

## **FUNDAMENTAL LEGAL FLAWS IN THE PROVISIONAL FINDINGS**

### **1. INTRODUCTION**

1.1 This paper outlines the key legal flaws in the Provisional Findings critical to their conclusion that the proposed merger between Live Nation and Ticketmaster would result in a substantial lessening of competition.

1.2 The Provisional Findings rest on the propositions that Live Nation had entered into an agreement to be an initial customer of CTS's ticketing services, that this agreement would have started CTS on its way to getting enough customers to become the third largest competitor in the market, that the merger now will cause Live Nation to reduce its dealings with CTS, and that CTS will thus forgo its planned entry into the UK. As a result, the Provisional Findings conclude that the market for live music ticketing services would have been more competitive absent the merger (in the "counterfactual"), and the merger therefore substantially lessens competition.

1.3 The many factual errors and serious technical flaws in the economic and substantive reasoning in the Provisional Findings are explained in the parties' accompanying papers. In addition to those important factual and analytical errors, there are two fundamental flaws in the Commission's legal analysis that are fatal to its provisional conclusions, regardless of how those facts are interpreted:

1.4 First, the Provisional Findings misconstrue the meaning of foreclosure, a prerequisite to any legitimate competitive concern. The Provisional Findings acknowledge that Live Nation has no market power in promotions, with a share of only 15-20%, and it is an even smaller part of the available customer base with a share of 10%. They nevertheless conclude that reducing CTS's access to Live Nation constitutes "foreclosure" because other large potential customers have expressed unwillingness to be the initial large customer that the Commission believes CTS needs to become a large player. However, the Commission's identification of others who are fully capable of being CTS's initial large "sponsoring" customer precludes a finding of foreclosure, regardless of those customers' current desires to use CTS,

because nothing about the merger inhibits CTS's efforts to compete for them just as it did for Live Nation (nor for the rest of the 80-85% of the market not accounted for by Live Nation). The Provisional Findings do not find otherwise. The fact that these customers may not currently express a desire to use CTS therefore reflects the normal competitive process, not "foreclosure" from that process.

1.5 Second, the Provisional Findings misinterpret the meaning of "substantial lessening of competition". The Provisional Findings do not find that Live Nation or Ticketmaster has market power, whether unilaterally or via tacit coordination with their respective competitors. They find instead that Ticketmaster, for example, must compete in particular against See Tickets (along with a large number of smaller players in a market that also includes self-ticketing). Nor do the Provisional Findings conclude that either party would gain market power as a result of the merger. Instead, they base their conclusion on a theory that the ticketing market would be "more" competitive absent the merger because of CTS's entry. A merger, however, does not "substantially lessen competition" under the Enterprise Act unless it creates or increases market power, a finding that was not and cannot be made in this case. The Provisional Findings' conclusion to the contrary misapplies the concept of the "counterfactual" and misconstrues the meaning of "substantial lessening of competition".

1.6 Both of these points are substantiated below.

## **2. THE PROVISIONAL FINDINGS MISCONSTRUE THE MEANING OF FORECLOSURE**

### ***The Provisional Findings on Foreclosure***

2.1 The Provisional Findings acknowledge that a prerequisite to any potential competition concerns arising from the merger is an ability and incentive by the combined firm to "foreclose" rival ticketing agents, by eliminating or reducing their access to Live Nation as a customer. As the Provisional Findings make clear, "for the merged entity to foreclose competitors from any market, either partially or totally, it

must have the ability and incentive to do so.”<sup>1</sup> The Provisional Findings posit that the merged firm would have this ability to “foreclose” CTS by reducing the number of tickets and other support associated with CTS’s agreement to supply ticketing services to Live Nation as a customer for those services.

2.2 Yet, the Provisional Findings reach this conclusion while simultaneously acknowledging that Live Nation is a very small part of the customer base for ticketing services. They acknowledge that “for most ticket agents, tickets from Live Nation account for a small proportion of their total live music ticket business” and that, even at its own venues, events promoted by Live Nation represented only “a small proportion” of such events.<sup>2</sup> Indeed, Live Nation represents only 10% or less of the demand for ticketing services for live music events.<sup>3</sup>

2.3 The Provisional Findings further acknowledge that Live Nation has no market power in promotions. Finding instead that Live Nation’s share is between 15% and 20%, in a UK promotions market characterized by easy entry and buyer power, the Provisional Findings conclude that Live Nation “was unlikely to have substantial power in the UK market for live music promotion.”<sup>4</sup>

2.4 Under these circumstances, it is not surprising that the Provisional Findings also conclude that Live Nation is simply too small to give the combined firm an ability to foreclose any of the numerous ticketing agents already competing in the market: “We concluded that, even if these agents were deprived of Live Nation tickets, they could still operate profitably and compete effectively.”<sup>5</sup>

2.5 Despite these findings, the Provisional Findings conclude that Live Nation nevertheless would have the ability to “foreclose” CTS from the market. The underlying reasoning posited is that, to enter the market, CTS needs a customer with a

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<sup>1</sup> Provisional Findings para. 7.5.

<sup>2</sup> Provisional Findings para. 5.61, 7.98 (emphasis added).

<sup>3</sup> Provisional Findings, Appendix E, para. 67.

<sup>4</sup> Provisional Findings para. 5.46, 5.55 (emphasis added).

<sup>5</sup> Provisional Findings para. 7.110.

large enough number of tickets, that Live Nation would have been such a customer, that CTS would then expand from this position to service other customers, but that post-merger Live Nation will now reduce the number of tickets and other support for CTS. The result is that CTS would choose not to enter the market initially as a smaller player.

2.6 Nowhere, however, do the Provisional Findings say the merger would or could inhibit CTS's ability to work with any of the other potential large customers that the Commission has identified. The Provisional Findings merely express doubt over whether those other customers would want to work with CTS (despite the Commission's opinion of its attributes), but there is no suggestion that the proposed merger would play any role in those rejections.<sup>6</sup> Nor do the Provisional Findings say that the proposed merger would do anything to inhibit CTS from entering more gradually by proving itself with ticketing allocations, finding instead that such a strategy is not part of CTS's business model, that it "only entered markets where it believed it could become the largest or second largest provider", and Live Nation was "critical to its decision to enter the UK market."<sup>7</sup>

2.7 The many factual and economic flaws in this analysis are explained in the parties' accompanying paper. However, regardless of Live Nation's potential relationship with CTS without the merger (under the Letter of Intent or otherwise), or CTS's particular intentions with the merger, the scenario outlined in the Provisional Findings simply does not constitute the required "foreclosure", as explained below.

***These findings do not constitute "foreclosure"***

2.8 A prerequisite to holding a vertical merger anticompetitive is a finding that the transaction will allow the combined firm to "foreclose" rivals from the market.<sup>8</sup> In this case, the Provisional Findings theorize that the combined firm could foreclose

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<sup>6</sup> Provisional Findings para. 7.79.

<sup>7</sup> Provisional Findings paras. 6.56, 6.57.

<sup>8</sup> An additional ground for finding a vertical merger anticompetitive is that it facilitates coordination among rivals, a theory not relevant to the Commission's findings.

CTS from the relevant UK ticketing market by depriving it of Live Nation as a customer, a strategy that the Competition Commission's Merger Guidelines call "customer foreclosure."

2.9 Even if CTS needs a large "sponsoring" customer to enter the market, the existence of other potential customers who are perfectly suitable to serve this role precludes a finding of foreclosure, regardless of whether those customers ultimately select CTS over other ticketing agents, because nothing about the merger inhibits CTS's ability to compete for them to be its sponsoring customer. Foreclosure occurs when "actual or potential rivals' access to supplies or market is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete."<sup>9</sup> To create competition concerns, rivals must "be foreclosed to an extent that compromises their ability to compete."<sup>10</sup> The merger laws ensure an opportunity to compete, not a guarantee of success.

2.10 Accordingly, depriving or reducing a supplier's access to a single customer, which merges with a competing supplier, can amount to foreclosure only when that customer is so large that it is the critical part of the total customer base, generally because it has market power in its own downstream market. As the Commission's Merger Guidelines make clear, customer foreclosure "will be more likely where the merged firm has significant market power downstream."<sup>11</sup> The EC Guidelines similarly say "it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market."<sup>12</sup>

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<sup>9</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, pages 6-25 (hereafter "EC Non-Horizontal Merger Guidelines"), para. 18.

<sup>10</sup> *Celsa Steel Service (UK) Limited / BRC Ltd., Express Reinforcement Ltd.* (ME/3982-08, ME3963-08 and ME/3964-08), para. 91, 20 February 2009 (emphasis added).

<sup>11</sup> Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, April 2009 (hereafter "Joint CC/OFT Merger Guidelines"), para. 4.149 (emphasis added).

<sup>12</sup> EC Non-Horizontal Merger Guidelines para. 61 (emphasis added).

2.11 Contrary to the suggestion in the Provisional Findings that a different standard might apply to potential competitors like CTS than to actual ones already competing in the market,<sup>13</sup> in fact the same standard applies to both. To raise competition concerns, the vertically merged entity must “foreclose access to a sufficient customer base to its actual or potential rivals” in a way that reduces their “ability or incentive to compete”.<sup>14</sup>

2.12 In this case, the Provisional Findings acknowledge that the requisite finding of “customer foreclosure” would be contrary to the norm in the Commission’s own Merger Guidelines because Live Nation, with its 15-20% share of promotions, simply does not have market power. As the Provisional Findings put it: “We recognize that, in this case, we did not have evidence that Live Nation had substantial market power either as a promoter or as a venue operator and, therefore, on the basis of our guidance, it might appear unlikely that the merged entity could foreclose CTS (or any other ticket agent).”<sup>15</sup> The Provisional Findings similarly acknowledge that Live Nation is a very small part of the available customer base, amounting to only 10% of live music customers.

2.13 Nevertheless, the Provisional Findings say that reducing CTS’s business with Live Nation would constitute foreclosure, notwithstanding Live Nation’s very small presence, because the Commission “did not believe that CTS was likely, in the foreseeable future, to find an alternative partner which would sponsor its entry into the UK market.”<sup>16</sup> The Commission contacted certain other promoters with large enough ticket numbers to be the sort of large initial customer that the Commission

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<sup>13</sup> Provisional Findings para. 7.34.

<sup>14</sup> EC Non-Horizontal Merger Guidelines, para. 58 (emphasis added). The EC Guidelines formed the basis of the joint CC/OFT Merger Guidelines: “Our guidelines on non-horizontal mergers are borrowed from the European Commission’s excellent non-horizontal merger guidelines.” Chris Walters, OFT Assistant Director of Mergers, Competition Commission/OFT Joint Merger Assessment Guidelines Seminar, 1 June 2009, Transcript page 68 ([www.competition-commission.org.uk/about\\_us/our\\_organisation/workstreams/analysis/seminar\\_010609.htm](http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/seminar_010609.htm)).

<sup>15</sup> Provisional Findings para. 7.33.

<sup>16</sup> Provisional Findings para. 7.33.

says CTS needs to enter the market.<sup>17</sup> Although AEG’s reaction is redacted and SJM declined to comment, the Commission concluded that neither appeared interested in being CTS’s initial large customer. The Commission received a similar response from Metropolis, although tellingly this was because Metropolis “did not have any concerns about using Ticketmaster post-merger”.<sup>18</sup> The proposed merger therefore was found to deprive CTS probably of the one customer, Live Nation, who was willing to be CTS’s initial large customer.

2.14 This is not foreclosure. As shown above, foreclosure restricts “access” to the market and the opportunity and “ability” to compete for customers like AEG and SJM. It is up to the would-be supplier to win or lose that competition.

2.15 Nothing in the Provisional Findings suggests that anything about the proposed merger inhibits CTS from competing for AEG, SJM or any other potential sponsoring customer. The Provisional Findings do not and cannot suggest, for example, that the proposed merger in any way makes CTS less attractive for any of these large ticketing customers to serve as CTS’s initial customer or otherwise reduces CTS’s incentive to compete for them. Without these facts, the merger does not “foreclose” CTS. Even accepting the Commission’s premise that CTS needs a large initial customer to enter, the finding that alternative potential customers would be suitable to serve this role, together with Live Nation’s very small share of the available customer base, precludes a finding that the proposed merger could foreclose CTS from the market.

2.16 Indeed, far from finding that the merger restricts CTS’s access to these other large customers, the Provisional Findings say only that the merger is creating opportunities to compete for their business. AEG reportedly advised the Commission that it had “serious concerns about remaining with Ticketmaster” after the merger and “was considering switching both the ticketing for its venues and promotions business to another ticket agent.”<sup>19</sup> If the Commission’s prediction is accurate that AEG

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<sup>17</sup> Provisional Findings para. 7.75.

<sup>18</sup> Provisional Findings para. 7.77.

<sup>19</sup> Provisional Findings para. 7.76.

(which already uses CTS in Germany) and other customers will reject CTS for their ticketing agent needs, this outcome reflects the normal competitive process, not foreclosure from that process.

2.17 Contributing to the Provisional Findings' error is the mistaken notion that access to tickets is an "entry barrier" into the ticketing agent market. On the contrary, an entry barrier is something that inhibits the opportunity of would-be entrants to compete for customers.<sup>20</sup> In this case, promoters and venues are the customers and ticketing agents compete for their business by offering rebates and showing their capabilities.<sup>21</sup> A mere failure to win that business is not an "entry barrier".

2.18 Nor do the Provisional Findings identify anything about the merger that precludes CTS from competing for any of the rest of the 80-85% of live music tickets not controlled by Live Nation (even if the ticketing market were limited to live music), including allocations for individual events. If CTS chooses not to compete for those tickets because its business model is not to enter markets more gradually by building its brand and proving its capabilities over time with each event, that is certainly its prerogative but it is not foreclosure.

2.19 Regardless of the interpretation of the Letter of Intent or the number of tickets or support CTS says Live Nation would have provided absent the merger, Live Nation simply is not big enough to foreclose CTS from the market. There is thus no reason to depart from the Competition Commission's Merger Guidelines, which were adopted only recently in April 2009 to favour consistency and predictability in enforcement over ad hoc adoption of novel and untested theories. The Provisional Findings' conclusion to the contrary rests on an incorrect conception of foreclosure.

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<sup>20</sup> Joint CC/OFT Merger Guidelines para 4.176.

<sup>21</sup> Provisional Findings para. 5.12.

### 3. THE PROVISIONAL FINDINGS MISCONSTRUE THE MEANING OF SUBSTANTIAL LESSENING OF COMPETITION

#### *The Provisional Findings on Anticompetitive Effects*

3.1 The Provisional Findings conclude that neither Live Nation nor Ticketmaster has substantial “market power”, that is, an ability to raise price above competitive levels or the equivalent (such as to decrease quality below competitive levels) without regard to the reaction of competitors or customers.

3.2 As noted above, the Provisional Findings conclude that Live Nation “was unlikely to have substantial power in the UK market for live music promotion” due to the presence of “other large and well-established promoters, and many small promoters,” the “significant bargaining power held by artists’ agents,” and the absence of significant entry barriers into promotions.<sup>22</sup>

3.3 Similarly, the Provisional Findings do not and cannot find any market power on Ticketmaster’s part, finding instead that it must compete against, in particular, See Tickets, along with providers of self-ticketing and smaller agents. While concluding that Ticketmaster has a 40-50% share of live music ticketing services (and less when co-branded sales are included) the findings “conclude that there was competition in the market for the primary retailing of live music tickets, in particular between Ticketmaster and See Tickets”.<sup>23</sup>

3.4 This finding of competition in the ticketing market is not surprising given that the Provisional Findings identify eleven ticketing agents competing to supply services to live music promoters and venues in the UK, along with the finding of more intense competition between Ticketmaster and See Tickets.<sup>24</sup> Like Ticketmaster, each of these ticket agents competes for ticket allocations from promoters and venues largely

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<sup>22</sup> Provisional Findings para. 9, 5.55.

<sup>23</sup> Provisional Finding para. 8, 5.41. The accuracy of this market share estimate will be addressed in Ticketmaster’s accompanying paper.

<sup>24</sup> Provisional Findings, Annex B, para. 28.

on the basis of “the level of rebate offered and the quality of service, in particular the ability of the ticket agent to sell tickets to consumers.”<sup>25</sup>

3.5 The Provisional Findings also do not suggest that anything about the merger would create market power in either Live Nation or Ticketmaster. There is no suggestion, for example, that the continued absence of CTS from the market suddenly would give Ticketmaster market power or give the existing ticketing agents an ability to start tacitly coordinating.

3.6 Despite these findings, the Provisional Findings conclude that the merger nevertheless would result in a “substantial lessening of competition.” Absent the merger, the Provisional Findings reason, competition from the smaller players against the two largest ticketing agents “was limited”, but CTS would have entered and grown to become the “third largest” ticketing agent to compete against the top two, principally because of subsequent business from customers other than Live Nation.<sup>26</sup> The Provisional Findings thus conclude that the ticketing market would be “more” competitive without the merger because of CTS’s entry and the “market would have become more competitive than in the pre-merger situation.”<sup>27</sup> The Provisional Findings therefore disregard the findings in the 2005 OFT study that the ticketing market was competitive because those findings “would not be inconsistent with a finding that the ticketing market in 2009 would be more competitive if a new significant supplier were to enter.”<sup>28</sup>

3.7 These findings misconstrue the meaning of “substantial lessening of competition”, as explained below.

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<sup>25</sup> Provisional Findings para. 5.12.

<sup>26</sup> Provisional Findings paras. 5.41, 6.40.

<sup>27</sup> Provisional Findings para. 6.62, 13 (emphasis added).

<sup>28</sup> Provisional Findings, Appendix E, para. 123 (emphasis added).

***These findings do not constitute a “substantial lessening of competition”***

3.8 The Enterprise Act prohibits mergers only if they would result in a “substantial lessening of competition.”<sup>29</sup> Although the Act does not expressly define the term, the Commission has made clear that a substantial lessening of competition can only occur when a merger allows a party to obtain or enhance market power.

3.9 As this authority explained:

“The CC’s assessment of whether a merger results in, or may be expected to result in, an SLC is framed in terms of two related issues. The first concerns the identification of the relevant market or markets for the goods or services concerned (hereafter referred to as products). The second concerns the CC’s assessment of whether the merger would increase the market power of firms in the market so defined.”<sup>30</sup>

3.10 In its recent joint Merger Guidelines, moreover, the Commission and the OFT confirmed that a reduction in the number of major players in an industry does not constitute a substantial lessening of competition when the remaining post-merger competitive constraints are sufficient to preclude an exercise of market power: “Not all mergers give rise to competition issues. Some will simply not lessen competition substantially, because sufficient post-merger competitive constraints will remain to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merger firm.”<sup>31</sup> As the OFT has explained, vertical merger concerns are likely to arise “only if market power exists or is created in one or more markets along the supply chain.”<sup>32</sup>

3.11 This approach mirrors that of the European Commission, which similarly has made clear: “Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits [of competition] by

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<sup>29</sup> Enterprise Act 2002, Chapter 40, para. 47.

<sup>30</sup> Merger references: Competition Commission Guidelines, June 2003, paragraph 1.24.

<sup>31</sup> Joint CC/OFT Merger Guidelines, para. 4.15.

<sup>32</sup> OFT Mergers Substantive Assessment Guidance, May 2003, para. 5.1 (emphasis added).

significantly increasing the market power of firms.”<sup>33</sup> In vertical mergers, the existence of “a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but it is not a sufficient condition.”<sup>34</sup>

3.12 The Competition Commission has explained that “market power” is defined “most simply as the ability to raise price consistently and profitably above competitive levels”.<sup>35</sup> Such power can be achieved in one of two ways: either a single firm may be able unilaterally to increase prices above competitive levels, or a group of firms may be able to coordinate tacitly to achieve that same outcome.<sup>36</sup> According to the Merger Guidelines, an ability to coordinate tacitly requires a specific set of market characteristics that allows firms tacitly to reach, monitor and enforce the terms of such coordination.<sup>37</sup>

3.13 In this case, however, the Provisional Findings conclude that the merger would “substantially lessen competition” in the relevant ticketing market without any finding of market power. The Provisional Findings did not, and could not, find any market power by Ticketmaster, finding instead that it competes in particular with See Tickets, that there are a large number of smaller competitors in a market that also includes self-ticketing and low entry barriers. Nor is there any suggestion of tacit coordination between any of these players or a finding of the several market conditions needed to be conducive to such coordination. Nowhere do the Provisional Findings conclude that Ticketmaster has or will obtain market power. A finding that the merger would “substantially lessen competition” therefore is precluded as a matter of law.

3.14 The Provisional Findings’ error appears to arise from its misperception of the concept of the “counterfactual.” As the Provisional Findings put it, the market,

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<sup>33</sup> EC Horizontal Merger Guidelines para. 8 (emphasis added).

<sup>34</sup> EC Non-Horizontal Merger Guidelines para. 27 (emphasis added).

<sup>35</sup> Merger references: Competition Commission Guidelines, June 2003, para. 1.24

<sup>36</sup> Joint CC/OFT Merger Guidelines paras. 4.94, 4.115.

<sup>37</sup> *Id.* para. 4.118.

although not characterized by any unilateral or collective market power, is not “fully” competitive and the counterfactual would be “more competitive” without the merger because of CTS’s entry.

3.15 However, the concept of the counterfactual, which is found nowhere in the Enterprise Act, does not replace the market power prerequisite for finding a substantial lessening of competition. As the Competition Appeal Tribunal recently explained, the counterfactual is “not a statutory test,” but is simply an “analytical tool” that may assist the Commission in determining whether that statutory test is met.<sup>38</sup> The Competition Commission generally “will assess the counterfactual over the foreseeable future, in the same way as the effects of the merger are analysed.”<sup>39</sup> For example, the counterfactual may help the Commission determine that a merger, which on its face might suggest a creation of market power, will not actually do so because one of the merger parties is failing and would otherwise exit,<sup>40</sup> or because other market participants are poised to expand or enter.<sup>41</sup>

3.16 Nothing in a proper counterfactual analysis, however, allows the Commission to prohibit a merger that does not create or enhance the market power needed for a substantial lessening of competition under the Enterprise Act. This is true regardless of whether the Authority concludes that a market would be “more” competitive absent the merger. The Provisional Findings’ conclusion that the market “would have become more competitive than in the pre-merger situation” therefore does not constitute the requisite substantial lessening of competition.

#### **4. CONCLUSION**

4.1 The Provisional Findings misconstrue the meanings of foreclosure and substantial lessening of competition, each of which is fatal to their conclusion.

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<sup>38</sup> See *British Sky Broadcasting Group Plc v. The Competition Commission*, Competition Appeal Tribunal, 29 September 2008, cases 1095/4/8/08 and 1096/4/8/08, para. 91.

<sup>39</sup> Joint CC/OFT Merger Guidelines paras. 4.16.

<sup>40</sup> *Id.* paras. 4.21 – 4.33.

<sup>41</sup> *Id.* para. 4.18.

Regardless of the Commission's views on CTS's dealings with Live Nation with or without the merger, there is thus no proper legal basis to prohibit the proposed merger.