent the merger, and on the counterfactual it would not have needed to rely on Ticketmaster to use such data. Moreover, the Further PFs themselves note that: "according to Live Nation, it was better at utilizing its customer data ... than Ticketmaster".¹⁴⁵ In any event, the conclusion does not withstand scrutiny.
- (a) In the absence of the merger, Ticketmaster would be Live Nation's largest competitor, creating a significant commercial incentive for Live Nation not to support Ticketmaster's business by supplying tickets. This is true of the world's largest market, the US (see para. 1.9 above), and also of the UK, the Netherlands and Sweden. (This incentive is *exactly the same* as the incentive the CC found for the merged group to "limit its allocation of Live Nation tickets to Eventim"¹⁴⁶: the merged group has no wish to assist its leading global rival to succeed. Equally, in the absence of the merger, Live Nation would have no incentive to assist the world's leading competitor to succeed.)
 - (b) On the counterfactual, Live Nation stood to benefit significantly by allocating tickets to Eventim and *not* Ticketmaster. This is because if Eventim is successful, its success will increase competition in ticketing which will stimulate increased output, grow the pie, and expand the market for live music tickets, from which Live Nation would itself benefit.
 - (c) If Live Nation and Eventim could between them have sold all of Live Nation's tickets or sufficient of them that Live Nation did not need to use Ticketmaster (which is exactly what has happened in the comparator markets), then Live Nation's incentives would have been to use its own website and Eventim because sales through these channels are more profitable than sales through Ticketmaster, as the Further PFs make clear.¹⁴⁷ (This issue is discussed in section (ii) below.)
- 3.82 Eventim believes that, before the merger with Ticketmaster was in contemplation, Live Nation must have considered how it would arrange for its tickets to be sold once the LOI became operative in the UK. Of course, as para. 6.30 of the Further PFs noted, Live Nation must have worked on the basis that it wished to sell as many of its tickets as possible on its own website, because this is the most profitable category of sales for Live Nation. Eventim's point here is that the majority of shows do not sell out and Live Nation's principal objective was to sell as many tickets as it could.¹⁴⁸ This raises the question: how did Live Nation intend to ensure that it sold as many tickets as it could, given the risk that sales through Live

¹⁴³ Further PFs, para. 6.20.

¹⁴⁴ Further PFs, para. 6.35.

¹⁴⁵ Further PFs, para. 8.93.

¹⁴⁶ Further PFs, para. 7.38.

¹⁴⁷ Further PFs, para. 6.29.

¹⁴⁸ Further PFs, para. 6.26.

Nation's own website alone might not be sufficient? This question is obvious and important and it is almost inevitable that it was considered in detail by Live Nation *prior to the merger being contemplated*. It appears that Live Nation has not voluntarily produced any internal documents on this issue,¹⁴⁹ which suggests that the documents show that Live Nation's plans, prior to the merger being contemplated, were to sell through its own website and Eventim's and *not* Ticketmaster. Eventim respectfully submits that the CC should request Live Nation to produce documents in this category (going beyond board papers and board minutes to include reports, emails and similar documents prepared by or for, or circulated to or by, those individuals in Live Nation that had any material responsibility for planning for the sales of tickets following the LOI). Documents created after the merger was in contemplation have little or no evidential weight.

(ii) The abilities of Live Nation and Eventim to sell Live Nation's tickets

3.83 Live Nation and Eventim could between them have sold all of Live Nation's tickets or sufficient of them that Live Nation did not need to use Ticketmaster. The "real world" evidence to support this is as follows:

- (a) Live Nation has proven a successful vendor, obtaining the number 2 position in the US in its first year (see para. 1.9 above) and enjoying significant success in the comparator countries, i.e. the Netherlands and Sweden. The success of Live Nation in the US, where ticket sales for Live Nation events did not seem to suffer at all when they were available only on Live Nation's own site and not from Ticketmaster, shows that ticket selling is content-driven, and that, for the most attractive content, the potential ticket buyer will find the tickets they are looking for and will buy them from any trustworthy source.
- (b) When Regular Music switched most of its tickets from Ticketmaster to See Tickets, it did not see any fall in sales and did not spend any more on advertising.¹⁵⁰ Further, the CC found that venues which self-ticketed did not sell a lower proportion of tickets than the venues ticketed by Ticketmaster or See Tickets.¹⁵¹ Both of these pieces of evidence suggest that it was not essential to use Ticketmaster *prior to entry by Eventim as a retailer of tickets*. They suggest that following such entry, Live Nation could avoid using Ticketmaster whilst selling its tickets successfully.
- (c) As discussed above, Eventim is the world's number 2 retailer of live music tickets and has successfully entered 17 European markets.¹⁵²
- (d) In both the Netherlands and Sweden, Ticketmaster was the largest live music ticket retailer (with a share in the Netherlands of over *[CONFIDENTIAL]* per cent¹⁵³) and Eventim was a new entrant. Yet in both countries, when the LOI became operative in January 2009, Live Nation "allocated" *no tickets whatsoever* to Ticketmaster.¹⁵⁴ The tickets still sold, showing that Ticketmaster would not have been an unavoidable trading partner for Live Nation in the counterfactual *even though Ticketmaster has a significant share in the UK*.

¹⁴⁹ Despite seemingly creating much more internal documentation than Eventim, which is a very lean organisation.

¹⁵⁰ Further PFs, Annex E, para. 81.

¹⁵¹ Further PFs, Annex E, para. 88.

¹⁵² Leaving to one side Eventim's home country, Germany, and the UK.

¹⁵³ Source: Eventim estimates.

¹⁵⁴ See para. 3.35 above.

(g) Eventim's decision to enter the UK was not "focused" on the provision to Live Nation of a managed ticketing service

3.84 In its Further PFs, the CC inferred from Eventim's internal documents that Eventim's decision to enter the UK market was "focused" on the provision to Live Nation of a managed ticketing service on terms which assured Eventim of a profitable entry opportunity.¹⁵⁵

(i) The finding in the Further PFs is wrong

3.85 Eventim submits that this conclusion is incorrect.

- (a) Eventim attaches *[CONFIDENTIAL]*^{156 157}
- (b) The German-language internal documents,¹⁵⁸ read as a whole,¹⁵⁹ *[CONFIDENTIAL]*¹⁶⁰
- (c) The CC's own finding that, "*We ... accepted that the LOI with Live Nation was critical to Eventim's decision to enter the UK, as it provided Eventim with both a substantial revenue stream and significant ticket inventory for sale*"¹⁶¹ is inconsistent with the proposition that Eventim's decision whether to enter the UK was "focused" on the provision of a managed ticketing service.
- (d) The inference is inconsistent with evidence from Eventim recorded elsewhere in the Further PFs that:
 - (i) Eventim "*only entered markets where it believed that it could become one of the largest ticketing providers (supplying both managed ticketing services and ticket retailing)*"¹⁶²; this evidence implied that ticket retailing was *at least as important* as the provision of a managed ticketing service to Eventim's entry decision; and

¹⁵⁵ Further PFs, paras. 6.57, 6.60 and 6.38. See also paras. 7.17 and 7.45.

¹⁵⁶ *[CONFIDENTIAL]*

¹⁵⁷ *[CONFIDENTIAL]*

¹⁵⁸ Annex 18.

¹⁵⁹ *[CONFIDENTIAL]*

¹⁶⁰ *[CONFIDENTIAL]*

¹⁶¹ Further PFs, para. 6.56.

¹⁶² Further PFs, para. 6.52.

- (ii) "in the absence of an acquisition opportunity or a partnership with a significant source of tickets" Eventim had decided not to enter the UK over many years¹⁶³; Eventim's focus on obtaining tickets implied that ticket retailing was *more important* to Eventim's entry decision than the provision of a managed ticketing service.
- (e) The inference is also inconsistent with evidence which shows that the allocation of tickets from Live Nation was of fundamental importance to Eventim's decision to enter the UK market, namely:
 - (i) *[CONFIDENTIAL]*"¹⁶⁴ *[CONFIDENTIAL]*
 - (ii) In the press release dated 14 January 2008 announcing the signing of the LOI,¹⁶⁵ Eventim's CEO made clear that Eventim decided to license its software to Live Nation in order to obtain minimum volumes of high-profile artist content necessary to overcome barriers to large-scale expansion in UK, and not merely in return for revenues from a "managed ticketing service".
 - (iii) Eventim's normal course of business forecasts¹⁶⁶ showed *[CONFIDENTIAL]*¹⁶⁷
 - (iv) The LOI in *[CONFIDENTIAL]*

¹⁶³ Further PFs, para. 6.56.

¹⁶⁴ *[CONFIDENTIAL]*

¹⁶⁵ See Annex 2.

¹⁶⁶ See Annex 11. *[CONFIDENTIAL]*

¹⁶⁷ *[CONFIDENTIAL]*

(ii) Having made the wrong finding on the facts, the Further PFs then draw an incorrect inference

3.86 In the Further PFs, the CC asked itself whether the provision of back office services by Eventim would be profitable and concluded that they would and that Live Nation had little scope to frustrate Eventim's profitable entry into the UK.¹⁶⁸ Eventim submits that this is the wrong question: the lack of effective competition that the CC found was in ticket retailing, not back office services. **[CONFIDENTIAL]** Eventim is the second largest ticket retailer in the world, considers ticket retailing as its absolute core business, has never restricted itself to "back office services" in any market, and has no intention of doing so in the UK.

(h) The counterfactual is one in which successful large scale entry by Eventim will provide significant benefits to consumers in a market where competition was not fully effective

3.87 For the reasons given above, the counterfactual is that Eventim enters the UK ticketing market successfully as a large-scale retailer.

3.88 This is important for consumers (and, therefore, for the application of the SLC test) because the Further PFs found (rightly) that "competition in the UK market for the primary retailing of live music tickets was not fully effective".¹⁶⁹ It follows that successful large-scale entry by Eventim would increase competitiveness in the UK market, delivering significant benefits to UK consumers. Indeed, the Further PFs reach the same conclusion when they conclude that if Eventim were to exit the market "*the extent of competition in the market would be reduced significantly, compared with the counterfactual. In particular ... the competitive pressure on the merged entity (eg from lower prices, better service and/or new innovation) would be removed*".¹⁷⁰

3.89 Using conservative assumptions, LECG has estimated the annual benefits to consumers of Eventim's entry to be at least £70 million. This is explained and evidenced in section 5 of the LECG Report.¹⁷¹

¹⁶⁸ Further PFs, paras. 6.38 and 7.17.

¹⁶⁹ Further PFs, para. 6.45 (and see also para. 5.52).

¹⁷⁰ Further PFs, para. 7.45.

¹⁷¹ **[CONFIDENTIAL]**

(i) The relevant market for primary retailing of tickets

3.90 The Further PFs concluded that the market for the primary retailing of tickets should include self-ticketing.¹⁷² Eventim submits that the three reasons identified by the CC in reaching this conclusion are incorrect, and that the conclusion is undermined by other findings of fact made by the CC. The application of the SSNIP test to the question whether self-supply should be considered as part of the same market as third party supply was explained by the CC in *DS Smith / Linpac Containers* as follows:¹⁷³

"We considered that, all other conditions being unchanged, a 5 per cent increase in the price of sheet to third parties would give rise to a competitive response from some integrated plants within a year without the need for significant investment."

3.91 Turning now to the three reasons identified by the CC and the other findings that are inconsistent with the CC's conclusion on this issue:

- (a) The first reason identified in the Further PFs was that venues which self-ticketed "provided the same essential ticketing service" to the consumer as a primary ticketing agent. This is true in many, if not most, cases of self-supply. The reason does not engage with the relevant issue, namely whether, if the relative price of third party supply were to rise by 5 per cent, the price rise would be defeated by entry by parties that currently self-supply.
- (b) The second reason identified in the Further PFs was that many venues had adopted self-ticketing. Again, this does not engage on the issue identified in *DS Smith* and summarised in paragraph (a) above.
- (c) The third reason identified in the Further PFs was that a couple of self-ticketing venues were using their self-ticketing technology to sell tickets for other promoters. This evidence is more relevant than that specified in (a) and (b), but does not engage with the question whether such third party supply would be sufficient to defeat a SSNIP.
- (d) The analysis on this issue is undermined by the CC's conclusions:

"we judged that self-ticketing (either actual or threatened) imposed a limited competitive constraint on the large incumbent ticket agents."¹⁷⁴

"we ... did not find evidence of venues switching from using a ticket agent to self-ticketing, or vice versa, which we might have expected to find if the threat of self-ticketing were to constrain the terms offered by Ticketmaster and See Tickets."

The SSNIP test in this context asks, in essence, whether third party supply of tickets faces close competition from self-ticketing, with the consequence that small changes in the relative price of third party supply would lead to a rapid response by self-suppliers that is sufficient to defeat an attempted price increase. The two findings quoted above show, very convincingly, that the SSNIP test is not satisfied in this case and that self-ticketing is not part of the relevant market.

¹⁷² Further PFs, para. 5.23 and Annex E, paras 55 to 57.

¹⁷³ At para. 4.13.

¹⁷⁴ Further PFs, para. 5.34 and Annex E, para. 92.

(i) Live Nation's position in the counterfactual as a competitor to Ticketmaster and a promoter with market power

- 3.92 In the counterfactual, Ticketmaster would face the substantial pressure of competition from Eventim *and* Live Nation in the retailing of tickets (see section (i) above for discussion of the relevant product market). This is important because, for reasons explained in sections 4 and 5, the merger reduces the number of large-scale competitors retailing tickets for large-scale promoters or venue operators¹⁷⁵ from, at most, four (Ticketmaster, Live Nation, Eventim and, arguably, See Tickets) to, at most, two (the merged group and, arguably, See Tickets), reinstating the pre-LOI market structure that has served customers so poorly, as the Further PFs noted:

"We also found that the current market structure had persisted for some time, and that the two incumbent ticket retailers, Ticketmaster and See Tickets, had not been challenged either by large-scale entry or by the expansion of any of the existing suppliers in the market... We judged that the relative stability of market structure in this market is suggestive of a lack of fully effective competition."¹⁷⁶

- 3.93 On the issues of whether Live Nation has market power as a promoter and the irrelevance of this question to the SLC analysis in this particular case, Eventim refers to and repeats its comments of *[CONFIDENTIAL]*.

¹⁷⁵ See also the DoJ's "Competitive Impact Assessment", attached at Annex 6.
¹⁷⁶ Further PFs, Annex E, para. 135.

4. THE POST- MERGER OUTCOME

(a) Introduction and summary

- 4.1 In the Further PFs, the CC found that, with only two large primary retailers of live music tickets (Ticketmaster and See Tickets), and little likelihood of one of the small retailers (none with more than 5 per cent of the market) expanding to become a large retailer in the near future, competition in the retail market for tickets in the UK was less than fully effective.¹⁷⁷ Since Eventim was the only credible potential large-scale entrant, the assessment of whether consumers would benefit from more effective competition in the foreseeable future depended on its predictions of the effect of the proposed merger on Eventim, in particular if Live Nation reduces the number of tickets that it would otherwise have supplied to Eventim but for the merger.
- 4.2 The Further PFs concluded that gaining access to tickets to sell was not a barrier to large-scale entry and expansion¹⁷⁸ and that reducing the number of tickets provided to Eventim by Live Nation would not have a "magnifying effect" (or, more accurately, an "inhibiting effect") on Eventim's entry.¹⁷⁹ The CC therefore provisionally concluded that, although the merger was likely to reduce the number of tickets provided by Live Nation to Eventim,¹⁸⁰ the merger would make a limited difference to Eventim's ability to compete as a retailer of live music tickets in the UK.¹⁸¹
- 4.3 Eventim disagrees. Its position can be summarised as follows:

(a) *[CONFIDENTIAL]*

(b) Even if point (a) is wrong, the merger radically changes Live Nation's incentives and it has the ability to harm or marginalise Eventim's interests using the techniques summarised in Table 1, "Effects of the merger" column. These include numbers of tickets, but the merger affects much more than ticket numbers: it affects the interpretation and operation of the LOI and compliance with the LOI, and, taken together, *[CONFIDENTIAL]*. The huge differences between the "Counterfactual" and "Effects of the merger" columns in Table 1 mean that Eventim is *[CONFIDENTIAL]* with the consequence that the effective competition that consumers need either will not occur or is significantly less likely to occur. This conclusion applies whether the counterfactual is taken as scenario 1, scenario 2, scenario 3 or a range of these scenarios: see Table 2 above.

(c) It is unusual for the Consumers' Association to involve itself in the process of opposing a merger. In this case, very exceptionally, the Consumers' Association has done so (and also made submissions to the Competition Appeal Tribunal). Whilst the assessment of the likely effect of the merger on consumers is for the CC, it is striking that the UK's leading consumer body should be so strongly opposed to the transaction. Its opposition suggests that the Further PFs are flawed.

(b) The effect of the merger will be to change *[CONFIDENTIAL]*

¹⁷⁷ See Further PFs para. 5.52 (and Summary, para. 10 and Annex E, para. 139).

¹⁷⁸ Further PFs, para. 7.56, second sentence.

¹⁷⁹ Further PFs, para. 7.57.

¹⁸⁰ Further PFs, para. 7.59.

¹⁸¹ Further PFs, para. 7.60.

4.4 The Further PFs considered whether foreclosure by the merged group was likely to induce Eventim to exit and found that it was unlikely because of the terms of the LOI, which were binding and which both parties had publicly said they were committed to honouring.¹⁸²

4.5 However, once the merger approval process is finally out of the way (and perhaps even before then), the significant change in incentives brought about by the merger is likely to result in:

(a) *[CONFIDENTIAL]*

(b) *[CONFIDENTIAL]*.¹⁸³

4.6 *[CONFIDENTIAL]*.

4.7 There are six categories of evidence which support the propositions in para. 4.5 above.

(i) The parties' incentives

4.8 In the Original PFs, the CC had found that both parties might have an incentive to reach an agreement such that Live Nation and Eventim would both be released from their obligations under the LOI and Eventim would exit the UK market in return for a financial settlement (without concluding whether such a financial settlement was likely).¹⁸⁴

¹⁸² Paras 7.45 and 7.17 (and see also para. 7.16).

¹⁸³ *[CONFIDENTIAL]*

¹⁸⁴ Original PFs, para. 7.84.

- 4.9 In its "Competitive Impact Assessment"¹⁸⁵ (which was published after the CC's Further PFs), the US DoJ stated:

"By 2008, Ticketmaster's longstanding dominance faced a major threat. Live Nation was better positioned to overcome the entry barriers discussed above than any other existing or potential competitor because it could achieve sufficient scale to compete effectively with Ticketmaster simply by ticketing its own venues. Live Nation also possessed a unique competitive advantage in that it could bundle access to important concerts with its ticketing service. Recognizing Live Nation's potential to disrupt its dominant position in the market for primary ticketing services, Ticketmaster attempted to renew Live Nation's primary ticketing contract before its December 31, 2008 expiration. But Live Nation instead chose to license technology from CTS Eventim AG ("CTS") that would enable it to sell concert tickets to its own venues beginning in 2009 and to compete with Ticketmaster for other venues' primary ticketing contracts in the future."

Eventim submits that it is unlikely that, having entered the merger to eliminate the "major threat" to its existing position, Ticketmaster would wish to remain a significant long term trading partner of Eventim.

(ii) Live Nation's "commitment" is premised on its breaching the LOI

- 4.10 The terms of the crucial statement by Live Nation that led the CC to reverse its Original PFs are premised on Live Nation breaching the LOI:
- (a) Live Nation's "commitment" is stated to apply "*whether or not the ticket was sold off the Eventim system*". Selling other than off the Eventim system is a clear breach of **[CONFIDENTIAL]** as explained in section 3(c) above. The "commitment" is therefore premised on Live Nation breaching the LOI on a term that is critical to Eventim's entry strategy.
 - (b) *On the CC's own findings*, Live Nation's "commitment" was premised on a further breach by Live Nation of the LOI. The "commitment" specifically excluded payments for sales through Eventim's website. Yet the CC (rightly) informed Eventim that "we accept your comment that **[CONFIDENTIAL]**".¹⁸⁶

[CONFIDENTIAL]

- 4.11 **[CONFIDENTIAL]**.¹⁸⁷

¹⁸⁵

Annex 6.

¹⁸⁶

[CONFIDENTIAL]

¹⁸⁷

Further PFs, para. 7.43.

4.12 *[CONFIDENTIAL]*.

(a) *[CONFIDENTIAL]*

(b) *[CONFIDENTIAL]*

(c) *[CONFIDENTIAL]*.¹⁸⁸

¹⁸⁸ Annex 3.

(d) *[CONFIDENTIAL]*

4.13 *[CONFIDENTIAL]*

[CONFIDENTIAL]

4.14 *[CONFIDENTIAL]*.¹⁸⁹

4.15 *[CONFIDENTIAL]*

4.16 *[CONFIDENTIAL]*^{190, 191, 192}

(a) *[CONFIDENTIAL]*¹⁹³

(b) *[CONFIDENTIAL]*¹⁹⁴

4.17 *[CONFIDENTIAL]*

4.18 *[CONFIDENTIAL]*

4.19 *[CONFIDENTIAL]*

[CONFIDENTIAL]

4.20 *[CONFIDENTIAL]*.¹⁹⁵

(c) Effects of foreclosure: access to tickets is a barrier to large-scale entry and/or expansion

(i) Introduction

4.21 Eventim disagrees with the CC's conclusion in its Further PFs that gaining access to tickets to sell was not a barrier to large-scale entry and expansion¹⁹⁶ and that reducing the number of tickets provided to Eventim by Live Nation would not have a "magnifying effect" (or, more accurately, an "inhibiting effect") on Eventim's entry.¹⁹⁷ In this section, Eventim explains:

(a) Why there is a "chicken and egg" problem, i.e. gaining access to large numbers of tickets to sell is a barrier to large-scale entry and expansion.

(b) That the reduction in the number of tickets supplied by Live Nation to Eventim in combination with the other changes brought about by the merger and summarised in Table 1 above will result in Eventim being excluded or marginalised, leading to an SLC.

(c) Why the reasoning in the Further PFs should not be adopted in a final decision.

¹⁸⁹ See, e.g., Further PFs paras 7.28 and 7.29.

¹⁹⁰ *[CONFIDENTIAL]*

¹⁹¹ *[CONFIDENTIAL]*

¹⁹² Email of 25 February 2010.

¹⁹³ *[CONFIDENTIAL]*

¹⁹⁴ *[CONFIDENTIAL]*

¹⁹⁵ Further PFs, para. 7.52. *[CONFIDENTIAL]*

¹⁹⁶ Further PFs, para. 7.56, second sentence.

¹⁹⁷ Further PFs, para. 7.57.

- (d) That the relevant question is to identify the effect of the merger on competition (and therefore consumers) and *not* to identify the principal barrier to entry.
- (e) That Live Nation and Ticketmaster did not provide any material new evidence or argument after the publication of the Original PFs that justifies their reversal.

(ii) Gaining access to tickets to sell is a barrier to large-scale entry and expansion

4.22 The CC and OFT draft joint "Merger Assessment Guidelines" state:¹⁹⁸

*"Strategic advantages arise where incumbent firms have advantages over new entrants because of their established market position (sometimes called 'first-mover advantages') ... Such barriers to entry may be particularly high in markets with network effects ... In markets characterized by **network effects**, a likely entrant will need to take the risk of developing new infrastructure but may not **succeed in creating the necessary demand** so as to make the development of a new network profitable."* (Emphasis added.)

4.23 For an e-commerce retailer, such as an online ticketing website, these network effects are *indirect*: concert promoters are better off when there are more consumers visiting the website; and consumers are better off the more attractive promoter content is on the website. So the benefit to customers on *one* side of the platform arises from the qualities of the customer group (for promoters: large group of consumers willing to spend; for consumers: large range of popular events, and enough tickets in stock per concert or artist) that come from the *other* side of the platform.¹⁹⁹ A platform that needs to attract both sets at the same time in sufficient quality and quantity is the source of the "chicken and egg" problem. This is widely recognised in the economics literature:

*"... most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform. Platform owners or sponsors ... must address the celebrated 'chicken-and-egg problem' and be careful to 'get both sides on board'."*²⁰⁰

*"Indirect network externalities give rise to a '**chicken-and-egg**' problem: to attract buyers, an intermediary should have a large base of registered sellers, but these will be willing to register only if they expect many buyers to show up."*²⁰¹

¹⁹⁸ Paras 4.182 to 4.184.

¹⁹⁹ In contrast, a direct network effect is like a telephone network: the more citizens that have telephones, the more valuable a telephone is to each citizen. But promoters are not attracted to each other; they are attracted by consumers, and the same generally on the consumer side.

²⁰⁰ Rochet & Tirole, "Platform Competition in Two-Sided Markets", *Journal of the European Economic Association*, vol. 1, no. 4, June 2003, pp. 990-1029.

²⁰¹ Bernard Caillaud and Bruno Jullien, "Chicken & Egg: Competition Among Intermediation Service Providers." *Rand Journal of Economics*, Vol. 34 (2003), pp. 309–328.

- 4.24 Eventim's and Ticketmaster's web ticket shops are online sales "platforms": **[CONFIDENTIAL]**".²⁰² Eventim's business has two sides because a ticketing service provider (to promoters) and a ticket agent (as it is known to consumers) brings together two sets of customers: a smaller number of important promoters and venues (who control large numbers of concert tickets to sell) on the one side, and a much large number of consumers (who want to buy them) on the other. A Harvard Business School academic has said: "*Ticketmaster [is] a two-sided platform serving consumers and event venues (concerts, sports, etc.)*".²⁰³ The same is true of Eventim.
- 4.25 If one is starting out as a new entrant and the first-movers in other countries have incumbency advantages, the challenge is how to win the most important customers on the one side (a very concentrated market of a handful of the biggest promoters) while winning as many as possible consumers on the other (a very fragmented market of millions of customers). Clearly, it is more realistic to try to attract a few large customers than millions of small ones, so it makes sense to focus on large promoters. This is not least because, although Eventim is perfectly willing to spend money on marketing leaflets, ad campaigns, internet ads, search engine optimisation and search engine marketing (e.g. Google paid links) and so forth, there is no point advertising if you have empty shelves with no products to sell. So you cannot start with the consumer side, you must start with the promoter side. However, to do this, you would have to prise apart the long-established preferential relationships that already exist. The UK is a good case study for how difficult this is for a new entrant, and how incumbents profit from the cosiness of the status quo.
- 4.26 So far as the UK's major promoters and venues go, Ticketmaster had a long-term preferential supply contract with Live Nation (whereby Live Nation paid a penalty for using other agents) that ended in December 2009, and also has long-term agreements with other major UK promoters and venue operators such as AEG and SMG. Ticketmaster also has the preferred supplier relationship with the venue (venues also control tickets) with the two biggest arenas in the UK, Wembley Arena (managed by Live Nation) and the O2 Arena, as well as the main live music arenas in major cities such as Manchester, Newcastle, Cardiff, Belfast and Aberdeen.²⁰⁴ Due to its preferential treatment from promoters and venues under long-term contracts, Ticketmaster typically gets the most and best tickets to the most popular rock and pop and other live music events.
- 4.27 As a result, Ticketmaster's website has by far the broadest range of the most popular concerts and other events, it has the biggest brand and is the first (and in most cases only) place that UK consumers will look for tickets online. This explains the conclusions of the independent GfK consumer survey of UK ticket-buying consumers commissioned by the CC:
- (a) 75 per cent spontaneously mentioned Ticketmaster as a company they knew that sold tickets, the next highest mention being See Tickets at 18 per cent. Among those who had ever bought via a ticket agent (nearly nine in ten of all purchasers), 75 per cent tended to use Ticketmaster and 61 per cent had used them in the last six months.

²⁰² **[CONFIDENTIAL]**

²⁰³ Andrei Hagiu, Multi-sided Platforms: from Microfoundations to Design and Expansion Strategies, 15 November 2006, Harvard Business School, Strategy Unit, available at www.hbs.edu/research/pdf/07-094.pdf. Note that in the US it is venues rather than promoters who tend to control supply of tickets.

²⁰⁴ See Further PFs, Annex E, page E19, Table 7.

- (b) Over half (54 per cent) of those who had ever bought via a ticket agent said that Ticketmaster was their preferred supplier. Familiarity with, and the reputation of, the company were key reasons for preference. Price did not feature as a strong driver of ticket agent preference.
- (c) Very few purchasers shopped around for their tickets, with 90 per cent indicating that they bought from the first place they tried on the last purchase occasion. The majority (64 per cent) said they did not consider booking tickets from anywhere other than the channel they used, a further indication of the lack of propensity to shop around for tickets.²⁰⁵

A new entrant will never be able to compete with this kind of an incumbency advantage under normal circumstances: it faces the "vicious circle" that works in exactly the opposite way as the virtuous circle operates for the incumbent: small ticket volumes to a small range of events attract few online consumers, which means it is not rational for promoters ever to allocate larger volumes, and the entrant is stuck as a fringe player.²⁰⁶ Indeed, the Further PFs stated: *"we believed that Eventim would only win significant new ticket allocations from these switching clients if it was able to demonstrate to them an ability to sell tickets."*²⁰⁷

- 4.28 The "chicken and egg" problem is terrific for the incumbent.²⁰⁸ Due to its virtuous circle of promoter relationships feeding consumer awareness and web traffic and vice versa, Ticketmaster can make gross margins of around 50 per cent with a market share of 40 to 50 per cent and because the UK is such a large market (worth almost £1 billion per year by now) the profit pool is very large indeed.²⁰⁹ Ticketmaster can maintain these margins because its brand awareness and consumers' unwillingness to shop around (even to See Tickets – see

²⁰⁵ GfK NOP survey for the CC, August 2009, paras. 4-6.

²⁰⁶ The DoJ's "Competitive Impact Assessment" (<http://www.justice.gov/atr/cases/f254500/254544.htm>) is entirely consistent with the "chicken and egg" problem (although it does not use this particular turn of phrase). The DoJ stated: *"These margins have persisted because they are protected by high barriers to other companies successfully, substantially, and profitably entering or attempting to expand in the market for primary ticketing services to major concert venues. First, the platforms required to provide primary ticketing services to major concert venues are technologically complicated and expensive to develop and deploy. Second, major concert venues are reluctant to enter long-term exclusive contracts with new primary ticketing companies because they lack Ticketmaster's established reputation for capably handling high-volume on-sales and providing high-quality service to venues. Third, the costs of installing and training employees to use new equipment make it expensive for venues to switch between primary ticketing companies. Fourth, because there are high fixed costs to develop and maintain a primary ticketing platform, entrants struggle to obtain sufficient scale to compete successfully with Ticketmaster on price. Fifth, Ticketmaster's scale provides another important incumbent advantage over other firms - extensive data about individual concertgoers collected over many years. Ticketmaster can use that data as a powerful marketing tool to secure venue contracts for primary ticketing services. Sixth, Ticketmaster's practice of signing long-term exclusive contracts with venues limits how quickly other firms can amass sufficient scale to compete effectively with Ticketmaster on any of these dimensions."*

²⁰⁷ Para. 7.50. See also para. 7.53: *"AEG told us that the volume of tickets Live Nation allocated to Eventim made a difference to Eventim's ability to sell tickets and its ability to win allocations of tickets from other promoters and venues."* and Annex E, paras 96, 106, 107 109 and 136.

²⁰⁸ See the Further PFs, paras 5.30 (*"Regular Music told us that Ticketmaster and See Tickets were the only two credible ticket agents of any scale in the UK"*), 5.31 (*"in the examples Ticketmaster provided ... the principal alternative was almost always See Tickets"*), 5.32 (*"Ticketmaster's large customer base made it attractive to promoters and venues"*) and 5.37 (*"a situation where expansion has not occurred, but should be highly profitable, was consistent with there being barriers to expansion."*) and Annex E, para. 105 (noting that the consumer survey suggested a degree of incumbency advantage)

²⁰⁹ See Annex 12 for Ticketmaster's UK margins and Annex E, Table 5 of the Further PFs for details of 2008 live music ticket sales in 2008.

below) means it will not lose consumers when it charges service fees that are generally way higher than through other sales channels. One might still expect that Ticketmaster faces keen competition from See Tickets, the next-biggest rival by far. After all, although the Further PFs found the UK market for live music tickets as "less than fully effective", it did say that "there was competition in the market ... in particular between Ticketmaster and See Tickets."²¹⁰ It is worth testing the strength of this competition with the CC's own pricing example. The CC used the Stereophonics March 2010 tour as a sample to check ticket service and delivery fees.²¹¹

- 4.29 This reveals that Ticketmaster mostly charges around 50 to 70 per cent more than See Tickets in all cities where both the top two players offer tickets, as illustrated in Table 3.

Table 3: Ticketmaster's ability to command an exceptional premium over its rivals

Venue	Face value of 2 tickets £	Markup charged by #1 Ticketmaster £	Markup charged by #2 See Tickets £	Ticketmaster charges are % more than See
Nottingham	60	12.75	7.50	+70%
Manchester	60	13.30	8.00	+66%
London O2	65	13.00	8.50	+53%
Newcastle	60	11.90	8.00	+49%
Sheffield	60	8.25	8.00	+3%

- 4.30 In a market in which the market leader can charge 50 to 70 per cent more than the next-biggest player for basically the same service: booking and shipping two tickets to the exact same concerts by the same band in the same town, one can wonder whether Ticketmaster is not in a market by itself. See Tickets does not seem to constrain 50 per cent higher charges any more than any of the other ticketing players.
- 4.31 In any event, these large fees and large margins in a large market are what appealed to Eventim, if it could overcome the entry barriers.

(iii) The original PFs were correct on this issue

- 4.32 In the Original PFs, the CC noted that Eventim had argued²¹² that in order to enter a new geographic market on a large scale it needed a significant guaranteed base of ticket inventory to benefit from the virtuous circle that having tickets to sell attracted customers and having customers attracted other promoters and venues (i.e. that successful large scale entry required a "kick-start"); whereas Ticketmaster had argued²¹³ that an entrant could obtain a broad portfolio of quality tickets from the start and could then obtain larger ticket allocations by successfully selling tickets.
- 4.33 The CC found that entry was possible with low volumes of tickets and that such an entrant would be allocated more tickets if successful.²¹⁴ The CC therefore concluded that the barriers to entry into the market were not insurmountable.

²¹⁰ Further PFs, Summary at para. 10.

²¹¹ Fees are booking the two tickets plus delivery. The tickets themselves cost £30 per seat outside London and £32.50 per seat at the London O2. See Further PFs, Annex E, page E9, Table 3.

²¹² Original PFs, paras 5.30 and 5.32.

²¹³ Original PFs, para. 5.31.

²¹⁴ Original PFs, para. 5.35.

4.34 The CC then turned to barriers to *expansion* and stated:

"However, we concluded that there were significant barriers to expansion in the market, in particular a 'chicken and egg' problem by which a new ticket agent needed a consumer base in order to attract substantial ticket allocations from promoters and venues but, at the same time, needed substantial ticket allocations in order to attract consumers." (Emphasis added.)

4.35 The CC reached its conclusions on barriers to *expansion* in reliance on four main pieces of evidence.

- (a) Lastminute.com had not received any significant ticket allocations.²¹⁵
- (b) Gigantic, a recent entrant, "had not yet gained sufficient ticket allocations to generate a large customer base".²¹⁶
- (c) Most of the existing small providers in the market had failed to expand significantly, in some cases over many years, whilst Ticketmaster's market share had remained much higher, suggesting that there were significant barriers to expansion.²¹⁷
- (d) The results of the CC's survey suggested that there was an incumbency advantage meaning that "there was no clear incentive for promoters and venues to allocate larger volumes of tickets to these smaller retailers".²¹⁸

4.36 There are three points to note about the analysis of this issue in the Original PFs:

- (a) It receives strong support from the description of the market in section (ii) above, and is therefore supported by economics literature and the (very important) fact that although Eventim identified Great Britain in 1999 as a country it wished to enter and competition in Great Britain is less than fully effective (implying that there are significant profits available for a successful new entrant) Eventim did not take any steps to enter until it signed the LOI. Eventim's track record of success shows beyond doubt that it has all of the other assets necessary successfully to enter a new market (ticketing system, assets, skills and capital). Its failure to deliver on its strategy of entering Great Britain despite the obvious incentives to do so is susceptible of only one explanation, namely that there was some other barrier to entry (i.e. the "chicken and egg" problem that was identified clearly in the Original PFs).
- (b) The CC found that obtaining access to tickets was *not* a barrier to *small-scale* entry.
- (c) The "chicken and egg" problem (of obtaining access to *large* numbers of tickets) involved a barrier to *expansion* to a large scale, and was *not* identified as a barrier to *small-scale* entry.

²¹⁵ Original PFs, para. 5.33.

²¹⁶ Original PFs, para. 5.36.

²¹⁷ Original PFs, para. 5.37.

²¹⁸ Original PFs, para. 5.38.

(iv) The reduction in the number of tickets supplied by Live Nation to Eventim in combination with the other changes brought about by the merger and summarised in Table 1 above [CONFIDENTIAL]

4.37 Eventim explained earlier in this paper that:

- (a) On the counterfactual, Eventim would receive sufficient numbers of Live Nation tickets to invest heavily in marketing and promotion in circumstances where the LOI is interpreted and operated reasonably as part of the "cooperative" "win win" approach and Live Nation complies with the LOI. These factors *taken together* would make Eventim an attractive partner for other promoters and venue operators, enabling Eventim to win large allocations of tickets to non-Live Nation events and solving the "chicken and egg" problem. This is summarised in Table 1 above.
- (b) [CONFIDENTIAL]
 - (i) [CONFIDENTIAL]
 - (ii) [CONFIDENTIAL]²¹⁹

4.38 [CONFIDENTIAL].²²⁰

- (a) There is no "magic number" of tickets that is necessary for entry to occur successfully on a large-scale. All tickets are not created equal: the nature of the event, the quality of the ticket, its price and its availability to sell at or before first release are all important parameters.
- (b) In any event, the tickets themselves form only part of the picture. As explained in Table 1 above, the interpretation and operation of the LOI and compliance with the LOI are important factors (along with the tickets themselves) that affect Eventim's decisions to invest in marketing and promotion. In turn, Eventim's attractiveness to consumers affects the willingness of third party promoters and venue operators to allocate significant numbers of tickets to Eventim.
- (c) Returning to the question of tickets, it is clear to Eventim that receiving small numbers of tickets would not be sufficient to enable entry to occur successfully on a large-scale (for all the reasons given in sections (ii) and (iii) above) and that receiving the number of tickets predicted in its business plan would very likely be sufficient (see scenario 1 in Table 2 above). Between these two positions, there is unlikely to be a tipping point (i.e. a "magic number" of tickets that is sufficient, when one fewer ticket would not) but instead a tipping range (such that obtaining more tickets within the range leads to entry on a larger scale sooner if all the other factors mentioned in sub-paragraph (b) above are held constant).
- (d) [CONFIDENTIAL]
- (e) However, entry with the minimum ticket volumes (i.e. as described in point (d) above) would be slower and on a smaller scale than entry with larger volumes of tickets (e.g. scenario 2 in Table 2). This is because, as the economics literature recognises, the market is two-sided: the more tickets Eventim has, the more attractive

²¹⁹ It is too early to make precise predictions about the number of tickets that Eventim will sell in the UK in 2010.

²²⁰ Further PFs, para. 7.45 ("the extent of competition in the market would be reduced significantly").

it will be to concert-goers; and the more concert-goers Eventim has access to, the more attractive it will be to promoters and venue operators.

(f) If, following the merger, *[CONFIDENTIAL]*

(v) The reasoning in the Further PFs is wrong

Para. 5.44 of the Further PFs does not support the conclusion that gaining access to tickets was not a barrier to large-scale entry

4.39 In para. 7.56 of the Further PFs, the CC found that gaining access to tickets to sell was not a barrier to *large-scale* entry and expansion for the reasons given in para. 5.44 of the Further PFs. Para. 7.56 states:

*"We found that there were significant barriers to large-scale entry and expansion in the UK market for the primary retailing of live music tickets ... However, following the responses we received to our provisional findings, we did not believe that gaining access to tickets to sell was one of these barriers (see paragraph 5.44)."*²²¹

4.40 It is therefore necessary to read para. 5.44 with care to understand why the Further PFs found that obtaining access to tickets to sell was not a barrier to *large-scale* entry and therefore reversed the PFs on this point. Para. 5.44 says (quoting in full):

"We found these submissions, and the evidence to which they referred, persuasive. We concluded that gaining access as a ticket agent to a small volume of tickets across a wide range of events did not appear to be a significant barrier to entry."

On its face, para. 5.44 clearly addresses the question whether obtaining access to tickets acts as a barrier to *small-scale* entry. Reading paras 7.56 and 5.44 together, the CC's provisional conclusion on this crucial question is that obtaining access to tickets is not a barrier to *large-scale* entry (which obviously requires *large volumes* of tickets) because it is possible to obtain access to a "*small volume*" of tickets. This is wrong: it is no answer to a concern about barriers to *large-scale expansion* to say that *small-scale entry* is possible (particularly when there is graphic and uncontroverted evidence that small-scale entry has not led to expansion into a large-scale presence on the market²²²).

The evidence identified in paras 5.41 to 5.43 does not support the conclusion that gaining access to tickets was not a barrier to large-scale entry

4.41 The conclusion in para. 5.44 of the Further PFs was based on argument from Ticketmaster (para. 5.41) and evidence regarding Metropolis and Gigantic (paras 5.42 and 5.43). The argument from Ticketmaster stands or falls on the evidence in support, which takes us to the positions of Metropolis and Gigantic.

4.42 The evidence from Metropolis was that:

*"... Metropolis told us that it allocated tickets across a number of ticket retailers and it would be willing to provide a small number of tickets to a new retailer. Metropolis said that, if the new ticket retailer were able to sell tickets more successfully than other ticket retailers, it would be re-allocated more tickets."*²²³

4.43 Eventim makes three points in response.

(a) Metropolis is a joint venture partner with Live Nation and is incentivised not to harm

²²¹ Further PFs, para. 7.56. See also para. 7.57.

²²² See Further PFs para. 5.52 (and Summary, para. 10 and Annex E, para. 139).

²²³ Further PFs, para. 5.42.

its partner's merger prospects by making statements adverse to Live Nation's interests. So this "evidence" is likely to be self-serving and unreliable.

- (b) The statement is not "evidence" at all about large-scale entry. It simply says that if a new entrant sells a small volume of tickets, it would get more tickets. It has nothing to say about the "chicken and egg" problem, which requires a *quantum leap* to become a large-scale entrant. The UK has many fringe players, and they have been fringe players for the last ten years or longer. In the absence of a major acquisition, Eventim needs a long-term stable relationship with a major promoter. Metropolis is not offering that: it is offering a trickle of tickets. This will not get Eventim (or anyone else) anywhere other than a fringe position, where it would be stuck.
- (c) In any event, Metropolis is no substitute as an entry sponsor because it does not have the unique features and artist roster of the world number one, Live Nation.

4.44 The other evidence identified in the Further PFs relates to Gigantic:

*"Live Nation highlighted the example of Gigantic, which was a small new entrant but which had been successful in obtaining ticket allocations to a wide range of events, both from Live Nation and other promoters."*²²⁴

4.45 This example does not rebut or address the "chicken and egg" problem. It shows that entry is possible on a small scale, something which Eventim has never denied and which the Original PFs clearly found.

4.46 Indeed, the Further PFs recognise elsewhere that Gigantic is no different than lastminute.com and all the other fringe players, who have spent the last ten years remaining fringe players. The Further PFs stated:

*"Gigantic... is seeking to position itself as an ethical ticket retailer, donating a proportion of profits to charity. ... For Gigantic, we noted it was a **small start-up** business, which was competing for live music ticket sales on the Internet among many Internet retailers, and it had not yet gained a large customer base. Therefore, we concluded that we could **not be confident** that [this] new entrant[] **would grow** to become [an] effective competitor[] to Ticketmaster and See Tickets in the near future, **particularly in the presence of material barriers to expansion.**"*²²⁵ (Emphasis added.)

4.47 Indeed, the Original PFs stated that Gigantic had "*not yet gained sufficient ticket allocations to generate a large customer base*".²²⁶ Although this reference to ticket allocations was omitted from the Further PFs, Eventim submits that the point in the Original PFs was correct. The Gigantic example is evidence of the existence of the "chicken and egg" problem, and is emphatically *not* evidence that the problem does not exist.

Para. 5.44 of the Decision does not support the conclusion that gaining access to fewer tickets from Live Nation would not have a magnifying effect on Eventim's entry into the UK

4.48 The Further PFs then reject concerns about the "magnifying effect", again in reliance on the evidence in para. 5.44. Para. 7.57 of the Further PFs states:

"In our provisional findings we said that the effect on Eventim of gaining access to fewer tickets from Live Nation as a result of the merger could be significant, partly due to lower revenues from selling fewer Live Nation tickets but, more importantly,

²²⁴ Further PFs, para. 5.43.

²²⁵ Further PFs, para. 5.50.

²²⁶ Original PFs, para. 5.36.

due to being able to attract fewer consumers and so being able to gain access to fewer tickets from other promoters and venue operators. Given our revised view that gaining access to a small volume of tickets for a wide range of events was not a significant barrier to entry (see paragraph 5.44), we concluded that gaining fewer tickets from Live Nation, compared with the counterfactual, would not have this magnifying effect upon Eventim's entry into the UK live music ticket retailing market."

- 4.49 As noted above, on its face, para. 5.44 clearly addresses the question of whether obtaining access to tickets acts as a barrier to *small-scale* entry.²²⁷ However, in para. 7.57, the CC relies on evidence about obtaining access to *small numbers* of tickets to address a concern that Eventim, which was seeking to enter on a *large scale*, would win fewer customers if it received fewer tickets from Live Nation and, as a result, would obtain fewer tickets from other promoters and venue operators. The concern involved *large changes* in *large numbers* of tickets for a *large-scale* entrant. The possibility of obtaining *small numbers* of tickets has nothing to do with it. The evidence from para. 5.44 simply does not engage with the issue and is therefore not probative.

The Further PFs misstated the "chicken and egg" problem

- 4.50 Para. 5.44 of the Decision summarises the CC's conclusion on barriers to entry. It is important to look also at the question the CC asked itself when considering this issue. The relevant section starts:

*"In our provisional findings, we accepted Eventim's submission that the retailing of live music tickets was a two-sided activity, and a ticket agent needed to offer tickets to a wide range of events in order to attract consumers. In our provisional findings, we accepted that this requirement represented a significant barrier to entry."*²²⁸

At this point in the text, the Further PFs included a footnote: *"In our provisional findings, we referred to this requirement as a 'chicken-and-egg' problem."*

- 4.51 In other words, the CC characterised the "chicken and egg" problem that had formed a fundamental part of its Original PFs as involving a barrier to *entry* arising from a need to offer tickets to a wide *range* of events. This is not at all what the Original PFs said.²²⁹ As can be seen from the quote in para. 4.34 above, the CC found that the "chicken and egg" problem was about barriers to *expansion*, not barriers to *entry*; and the barrier involved obtaining access to *substantial ticket allocations*, not obtaining access to tickets to a *wide range* of events. The CC completely reformulated the issue to be addressed, and therefore, regrettably, did not engage with the relevant issue.

The Further PFs overlooked evidence identified elsewhere in the Further PFs that obtaining access to tickets to sell was a barrier to *large-scale* entry and expansion

- 4.52 As discussed above, the CC found in para. 7.56 that gaining access to tickets to sell was not a barrier to large scale-entry and expansion. This finding led directly to the conclusion that the merger was not likely to result in an SLC. However, at other points in the Decision, the CC *did* identify evidence that gaining access to tickets to sell was a barrier to large scale-entry and expansion, but it did not factor that evidence into its provisional conclusions.
- (a) Returning to the discussion of barriers to entry and expansion in Chapter 5, the CC stated (under the heading "Other barriers to entry and expansion"):

²²⁷ As noted above, the evidence set out in Further PFs paras 5.42 and 5.43 that underlies the conclusion relates only to *small-scale* entry

²²⁸ Further PFs, para. 5.40.

²²⁹ Nor does it reflect Eventim's submissions.

"5.46 We judged that the more significant challenge in becoming a large-scale retailer of live music tickets was to sell tickets more quickly than other ticket agents, which meant gaining access to more consumers than other ticket agents and gaining access to larger allocations of tickets from promoters and venue operators than other ticket agents. ...

5.49 In addition, we noted that there were other factors which made it difficult to become a large-scale retailer of live music tickets. First, we noted that the presence of long-term relationships between the large incumbent ticket agents and promoters/venues made it difficult for other ticket agents to gain access to large ticket allocations." (Emphasis added.)²³⁰

²³⁰

Paras 107 and 109 of Annex E to the Further PFs contain similar statements.

(b) In para. 7.56 itself, the CC said:

"We found that gaining access to a small volume of tickets across a wide range of events was possible, even if gaining access to a large volume of tickets across a wide range of events was much harder." (Emphasis added.)

4.53 Further, having found that "*gaining access to a large volume of tickets across a wide range of events was much harder*", Eventim submits that the CC should have addressed the logical and important next question, namely: if it is much harder to gain access to a large volume of tickets, how would a supplier, such as Eventim, which was seeking to enter on a large scale, go about getting a large volume of tickets? Eventim's case in is that it could not obtain access to the large volumes of tickets necessary to enter on a large scale without being a "sponsored" new entrant²³¹ based on a preferential long-term relationship.

(vi) Analysis of the effects of the merger cannot be avoided by saying that Eventim's success would depend on its own endeavours

4.54 See section 3(●) above (discussing the same issue from the perspective of the counterfactual analysis).

(vii) Live Nation and Ticketmaster did not provide any material new evidence or argument after the publication of the Original PFs that justifies their reversal

4.55 Finally, in para. 5.40 of the Further PFs, the CC states that it reversed its conclusion on this issue in the Further PFs because "*in response to our [Original] provisional findings we received detailed submissions from Ticketmaster and Live Nation which refuted this view.*" This issue is largely of historic interest, but in the light of the presentation to the Competition Appeal Tribunal on costs, it is worth noting that the argument and evidence relied on to support the finding in para. 5.44 was all available at the time of the Original PFs. Ticketmaster's argument as recorded in para. 5.41 of the Further PFs is materially the same as its argument as recorded in para. 5.31 of the Original PFs. The evidence from Metropolis in para. 5.42 of the Further PFs is really no more than an inference from para. 7.25 of the Original PFs. And the evidence about Gigantic in para. 5.43 of the Further PFs follows from para. 5.36 of the Original PFs.

(d) The CC was wrong provisionally to approve the deal in reliance on the "commitment" from Live Nation

4.56 In the Original PFs, the CC noted that, "*Live Nation said that, under its interpretation of the LOI, CTS [Eventim] was not entitled to any fee for sales of Live Nation tickets which were not made on the CTS system.*"²³² This led the CC to conclude in its Original PFs:

*"We noted that, if the merger were to proceed, we might expect the majority of the merged entity's ticket sales to be undertaken on Ticketmaster's system, ie not on CTS's system. If so, we might expect Live Nation to argue that no fee is payable to CTS for the vast majority of its ticket sales [●] ... We also concluded that Live Nation could inhibit CTS's growth in the UK market compared with the counterfactual and could affect CTS's viability in the early stages of its entry into the UK market by limiting its income."*²³³ (Emphasis added.)

²³¹ Or by acquisition.

²³² Original PFs, para. 6.19.

²³³ Original PFs, paras 7.29 and 7.31.

4.57 The CC's concerns that the merged group would refuse to pay Eventim a specified sum for each controlled ticket sold (subject to exclusions) whether or not the ticket was sold off the Eventim system formed an essential part of the CC's Original PFs that the merger was likely to lead to an SLC.

4.58 In its Further PFs, the CC reversed its position on this issue, stating:²³⁴

"Prior to our provisional findings, Live Nation told us that, under its interpretation of the LOI, Eventim was not entitled to any fee for sales of Live Nation tickets which were not made on the Eventim system, though, [●]. In contrast, Eventim told us that the LOI stated that all of Live Nation's controlled tickets would be placed on its system. However, following our provisional findings, Live Nation told us that it was committed to paying Eventim £[●] for each controlled ticket sold (excluding box office sales (see paragraph 6.10) and sales through Eventim's website), whether or not the ticket was sold off the Eventim system. (For sales through Eventim's website, Eventim would [●] (see paragraph 6.11)) Therefore, even if Eventim sold no Live Nation tickets as a ticket retailer, so long as these tickets were sold either by Live Nation or another party, Eventim would receive £[●] per ticket, equal to around £[●] a year." (Emphasis added.)

4.59 The CC reversed its Original PFs on this important point²³⁵ because of a statement from Live Nation that it had made a "commitment". The statement is therefore a fundamental issue in the CC's analysis of the case. It reads as follows:

*"LN now accepts that - regardless of the strict interpretation of the LOI - it will have to make a de facto [●] payment to CTS [Eventim] for each LN-controlled ticket that is sold by a non-CTS agent (including TM) outside the CTS system".*²³⁶ (Emphasis added.)

4.60 The publication of the PFs revealed the importance of this issue to the CC's analysis and Live Nation made its statement shortly afterwards. The statement was therefore made (for perfectly understandable reasons) with the aim of advancing Live Nation's position in the CC's review of the proposed merger in circumstances where the CC was consulting on remedies following the publication of PFs finding that the proposed merger was likely to lead to an SLC. It must surely have been drafted with great care. It therefore called for careful scrutiny.

4.61 The "commitment" is not:

- (a) **Clear.** In particular, it is unclear what was meant by "*a de facto ... payment*" and whether, and if so how, this was different from a *de jure* payment.
- (b) **Irrevocable.** This is very important because the CC itself found that "*Live Nation would have the incentive to frustrate Eventim's position in the UK*".²³⁷ On its face, the statement is (at most) one of present intention. Live Nation might, for example, come to re-visit its position in the light of advice from legal counsel on Live Nation's legal obligations, concerns expressed by board members that Live Nation is acting

²³⁴ Further PFs, para. 6.20.

²³⁵ Live Nation's "commitment", "confirmation" and/or "clarification" (see the Further PFs, paras 6.20, 7.42 and 7.43) led the CC to find that the binding LOI assured Eventim of the ability profitably to enter the UK (see the Further PFs, paras 7.58, 7.17, 7.44 and 7.60).

²³⁶ Live Nation's Response to Provisional Findings Report, 3 December 2009, para. 3.14.

²³⁷ Further PFs, para. 7.58.

against the interests of shareholders by making payments to an actual or potential competitor that are not strictly required by law, or any number of other reasons.

- (c) ***Binding***. On its face, a statement by Live Nation that it "accepts" a position to make "de facto" payments does not bind Live Nation to that position.
- (d) ***Enforceable***. In order to make the "commitment" enforceable, it would have been necessary to make an order under the Act requiring Live Nation to comply with the "commitment" (which would have required a finding that the merger was likely to lead to an SLC in the absence of a "commitment" that was enforceable under the Act).
- (e) ***Clearly sourced***. It might reflect Live Nation's interpretation of the LOI (although Live Nation emphasised that in its view payments were *not* required by the LOI); or Live Nation's assumption about the measure of damages it would have to pay for *breaching* the LOI by placing tickets on a system other than Eventim's; or a statement by Live Nation of its willingness to make *ex gratia* payments to Eventim (although such payments are generally not in the interests of shareholders); or something else entirely that Live Nation chose to describe as a "de facto payment".
- (f) ***Consistent with the LOI***, even though the CC's analysis depends on the LOI being effective. In fact, Live Nation's "commitment" proceeds on the basis that it will breach the LOI in two respects. The first is that the commitment applies "*whether or not the ticket was sold off the Eventim system*" but the LOI is absolutely clear that all tickets must be sold off the Eventim system.²³⁸ This is among the most critical of all the LOI obligations as explained in para. 3.17 above. The second is that, under the "commitment", Live Nation *excluded* payments for sales through Eventim's website, but the *CC itself* recognised that Live Nation was *obliged* to make payments in the case of such sales by (rightly) informing Eventim in writing that "we accept your comment that *[CONFIDENTIAL]* of the LOI does not give a carve-out to the *[CONFIDENTIAL]* for sales through Eventim's website".²³⁹

4.62 In those circumstances, the "commitment" did not provide a sound basis for reversing the Original PFs.

²³⁸

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5. SLC ANALYSIS

(a) Introduction and summary

- 5.1 This case raises a set of novel substantive issues in relation to the market for primary retailing of live music events, which the Further PFs divided into two separate theories of harm arising from the merger. The principal "vertical" theory of harm was that the merged entity might foreclose Eventim because of Eventim's position as a significant new retail (online) entrant, due to its agreement with Live Nation (*eventim.co.uk versus ticketmaster.co.uk* and *seetickets.co.uk*).²⁴⁰ The secondary "horizontal" theory of harm was that the merger would remove or reduce the significance of Live Nation as an (online) retailer of live music tickets (in essence, this is *livenation.co.uk versus ticketmaster.co.uk*).²⁴¹
- 5.2 In this section, Eventim explains that:
- (a) Although it is convenient and practical to examine the different theories of harm separately, the legislation focuses on the effect of the merger and it is therefore important to assess whether, taken together, the theories of harm mean that the merger is likely to give rise to an SLC.
 - (b) The merger will lessen competition by removing as an independent competitor to Ticketmaster, a second new entrant, Live Nation (this develops and expands the secondary "horizontal" theory of harm mentioned above).
 - (c) The CC should also consider a third theory of harm along with the two summarised above, namely that the merger will lessen technology or innovation competition.

Taken together the principal theory of harm about exclusion or marginalisation of Eventim and the secondary theories of harm identified in paras (b) and (c) above involve an SLC.

(b) The SLC test is to be applied in the round, not separately to each individual theory of harm

- 5.3 The Further PFs seem to have found that there was a lessening of competition in both its "horizontal"²⁴² and "vertical"²⁴³ theories of harm, which are addressed separately in the Further PFs, but neither lessening of competition was considered to be "substantial" taken in isolation.
- 5.4 Even on the analysis set out in the Further PFs, the effect of the merger will be to eliminate one new entrant into ticket retailing in the UK (Live Nation) and weaken a second (Eventim). Both theories therefore affect the same customers and the same market - a market in which existing competition was found to be less than fully effective²⁴⁴ and in which one of the proposed merging parties, Ticketmaster, is the principal beneficiary of that limited competition. There is only one anti-competitive outcome requiring a remedy under the Act

²⁴⁰ Further PFs, para. 7.15.

²⁴¹ See Further PFs, para. 7.1.

²⁴² See Further PFs, para. 7.45: "*although the merger might result in a loss of competition ... the merger was unlikely to have any significant detrimental effect on consumers or on any other party*".

²⁴³ See Further PFs, paras 7.58 and 7.60.

²⁴⁴ Further PFs, para. 5.52.

and the CC's two theories should therefore be considered together in determining whether there is an SLC (giving rise to a "tandem SLC").²⁴⁵ (The theory of harm involving a loss of technology or innovation competition also affects the same customers and the same market.)

- 5.5 An alternative way of putting the point is that the Act requires the CC to consider whether the two or three lessenings of competition on the same market *together* gave rise to a substantial lessening of competition. The test under the Enterprise Act 2002, section 35(1)(b) is:

"whether the creation of that situation [the relevant merger situation] may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

- 5.6 The test therefore focuses on the effects on competition *of the merger*, and it is not sufficient simply to consider whether any theory of harm *taken in isolation* is sufficient in itself to give rise to a substantial lessening of competition without also considering whether the theories taken together result in *the merger* leading to an SLC.

(c) The loss of competition by removing a second new entrant, Live Nation, is part of the SLC

- 5.7 The Further PFs found that the merger would result in a loss of competition between Live Nation and Ticketmaster in the supply of tickets that could reduce the number of *consumers being reached* and tickets being sold, but, nevertheless, the detrimental effects arising from that loss of competition would fall principally on Live Nation and not *on consumers* or any other party:

"We recognized that, in the absence of the merger, Live Nation and Ticketmaster would compete to reach potential consumers for tickets to certain events ... We accepted that rivalry between Live Nation and Ticketmaster could result in more consumers being reached and more tickets being sold for these events than if there was no such competition between them. However, we found that these benefits of competition between Live Nation and Ticketmaster would accrue principally to the promoters of the events concerned, ie, in most cases, Live Nation (see paragraph 6.26). We found that it was unlikely that competition between Live Nation and Ticketmaster over tickets for a limited range of events would result in any significant benefits for consumers or other industry participants. In other words, we found that, although the merger might result in a loss of competition between Live Nation and Ticketmaster for some events, as Live Nation would be the promoter for the majority of the events affected, the merger was unlikely to have any significant detrimental effect on consumers or on any other party."²⁴⁶ (Emphasis added.)

- 5.8 Eventim submits that the conclusion that *"it was unlikely that competition between Live Nation and Ticketmaster would result in any significant benefits for consumers or other industry participants"* is incorrect, for either or both of two reasons.²⁴⁷

- 5.9 First, in a market where the CC found that competition was not fully effective,²⁴⁸ a loss of competition between significant retailers is likely to lead to consumer harm.²⁴⁹ The Further

²⁴⁵ [CONFIDENTIAL]

²⁴⁶ Further PFs, para. 7.5.

²⁴⁷ [CONFIDENTIAL]

²⁴⁸ Further PFs, paras 5.52 and 6.45.

²⁴⁹ See the draft joint "Merger Assessment Guidelines" of the CC and OFT, April 2009, para. 4.6: *"An SLC that harms upstream customers will be presumed to lead to detriment to final consumers as well, in the*

PFs themselves said: "*We accepted that rivalry between Live Nation and Ticketmaster could result in more consumers being reached and more tickets being sold for these events than if there was no such competition between them.*"²⁵⁰ If - as the Further PFs themselves state - the merger leads to fewer tickets being sold, then it *must* be because some of the benefits of rivalry have been lost. The finding in the Further PFs therefore goes straight to the heart of the SLC test. Further, the finding means that marginal consumers that "exit" the market (no longer attend the concert(s)) would be losing something they valued under the counterfactual market outcome – this is consumer harm.

- 5.10 Secondly, in measuring the effect of the merger, it is necessary to take into account the impact of consumer exit (e.g. empty seats at rock concerts) on: (a) fans that still attend the concert; (b) the artist that plays to them; and (c) the promoter who bears the risk of unsold seats. When Ticketmaster's CEO notes that superband The Eagles told him "*We want someone in every seat*"²⁵¹ they do so because performers perform "better" when playing to a "packed house" whose "buzz" atmosphere benefits the concert fans present. While these "soft" benefits may be difficult to quantify, they are no less relevant as a result and affect the value consumers attach to a "big night out". It appears that none of these effects were taken into account by the CC in the Further PFs when assessing whether the materiality of the merger effects was sufficient to lead to an SLC.²⁵² Eventim submits that it is not sufficient simply to say that the benefits of competition between *retailers* to supply *their customers* would accrue "*principally to the promoters*".

short or longer term. The Authorities do not consider it necessary to trace the path of adverse effects down the supply chain."

²⁵⁰ Further PFs, para 7.5.

²⁵¹ See Merrill Lynch Investor Conference Call with the CEOs of Ticketmaster and Live Nation, September 9, 2009, **[CONFIDENTIAL]**

²⁵² **[CONFIDENTIAL]**. It said: "*one of the problems with consumers failing to attend at all is not simply the individual welfare loss to them but the potential that, if a show is not sold-out, there is the ripple-effect of a collective welfare loss: a decline in event atmosphere and consumer 'utility' if many seats are empty; this also affects the artist playing to a venue that is not pleasingly crowded. The mood is less electric, and everyone goes home afterwards with less of a buzz than they otherwise would. Irving Azoff captures this when he observes: 'like the Eagles have told me, they don't care if I sell the seats behind the stage for \$12. We want someone in every seat.'*" This point was reiterated in different terms in the **[CONFIDENTIAL]**

(d) The loss of innovation competition in an e-commerce market is part of the SLC

- 5.11 In its Original PFs, the CC found that previously, in UK markets for ticket retailing "*innovation had been limited*"²⁵³:

*"We noted that Ticketmaster did not offer consumers the ability to choose their seats from a seating plan or to purchase other merchandise at the same time as their live music tickets, both of which were offered on competing systems. [] We believed this evidence indicated that, for some time, there had been a lack of competitive pressure on Ticketmaster to innovate."*²⁵⁴

The CC took account of the likely lower levels of innovation in the Original PFs in finding that the merger was likely to lead to an SLC.²⁵⁵

- 5.12 The proposition that Ticketmaster has carried out limited innovation is strongly supported by evidence.

- (a) Neither Ticketmaster's nor See Tickets' systems currently allow customers to choose their own seats on an interactive seatmap and, in research carried out by LECG, booking tickets on Ticketmaster's site was found to be significantly slower than on Eventim's.²⁵⁶
- (b) The LECG report estimated that the benefits to customers of being able to choose their own seat and to purchase more quickly when buying on Eventim's system were, respectively, £1.29 per ticket purchased and 30 pence per visit to the website.
- (c) **[CONFIDENTIAL]**.

These issues are further described in **[CONFIDENTIAL]**. Eventim's paper is attached as Annex 17 and Eventim repeats its contents as part of this submission.

- 5.13 By contrast, in its Further PFs, the CC removed the statement that under the counterfactual "*innovation had been limited*"²⁵⁷ and stated that it did not reach a view on how innovative Ticketmaster had been or could be expected to be in the future.²⁵⁸ The CC did not address the question whether the merger might be expected to lead to an SLC through reduced levels of innovation despite receiving extensive submissions from Eventim on this issue.²⁵⁹ Eventim submits that it is necessary to make a finding on how innovative Ticketmaster had been and could be expected to be in the future in order to assess whether the merger is likely to lead to an SLC through reduced innovation competition and that there is no reason not to make such a finding. The evidence strongly supports the findings in the Original PFs as explained above.
- 5.14 By contrast, the impact of the merger on innovation features prominently in the "Competitive Impact Assessment"²⁶⁰ which the US DoJ published after the Further PFs were published. It states:

²⁵³ Original PFs, para. 6.49.

²⁵⁴ Original PFs, Annex E, para. 130

²⁵⁵ Original PFs, paras 7.86 and 7.87.

²⁵⁶ **[CONFIDENTIAL]**

²⁵⁷ Further PFs, para. 6.45.

²⁵⁸ Further PFs, Annex E, para. 137.

²⁵⁹ **[CONFIDENTIAL]**

²⁶⁰ <http://www.justice.gov/atr/cases/f254500/254544.htm>.

"This loss of competition likely would result in higher prices for and less innovation in primary ticketing services."

"The proposed transaction would also diminish innovation in primary ticketing services because the merged firm would have reduced incentives to develop new features."

- 5.15 The DoJ's view is consistent with Paul Geroski's emphasis on the role of innovative new entry: "Entry can also play a more creative role in markets, serving as a vehicle for the introduction and diffusion of innovations..."²⁶¹ Innovative new entry is rare (accounting for less than 10 per cent of episodes of entry) but when it does occur, it can bring great benefits to consumers.²⁶²
- 5.16 Once it is established that Ticketmaster has a poor record of innovation (reflecting the lack of effective competition) and that Eventim is an innovative entrant, then it is straightforward to establish that there is an SLC through a loss of innovation competition if *either* the merger leads to the exit of Eventim from the market *or* Eventim is marginalised (attracting fewer customers, meaning that fewer customers experience the superior system and Ticketmaster's incentive to innovate in response is reduced). In short: innovative entry is rare and may need nurturing; yet this merger seems set to crush the innovative entrant and reinstate the old ways of operating.²⁶³
- 5.17 This paragraph discusses the scenario in which (per the CC's Further PFs) the merger is unlikely to have a significant effect on Eventim succeeding as a primary retailer of live music tickets in the UK²⁶⁴.

²⁶¹ P Geroski, "Market dynamics and Entry" (Cambridge, MA: Blackwell), 1991, p. 210, cited in the Inaugural Geroski lecture (see http://www.competition-commission.org.uk/our_role/cc_lectures/cc_geroski_lecture.htm).

²⁶² Markides, Inaugural Geroski lecture (see http://www.competition-commission.org.uk/our_role/cc_lectures/cc_geroski_lecture.htm).

²⁶³ For confirmation of Live Nation's strategy of resisting innovation, see para. 6.21 of the Further PFs: "*Eventim told us that its system offered Live Nation the ability to offer for sale the same ticket simultaneously through multiple retail channels ... Live Nation told us that it did not intend to use this functionality in the UK as it was incompatible with the long-established practice.*"

²⁶⁴ Further PFs, para. 7.60.

- (a) The CC found that the merger would significantly alter Live Nation's incentives (so that it would favour Ticketmaster) and "*if the merger were to proceed, Live Nation might choose to put the majority of its controlled tickets on Ticketmaster's system and not on Eventim's system*".²⁶⁵ **[CONFIDENTIAL]**²⁶⁶ the LOI clearly requires all Live Nation controlled tickets to be placed on Eventim's system.
- (b) If the merger enables Ticketmaster to sell Live Nation controlled tickets on Ticketmaster's system (rather than Eventim's) and customers for this important content therefore do not experience Eventim's system, then: (i) Eventim will acquire fewer customers from Ticketmaster; (ii) if Ticketmaster (and See Tickets) does not feel under so much competitive pressure from Eventim, it will have less incentive itself to innovate to keep up or overtake; and, last but not least, (iii) those customers who are stuck with Ticketmaster will miss out on the benefits identified in the LECG report.

²⁶⁵ Further PFs, para. 7.43.

²⁶⁶ See para. 4.12 above.

6. CONCLUSION

6.1 When the signing of the LOI was announced, the merger was not in contemplation and the reasons the parties were entering the transaction were fresh in their mind. Much of what has been described in this paper was reflected, very concisely in Eventim's press statement announcing the deal (Annex 2).

6.2 Eventim's press statement includes a quote from Live Nation's CEO:

"We have found our ideal partner in CTS. In terms of technology, Eventim is the most advanced ticketing platform in the world. Together we will expand on our current market position and implement our innovative ideas. This is absolutely a win-win situation."

The quotation reflects the counterfactual, and is in stark contrast to the world following implementation of the merger where: Eventim's system **[CONFIDENTIAL]** Live Nation prefers to use Ticketmaster's system; Eventim is **[CONFIDENTIAL]**; and nobody "wins", least of all consumers. The difference between the current position and the CEO's quotation provides an accurate general summary of the SLC arising from the merger.

6.3 In the press statement, Eventim described the benefits ("wins") it expected to obtain from the agreement:

"The new collaboration with Live Nation gives CTS an excellent basis for expanding its current network and for entering markets in many other European countries from 2009 onwards. The exclusive arrangement for Great Britain, especially, is extremely valuable. 'The barriers to market entry in England, specifically, are particularly great. With LN, we are now in a superb position to successfully enter an attractive market' [Klaus-Peter] Schulenberg [Eventim's CEO] commented."

The passage cited is an excellent summary of the "chicken and egg" problem and refers specifically to the UK market on two occasions. Eventim has put its money where its mouth is on this issue. If there really were no "chicken and egg" problem, and the merger really did make little or no difference, as Live Nation successfully urged on the CC, then:

- (a) Eventim missed out on a decade's worth of profits²⁶⁷ in a large market where Ticketmaster's gross margins are around 50 per cent. (because Eventim surely has all the other assets necessary successfully to enter new markets, having done so 17 times previously²⁶⁸).
- (b) **[CONFIDENTIAL]**
- (c) Eventim has wasted considerable time and money in taking its case to the Competition Appeal Tribunal and in preparing this paper -- and for what? A cynical ploy to "game" the regulatory process and extract a few more tickets than it would have received in the counterfactual? It would have been much better simply getting on with earning attractive margins in the UK market.

6.4 **[CONFIDENTIAL]**

6.5 Rather, Eventim respectfully submits that for all of the reasons given in this paper the conclusions in the Further PFs are fundamentally flawed and cannot be sustained. The new

²⁶⁷ Since it first identified its objective of entering the UK market in a public statement in 1999.

²⁶⁸ Leaving to one side Eventim's home market, Germany, and the UK.

evidence on the *[CONFIDENTIAL]* that post-dates the Further PFs strongly supports earlier evidence that initially led the CC in October 2009 to conclude there was a likely SLC and must change the complexion of the overall evidence in the case.

- 6.6 Eventim's interests to one side, the intervention by the Consumers' Association is a powerful guide that remedies are required to protect UK consumers against the SLC's effects, *[CONFIDENTIAL]* Eventim urges the CC to fulfil its mission, and stand between the SLC and consumers in an anaemically competitive £1 billion retail market. This *is* a case where the courageous decision is the right one, and there is ample evidence to support it.

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